

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

Submission in response to
DITRDC Consultation Paper

**Draft Online Safety (Basic
Online Safety Expectations)
Determination 2021**

Public Version

November 2021

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide input to the Department of Infrastructure, Transport, Regional Development and Communications (“the Department”) consultation on the Draft of the *Online Safety (Basic Online Safety Expectations) Determination 2021* (“BOSE”).
2. We understand that the focus of the BOSE is to articulate the Government’s minimum safety expectations of online service providers. The policy concern of the Government was that online platforms generally sat outside the scope of existing regulatory schemes in Australia. Optus supports this intent and the focus on protecting all Australians as more of their lives move online and rely more heavily on internet services.
3. Optus works closely with the eSafety Commissioner and her staff on various initiatives, including as a certified provider of online safety training courses to schools through the Digital Thumbprint program¹ and previously as a member of the Commissioner’s eSafety Advisory Committee sub-group on Online Harms.
4. However, Optus is concerned that the wide drafting of key definitions in in the *Online Safety Act* (“the Act”) – such as Relevant Electronic Services (RES) and Designated Internet Services (DIS) (which apply to the BOSE) – results in carriers, carriage service providers and internet service providers being included within the scheme. This is despite previous advice to the contrary from Government.²
5. Our view is that the BOSE, while appearing to offer a set of “basic” principles to be adopted by the industry sectors included in the social media, RES and DIS definitions, actually results in very complex arrangements when applied to the telecommunications industry and gives rise to significant implementation and compliance issues. We repeat that the policy intent as advised to us was that this was not to apply to the telecommunications industry.
6. When applied to the telecommunications industry, the BOSE places unrealistic expectations on C/CSPs and ISPs that are neither technically feasible, nor permitted under the Telecommunications Act.
7. As such, we urge the Department to limit the application of the BOSE only to social media providers, as per the Government’s stated intent, or alternatively to specifically exempt or exclude carriage service providers from the BOSE.
8. Optus submits that the most efficient and effective way forward is to specifically exclude CSPs and ISPs from the application of the BOSE.
9. Communications Alliance has also made a submission to this consultation. Optus is a member of Communications Alliance and supports their submission.

¹ <http://www.digitalthumbprint.com.au/>

² Including the intent outlined on pages 30 and 35 of the Explanatory Memorandum to the Online Safety Act, for the BOSE to only apply to social media providers initially.

APPLICATION TO C/CSPs AND ISPs

10. The BOSE captures both “RES” and “DIS”, as defined in the Act. These are broadly drafted definitions, which capture a much larger range of entities than appears to be intended. Optus submits that such a wide application is inadvertent and, if this is the case, the Act should be amended to clarify the definitions and the amended definitions will then apply to the BOSE.
11. A RES, as currently defined, includes services that allow end-users to communicate via email, SMS and MMS. These are services generally provided by CSPs and ISPs.
12. However, in discussions with Government the telecommunications industry was previously advised that it was not intended for CSPs to be subject to the BOSE – possibly based on the fact that the BOSE doesn’t specifically list the CSP/ISP sector. However, given the definition of a RES includes email, SMS and MMS services, this means C/CSPs and ISPs such as Optus are captured by the BOSE, despite the Government’s advice to the contrary.
13. The definition of a DIS is similarly problematic; both because it is extremely broad so as to capture any entity with a website, anywhere in the world, as long as that website can be accessed by an Australian end-user; and also because it would appear to capture ISPs even if this is not the intent. Again, this captures entities such as Optus as we have a website available to Australian end-users, even if such websites are not an online safety concern.
14. Given regular comments from the Minister specifying that his concerns lie primarily with Social Media organisations, where it appears that the Government believes additional safety controls are desirable, the BOSE should be limited only to that sector. Alternatively, the Department should clarify exactly what types of services the BOSE intends to capture and should specifically exclude or exempt services such as email, SMS and MMS services provided by CSPs.
15. The application of the BOSE to RES as defined in the Act appears to incorrectly assume that technological solutions and controls exist to monitor and remove content from all services within the RES definition. For instance, the capturing of email, SMS and MMS services by the RES definition presents Optus with significant technical challenges. While it is agreed that safety by design should certainly be incorporated into new technologies (like Social Media services), email, SMS and MMS are old technologies, that emerged in a time where the same social issues that we experience today, were simply not present.
16. C/CSPs and ISPs simply do not have the technical means or ability to identify the contents of a communication as delivered by email, SMS or MMS in real time, let alone en masse, across large telecommunications networks. In fact, they are generally not permitted by law to intercept the contents of a communication passing over their network, unless subject to a law enforcement warrant or similar.
17. Division 2 of Part 13 of the Telecommunications Act 1997 prohibits the disclosure and use of information that relates to “the contents and substance of contents or substance of a communication that is being [has been] carried by a carrier or carriage service provider (including a communication that has been collected or received by such a carrier or provider for carriage by it but has not been delivered by it)”.
18. With reference to the core expectation “Provider will take reasonable steps to minimise provision of certain material” (Division 3, section 11 of the BOSE), it is not feasible for C/CSPs, particularly mobile service providers, to minimise content delivery over the

telecommunications network in general. The only options available to such providers includes barring, suspending or even disconnecting a customer's service after the fact. This is of course not possible where messages are received from anonymous communications services or international parties.

19. The same concern arises with the expectation in section 10 of the BOSE – it's unclear how a CSP would meet this requirement.
20. The core expectation which requires prevention of access by children to class 2 material (clause 12) is also problematic. As CSPs are unaware of the content of communications, they are unable to prevent access by children to certain types of content, especially where sent by email, SMS or MMS. Where a parent provides their child with access to their mobile phone, tablet or email service, this is not visible to the CSP and therefore not something in the control of CSPs.
21. Optus submits that the most efficient and effective way forward is to specifically exclude CSPs and ISPs from the application of the BOSE.

Information to end-users

22. The additional expectations in division 5 of the BOSE also appear to be targeted at social media platforms, as opposed to CSPs. The provision of the required information at regular intervals of use, and via "targeted in-service communications" does not appear relevant nor appropriate to C/CSPs and their end-users.
23. There also does not appear to be any consideration as to the cohort of end-users, as what will be relevant for a residential end-user, or an end-user of a particular age bracket, would not be appropriate for an entity solely providing services to large corporate and government enterprises.

Complaints and reports

24. Considering that providers of emails, SMS and MMS services have neither the technical or legal capability to minimise the existence of the material listed in BOSE clause 11 (as well as other such BOSE requirements), such providers have limited ability to assist customers who make a report or complaint to them about illegal content transmitted via the service.
25. It would be more appropriate for such reports or complaints to be directed to the Office of the eSafety Commissioner for investigation.
26. As noted above, Optus submits that the most efficient and effective way forward is to specifically exclude CSPs and ISPs from the application of the BOSE.