The Senate

Environment and Communications Legislation Committee

Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 [Provisions]

Telecommunications (Regional Broadband Scheme) Charge Bill 2017 [Provisions]

September 2017

ISBN 978-1-76010-646-1

Committee contact details

PO Box 6100
Parliament House
Canberra ACT 2600

Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ec.sen@aph.gov.au
Internet: www.aph.gov.au/senate_ec

This document was printed by the Senate Printing Unit, Parliament House, Canberra

Committee membership

Committee members

Senator Jonathon Duniam, Chair (from 21 August 2017)	LP, Tasmania
Senator Anthony Chisholm	ALP, Queensland
Senator Linda Reynolds CSC	LP, Western Australia
Senator Janet Rice	AG, Victoria
Senator Anne Urquhart	ALP, Tasmania
Senator John Williams	NP, New South Wales

Participating member for this inquiry

Senator Sarah Hanson-Young	AG, South Australia

Former member

Senator Peter Whish-Wilson (to 4 September 2015)	AG, Tasmania

Committee secretariat

Ms Christine McDonald, Committee Secretary
Mr Colby Hannan, Principal Research Officer
Ms Georgia Fletcher, Administration Officer

Table of contents

Abbreviations

ACCAN	Australian Communications Consumer Action Network
ACCC	Australian Competition and Consumer Commission
ACMA	Australian Communications and Media Authority
CC Bill	Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017
CCA	*Competition and Consumer Act 2010* (Cth)
EM	explanatory memorandum
Mbps	megabits per second
NBN	National Broadband Network
NBN Co	NBN Co Limited
NFF	National Farmers' Federation
PC	Productivity Commission
RBS	Regional Broadband Scheme
RBS Bill	Telecommunications (Regional Broadband Scheme) Charge Bill 2017
RRRCC	Regional, Rural and Remote Communications Coalition
Scrutiny Committee	Senate Standing Committee for the Scrutiny of Bills
SIP	statutory infrastructure provider
TCPSS Act	*Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth)
Tel Act	*Telecommunications Act 1997* (Cth)
TIO	Telecommunications Industry Ombudsman
TUSO	telecommunications universal service obligation
USO	see TUSO
VHA	Vodafone Hutchison Australia

List of recommendations

Recommendation 1

1.1 The committee recommends that the proposed disallowance procedure in clause 19 of the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 and proposed section 102ZFB of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended to provide that a determination is deemed to have been disallowed if:

- **notice of a motion to disallow the determination is given in a House of the Parliament within 15 sitting days of that House after the copy of the determination was tabled in the House under section 38 of the *Legislation Act 2003*; and**
- **at the end of 15 sitting days of that House after the giving of that notice of motion:**
  - **the notice has not been withdrawn and the motion has not been called on, or**
  - **the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of.**

Recommendation 2

1.2 After due consideration of recommendation 1, the committee recommends that the bills be passed.

Chapter 1

Introduction

1.1 On 23 June 2017, the Senate referred the provisions of the following bills to the Senate Environment and Communications Legislation Committee for inquiry and report:

- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 ("CC Bill"); and
- Telecommunications (Regional Broadband Scheme) Charge Bill 2017 ("RBS Bill").[1]

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 14 July 2017.

1.3 The committee received 15 submissions, which are listed at Appendix 1. The committee also held a public hearing for this inquiry in Canberra on 10 August 2017. A list of witnesses who appeared at the hearings is at Appendix 2.

1.4 The public submissions and transcript of evidence are available on the committee's website at www.aph.gov.au/senate_ec.

1.5 The committee thanks all of the individuals and organisations that contributed to the inquiry.

1.6 The committee was initially required to report by 8 August 2017. However, to facilitate the public hearing, the committee sought an extension of time to report. The Senate agreed to extend the reporting deadline to 6 September 2017.[2]

Scope and structure of the report

1.7 This report comprises three chapters:

- The remaining sections of this chapter provide background information relating to the development of the bills as well as an overview of the structure and provisions of the bills. Comments on the bills made by the Senate Standing Committee for the Scrutiny of Bills are summarised at the end of the chapter.

---

1 *Journals of the Senate*, 22 June 2017, p. 1542.

2 *Journals of the Senate*, 8 August 2017, p. 1607.

- Chapter 2 examines the principal issues raised by stakeholders relating to the overall intent and specific provisions of the bills.
- Chapter 3 discusses matters related to particular provisions that would delegate legislative powers to the executive. The committee's overall findings on the bills are provided at the end of that chapter.

Note on references

1.8 In this report, references to the committee *Hansard* transcript are to the proof transcript. Page numbers may vary between proof and official *Hansard* transcripts.

1.9 The written submissions provided by various stakeholders and the *Hansard* transcript differ in the abbreviations used when referring to NBN Co Limited, with 'nbn', 'nbn co', 'nbn Co' and 'NBN Co' all used. For consistency, 'NBN Co' is used whenever the company is referred to in this report.

Background

1.10 The bills follow the cost-benefit analysis and review of regulatory arrangements for the National Broadband Network (NBN) undertaken by the panel chaired by Dr Michael Vertigan AC (the Vertigan Panel). The Vertigan Panel produced the following three reports:

- *A statutory review under section 152EOA of the Competition and Consumer Act 2010* (June 2014);
- *Volume I: National Broadband Network market and regulatory report* (August 2014); and
- *Volume II: The costs and benefits of high-speed broadband* (August 2014).

1.11 The government's response to the Vertigan Panel's recommendations was outlined in a policy statement released in December 2014 entitled *Telecommunications Regulatory and Structural Reform*.

1.12 The bills seek to implement key measures of the government's response to the Vertigan Panel's recommendations. The bills would amend the broadband regulatory framework by:

- making amendments to network rules that apply to superfast carriage services provided to residential and small business customers other than the NBN;
- establishing a Regional Broadband Scheme (RBS) to provide for the funding of NBN Co satellite and fixed wireless services for rural and regional areas; and
- establishing statutory infrastructure provider (SIP) obligations.

Overview of the bills

1.13 The CC Bill proposes amendments to the *Telecommunications Act 1997* (Tel Act), the *Competition and Consumer Act 2010* (CCA) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act).

1.14 The CC Bill comprises five schedules, as follows:

- Schedules 1 and 2 contain proposed amendments to the 'superfast network rules' provided for in Parts 7 and 8 of the Tel Act.
- Schedule 3 contains the amendments that would establish a regime of SIP obligations.
- Schedule 4, in conjunction with the RBS Bill, would establish the RBS.
- Schedule 5 contains an amendment that would alter arrangements for determining the 'designated day' for the purposes of Telstra's structural separation.[3]

1.15 It is proposed that the amendments in the bills would commence on the day after Royal Assent.

1.16 The following paragraphs provide a brief summary of the proposed amendments. Further details on how the proposed amendments are intended to operate can be found in the respective explanatory memorandums (EMs) for the bills.

Amendments to the superfast network rules

1.17 Parts 7 and 8 of the Tel Act, which were introduced in 2011, contain network rules that apply to superfast carriage services provided to residential and small business customers other than the NBN. The rules require operators of such networks to supply a Layer 2 bitstream service to access seekers (Part 7) and that the networks are structurally separated (Part 8). Among other exemptions, the rules do not apply to superfast networks that existed prior to 1 January 2011 or to subsequent extensions of less than 1 kilometre of such networks.

1.18 The overall intent and design of the rules seeks to ensure that the structural changes brought about to the industry through the creation of NBN Co and the structural separation of Telstra would not be undone by other new networks operating

3 Structural separation refers to the separation of a company's retail and network infrastructure businesses. Telstra's structural separation involves the migration of Telstra's fixed line voice and broadband services to the NBN. For more information, see Department of Communications and the Arts, 'Telstra's separation framework', www.communications.gov.au/what-we-do/internet/competition-broadband/telstras-separation-framework.

in the same way that had previously given rise to concerns about the state of competition in the market.[4]

1.19 Part 1 of schedule 1 to the CC Bill proposes that Part 7 of the Tel Act would be repealed. Following the repeal of Part 7, access to specific wholesale services on superfast broadband networks would only be mandated if the services are declared by the Australian Competition and Consumer Commission (ACCC).

1.20 Various amendments to Part 8 of the Tel Act and the CCA are also proposed. Specific proposals contained in the bill include:

- amending the exemption under subsection 156(4) for network extensions of less than 1 kilometre from a point on the infrastructure of a network as it stood immediately before 1 January 2011;
- changing the exemption under subsection 156(3) of the Tel Act for networks that, prior to 1 January 2011, were being rolled out in stages as part of a real estate development project, so that the exemption will only apply until 30 June 2018;[5]
- providing that the Part 8 rules no longer apply to local access lines that that are part of a telecommunications network used to supply superfast carriage services to small business customers—this change is intended to create 'greater flexibility for network operators in the supply of superfast carriage services to small business customers';[6]
- providing a process for voluntary functional separation undertakings to be submitted and considered by the ACCC—this process would also for a telecommunications business other than NBN Co and Telstra to have both network/wholesale and retail operations;[7]
- providing the ACCC with the power to provide a class exemption from the Part 8 rules for small start-up networks with fewer than 2,000 retail residential customers on all fixed-line networks (this threshold could be extended, by regulation, to 12,000 retail residential services);[8]

---

4 Explanatory Memorandum (EM), CC Bill, p. 2; Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014, Explanatory Statement, pp. 1–2.

5 The EM for the CC Bill notes that real estate development projects will instead be covered by proposed new section 143E and that the Minister will be able to grant exemptions for specific new developments or class of developments under certain circumstances. See EM, CC Bill, p. 4.

6 EM, CC Bill, p. 5.

7 EM, CC Bill, p. 5; The Hon Paul Fletcher MP, Minister for Urban Infrastructure, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 9.

8 EM, CC Bill, p. 6.

- changing the offence provisions in Part 8 from criminal offences to civil offences, while also introducing a formal warning and infringement notice regime;[9] and
- providing that key decisions by the ACCC under the amended Part 8, such as the decision not to accept an undertaking, will be subject to merits review by the Australian Competition Tribunal.[10]

1.21 It is intended that the existing rules would be grandfathered—that is, the new rules would apply to 'local access lines that come into existence on or after 1 July 2018, or that are altered or upgraded after that date and as a result become capable of being used to supply a superfast carriage service'. Other superfast fixed-line networks will continue to be subject to the current wholesale-only obligation in section 143 of the Tel Act.[11]

1.22 Taken together, the repeal of Part 7 and the changes to Part 8 are intended to ensure that, with limited exemptions, 'in future superfast residential networks would either be subject to a class exemption granted by the ACCC, operating on a functionally separated basis approved by the ACCC, or operating on a wholesale-only basis'. This is intended to 'make the default structural separation requirement clearer and more effective as a baseline for the industry, while at the same time creating new commercial and competitive opportunities'.[12]

Statutory infrastructure provider regime

1.23 Schedule 3 to the bill would introduce a SIP regime that is intended to 'provide industry and consumers with certainty that all premises in Australia will have access to infrastructure that supports the delivery of superfast broadband services'.[13]

1.24 Currently, a ministerial statement of expectations provides a requirement for NBN Co to rollout the NBN. The CC Bill proposes that connection and supply obligations will instead be imposed by legislation, with this statutory regime to be administered by the Australian Communications and Media Authority (ACMA).

9 On this proposal, the EM notes: 'Although criminal penalties can be invoked for breaches of some competition laws, they are usually applied in relation to conduct that is especially egregious (e.g. cartel conduct). The Government therefore considers civil penalties more appropriate in the context of Part 8'. EM, CC Bill, pp. 6–7.

10 EM, CC Bill, p. 7.

11 EM, CC Bill, p. 3. Further information about the grandfathering arrangement is provided at pages 3–4 of the EM for the CC Bill.

12 EM, CC Bill, p. 3

13 EM, CC Bill, p. 21.

After the NBN rollout is complete, NBN Co will be the default SIP for all of Australia, although in particular circumstances other carriers could become a SIP.[14]

1.25 The SIP obligations would impose connection and supply obligations on SIPs (that is, NBN Co and alternative providers). Specifically, the SIP for a service area must, on reasonable request by a carriage service provider on behalf of an end-user at premises in the service area, connect the premises to a qualifying telecommunications network in order that the carriage service provider can provide qualifying carriage services to the end-user at the premises. The SIP obligations require services with a peak download speed of at least 25 megabits per second (Mbps) and a peak upload speed of at least 5 Mbps, and carriage services that can be used by end-users to make and receive voice calls. If it is not reasonable to provide fixed-line services, the SIP 'must provide a fixed wireless or satellite technology solution'.[15]

1.26 In its submission, NBN Co highlighted the importance, from its perspective, of the requirement for requests from service providers to be 'reasonable'. NBN Co explained:

> The Bill reflects the Government's clear intention that premises in Australia have ready access to superfast broadband, however, it also acknowledges the practical reality, important to [NBN Co] as a SIP, that there may be limitations to the provision of access in some instances. The Bill therefore requires a SIP to connect premises to a qualifying network on reasonable request from a carriage service provider. This concept of reasonableness will ensure that [NBN Co] responds appropriately to [retail service provider] requests (on behalf of an end user) for a superfast broadband connection where the network is available, while acknowledging there may be instances where [NBN Co] is constrained in its ability to meet a particular request or where multiple requests are made unreasonably for connections to a premises.[16]

1.27 In addition, the CC Bill proposes that the Minister will have a reserve power to set standards and rules that SIPs must comply with and/or benchmarks that SIPs must meet or exceed.[17]

---

14 The EM notes that, for example, a carrier could become a SIP if it has a contract to provide infrastructure in a new development. EM, CC Bill, p. 8.

15 EM, CC Bill, p. 9.

16 NBN Co, *Submission 7*, p. 1.

17 The matters about which the Minister may set standards, rules or benchmarks are outlined in proposed section 360U and 360V of the Tel Act. The relevant EM acknowledges the matters that could be specified 'are broad', including timeframes for connecting premises and rectifying faults, as well as rules regarding how premises must be connected and how complaints must be addressed. CC Bill, schedule 3, item 7 (Tel Act, proposed sections 360U and 360V); EM, CC Bill, p. 10.

1.28 On how providers covered by the SIP obligations would be identified, the EM for the CC Bill states the following:

> The [CC] Bill provides that, as the NBN rolls out, NBN Co will become the default SIP for each area which it declares to be 'ready for service'. These areas are termed 'interim NBN service areas' in the Bill. NBN Co will also be required to declare interim NBN service areas for all areas that, prior to the Bill coming into force, it has already declared to be ready for service. To ensure enhanced transparency about the service status of an NBN rollout area, the Bill would require NBN Co to notify the ACMA when it declares an interim NBN service area.
>
> …Following completion of the rollout, NBN Co will be the default SIP for the 'general service area' which, as a default, will be all of Australia. However, 'nominated service areas' that are covered by other SIPs will be excluded from the general service area.[18]

1.29 The CC Bill also provides a complaints process that includes a requirement for a SIP to notify a service provider within five days if it refuses a request to connect premises to its network. In turn, the service provider is required to provide the notice to the end user. The relevant EM advises that this process seeks to address the concern that 'end-users frequently have little visibility, when a request for a service is rejected, of why the request has been rejected and whether the rejection was caused by the actions of a retail provider or a wholesale provider'.[19]

Targets for NBN Co

1.30 As part of the SIP regime, proposed section 360S of the Tel Act would provide targets for NBN Co that are expressed as intentions of the Parliament. These statements set out that the Parliament expects NBN Co to take all reasonable steps to ensure that the telecommunications networks operated by NBN Co are used to supply qualifying fixed-line carriage services to customers in Australia:

- are capable of being used to supply fixed-line carriage services with peak download speeds of at least 50 Mbps and peak upload speeds of at least 10 Mbps to at least 90 per cent of premises in areas that, according to NBN Co's website, are serviced by those networks; and
- that NBN Co's fixed-line networks are capable of being connected to at least 92 per cent of premises in Australia.[20]

18 EM, CC Bill, pp. 8–9.

19 EM, CC Bill, p. 10.

20 CC Bill, schedule 3, item 7 (Tel Act, proposed section 360S); EM, CC Bill, p. 10.

Regional Broadband Scheme

1.31 The RBS Bill and schedule 4 to the CC Bill propose the introduction of an industry charge to fund non-commercial fixed wireless broadband and satellite broadband for regional areas as part of an RBS. At present, losses associated with these services are funded by an internal cross-subsidy within NBN Co.[21] Under the proposed RBS, carriers would be required to pay a charge for each premises on their network with an active fixed-line broadband service that enables a download speed of 25 Mbps or more, with the charge calculated on a monthly basis. The funds raised by this charge would be quarantined in a special account, which will be used to pay eligible funding recipients and to cover the administration costs associated with the scheme.

1.32 The EM for the CC Bill outlines the rationale for introducing the charge and how the funding mechanism is intended to operate as follows:

> The purpose of the charge is to sustainably fund the net costs of NBN Co's fixed wireless and satellite networks, which provide access to essential broadband services predominantly in regional Australia. The charge was foreshadowed by Government in its December 2014 response to the…Vertigan Review.
>
> Rolling out superfast broadband infrastructure to regional Australia is very expensive. NBN Co's fixed wireless and satellite networks are expected to incur a net cost of $9.8 billion (in net present value terms) over thirty years. NBN Co currently funds these net costs through an internal cross subsidy from its fixed line networks. The monies collected from the Scheme will be used to fund NBN Co's net costs for constructing and operating fixed wireless and satellite network infrastructure, replacing the company's opaque internal cross subsidy. The funding assistance will be in the form of contracts and/or grants made by the Secretary of the Department to NBN Co.[22]

1.33 The Minister who introduced the CC Bill in the House of Representatives indicated that the RBS is intended to make the existing cross-subsidy within NBN Co transparent and to require 'all fixed-line broadband carriers to contribute equitably to the cost of providing regional broadband services'. The Minister added:

> Once established the Regional Broadband Scheme will provide certainty for regional Australians that their essential broadband services will be maintained and upgraded into the future.[23]

---

21 The Hon Paul Fletcher MP, Minister for Urban Infrastructure, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10.

22 EM, CC Bill, p. 11.

23 The Hon Paul Fletcher MP, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10.

1.34 Liability for the charge would commence on 1 July 2018, with the charge collected one year in arrears (that is, from 2019–20). In 2019–20, the financial impact (on an underlying cash basis) is estimated to include revenue of approximately $30 million and expenditure of approximately $29 million. In the years leading to 2019–20, approximately $700,000 is expected to be spent on administrative costs related to establishing the RBS.[24]

Entities covered by the charge

1.35 The EM for the CC Bill explains that carriers will have to pay the charge for premises to which a carriage service provider provides a broadband service during the whole or part of a month using a local access line that is technically capable of providing a download speed that is normally 25 Mbps or greater.[25] The RBS would not cover mobile broadband services, fixed wireless broadband services or satellite broadband services.[26]

1.36 Three categories of exemptions from the charge are proposed. These are:

- an exemption for small networks—carriers with less than 2,000 potentially chargeable premises during the whole or a part of a month are exempt from paying the charge on those premises;
- an exemption for lines transitioning to the NBN or being decommissioned under certain agreements, such as the lines transitioning to NBN Co from Telstra under the revised Definitive Agreements; and
- a transition period to assist smaller carriers—the first 25,000 residential and small business premises covered by the charge will be exempt for the first five years of the RBS to 'lessen the burden on smaller carriers and help them transition to paying the charge'.[27]

Charge amounts

1.37 The EM for the RBS Bill explains that the RBS is intended to require all carriers, including NBN, to contribute funding at an initial rate of approximately $7.10 per month, per chargeable premises.[28] The charge is imposed on an annual basis

24 EM, RBS Bill, p. 4.

25 EM, CC Bill, pp. 12–13.

26 The EM notes that while such services are not intended to be captured by the RBS, it is intended that the RBS provisions 'capture a line that runs most of the way to the premises but is then connected to the premises over a short distance using wireless or mobile technology'. EM, CC Bill, p. 13.

27 EM, CC Bill, pp. 13–14.

28 EM, RBS Bill, p. 2.

(each financial year) and comprises a base component (initially $7.09 per month) and an administrative cost amount (initially $0.01266 per month).[29]

1.38 Although specific base component and administrative cost amounts are set in the bill and indexed, the bill proposes that the Minister would have the power, by legislative instrument, to change the base component and/or the administrative cost amount following receipt of advice from the ACCC.[30] However, this discretion is limited by clause 17A of the RBS Bill, which applies an upper limit on the monthly charge that can be set by the Minister. This upper limit, referred to as the 'combined component cap', is set at $10 for the first financial year and for future years would be indexed to the consumer price index. The legislative instrument would be subject to disallowance.[31]

Pass through to wholesale customers

1.39 When the bills were introduced in the House of Representatives, the Minister explained that customers on NBN Co's networks 'will not experience price rises as the charge is already embedded in NBN Co's pricing'. The Minister observed that, once the rollout of the NBN is complete, it is expected that NBN Co will have 'around 95 per cent of the fixed-line market, which means it will continue funding the bulk of the cost for providing broadband to regional Australia'. The Minister added that, for non-NBN entities, 'it will be up to these networks to decide whether some or all of the charge is passed on'.[32]

---

29 The base cost would be indexed annually to the consumer price index. The administrative cost will range between $0 and $0.01266 for the first five years, and then be indexed annually based on the charge applied in the fifth year. The RBS Bill provides that, in the fifth year, the administrative cost would be either $0 or another amount determined by the Minister. According to the proposed statutory formula for the administrative cost for year 6 and onwards, if another amount has not been set the cost would remain at $0 for future years. See RBS Bill, clauses 16(5)–(7).

30 RBS Bill, clauses 12(4)–(6), 13, 16(8)–(10) and 17.

31 It is proposed that the period for disallowance would differ from the ordinary process set out in the *Legislation Act 2003* to 'maximise opportunity' for parliamentary scrutiny of any determinations made (EM, RBS Bill, p. 71). This proposed modification to the usual disallowance process is discussed in Chapter 3.

32 The Hon Paul Fletcher MP, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10. In its May 2017 final determination on prices and other terms and conditions for wholesale high speed internet services supplied by non-NBN fixed line networks, the ACCC decided that non-NBN networks would be permitted to pass on the proposed RBS charge to their wholesale customers. See ACCC, *Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination joint inquiry: Final decision report*, May 2017, p. 24.

Payments to eligible funding recipients

1.40 To fund the fixed wireless and satellite networks supported by the RBS, the CC Bill would provide that the Secretary of the Department of Communications and the Arts, on behalf of the Commonwealth, may enter into a contract with, or provide a grant to, certain operators of fixed wireless and satellite networks for the purposes of:

- the connection of premises to fixed wireless or satellite networks;
- the supply of eligible services to carriage service providers to enable them to provide fixed wireless and satellite broadband services; or
- fixed wireless or satellite facilities.[33]

1.41 Networks would be eligible to receive funding if their fixed wireless and satellite networks are capable of peak download speeds of at least 25 Mbps. The relevant EM notes:

> Whilst it is envisaged that NBN Co will be the only eligible funding recipient at the Scheme's commencement, there is flexibility for the Minister to declare other eligible funding recipients if required.[34]

1.42 The EM goes on to provide further details about the funding arrangements, including a proposed mechanism to offset a funding recipients charge liabilities against their funding entitlement.[35]

Reporting requirements and review

1.43 The CC Bill contains proposed reporting obligations for carriers to assist with the operation of the RBS:

- The first reporting obligation is a once-off report to the ACCC to 'give the ACCC a snapshot of the high speed, fixed line broadband market at it stands during November 2017'. This report is intended to assist the ACCC to provide advice to the Minister about the base component of the RBS charge.
- The second reporting obligation is an annual report to the ACMA on information necessary to enable the carrier's charge liability to be assessed and the charge collected.[36]

1.44 The CC Bill also establishes information gathering powers for the ACCC and ACMA for certain information relevant to the RBS.[37]

---

33 EM, CC Bill, p. 17.

34 EM, CC Bill, p. 17.

35 EM, CC Bill, pp. 17–18.

36 EM, CC Bill, p. 14.

1.45 The RBS would be subject to a statutory review. Specifically, the CC Bill includes a provision that would require a review of the amendments enacted by schedule 4 of the CC Bill to be conducted during the first four years of the RBS or as soon as practicable afterwards. This review must involve public consultation.[38]

Establishing the 'designated day' for Telstra's structural separation

1.46 Schedule 5 to the CC Bill would alter arrangements for the 'designated day' for the purposes of Telstra's structural separation.[39] At present, the designated day is either 1 July 2018 or another date specified by the Minister. The bill would change the date specified in the Tel Act to 1 January 2020 while retaining the ministerial discretion to set a different date. The relevant EM states that this change 'better reflects the date by which the NBN rollout is now expected to be completed'.[40]

Reports of other committees

1.47 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee). The Scrutiny Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.48 The Scrutiny Committee commented on the bills in its *Scrutiny Digest No. 8 of 2017*. In relation to the CC Bill, that committee is seeking advice from the Minister in relation to the proposed modified disallowance procedures, provisions which exempt certain instruments from disallowance and a strict liability offence. In relation to the RBS Bill, that committee commented on the proposed delegation to the executive of legislative power in relation to taxation and the proposed modified disallowance procedures.[41] These matters are discussed in Chapter 3.

---

37 The ACCC and ACMA would also be authorised to disclose information to certain government entities and the Regional Telecommunications Independent Review Committee. EM, CC Bill, p. 18.

38 CC Bill, schedule 4, item 13 (*Telecommunications (Consumer Protection and Service Standards) Act 1999*, proposed section 102ZFA); EM, CC Bill, p. 19.

39 The designated day is the date from which Telstra will be subject to structural separation obligations set out in its structural separation undertaking. EM, CC Bill, p. 19.

40 EM, CC Bill, p. 19.

41 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, August 2017, pp. 33–40.

Chapter 2

Stakeholder views and key issues

2.1 This chapter examines the proposed amendments contained in the bills in detail. The chapter starts by presenting a summary of stakeholders' overall positions on the bills as well as additional information received during this inquiry that is relevant for considering the intent and structure of the bills.

2.2 The majority of the chapter is devoted to examining the evidence received from stakeholders that commented in detail on specific proposed measures. The three categories of measures contained in the bills are addressed in separate sections. The committee's views on the issues raised in evidence about particular proposed measures are outlined at the end of these sections while the committee's overall conclusions on the bill can be found at the end of the chapter.

2.3 In conducting this inquiry, the committee has focused on evidence received during this inquiry that specifically addresses the provisions of the bills. Nevertheless, the committee is cognisant that this inquiry follows a recent Productivity Commission (PC) inquiry into the telecommunications universal service obligation (TUSO). Several stakeholders referred to the PC's report and the committee has noted comments in the PC's report that are relevant to the measures contained in the bills. Notwithstanding this, the committee emphasises that the government is currently considering the PC's report as part of a separate policy development process which does not have any direct implications for parliamentary consideration of the bills.

Overall views and other comments on the bill

2.4 Submissions from consumer groups and regional industry or community organisations were supportive of the bills, particularly in relation to the Regional Broadband Scheme (RBS) and statutory infrastructure provider (SIP) obligations. For example, strong support for the bill was given by the Regional, Rural and Remote Communications Coalition (RRRCC), which represents 20 consumer, regional and agricultural industry organisations.[1] The RRRCC submitted that it welcomes the package of bills and 'would like to see it enacted as soon as possible'.[2]

---

1 These organisations are: AgForce Queensland, Australian Communications Consumer Action Network (ACCAN), Australian Forest Products Association, Better Internet for Rural, Regional & Remote Australia, Broadband for the Bush Alliance, Cotton Australia, Country Women's Association of Australia, Country Women's Association of New South Wales, Country Women's Association of South Australia, GrainGrowers, Isolated Children's Parents' Association, National Farmers' Federation (NFF), National Rural Health Alliance, Northern Territory Cattlemen's Association, NSW Farmers, The Pastoralists' Association of West Darling, Queensland Farmers' Federation, Ricegrowers' Association of Australia, Victorian Farmers Federation and WAFarmers.

2 Regional, Rural and Remote Communications Coalition, *Submission 1*, p. 1.

2.5 Telstra supports the overall intent of the bills; however, it has various concerns with how aspects of the bills have been drafted, such as the scope of particular provisions.

2.6 Businesses affected by the RBS focused on that aspect of the bill. Several of these businesses do not support the RBS in its current form, arguing that the RBS should not proceed while the government is considering the future of the TUSO and that the charge should be broadened to cover mobile and fixed wireless broadband. Optus, which supports the policy intention of the RBS but shares some of Telstra's concerns about the scope of the RBS as drafted, countered some of these arguments.

2.7 The Department of Communications and the Arts (the department) provided a written submission and made officers available to answer questions about the bills at the committee's public hearing. One of the key points made in the department's evidence is that the three categories of measures proposed in the bills (the amendments to the superfast network rules, the SIP regime and the RBS) 'work together as an integrated package'. The department provided the following evidence providing background regarding why the measures are being introduced and how they work in concert:

> Australia has an open and competitive telecommunications marketplace but this is being held back by excessive regulation. The proposed changes to the carrier separation rules address this. However, the growth of competition in the market place will put pressure on the ability of NBN Co Limited…to deliver fixed wireless and satellite services in regional areas. The proposed Regional Broadband Scheme responds to this. [NBN Co] is intended to provide access across Australia to better broadband and a platform for fairer and more effective retail competition. The proposed…SIP arrangements provide certainty that this will happen. The Department does not consider any part of the package can be removed without detracting from the package as a whole.[3]

Proposed changes to the superfast network rules

2.8 Proposed amendments contained in schedules 1 and 2 to the CC Bill that attracted significant comment in submissions include:

- the removal of Part 8 regulatory obligations for networks servicing small business customers; and
- changes to the exemption under subsection 156(4) of the *Telecommunications Act 1997* (Tel Act) for network extensions of less than 1 kilometre from a point on the infrastructure of a network as it stood immediately before 1 January 2011.

2.9 The following paragraphs examine the evidence received on these proposed amendments.

---

3 Department of Communications and the Arts, *Submission 10*, p. 1.

Application of superfast network rules to residential customers only

2.10 The department explained that the basis for removing the application of wholesale-only rules to networks servicing small business customers is that 'there is usually strong infrastructure competition to service small business customers'. This also reflects the general intent that changes to the carrier separation rules 'will create competitive and commercial opportunities'.[4]

2.11 Vocus Group supports the proposed changes. It argued that Part 8 should not capture networks that have been constructed for the purpose of servicing business customers, and which only service business customers. Vocus explained that such networks serve small business customers and there are practical difficulties involved in distinguishing between businesses that are small businesses and businesses that are not small businesses.[5]

2.12 Superloop, which owns and operates metropolitan fibre networks in Australia and elsewhere in the Asia Pacific region, also supports this change. Superloop provided the following evidence highlighting issues with the current legislation and the need for change:

> The definition of small business, which refers to the definition in the Fair Work Act being an employer of fewer than 15 people, was flawed. There are many successful, sophisticated business entities within Australia that employ less than 15 people—Superloop itself had fewer than 15 employees at the time it listed on the Australian Stock Exchange with a market capitalization of approximately $90 million. While the restriction on supply applies to small businesses, it is a disincentive to investment in network expansion and creates a hurdle in contracting for the supply of superfast services for businesses outside major metro areas where such businesses employ less than 15 people. There is also a risk to carriers in contracting to a business that is only just above the threshold of 15 employees, if the departure of employees bringing that customer into the definition of a small business.[6]

4 Department of Communications and the Arts, *Submission 10*, p. 2.

5 Vocus Group, *Submission 4*, p. 3.

6 Although it supports the proposed change, Superloop considers there would be merit in defining the term 'residential customers' to exclude certain types of accommodation where residents obtain services from the accommodation provider (such as hospitals, hostels, hotels and motels, aged care facilities, university colleges and halls of residence, and purpose built student housing accommodation facilities). Superloop, *Submission 15*, p. 2.

2.13 Optus submitted that it 'generally supports' the proposed repeal of Part 7 and the amendments to Part 8. However, Optus advised that it does not support the proposed removal of Part 8 obligations in relation to networks solely servicing small business customers. Optus argued that this proposed amendment could risk the creation of 'islands of customers that effectively have no choice of supplier'. Optus explained:

> 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.[7]

2.14 Telstra advised that it supports the proposed exemption of business customers from the superfast network rules; however, it expressed concern that the exemption is drafted to exempt networks marketed exclusively as a business network (proposed section 143H). Telstra argued that this drafting approach 'does not reflect the commercial reality that almost every network will have mixed uses'.[8]

2.15 To address this issue, Telstra called for proposed section 143H to be redrafted to instead focus on 'how the network is used, or proposed to be used, as opposed to how the network is marketed'. Furthermore, Telstra argued that the word 'exclusively' in the phrase 'the network is marketed by the carrier exclusively as a business network' in proposed paragraph 143H(1)(b) should be either omitted or replaced with a lower threshold, such as 'wholly or principally'.[9]

2.16 Telstra also commented on proposed section 156A, which is a deeming provision intended to capture circumstances where, on or after 1 July 2018, the use of a line changes from wholly or principally supplying services to non-residential customers to residential customers. Telstra expressed concern about the implications that may arise because of changes in use. It argued:

> 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

---

7 Optus, *Submission 13*, p. 8.

8 Telstra provided the following examples to illustrate its concerns: '[W]here 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 [superfast network obligations] is in a predominantly commercial area where there are shops downstairs along the street but where people live upstairs'. Telstra, *Submission 9*, pp. 22–23.

9 Telstra, *Submission 9*, p. 23. Telstra noted that 'wholly or principally' is currently used in section 141 of the Tel Act as part of the definition of a superfast broadband network.

> change in use. Telstra does not monitor what customers do in the millions of premises connected to our network—nor should we.[10]

Evidence from the department

2.17 In response to written questions on notice, the department addressed Telstra's concerns about the application of proposed section 156A of the Tel Act if, on or after 1 July 2018, the use of a line changes from wholly or principally supplying services to non-residential customers to wholly or principally supplying services to residential customers.

2.18 The department explained that the intent of proposed section 156A is to preserve the underlying principle that 'networks servicing residential customers should be wholesale-only…on the basis they can constitute access bottlenecks that inhibit retail competition' in situations where residential customers reside in converted business premises. The department's evidence confirmed advice provided in the explanatory memorandum (EM) for the CC Bill that carriers' obligations would not be affected by incidental changes in use on a network that occur without the network operator's knowledge. The department advised:

> Such change in use is accommodated by paragraph 142C(1)(c), which casts the wholesale-only obligation on local access lines that are used, or proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers. Where a carrier operates lines targeting business customers, for example, and a business customer on any line becomes a residential customer, the carrier would not have to comply with subsection 142C(2) if the line was still principally used to supply superfast carriage services to business customers…[W]here a line services a single customer and that customer becomes a residential customer, the carrier would be exempt from subsection 142C(2) if the total number of residential customers serviced by the network is minor.[11]

2.19 The department considers that proposed section 156A relates to 'edge cases' and is 'not expected to be heavily used'. Furthermore, the department commented:

> It is…worth noting that as part of its structural separation, Telstra is generally expected to exit the market for supplying infrastructure for residential broadband. It is unclear why, then, Telstra would wish to service residential customers in a building that has changed use. If Telstra were to service such customers, it is not clear why it should not do so on a separated basis like any other carrier.[12]

---

10 Telstra, *Submission 9*, p. 23.

11 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 3. See also Explanatory Memorandum (EM), CC Bill, pp. 124–25.

12 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 3.

2.20 The department made a similar observation about Telstra's structural separation in response to Telstra's concerns about the implications of the mixed use of networks for proposed section 143H (the exemption for networks marketed as business networks).[13]

2.21 The department also responded to Telstra's position that the term 'exclusively' in proposed paragraph 143H(1)(b) should be replaced with a lower threshold, such as 'wholly or principally'. The department explained that an exemption has been proposed for networks exclusively marketed as a business network to allow for a minor number of residential customers, as it is acknowledged that 'there may be a small number of cases where the customer has changed but the carrier operating the network is not aware of the fact'. This proposed exemption, however:

> …is deliberately worded to be made available for networks that are marketed exclusively as business networks on the basis that the policy position in the Bill is that local access lines used to supply superfast carriage services to residential customers should generally operate under structural or functional separation.[14]

2.22 When considering Telstra's evidence on this matter, the department emphasised that the CC Bill 'seeks to balance the importance of ensuring residential customers living in areas serviced only by business networks are not prevented from accessing broadband services with the potential gaming by carriers to use networks to service both residential and business customers'. In the department's view, amending the phrase 'the network is marketed by the carrier exclusively as a business network', to replace 'exclusively' with 'wholly or principally', as suggested by Telstra, would 'not be consistent with the policy objectives of the legislation'. The department warned that such a change would enable carriers to 'roll out substantial integrated local access networks where only a bare majority of customers (50% plus one, for example) need to be business customers'.[15]

2.23 Finally, the department emphasised that, as with proposed section 156A, the provisions exempting networks marketed as business networks 'are not expected to be heavily used'.[16]

---

13 In the department's view, Telstra's concerns: 'fail to recognise the underlying policy that networks servicing residential customers should be wholesale-only (i.e. structurally separated) and that any carriers wishing to market (and operate) a network as both a business and residential network should undertake structural or functional separation for local access lines used to service residential customers'. Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

14 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

15 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), pp. 4–5.

16 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

Proposed changes to the '1 kilometre exemption'

2.24 The changes to the 1 kilometre exemption rule would mean that, for superfast networks that existed prior to 1 January 2011, network extensions of less than 1 kilometre would, from 1 July 2018, only be available for networks that are being transferred to NBN Co under contracts (the Definitive Agreements). Any other extensions would need to be used to supply services on a structurally separated (wholesale-only) basis as the default or be covered by a functional separation undertaking approved by the Australian Competition and Consumer Commission (ACCC).

2.25 Certain exemptions are provided, including for lines installed to connect premises that are in 'close proximity' to networks. The EM for the CC Bill provides the following guidance on the term 'close proximity':

> 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'.
>
> Close proximity has a meaning affected by proposed new section 162, which empowers the Minister to determine, by legislative instrument, when premises are, or are not, in close proximity to a local access line…[17]

2.26 In response to written questions on notice, the department provided the following additional explanation about the effects of replacing the '1 kilometre exemption' with the close proximity rule as proposed by the CC Bill:

> The close proximity rule differs from the 1km exemption in that it provides for connection to the existing network, not extension of the network *per se*. For example, if the network passed a house it could connect the premises but if the network had to be extended to service a new apartment block nearby, that would be an extension. Judgment may be required in some instances to differentiate between a connection and an extension. This would be a matter for the ACCC as the regulator in the first instance and the court if necessary.
>
> Proposed section 143F in the CC Bill extends the close proximity rule to include networks built between 1 January 2011 and 1 July 2018. As with the existing close proximity rule, the rule simply allows a carrier to operate networks, including connecting premises, under the separation laws that applied at the time the network was built. This is consistent with the decision to grandfather rules applying to networks when they were established. It does not provide an exemption for extending a network.[18]

17 EM, CC Bill, p. 94.

18 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 2.

2.27 Telstra and TPG Telecom oppose the proposed changes to the 1 kilometre exemption for network extensions after 1 July 2018 and the related exemption proposed for lines that are in 'close proximity' to networks. TPG Telecom provided the following summary of how it expects the proposed change to affect its operations:

> The effect of this is that if we extend our pre-existing network to connect premises that are not in close proximity to infrastructure of our network as it stood before 1 July 2018, we are prohibited from providing retail services on the network unless we functionally separate our company. The term 'close proximity' is not defined, except to say that it may be determined by the Minister. Until the Minister makes a determination, it is uncertain how far our network can be extended to connect new premises, however, given that the…CC Bill proposes repealing the 1km exemption, it appears likely that the Minister will determine 'close proximity' will be less than 1km.[19]

2.28 Telstra submitted that, in its view, the existing 1 kilometre 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'.[20] TPG Telecom argued that the proposed change 'will curtail fixed-line network expansion except where carriers are willing to be wholesale only or incur the costs of functional separation', thus creating inefficiencies and distorting competition.[21] Telstra also expressed concern that the interpretation of the 'close proximity' test based on the guidance provided in the EM (see paragraph 2.25 above) 'may result in divergent outcomes in similar situations which consumers will find difficult to understand and accept'.[22]

2.29 Telstra argued that if the 1 kilometre rule 'is not to be retained in full, it should at least apply to any other networks…which are, like the Telstra and Optus [hybrid fibre co-axial (HFC)] networks, subject to commitments by the network owner to decommission them or transfer them to NBN Co'. Telstra argued that retaining the rule for these networks, such as its fibre networks in greenfield estates, 'would enable modest extensions to be made to these networks to meet consumer demand for superfast services pending the deployment of the NBN'.[23]

---

19 TPG Telecom, *Submissio*n 2, p. 7.

20 Telstra, *Submission 9*, p. 18.

21 TPG Telecom, *Submissio*n 2, p. 8.

22 The following example was provided to illustrate Telstra's concerns: '[W]hile 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 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'. Telstra, *Submission 9*, pp. 18–19.

23 Telstra, *Submission 9*, p. 21.

2.30 Despite these alternative drafting suggestions, Telstra concluded that:

> 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.[24]

Evidence from the department

2.31 The department noted that removal of the 1 kilometre exemption was recommended by the Vertigan Panel due to concerns that the exemption:

> …advantaged carriers with pre-2011 network over those who build networks after 2011, especially those with larger network footprints, and enabled carriers with pre-existing networks to roll out large extensions which were not subject to wholesale-only requirements, designed to protect residential consumers.

2.32 The department added that 'experience has shown that such networks can form local access bottlenecks that restrict consumer choice'.[25]

Committee view on schedules 1 and 2 to the CC Bill

2.33 The committee supports the overall intent of the proposed amendments to the Tel Act and the CCA contained in schedules 1 to 2 of the CC Bill. The committee has considered the evidence received from industry stakeholders on specific drafting issues; however, after taking into account the evidence received from the department regarding these matters and the overall intent of the CC Bill, the committee has not been convinced of the need for amendments.

Statutory infrastructure provider regime

2.34 As explained in Chapter 1, schedule 3 to the CC Bill would establish SIP obligations to be administered by the Australian Communications and Media Authority (ACMA).

2.35 Before examining the evidence received on the proposed SIP regime during this inquiry, it is instructive to note that the proposed SIP obligations have also been examined by a public inquiry conducted by the PC. In the final report of its recent inquiry into the TUSO, the PC recommended that the role of NBN Co and other designated providers as SIPs should be clearly defined in legislation 'as a matter of priority'.[26] In doing so, the PC commented that the proposed SIP regime 'would assist

24 Telstra, *Submission 9*, p. 21.

25 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 2.

26 Productivity Commission, *Telecommunications Universal Service Obligation*, Report no. 83, April 2017, p. 265.

in providing greater confidence to the community about [NBN Co's] role with respect to the provision of wholesale broadband services'.[27]

Overall stakeholder views on the proposed SIP regime

2.36 The Australian Communications Consumer Action Network (ACCAN) 'strongly supports' the proposed SIP regime. It provided the following summary of the problems the SIP regime is expected to address and the specific benefits associated with the introduction the SIP regime in the form proposed by the bill:

> ACCAN does not believe that the current framework governing the delivery of broadband services is in the interest of consumers. Too often consumers have no transparency or assurance over their service, get passed between retailer and wholesaler and could potentially be left without access to any network.
>
> Broadband services are essential services that should be underpinned by standards and conditions. ACCAN believes the [CC Bill] is in the interest of consumers as it puts in place the architecture that could be used to establish a framework that:
>
> - Ensures access to a superfast network to all premises,
> - Provides transparency and accountability over network providers,
> - Ensures that networks need to exceed minimum performance levels and timeframes for connection and fault repairs, and
> - Ensures that networks act in a manner which supports consumers' complaint and dispute resolution.[28]

2.37 ACCAN urged that the SIP regime be enacted 'as quickly as possible so the powers within the legislation can be used to protect consumers and their services'.[29]

2.38 Rural industry groups also support the proposed SIP regime. Cotton Australia, for example, submitted that 'regional, rural and remote consumers and businesses need legislative rights to access broadband data and voice services'. It argued that ensuring access to data networks for all premises in statute via the proposed SIP regime is 'a critical stipulation'.[30]

2.39 Optus and Vodafone Hutchison Australia (VHA) support the SIP regime as drafted in the bill. For example, Optus argued that the proposed SIP regime is 'appropriate given the role and policy objectives of the NBN and it will remove the

---

27 Productivity Commission, *Telecommunications Universal Service Obligation*, p. 11.

28 ACCAN, *Submission 8*, p. 3.

29 ACCAN, *Submission 8*, p. 3.

30 Cotton Australia, *Submission 5*, p. 1.

uncertainty inherent from the fact that current obligations are set out in a Statement of Expectations that can be changed from time to time'.[31]

2.40 Telstra supports the overall proposal for a SIP regime; however, its submission outlines some drafting concerns with aspects of the proposed regime as contained in the CC Bill.

Adequacy of the speeds to be established in legislation

2.41 Some criticism was received about the adequacy of the 25/5 Mbps speeds.[32] The department explained that the 25/5 Mbps obligation are the speeds set in NBN Co's 2016 Statement of Expectations and 'reflect anticipated consumer need for speed in the foreseeable future'. The department provided the following evidence in support of this conclusion:

> In 2014, as part of the Vertigan cost-benefit analysis of the NBN, Communications Chambers was contracted to construct a bottom-up model of the 'technical' bandwidth required for the applications utilised by various types of household, and used this to estimate future demand. Its report estimated that by 2023 the median Australian household will have 'technical' demand (that is, generated by actual application usage) for download bandwidth of 15 Mbps. Therefore, a 25 Mbps download service is considered to be a service that will actually support most applications that people will need for the foreseeable future. This conclusion is consistent with current usage on the NBN with 29 per cent of services being 12/1 Mbps and 55 percent being 25/5 Mbps.[33]

2.42 The department added that SIPs can 'supply faster services in response to consumer demand'.[34] In addition, and consistent with NBN Co's 2016 Statement of Expectations, the department noted that the proposed SIP regime includes a further obligation 'to ensure that 90 per cent of premises in its fixed-line footprint can receive peak download speeds of at least 50 Mbps and peak upload speeds of at least 10 Mbps'.[35] This is one of two targets for NBN Co expressed as the intention of the Parliament (these targets are outlined in Chapter 1).

Approach potentially taken by NBN Co up to the designated day

2.43 One of the concerns expressed by Telstra is that, before the 'designated day' for Telstra's structural separation (which schedule 5 to the CC Bill would change to 1 January 2020 or another day set by the Minister), NBN Co would be able to determine when its SIP obligations apply. Telstra explained that:

---

31 Optus, *Submission 13*, p. 9.

32 See Professor Mark Gregory, *Submission 14*, p. 5.

33 Department of Communications and the Arts, *Submission 10*, p. 3.

34 Department of Communications and the Arts, *Submission 10*, p. 3.

35 Department of Communications and the Arts, *Submission 10*, p. 3.

> 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. 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.[36]

2.44 Telstra explained that it is concerned about a possible 'Swiss cheese' effect, where most areas within a region are serviced by NBN Co but pockets are not. Telstra submitted that a possible implication of this is that Telstra would be required to meet service requests up until the designated day, after which NBN Co would be required to connect the premises and supply wholesale services.[37]

2.45 The department provided the following evidence in response to these concerns:

> Our view of the legislation is that as NBN Co rolls out its network and it establishes an area, it would be servicing the premises in the area. If there was an issue about the ability to connect immediately, that is really a matter of the time frame for connection as opposed to their obligation to service the premises.[38]

Scope of ministerial powers

2.46 Telstra expressed concern that proposed section 360L would provide the Minister with a broad power to declare that a specified carrier is the SIP for a designated service area. Telstra submitted:

> 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.[39]

2.47 To address this concern, Telstra suggested that proposed section 360L be amended to provide that, when considering decisions under this section, the Minister must 'consider the extent to which the proposed exercise of power is consistent with NBN Co being the primary SIP nationwide'.[40]

---

36 Telstra, *Submission 9*, p. 5.

37 Telstra, *Submission 9*, p. 6.

38 Mr Phillip Mason, Assistant Secretary, Telecommunications Competition, Department of Communication and the Arts, *Committee Hansard*, 10 August 2017, p. 20.

39 Telstra, *Submission 9*, p. 6.

40 Telstra, *Submission 9*, p. 6.

Exemption for satellite services

2.48 It is proposed that the SIP obligation relating to enabling carriage service providers to supply carriage services that can be used by end-users to make and receive voice calls would not apply if the carriage service is supplied using a satellite.[41] The relevant EM explains that this is to account for areas where a SIP only supplies broadband services using satellite technology and where 'voice services may be better supported by other network technologies operated by carriers who are not SIPs'.[42] The department's submission provides the following further details about the decision to exclude satellite from the obligation:

> The requirement does not extend to broadband services provided using satellite because of the potential technical constraints of such services, particularly latency where voice calls are made involving two satellite hops. The Government's response to the Productivity Commission's Inquiry into the Universal Service Obligation will also consider the provision of voice services in NBN's satellite footprint in a technologically neutral manner.[43]

2.49 Organisations representing rural industries emphasised that delivery of voice services by satellite is undesirable because of concerns about reliability.[44] However, other stakeholders questioned whether the current limitations of satellite could be accounted for using a more flexible drafting approach.

2.50 The Telecommunications Industry Ombudsman (TIO) suggested that the proposed SIP regime should be 'future-proofed and technologically neutral'. In relation to this, the TIO questioned the exclusion of satellite services from the SIP supply obligation. The TIO argued that:

> The introduction of a SIP supply obligation that introduces a lower standard for satellite than current capability may act as a disincentive for industry innovation. This would be contrary to the stated objectives of the *Telecommunications Act 1997* – to promote the long-term interests of consumers and supply diverse and innovative telecommunications services.[45]

2.51 Telstra also argued that the SIP supply obligation should include satellite services. Telstra acknowledged that reliance on satellite services should be reduced as a result of NBN fixed wireless services and mobile services supplied through the Mobile Black Spot Program. However, it considers it 'is likely that there will still be some end users in remote areas who can only be served by satellite and therefore will

---

41 CC Bill, schedule 3, part 1, item 7 (proposed ss. 360Q(1B) and 360Q(2A) of the Tel Act).

42 EM, CC Bill, p. 133.

43 Department of Communications and the Arts, *Submission 10*, p. 3.

44 NFF, *Submission 1*, p. 2. This comment was supported by Cotton Australia (see *Submission 5*, p. 2).

45 Telecommunications Industry Ombudsman, *Submission 12*, p. 2.

need to utilise satellite provided telephony unless they are provided with voice services via an alternative network'.[46] Telstra added 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'.[47]

2.52 Rather than a complete statutory exemption for satellite services, Telstra argued that the CC Bill should be amended to provide the Minister with the power to exempt satellite services from the obligation to provide voice-capable services. Telstra reasoned that this proposal:

> …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.[48]

Committee view on the proposed SIP regime

2.53 The committee notes that the idea for implementing a SIP regime has received broad support from consumer and industry stakeholders. The PC has also expressed support for the introduction of SIP obligations: of particular note, the PC recommended that the role of NBN Co and other designated providers as SIPs should be clearly defined in legislation 'as a matter of priority'.

2.54 On the design of the SIP regime, the committee supports the approach taken in the CC Bill; that is, the overall framework for the SIP regime is set out in legislation while the Minister or, if these powers are delegated, the ACMA, may make legislative instruments to determine relevant standards, benchmarks and rules. The committee emphasises that the approach of legislating a SIP regime with details supported by legislative instruments is preferable to the possible alternative of the Minister introducing a SIP regime as part of carrier licence conditions.[49]

2.55 Regarding the proposed statutory carve out for satellite services from the voice telephony obligation, the committee accepts the reasoning as to why such an exemption is necessary at this time. The committee recognises that, from a legislative drafting perspective, there is merit in ensuring the SIP obligations are technology neutral. However, the committee has also noted the concerns expressed by the National Farmers' Federation (NFF) and shared by others about the provision of voice services by satellite. Although Telstra's suggestion to replace this statutory carve out with a discretionary power delegated to the Minister has some appeal, it is the

---

46 Telstra, *Submission 9*, p. 7.

47 Telstra, *Submission 9*, p. 7.

48 Telstra, *Submission 9*, p. 7.

49 This is an option available to the Minister: see EM, CC Bill, p. 54.

committee's preference that any future proposal regarding the treatment of voice services provided over satellite networks involves a legislative amendment to ensure the proposal receives adequate scrutiny and that those affected are consulted.

Regional Broadband Scheme

2.56 The aspect of the bills that attracted the most comment in submissions is the proposed RBS. The RBS was also discussed by the PC in its recent TUSO report. As explained at the start of this chapter, in preparing this report, the committee has focused on the evidence received during this inquiry, although the PC's comments have been taken into consideration.

Support for the RBS

2.57 The proposed RBS received strong support from consumer and regional groups, including ACCAN, Cotton Australia, the NFF and the RRRCC. Essentially, the evidence received from these groups endorses the overall policy intent of the RBS: to support affordable access to broadband services for customers in rural, regional and remote Australia through funding arrangements that are sustainable and transparent.[50]

2.58 In outlining its support for the proposed RBS, the NFF anticipated that concerns about the scheme would be put forward by industry. The NFF submitted:

> The NFF seeks to temper any concerns that investment in uncommercial telecommunications infrastructure is potentially distortionary to competition. To simplify the rationale for investment to this extent is short-sighted and fails to consider long term economic benefit to the country—even from agricultural productivity alone.
>
> The NFF believes that both government and industry can collaboratively play a significant role in funding uncommercial infrastructure provided the framework is holistic and encompasses the suite of processes that are presently occurring in the telecommunication field. A levy is, in many ways, the most logical and equitable means of seeking an industry contribution.[51]

50 NFF, *Submission 1*, p. 2; Rural Regional and Remote Communications Coalition, *Submission 2*, p. 1; Cotton Australia, *Submission 5*, p. 2; ACCAN, *Submission 8*, p. 7.

51 NFF, *Submission 1*, p. 2.

Industry views

2.59 Vocus, OptiComm, TPG Telecom and VHA oppose the RBS provisions.

2.60 VHA noted the PC's criticism of the TUSO. It argued that the RBS should not be pursued 'before the future direction of the existing controversial USO arrangements has been resolved'.[52] Vocus similarly argued that deliberations on the RBS should not occur in isolation of considering the future of the TUSO.[53]

2.61 Vocus submitted that, in its view, the most appropriate way to fund the non-commercial services is through general government funding. Alternatively, Vocus argued that the costs should be recovered through an industry levy applied to a broad funding base that is technologically neutral (that is, with mobile, fixed wireless and satellite networks included).[54]

2.62 A particular concern is that the RBS does not apply to mobile and fixed wireless broadband networks. OptiComm and Vocus argued that fast, high data capacity mobile and wireless broadband technology is already available and is increasingly likely to become a substitute for fixed line services. Both referred to Telstra's announcement that it will provide a 5G network in 2020.[55] In support of the argument that the RBS should have a broader funding base, Mr Tony Moffatt, General Counsel, TPG Telecom, indicated that the RBS regime, as currently drafted, creates 'a specific incentive to find a technical way around it'.[56]

2.63 It was also argued that the burden of the RBS is too great for specific businesses. OptiComm explained that the RBS represents over 25 per cent of the price of wholesale broadband. It explained that the charge 'will be larger than our staff costs, larger than our backhaul costs and larger than our rent costs'. TPG Telecom also argued that the RBS would have 'significant financial and operation implications' that will damage its ability to compete.[57]

2.64 Telstra explained that it supported the RBS when it was first announced, however, it considers the RBS proposed in the bills 'applies far too broadly' to services that are not competitive with, or an economic threat to, NBN Co. Telstra's concerns are as follows:

- Telstra claimed that the RBS has been 'transformed from its original intention as a "anti-cherry picking measure" into an industry tax'. In particular, Telstra

52 Vodafone Hutchison Australia, *Submission 6*, p. 1.

53 Vocus Group, *Submission 4*, p. 2.

54 Vocus Group, *Submission 4*, pp. 3–4, 6.

55 OptiComm, *Submission 11*, pp. 4, 11, 14; Vocus, *Submission 4*, p. 5. TPG also noted the upcoming arrival of 5G mobile services; see TPG, *Submission 2*, p. 6.

56 Mr Tony, General Counsel, TPG Telecom, *Committee Hansard*, 10 August 2017, p. 7.

57 TPG Telecom, *Submission 2*, p. 1.

is concerned that the proposed RBS covers enterprise and wholesale data services which do not compete with NBN Co and are not subject to any NBN-related obligations. Telstra also noted the proposed RBS covers lines that are not actually being used to provide superfast broadband services but are "technically capable" of providing those services'.

- Telstra also considers carriers might not have the information needed to determine the nature of services and the number of premises being supplied at a retail level. It considers that liability under the proposed RBS is unclear as key terms such as 'premises' are not defined. Telstra argued that the RBS should instead apply to 'services in operation'.
- Telstra further argued that industry should be provided additional time to implement the systems and processes required for administering the RBS[58] and that the costs associated with administering the RBS should be incurred by the public sector, not recovered from industry.[59]

2.65 On its proposal for the RBS to cover 'services in operation' rather than 'premises', Telstra explained that the regime as proposed in the bills 'might require individual examination of individual premises and the lines going into individuals premises' as well as an IT build to support collection of the levy.[60] Telstra noted that the use of the concept 'services in operation', would likely result in an increase in the number of services covered by the RBS; accordingly, if Telstra's preferred term is used, Telstra argued that the amount of the levy should be adjusted downward so that the change is revenue neutral.[61] In response to questioning about Telstra's evidence, representatives of Optus indicated that Optus would also support redrafting the RBS provisions so that they applied to services in operation rather than premises if the overall revenue collected remained unchanged.[62]

2.66 Optus also shared Telstra's concerns about the application of the RBS to fibre networks that provide services to enterprise and government customers.[63] However, given the higher service prices involved in these services (an estimate of the range in the price of these services given at the public hearing 'hundreds of dollars to maybe

---

58 Telstra proposed that the start date of the RBS be delayed by one year to 1 July 2019 and that, if necessary, the levy amount could be increased to cover the revenue from 2018 that would be foregone. Mr James Shaw, Director, Government Relations, Corporate Affairs, Telstra, *Committee Hansard*, 10 August 2017, p. 1.

59 Telstra, *Submission 9*, pp. 9–17.

60 A Telstra representative explained that '[i]t's just simpler for our systems to use existing concepts rather than create new concepts and then build a system around them'. Mr James Shaw, Telstra, *Committee Hansard*, 10 August 2017, p. 3.

61 Mr Bill Gallagher, General Counsel, Corporate Affairs and Telstra Wholesale, Telstra, *Committee Hansard*, 10 August 2017, p. 3.

62 Mr Luke Van Hooft, Director, Economic Regulation, Corporate and Regulatory Affairs, Optus, *Committee Hansard*, 10 August 2017, p. 16.

63 Optus, *Submission 13*, pp. 4–8.

tens of thousands of dollars'), representatives of Optus acknowledged that the $7.10 levy would be a small component of these services.[64]

2.67 Finally, Optus differed from several other industry submitters in that it emphasised that the RBS is not a universal service scheme. Optus also disagreed with the position put by others that the RBS should be extended to wireless providers as Optus considers these services are complementary to NBN services, rather than being a substitute. Optus also countered that any competition provided by wireless is a 'key driver to ensure NBN Co operates efficiently and continues to deliver good outcomes to customers'.[65]

Evidence from the department and NBN Co

2.68 NBN Co provided detailed responses to concerns expressed by industry about the design of the RBS.

2.69 On the inclusion of business services in the funding base for the RBS, NBN Co commented that this is a 'critical component' of the proposed arrangements for ensuring the loss making rollout of satellite and fixed wireless networks are adequately subsidised. NBN Co argued:

> Failure to include business services will mean that the contributions of residential services would be required to fund the losses [NBN Co] incurs to serve regional and rural Australia. This is not desirable, efficient or sustainable relative to the outcomes of the proposed arrangements.[66]

2.70 Furthermore, NBN Co advised that the internal cross-subsidy that currently supports the funding of non-commercial services for regional Australia assumed that NBN Co 'would be the primary fixed network operator supplying services to both residential and business customers'. NBN Co added that it was assumed that revenue from NBN Co's fixed line network as a whole, not just limited to the residential market, would be used to subsidise fixed wireless and satellite services'.[67]

2.71 NBN Co continued:

> Moving to an industry wide funding model recognises that [retail service providers] who target low cost areas should contribute to the funding of the

64 Mr Andrew Sheridan, Acting Vice President, Corporate and Regulatory Affairs, Optus, *Committee Hansard*, 10 August 2017, pp. 16–17.

65 Optus, *Submission 13*, pp. 2, 3.

66 NBN Co, *Submission 7*, pp. 2, 3.

67 NBN Co, *Submission 7*, p. 2. NBN Co's evidence on the rationale for including business services in the RBS was supported by the department. Mr Philip Madsen stated that, from the beginning, the NBN model covered 'all premises in Australia, including business and residential'. Mr Madsen remarked: 'The notion that it's now entering into the business market puzzles me'. Mr Philip Madsen, Assistant Secretary, Telecommunications Competition Branch, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 22.

> higher cost areas which [NBN Co] is responsible for connecting. These low cost areas will include both business and residential customers. It is illogical that a residential connection in a low cost area will pay the RBS but a business connection in the same low cost area will not.
>
> With growth in the competitive fixed line market and the proposed removal of level playing field obligations in relation to small business services, the importance of including business services in the funding base is heightened. While the changes to Part 8 of the Telecommunications Act support a central tenet of the Government's policy (infrastructure competition), it is important that the financial implications of this competition are understood and that loss making services remain adequately funded.[68]

2.72 NBN Co also directly responded to the suggestion put forward by industry participants that extending the RBS to enterprise services is beyond NBN Co's residential remit. NBN Co described these claims as 'misleading'. It submitted:

> In addition to the coverage targets that NBN Co has been provided for residential and business premises (which does not distinguish between small business and larger enterprise customers), [NBN Co's] Corporate Plans and product mix reflect the fact that the network has been designed to serve all types of customers passed by the nbn™ network. Additionally, the White Paper process documented in the Definitive Agreements and the Telstra Migration Plan specifically recognise [NBN Co's] intention to develop wholesale business-grade services and that Telstra would disconnect retail business services supplied using special services from its legacy copper network as the capabilities were made available on the nbn™ network.[69]

2.73 In its submission, the department reiterated information contained in the EM for the RBS Bill about the intended design of the scheme. This evidence included that for the networks representing approximately five per cent of the market expected to be affected by the scheme, 'whether they choose to pass on the charge is a commercial decision for them and their retail service providers'.[70] In addition, the department highlighted the adjustments made following consultation with smaller carriers to 'cushion smaller carriers from the full effect of the charge and give them a sufficient period of time in which to adjust their business models to accommodate the charge'.[71]

2.74 The department also provided further evidence in response to specific suggestions put forward by industry. In response to questioning as to why fixed wireless are not included in the scope of the RBS, departmental officers explained these services represent only one to two per cent of the market, and that the regulatory

---

68 NBN Co, *Submission 7*, p. 2.

69 NBN Co, *Submission 7*, p. 3.

70 Department of Communications and the Arts, *Submission 10*, p. 5. See also EM, RBS Bill, p. 4.

71 Department of Communications and the Arts, *Submission 10*, p. 5. These measures are discussed in Chapter 1.

burden of applying the RBS to these providers is considered to outweigh the benefits associated with their inclusion.[72]

2.75 Regarding Telstra's suggestion for the concept of 'services in operation' to be used in place of 'premises', the department explained that the concept of 'premises' has been used due to concerns about different ways services in operation can be interpreted. To illustrate, a departmental officer referred to a potential example involving the services supplied to a major bank:

> [A] large corporate such as the Commonwealth Bank might have lines that service a particular branch, it might have lines that service its ATM network and it might have lines that service different components of its communications services. And there'd be uncertainty about whether all of those lines would be calculated or only some of them.[73]

2.76 Evidence given by the department also highlighted that, to be 'as clear as possible about the application of the charge', the EMs provide a detailed explanation of how the premises based charge 'would apply to a range of different circumstances, including multi-dwelling units, shopping centres and individual premises'.[74]

2.77 Finally, the department's evidence notes how the proposed reviews of the scheme will enable any issues that arise to be addressed. In particular, the arrangements for reviewing the amount of the charge and the overall operation of the scheme would ensure adjustments can be made so 'the charge remains sufficient to meet the reasonable net costs associated with [NBN Co's] fixed-wireless and satellite networks' and to account for any technological changes affecting the market.[75] NBN Co's Chief Regulatory Officer also acknowledged the potential for 'refinement' to the regime after it commences operation, noting that this would be consistent with previous experience of regulatory change in the telecommunications industry.[76]

2.78 The PC has also noted that the planned reviews of the RBS could enable the treatment of mobile broadband to be reviewed if it becomes evident that mobile broadband is increasingly substitutable for fixed line high speed broadband. More generally, the PC emphasised that the planned reviews would reduce the risk of a 'set and forget' approach to the RBS.[77]

---

72 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

73 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

74 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

75 Department of Communications and the Arts, *Submission 10*, pp. 5–6.

76 Ms Caroline Lovell, Chief Regulatory Officer, NBN Co, *Committee Hansard*, 10 August 2017, p. 22.

77 Productivity Commission, *Telecommunications Universal Service Obligation*, pp. 325–26.

Committee view on the RBS

2.79 The committee considers it is critically important to establish a scheme for adequately and transparency funding the much-needed infrastructure for rural and regional Australia that cannot be provided on a commercial basis. Of the various options available for funding these non-commercial services, the proposed RBS most clearly fulfils this objective.

2.80 Although the RBS is strongly supported by consumer and regional industry groups, certain industry stakeholders advocated for alternative options to be considered instead. As a general rule, the introduction of an industry charge is unlikely to receive universal stakeholder support and can attract points of view influenced by particular commercial interests. Nevertheless, the committee has been receptive to the various arguments relating to the RBS made by industry stakeholders. After careful consideration, however, the committee is of the view that the counterpoints made by the department and NBN Co to industry arguments are more compelling. The committee accepts that the approach taken by the government as outlined in the bills is the most appropriate method for achieving the objectives of the proposed RBS with minimal market distortion. The committee, therefore, supports the overall approach taken to drafting the RBS as outlined in the bills.

2.81 The committee, however, is sympathetic to the argument that industry may need additional time to prepare for the introduction of the RBS. In the committee's view, whether the commencement of the RBS would need to be delayed largely depends on how quickly the bills progress through the remaining stages of the legislative process. To provide industry with certainty, the committee urges prompt consideration of the bills with final consideration of the bills to occur as early as possible during the 2017 spring sitting period. Should this not be possible, however, the government should consider a short delay in the commencement of the RBS regime. The committee notes that the RBS charge could be subject to minor adjustment to ensure that a delay would be revenue neutral.

Chapter 3

Parliamentary scrutiny of the Regional Broadband Scheme and overall committee view

3.1 This final chapter comments on certain issues related to the delegation of legislative power and parliamentary scrutiny of decisions that could be made as part of the proposed Regional Broadband Scheme (RBS). The committee's overall conclusions on the bills can be found at the end of the chapter.

Delegation of legislative powers and adequacy of processes for facilitating parliamentary scrutiny

3.2 As noted in Chapter 1, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) commented on the bills in its *Scrutiny Digest No. 8 of 2017*. Following publication of its Scrutiny Digest, that committee sought and received advice from the Minister regarding various aspects of schedule 4 to the CC Bill and the RBS Bill. Specifically, the Scrutiny Committee commented on:

- strict liability offences for failure to lodge certain reports to the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC);
- the ability for the Minister to make determinations amending the default rate of the RBS charge and affecting the meaning of certain terms;
- modified disallowance procedures relating to the determinations referred to above; and
- proposed sections 102Z and 102ZA of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act), which would enable the ACCC and the ACMA to declare, by notifiable instrument, that a specified Commonwealth, state and territory department or authority is a 'authorised government agency', for the purposes of disclosing certain information collected as part of the RBS regime.

3.3 The committee's comments in this chapter are limited to the issues related to whether the bills would inappropriately delegate legislative powers or insufficiently subject the exercise of legislative power to parliamentary scrutiny. Regarding the remaining matter highlighted by the Scrutiny Committee about the strict liability offences, the committee notes that the Scrutiny Committee has sought and received advice from the Minister about the proposed imposition of strict liability for these particular offences. The committee will leave further consideration of this matter to the usual Scrutiny Committee process.

Overview of the proposed ministerial powers regarding the RBS charge and modified disallowance procedures

3.4 As noted in Chapter 1, although specific base component and administrative cost amounts for the RBS charge are set in the bill (totalling $7.10 for the first year) and indexed, the bill proposes that the Minister would have the power, by legislative instrument, to change the base component and the administrative cost amount following receipt of advice from the ACCC. This discretion is limited by clause 17A of the RBS Bill, which provides that the sum of the base component and administrative cost amount cannot exceed $10 (for the first financial year, and indexed to the consumer price index thereafter). Essentially, this would enable the Minister, rather than the Parliament, to set the rate of the RBS charge up to a capped amount.

3.5 It is also proposed in the CC Bill that the Minister may, by legislative instrument, determine that one or more classes of carriage service is to be excluded from the definition of designated broadband service under paragraph 76AA(1)(f).[1] The explanatory memorandum (EM) states that this power is 'intended to give the Minister flexibility to alter the definition to ensure it continues to apply only to broadband services as technological changes arise'.[2]

3.6 Proposed section 79A further provides that the Minister may, by legislative instrument, determine that a location is taken, or not taken, to be 'premises', for the purpose of the RBS.

3.7 In the following paragraphs, the determinations outlined in paragraphs 3.4 to and 3.6 are referred to collectively as the 'RBS determinations'.

3.8 The ordinary procedure for the Senate or House of Representatives to disallow a legislative instrument is contained in section 42 of the *Legislation Act 2003*. However, the bills seek to exempt the RBS determinations from the provisions of section 42 of the Legislation Act and to establish a modified disallowance procedure.[3]

1 Proposed subsection 76AA(2) of the TCPSS Act.

2 Explanatory Memorandum (EM), CC Bill, p. 164.

3 For the legislative instruments relating to the RBS charge referred to in paragraph 3.4, the special disallowance process that would apply is set out in clause 19 of the RBS Bill. For the legislative instruments relating to the definition of designated broadband service, the disallowance process that would apply is set out in proposed section 102ZFB of the TCPSS Act.

3.9 Under the procedure for disallowance established in the Legislation Act, either the Senate or the House of Representatives may disallow a legislative instrument if, within 15 sitting days after the instrument is tabled, a senator or member of the House of Representatives gives notice of a motion to disallow the instrument (in whole or in part) and, within 15 sitting days after the giving of that notice:

- the motion is agreed to by the Senate or House of Representatives; or
- the notice of motion to disallow the instrument has not been resolved or withdrawn (in which case the instrument is deemed to have been disallowed).[4]

3.10 The proposed modified disallowance procedure reflects the Legislation Act procedure in relation to the period permitted for a notice of motion to be given to disallow the legislative instrument and the period by which the House must pass a resolution to disallow the instrument.[5]

3.11 However, the proposed disallowance procedure differs from the Legislation Act procedure in the following two ways:

- Ordinarily, legislative instruments commence at the start of the day after the day the instrument is registered or, if the instrument provides otherwise, that day.[6] The instrument would cease to have effect if it is disallowed in accordance with section 42 of the Legislation Act. The procedure outlined in the bills differs in that the Minister's RBS determinations would not come into effect until the day after the period by which either House could have disallowed the instrument expires.
- The bills do not provide for an RBS determination to have been disallowed if a notice of motion to disallow the instrument has been given but has not been resolved or withdrawn. Therefore, under the procedure proposed in the bills, disallowance of an RBS determination could only occur if the Senate or the House of Representatives pass a resolution disallowing the determination within the 15 sitting day disallowance period.

Discussion

3.12 The proposed amendments discussed above present two key issues. The first is whether it is appropriate to delegate the Parliament's function to set the rate of the RBS charge. The second related issue is whether the proposed disallowance process for determinations made by the Minister is adequate to enable effective parliamentary scrutiny.

---

4 *Legislation Act 2003,* s. 42(1) and (2).

5 CC Bill, schedule 4, item 13 (proposed section 102ZFB of the TCPSS Act); RBS Bill, clause 19.

6 *Legislation Act 2003,* s. 12(1).

3.13 In commenting on the proposed power for the Minister to amend the RBS charge, the Scrutiny Committee emphasised that the levying of taxation is 'one of the most fundamental functions of the Parliament'. The Scrutiny Committee added that the 'committee's consistent scrutiny view is that it is for the Parliament, rather than makers of delegated legislation, to set a rate of tax'.[7]

3.14 Although the Scrutiny Committee welcomed that the Minister's ability to alter the rate of the charge is subject to the $10 cap, that committee nevertheless described the proposed arrangement as 'a significant delegation of the Parliament's legislative powers'. To address its concerns, the Scrutiny Committee concluded that 'it may be appropriate for the bill to be amended to further increase parliamentary oversight by requiring the positive approval of each House of the Parliament before a new determination…comes into effect'. That is, rather than relying on a disallowance process, each House of the Parliament would have to approve any determination before it could take effect. The Scrutiny Committee referred to section 10B of the *Health Insurance Act 1973* as an example of such a requirement.[8]

3.15 The Scrutiny Committee also commented on the proposed disallowance process contained in the bills that would apply to RBS determinations.

3.16 The Scrutiny Committee welcomed the proposal that, unlike other legislative instruments, the determinations would not come into effect until 15 sitting days after the disallowance period has expired. The Scrutiny Committee observed that this aspect 'improves parliamentary oversight of these determinations'.[9] However, the Scrutiny Committee expressed concern that, unlike the usual disallowance procedure, the bill would provide that disallowance could only occur following a *positive* determination by a House to disallow the instrument. That is, unlike legislative instruments subject to the disallowance process outlined in the Legislation Act, if a notice of motion to disallow an RBS determination has been given which has not been withdrawn, and the motion either has not been called on or has been called on and moved but not disposed of, the RBS determination would come into effect.

3.17 The Scrutiny Committee provided the following observations about the benefits for parliamentary scrutiny associated with the ordinary process:

> Normally, subsection 42(2) of the *Legislation Act 2003* provides that where a motion to disallow an instrument is unresolved at the end of the disallowance period, the instrument (or relevant provision(s) of the instrument) are taken to have been disallowed and therefore cease to have effect at that time. *Odgers' Australian Senate Practice* notes that the purpose of this provision is to ensure that 'once notice of a disallowance motion has been given, it must be dealt with in some way, and the

7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, August 2017, p. 38.

8 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 38.

9 This is the stated intent of the modified procedure: see EM, RBS Bill, p. 71.

> instrument under challenge cannot be allowed to continue in force simply because a motion has not been resolved.' *Odgers'* further notes that this provision 'greatly strengthens the Senate in its oversight of delegated legislation'.[10]

3.18 The Scrutiny Committee outlined its concerns about the absence of this provision for the RBS determinations as follows:

> In practice, as the executive has considerable control over the conduct of business in the Senate, there may be occasions where no time is made available to consider the disallowance motion within 15 sitting days after the motion is lodged and therefore the instrument would be able to take effect regardless of the attempt to disallow it. As a result, the proposed procedure would undermine the Senate's oversight of delegated legislation in cases where time is not made available to consider the motion within the 15 sitting days. The explanatory memorandum provides no justification for this proposed reversal of the usual disallowance procedures in subsection 42(2) of the *Legislation Act 2003*.[11]

3.19 The Scrutiny Committee described the divergence from the usual disallowance process as having a 'significant practical impact' on parliamentary scrutiny of the RBS determinations. Accordingly, the Scrutiny Committee requested that the Minister provide detailed justification for the modified disallowance procedure.[12]

3.20 In his response to the Scrutiny Committee, the Minister emphasised that, under the modified disallowance procedure proposed in the bills, an RBS determination would only commence and take effect 'once the disallowance period has passed and the Parliament has had sufficient time to scrutinise the determination'. Accordingly, the Minister argued that the modified disallowance procedure proposed in the bills 'provides greater Parliamentary scrutiny over any such Ministerial determination than would be available under the usual disallowance procedure'.[13]

3.21 The Minister's response commented on the Scrutiny Committee's suggestion for positive approval of each House of Parliament to be required before any proposed change to the RBS charge could would take effect. However, the Minister's response did not directly address the Scrutiny Committee's underlying concern regarding the absence of a procedure for disallowance when a motion to disallow an instrument is unresolved at the end of the disallowance period.

---

10 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 34, 39 (citation omitted).

11 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 34, 39–40.

12 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, pp. 36, 40.

13 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, p. 2.

Committee view

3.22 The delegation of power to the executive to make legislative instruments to support primary legislation is a standard feature of bills examined by this committee. It is often desirable for practical reasons that various matters, particularly the details of a legislative regime, are left to legislative instruments. The committee, however, will not support inappropriate delegations of legislative power. The committee will also seek to ensure that powers to make legislative instruments are subject to appropriate scrutiny by the Senate.

3.23 In relation to the proposed ability for the Minister to amend the RBS charge, the committee notes that, importantly, the Minister's ability to do this is constrained by a cap. The RBS Bill proposes that the RBS would total $7.10 in the first year of operation and, although the Minister could amend this, the substitute amount specified by the Minister cannot exceed $10 (indexed annually). The Minister's determination would also be subject to disallowance by the Parliament before coming into effect.

3.24 As a general principle, the committee considers that primary legislation should determine rates of taxation. Given the RBS charge applies to a complex and rapidly changing industry, however, there is merit in providing the Minister with the ability to adjust the charge. Due to the safeguards provided by the combined component cap and the requirement for the Minister to have regard to advice from the ACCC, the committee is not concerned by the concept of delegating to the Minister a limited power to adjust the RBS as is proposed in the RBS Bill. The committee's conclusion, however, relies on the establishment of a suitable disallowance process for determinations made by the Minister. While flexibility to respond to rapid change is important, this must not outweigh appropriate parliamentary scrutiny of ministers' decision-making.

3.25 The committee has carefully considered the proposed disallowance process outlined in the bills. The bills propose that the Minister's determinations in relation to changes to the components of the RBS charge and to exclude classes of carriage services from the definition of designated broadband service would not take effect until after the period allocated for disallowance has expired. The committee welcomes this approach. As the government is proposing that the Parliament delegate to the executive aspects of its function to levy taxation, it is appropriate that enhanced arrangements for parliamentary scrutiny of the Minister's determination apply.

3.26 However, the committee is concerned about the proposal to exempt the determinations from the usual disallowance procedure established by subsection 42(2) of the Legislation Act. Subsection 42(2) provides that, where a motion to disallow an instrument is not resolved by the end of the disallowance period, the instrument is taken to have been disallowed. The committee sees no reason to diverge from this practice. Indeed, the committee views this practice as an important safeguard for ensuring parliamentary scrutiny of delegated legislation.

3.27 The committee supports the comments made by the Scrutiny Committee and recommends that the bills be amended to provide that the RBS determinations will not come into effect if a motion to disallow is unresolved at the end of the disallowance period.

Recommendation 1

3.28 The committee recommends that the proposed disallowance procedure in clause 19 of the Telecommunications (Regional Broadband Scheme) Charge Bill 2017 and proposed section 102ZFB of the *Telecommunications (Consumer Protection and Service Standards) Act 1999* be amended to provide that a determination is deemed to have been disallowed if:

- **notice of a motion to disallow the determination is given in a House of the Parliament within 15 sitting days of that House after the copy of the determination was tabled in the House under section 38 of the *Legislation Act 2003*; and**
- **at the end of 15 sitting days of that House after the giving of that notice of motion:**
  - **the notice has not been withdrawn and the motion has not been called on, or**
  - **the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of.**

Use of notifiable instruments to specify an 'authorised government agency'

3.29 Proposed new section 102Z of the TCPSS Act[14] would provide the ACMA with the power to disclose certain information obtained in relation to the RBS to several specified departments and agencies.[15] The entities specified in the CC Bill are the Department of Communications and the Arts, the ACCC, the Regional Telecommunications Independent Review Committee, the Department of Finance, the Treasury and any 'authorised government agency'. Proposed new section 102ZA mirrors new section 102Z, but would apply to the ACCC instead of the ACMA.

3.30 Whether an agency is an 'authorised government agency' would be determined by the ACMA (or ACCC, as applicable). That is, proposed new sections 102Z and 102ZA would enable the ACMA and ACCC to declare, by notifiable instrument, that

14 CC Bill, Schedule 4, item 13.

15 The CC Bill would provide that the ACMA and ACCC may disclose relevant information to certain government agencies if the ACMA or ACCC is satisfied that the information will enable or assist that body to perform or exercise any of their functions or powers. The information that may be disclosed is limited to information obtained under, or for the purposes of, proposed division 8 or as part of the reporting obligations related to the assessment, collection and recovery of the RBS charge in proposed section 100.

any specified department or authority of the Commonwealth, a state or a territory is an authorised government agency.

3.31 Notifiable instruments are a relatively new category of instruments. They were introduced in March 2016 following the commencement of the *Acts and Instruments (Framework Reform) Act 2015*. The EM for the Framework Reform Act provides the following explanation of notifiable instruments:

> Notifiable instruments will not be legislative in character, and as such they will not be made subject to parliamentary scrutiny or sunsetting.
>
> The new category of notifiable instruments is designed to cover instruments that are not appropriate to register as legislative instruments, but for which public accessibility and centralised management is desirable. Instruments may become notifiable instruments by being registered, by being prescribed by regulation under the Legislation Act, or by being declared as notifiable instruments in the enabling legislation. Registration will satisfy any existing publication requirements for the instrument (for example, gazettal).[16]

Discussion

3.32 The Scrutiny Committee commented on the proposal for the ACCC and the ACMA to use notifiable instruments to add departments and agencies to the list of bodies to which the ACCC and the ACMA may disclose information. The Scrutiny Committee made the following observations:

> Given that these declarations will allow the ACMA and ACCC to disclose information to further bodies not specified on the face of the primary legislation, it is not clear to the committee why these declarations are to be notifiable instruments (which are not subject to parliamentary disallowance), rather than legislative instruments.[17]

3.33 The Scrutiny Committee sought advice from the Minister as to why the declarations are to be notifiable, rather than legislative, instruments.[18]

3.34 In his response, the Minister emphasised that the proposed power would be constrained in two ways:

- first, by the requirement that the information must have been obtained under, or for the purposes of proposed division 8 or as part of the reporting obligations in proposed section 100; and
- secondly, by the requirement that the ACCC/ACMA be satisfied that the information will enable or assist the entity to which disclosure is proposed to be made to perform or exercise any of that entity's functions or powers.[19]

16 EM, Acts and Instruments (Framework Reform) Bill 2014, p. 3.

17 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 36.

18 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, p. 36.

3.35 The Minister added that the class of persons to whom the ACCC or the ACMA may specify may receive information is constrained to government departments and agencies, which the Minister considers 'provides further protection and justification for the notifiable instrument form'. Furthermore, the Minister expects that declarations would only be made in 'exceptional cases'.[20]

Committee view

3.36 The committee notes the Scrutiny Committee's comments in its *Scrutiny Digest No. 8 of 2017* regarding the proposal that declarations by the ACCC and the ACMA of an 'authorised government agency' for the purposes of proposed new sections 102Z and 102ZA of the TCPSS Act are to be notifiable instruments. Following the response from the Minister, the Scrutiny Committee's preliminary comments included a request that the key information provided by the Minister be included in the explanatory memorandum. The Scrutiny Committee noted the importance of the explanatory memorandum as part of access to understanding the law and if needed as intrinsic material to assist with interpretation.[21]

3.37 The committee supports the request of the Scrutiny Committee to include information in the explanatory memorandum.

Conclusion

3.38 This report has focused on the evidence received from industry stakeholders, as these stakeholders provided detailed comments on the specific provisions of the bills. However, the committee considers it is important to highlight that the bills received strong support from organisations representing consumers. It is clear from the evidence provided by these organisations that the proposed measures would be of significant benefit to consumers overall. The committee was mindful of these benefits when examining the details of the bills and the evidence received from industry.

3.39 The committee considers that the bills contain three important and related measures that will improve the broadband regulatory framework. Although the committee has made a recommendation intended to enhance the processes for ensuring decisions made as part of the RBS will be subject to adequate parliamentary scrutiny, the committee supports the bills and commends the government for continuing to pursue major reforms of communications regulation.

---

19 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, pp. 3–4.

20 Senator the Hon Mitch Fifield, Correspondence to the Senate Standing Committee for the Scrutiny of Bills dated 23 August 2017, p. 4.

21 Senate Standing Committee for the Scrutiny of Bills, *Preliminary comments as at 28 August 2017*, pp. 6–7.

Recommendation 2

3.40 After due consideration of recommendation 1, the committee recommends that the bills be passed.

Senator Jonathon Duniam
Chair

Labor Senators' Additional Comments

Schedules 1 and 2: Amendments to the superfast network rules

1.1 Labor Senators support, in principle, the proposed changes to Part 7 and 8 of the *Telecommunications Act 1997* which seek to enhance competition in the telecommunications sector.

Schedule 3: Statutory Infrastructure Provider (SIP) Regime

1.2 Labor Senators support, in principle, the proposal to legislate an SIP regime to provide consumers with certainty about universal access to high-speed broadband, and provide industry with certainty about obligations to supply such services.

1.3 Labor Senators support, in principle, the establishment of reserve Ministerial powers to set standards, rules and benchmarks that SIPs must comply with.

Schedule 4: Statutory Infrastructure Provider (SIP) Regime

1.4 Labor Senators support, in principle, the policy objective of establishing a level playing field for competition in the telecommunications sector, and ensuring there is a sustainable funding mechanism for regional broadband services.

1.5 Labor Senators are concerned about aspects of the proposed Regional Broadband Scheme (RBS), and, in particular, note the concerns expressed by stakeholders about the incoherent logic underlying its design.

1.6 Malcolm Turnbull's flawed multi-technology-mix has damaged the economics of the NBN, and this continues to cause market distortions which are impacting on consumers and industry.

1.7 Labor Senators note the Senate Inquiry process has by no means established that the RBS proposed in the Bill is the most effective and efficient method of achieving the stated policy objectives.

Senator Anne Urquhart
Senator for Tasmania

Senator Anthony Chisholm
Senator for Queensland

Australian Greens' Dissenting Report

Summary

1.1 The Australian Greens welcome the introduction of the statutory infrastructure provider (SIP) obligations as set out in Schedule 3. The SIP obligations will ensure that all Australians have access to high-speed broadband, with minimum speed requirements of 25/5 Mbps and requirements for SIP services to support voice services on fixed lined and wireless platforms. These requirements are consistent with the Productivity Commission's review of the Telecommunications Universal Service Obligation.

1.2 We broadly agree with the amended network rules for carriage service providers set out in Schedules 1 and 2.

Relevant background

1.3 The Australian Greens are committed to ensuring all Australians have access to affordable, high quality internet services. Fast, reliable broadband has the potential to transform the lives of Australians. The NBN is not just a piece of infrastructure; access to digital networks is a right and it is incumbent upon government to make it fast and affordable.

- In 2011, a UN Special Rapporteur report declared that internet access is a human right and recommended that "each State should thus develop a concrete and effective policy, in consultation with individuals from all sections of society, including the private sector and relevant Government ministries, to make the Internet widely available, accessible and affordable to all segments of population".[1]
- In 2016, the UN passed a non-binding resolution condemning intentional disruption of internet access by governments and reaffirming that "the same rights people have offline must also be protected online".[2]

1.4 Australia's internet is lagging behind the rest of the world, in terms of speed and affordability.

- Akamai's State of the Internet Report[3] for Q2 2017 shows Australia is in 50th place in the world for internet speeds, slowing climbing from 51st place for Q1 2017.

---

1 UN Human Rights Council, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

2 UN Human Rights Council, *The promotion, protection and enjoyment of human rights on the Internet*, at: https://documents-dds-ny.un.org/doc/UNDOC/LTD/G16/131/89/PDF/G1613189.pdf?OpenElement

- The Digital Australia: State of the Nation[4] report shows the cost of fixed broadband makes affordability Australia's lowest performing digital readiness aspect, with Australia ranking at 57th in the world.
- The Digital Australia report also shows that Australia's average mobile broadband speeds of 15.7 Mbps (placing Australia at 11th in the world) are out-performing average fixed broadband speeds of 11.1 Mbps.

1.5 The bills seek to implement components of the Government's response to recommendations of the Vertigan Panel. As noted in the Dissenting Report from Labor and the Australian Greens[5] on the Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015:

> The Vertigan Panel was assembled by the former Communications Minister, Mr Malcolm Turnbull, in December 2013. Instead of appointing Infrastructure Australia as promised, Mr Turnbull appointed former Liberal Party staffers, Liberal Party advisors and noted and strident critics of the NBN to conduct his cost benefit analysis and review of regulation, with predictable results.
>
> The Senate Select Committee into the National Broadband Network subjected the Vertigan Panel's "independent" cost benefit analysis of broadband to rigorous scrutiny in early 2015. The Senate Select Committee concluded that 'the Cost-Benefit Analysis is a deeply flawed and overtly political document. It is not credible and is not a reliable basis upon which to make decisions about the NBN'.

Particulars of the bill

1.6 Schedule 3 specifies that the Minister will have the power to make a legislative instrument setting out circumstances in which the SIP obligation does not apply, and requirements for people purchasing a SIP service. The Australian Greens note that the option to access internet services is vital for all Australians. Associate Professor Mark Gregory of RMIT University states that:

> If approvals cannot be achieved or there are safety concerns, the alternative is to provide a satellite connection. To consider a situation where a SIP should not have to provide a connection in 2017 is unacceptable. This is an example where the legislation is poorly drafted.[6]

---

3 Akamai, *State of the Internet*, at: https://www.akamai.com/us/en/about/our-thinking/state-of-the-internet-report

4 EY Sweeney, *Digital Australia: State of the Nation*, at: https://digitalaustralia.ey.com

5 Senate Select Committee on Environment and Communications, Report on Telecommunications Legislation Amendment (Access Regime and NBN Companies) Bill 2015, 22 February 2016, p. 26, at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Telco_access_and_NBN_Bill/Report

6 Associate Professor Mark Gregory, *Submission 14*, p. 5.

1.7 The RBS is proposed as a narrowly-targeted, technology-specific tax. In this form, it is not robust to changing telecommunications technologies and markets and risks distorting competition between technology types. TPG states that:

> The Bills are anticompetitive because they directly attack the operations of a particular market segment, the fixed line network operators that the Department of Communications and the Arts (DOCA) considers to be directly competing with nbn Co.
>
> The Bills ignore the rapidly growing importance and technical advancement of fixed wireless and mobile networks and their ability to take considerable broadband market share from nbn Co in profitable urban areas.
>
> The Bills' narrowly targeted tax on fixed line broadband networks will distort competition in broadband markets as too large a financial burden is being placed on the owners of a particular type of network technology. The cost will be passed on to consumers and risks consumers shifting their buying preference to other technologies such as fixed wireless or mobile that become comparatively cheaper because they are not subject to the tax.[7]
>
> The DOCA's decision to ignore the competitive impact of mobile and fixed wireless broadband networks is based upon its analysis of increasingly out of date evidence regarding the ability of these technologies to compete with the nbn's fixed line technology. Mobile and fixed wireless broadband are already successful substitutes for fixed line broadband for a growing segment of the community and will increasingly affect nbn Co's viability and its ability to cross-subsidise non-economic services.[8]

1.8 Similarly, OptiComm highlights the excessive burden placed on a narrow segment of the market:

> Most carriers and carriage service providers will not be required to pay the levy and the burden of paying for the nbn in non-economic areas will fall on a small number of carriers and their end-user customers. This results in the captured carriers being required to pay a far higher tax than would be necessary if the tax was collected from the broader industry.[9]

1.9 The Productivity Commission also notes in their report that the funding scheme for the RBS should seek to minimise distortions that can be heightened with a narrow levy:

> The Regional Broadband Scheme is proposed to (at least initially) include only a narrow levy base. In principle, the choice of funding model for non-commercial services should seek to minimise distortions in the telecommunications market, the risk of which is heightened with a narrowly-based long-term industry levy. As such, the Government may

7 TPG, *Submission 2*, p. 1.

8 TPG, *Submission 2*, p. 5.

9 OptiComm, *Submission 11*, p. 1.

> need to revisit the merits of alternative funding arrangements for nbn's non-commercial services.[10]

1.10 A preferable option would be for the non-commercial services to be funded from the general budget. This is an approach that is recommended in industry submissions, including from the Vocus Group and TPG, as well as in the Vertigan Review:

> By far the best option for funding any ongoing subsidy would be through consolidated revenue. Among other advantages, that would allow Parliament and the public to assess in an ongoing way the benefits of using taxpayer funds for this purpose rather than others.[11]

1.11 Alternatively, the RBS could be extended to include a broad base of telecommunications operators and technologies. OptiComm supports this approach:

> We ask that the Senate Committee recommend amendments to the Bills in order to replace the narrowly targeted new tax with a levy similar to the existing USO and collected from all participants of the telecommunications industry.[12]

1.12 The Vocus Group also recommends the need for a broad, rather than narrow, focus for funding non-commercial NBN services:

> The risk and uncertainty arising under Option 3 [RBS] can be avoided by having a levy that has a broad rather than a narrow funding base. In particular, any levy should be technologically neutral, with mobile, fixed wireless and satellite networks included within the levy.[13]
>
> A more effective way to deal with the Market Change Risk is to have a broad funding base across the industry. If a broad funding base is used from the outset, there will be no need for any regulatory resets to that funding base and the uncertainty and risk.[14]

1.13 TPG also notes the broad funding base of the Telecommunications Industry Levy, which supports the USO:

> Restricting the RBS Charge to high speed fixed line operators provides a far smaller collection base than the Telecommunications Industry Levy (TIL), which supports the Universal Service Obligation (USO) and has close correlations to the nbn's regional broadband scheme. In comparison, the USO is funded by a levy collected from all participants in the telecommunications industry with eligible revenue above a set threshold. The result of the narrowly targeted tax is that the RBS Charge per premise

---

10 Australian Government, *Telecommunications Universal Service Obligation*, Productivity Commission Inquiry Report, No. 83, 28 April 2017, p. 17.

11 Vertigan Review, *NBN Market and Regulatory Report*, 2014, p. 21.

12 OptiComm, *Submission 11*, p. 2.

13 Vocus Group, *Submission 4*, p. 2.

14 Vocus Group, *Submission 4*, p. 6.

> or service is significantly higher than would be required if the tax is levied across the industry as a whole.[15]

1.14 The RBS and funding of NBN non-commercial services should not be considered independently of the Telecommunications Universal Service Obligation (USO), as recommended in the Productivity Commission's report:

> The funding of nbn's non-commercial services should, moreover, not be considered independently of universal service policy reforms. In this context, the Commission has faced a unique challenge in responding to proposed government policy on the funding of nbn non-commercial services (the Regional Broadband Scheme) Charge Bill 2017 before the conclusion of this inquiry.[16]

1.15 The Vocus Group also highlight the need to consider funding of NBN non-commercial services alongside the USO:

> Consideration of how to recover the costs of the Non Commercial Services should not take place in isolation from consideration of the Universal Service Obligation.[17]
>
> Given that the USO and the RBS have the same basic policy objectives, and the need for coherent and holistic regulatory policy in this area, as part of its inquiry, the Productivity Commission considered the RBS. Vocus notes that the Productivity Commission was not in favour of the RBS being considered in isolation from the USO reforms and was not in favour of the Narrow Approach for the RBS.[18]

1.16 TPG also addresses the importance of considering the RBS and SIP obligations alongside the USO, noting recommendations from the 2015 Regional Telecommunications Review (RTIRC) and the Productivity Commission report:

> The RTIRC recommended development of a new broad based Consumer Communication Fund for voice and data services and replacing the USO's TIL with a levy to support loss-making regional infrastructure and services, with scope to include subsidies for the non-commercial nbn services. The RTIRC stated, such an overarching regulatory structure would avoid piecemeal and short term regulatory adjustments by putting a more relevant and comprehensive framework in place.
>
> USO policies are designed to address the affordability, accessibility and availability of basic communications services. It is clear that nbn infrastructure, complemented by mobile coverage, will meet the objective of providing USO availability. The nbn's uniform pricing structure and its

15 TPG, *Submission 2*, p. 2.

16 Australian Government, *Telecommunications Universal Service Obligation*, Productivity Commission Inquiry Report, No. 83, 28 April 2017, p. 16–17.

17 Vocus Group, *Submission 4*, p. 2.

18 Vocus Group, *Submission 4*, p. 9.

> funding helps to address USO affordability and accessibility. Clearly, the nbn forms part of Australia's USO policy fulfilment.
>
> In considering the future of the USO, the Productivity Commission recommended "baseline" telecommunications standards be set and that nbn Co have a clearly defined role in providing baseline telecommunications services, in effect largely replacing Telstra as the USO provider. This USO or baseline role is clearly what the nbn's satellite and wireless services will be fulfilling in non-economic areas as voice and broadband services will be provided on that infrastructure in areas where they would otherwise not be available. The funding of the nbn's non-economic services is intrinsically tied to Australia's USO policy.[19]

1.17 Vodafone notes that the RBS does not include a sunset clause and risks becoming an entrenched tax that is used for purposes that deviate from the original intention of the scheme:

> It is concerning for example that the RBS does not have a sunset clause or automatic requirements for fundamental reviews in certain circumstances, such as privatisation of the NBN. VHA understands the RBS is intended to be in place until at least 2040.[20]

1.18 The costing on which the RBS pricing was based has already changed considerably, as identified by TPG:

> nbn Co's average cost of connecting a fixed wireless service is now $3550 per premise, a decrease from its previous estimate of $4000 to $5000. This is a decrease of between 11% and 29% in nbn Co's costs and makes fixed wireless cheaper than nbn Co's FTTP connections. This raises questions regarding whether the estimated costs used in the BCR's calculations of the levy required to fund the nbn's non-economic services are now obsolete and whether the RBS Charge needs to be reassessed, particularly as the cheaper fixed wireless network will be rolled out to 50% more premises than previously planned.[21]

1.19 The proposed legislation requires the ACCC to give advice to the Minister about the charge amount at least once every five years. TPG notes that a shorter review period is necessary due to the rapid nature of technological advancements in telecommunications and to assess the extent of competitive distortion caused by the tax:

> The Bills propose a review within the first 5 years. We submit that it is appropriate for the legislation to be reviewed every 18 months after implementation to gauge the effect on competition and the ongoing sustainability for the funding of the nbn's non-economic services. A short review date is necessary because the Bills risk considerable competitive distortion and because the telecommunications industry is subject to

19 TPG, *Submission 2*, p. 3.

20 Vodafone Hutchinson Australia, *Submission 6*, p. 1-2.

21 TPG, *Submission 2*, p. 9.

imminent and relevant technological advancement, particularly with regard to 5G mobile.[22]

Recommendation 1

1.20 The Australian Greens recommend revising the Regional Broadband Scheme, taking into consideration updated costings, the current and emerging state of telecommunications technology and markets, and recommendations from the Productivity Commission regarding the Telecommunications Universal Service Obligation.

Senator Janet Rice
Senator for Victoria

Senator Sarah Hanson-Young
Senator for South Australia

22 TPG, *Submission 2*, p. 8.

Appendix 1

Submissions and answers to questions taken on notice

Submissions

1	National Farmers' Federation
2	TPG Telecom Limited
3	Rural Regional and Remote Communications Coalition
4	Vocus Group Limited
5	Cotton Australia
6	Vodafone Hutchison Australia
7	NBN Co Ltd
8	Australian Communications Consumer Action Network (ACCAN)
9	Telstra
10	Department of Communications and the Arts
11	OptiComm Co Pty Ltd
12	Telecommunications Industry Ombudsman
13	Optus
14	Professor Mark Gregory, RMIT University
15	Superloop Limited

Answers to questions taken on notice

TPG Telecom – Answers to questions taken on notice (public hearing, Canberra, 10 August 2017)

Department of Communications and the Arts – Answers to written questions notice (following public hearing, Canberra, 10 August 2017)

Department of Communications and the Arts – Answers to questions taken on notice (public hearing, Canberra, 10 August 2017)

Appendix 2
Public hearing

Thursday, 10 August 2017 – Canberra

Telstra

Mr Bill Gallagher, General Counsel, Corporate Affairs and Telstra Wholesale
Mr James Shaw, Director, Government Relations, Corporate Affairs

OptiComm Co Pty Ltd

Mr Paul Cross, Chief Executive Officer
Mr Phillip Smith, Chief Regulatory Officer

TPG Telecom Ltd *via teleconference*

Mr Tony Moffatt, General Counsel

Optus *via teleconference*

Mr Andrew Sheridan, Acting Vice-President, Corporate and Regulatory Affairs
Mr Luke Van Hooft, Economic Regulation, Corporate and Regulatory Affairs

Department of Communication and the Arts

Mr Andrew Madsen, Assistant Secretary, Broadband Implementation Branch
Mr Phillip Mason, Assistant Secretary, Telecommunications Competition

NBN Co

Ms Caroline Lovell, Chief Regulatory Officer