

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

Submission in response to  
DITRDCA Exposure Draft

**Telecommunications  
Legislation Amendment  
(Statutory  
Infrastructure Providers  
and Other Measures) Bill  
2022**

Public Version

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## INTRODUCTION

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1. Optus welcomes the opportunity to comment on the exposure draft of the Telecommunications Legislation Amendment (Statutory Infrastructure Providers and Other Measures) Bill 2022 (the Bill) released by the Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the Department).
2. The Bill primarily proposes changes to legislation dealing with Statutory Infrastructure Providers (SIPs) and their obligations. However, Optus also notes there are also changes related to contraventions of deployment of optical fibre provisions and new provisions relating to the disclosure of information by the ACMA to the Department. These latter changes are unrelated to the statutory infrastructure provider framework.
3. Neither an explanatory statement for the proposed changes nor anything similar to a Regulation Impact Statement has yet been released for comment, even though the proposed changes appear to broadly expand powers (such as who can be declared a SIP). This makes it difficult to fully understand the intended operation of these proposed changes to the SIP framework and potential impact on SIP obligations. It appears that the changes are not machinery in nature. There is considerable expansion of powers, including for the Minister to be able to declare multiple carriers or carriage service providers as SIPs. Further, it also appears the Bill proposes duplication of existing powers – for example, the Minister already has power under Part XIC of the CCA to issue a Ministerial Pricing Determination and the ACCC already has power to impose record keeping and reporting rules and related disclosure directions.
4. Potentially duplicating such powers highlights the need for proper policy processes to be undertaken, such as identifying a clear issue that needs to be addressed, including why existing power are viewed as being inadequate. It is important that a RIS and explanatory statement is released for comment to assist interested parties understand the policy rationale for these changes.
5. Optus considers the Government has an opportunity to put in place a SIP framework that will ensure that NBN Co, in particular, as statutory infrastructure provider for the overwhelming majority of Australians, delivers good customer experience for end-users, in terms of getting connected and receiving a reliable service. To that end, it is important that the proposed changes:
  - (a) Do not soften the SIP framework that applies to NBN Co or allow NBN Co to exempt itself from obligations.
  - (b) Ensure that wholesale operators like NBN Co are required sooner rather than later to implement Ministerial standards, rules and benchmarks to address quality of service issues at the wholesale level; and
  - (c) Does not introduce unnecessary duplicative powers.
6. Comments on particular proposals in the Bill are following.

## PROPOSED CHANGES

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### New definitions

7. There are a number of proposed new definitions:
  - (a) 'backhaul infrastructure' has the meaning generally accepted within the telecommunications industry;
  - (b) 'mobile network' means a telecommunications network that is used principally to supply public mobile telecommunications services;
  - (c) 'radiocommunications fixed voice call' means a voice call provided using a carriage service:
    - (i) Supplied by means of a telecommunications network other than a fixed line telecommunications network; and
    - (ii) Marketed to customers, or potential customers, as a carriage service that enables end-users to make and receive voice calls at premises occupied or used by the end-users.
  - (d) New sections defining 'associate', 'control', 'control of a company' (noting this refers to the Broadcasting Services Act) and when a person is in a position to exercise control of a facility.
8. Optus considers that where possible, terms defined in other legislation or other parts of the Telecommunications Act should utilise consistent definitions. Otherwise, this can cause confusion in the interpretation and application of the relevant law. For example, it would appear that 'control' is approached in a different way in proposed s. 360AC and s. 360AE, as compared with the concepts of 'controlled carriage service', 'controlled facility' and 'controlled network' that already exist in the Telecommunications Act.

### Multiple C/CSPs can be declared SIPs by the Minister

9. The Bill proposes several provisions and amendments that effectively expand who can be considered a Statutory Infrastructure Provider. This includes:
  - (a) New powers to the Minister who can declare multiple SIPs (C/CSPs) for a designated service area (s.360L(2)). Either SIP can discharge a SIP obligation.
  - (b) A non-NBN carrier can be exempt from being a SIP where other infrastructure is installed by agreement in a project area / real estate development.
  - (c) New exemptions where a non-NBN carrier can be exempt from declaring a real estate development project or building redevelopment project a provisional nominated service area (under s. 360H) if mobile network infrastructure or infrastructure that would enable radiocommunications fixed voice calls was installed after 1 July 2020 in accordance with a contractual arrangement with the developer and will enable supply of eligible services (s. 360M & s. 360N).
10. It is not clear how a declaration of multiple SIPs would work and if exemptions from SIP obligations based on mobile infrastructure means that MNOs would be considered SIPs. It would appear that under section 360L there is no clear criteria for the Minister to take

into account in declaring which carriers or CSPs are to be SIPs for a designated area. This is a significant expansion of the Minister's powers, and as such, there should be clearly set out matters that the Minister must be required to take into account in exercising such power.

11. As a general comment, Optus has concerns if mobile networks would be considered SIP providers. There are technological differences to mobile networks as compared with fixed line networks that, for example, may mean it would be challenging to fulfil SIP obligations if SIP obligations applied to a mobile network. For example, the signal from mobile networks may be affected by obstructions (such as other buildings or topography) affecting the ability of an end-user to 'connect' to the network in their home or even different parts of their home. This is in contrast to a connection to a fixed line network where each premises can be connected to the network by an individual access line. Optus considers such differences mean that mobile networks should not be declared SIPs or considered as substitutes to a SIP unless this is part of universal service arrangements (and there is nothing in the proposed legislation or any explanatory materials that clarifies this issue).
12. It is also not clear to Optus how a CSP could be considered a SIP. Superfast fixed network operators are required to provide access to their networks to CSPs for the purpose of supplying retail services. However, there are usually restrictions in wholesale agreements that would stop CSPs from working on another operator's network, including to connect premises or fix faults. As such, a CSP would not be able to meet SIP obligations where work on the network was necessary. Optus considers that CSPs should not be declared SIPs as it is not clear how they would be able to comply with the relevant SIP obligations.

#### **New SIP and CSP requirements in responding to a SIP request**

13. Proposed changes include:
  - (a) There is a new requirement that a SIP must respond to a request from a CSP to supply a service within 10BD unless a longer period is specified by the Minister (s. 360Q(11) & (12)) or within 5BD where this affects an end-user; and a new requirement on the CSP to notify the end-user within 5BD (s. 360Q(13)).
  - (b) If a SIP becomes aware it will no longer be able to fulfil their SIP obligations re: connection/supply, it must give notice to the Department Secretary and the ACMA at least 90 days prior (where reasonably practicable) or otherwise not later than 10BD after it can no longer fulfil the obligations (s. 360R(2)). If the SIP becomes aware another C/CSP is willing to become the SIP, the first SIP must give notice to the Secretary of the Department and the ACMA at least 90 days prior (where reasonably practicable) or otherwise not later than 10BD after it can no longer fulfil the obligations (s. 360R(3)).
14. Optus considers it unnecessary to impose a timeframe on CSPs to inform their customers of the outcome of a SIP request. Informing customers promptly of outcomes of their requests is part of the ordinary course of business. Competition amongst retail providers and ease of switching ensures that those RSPs not providing good customer service lose customers. There are already strong incentives for RSPs to provide good customer service and it is simply unnecessary regulation.

## Changes to SIP Standards/Rules/Benchmarks

15. Proposed changes include:
- (a) The Minister's power to determine a SIP Standard is amended to include that the standard can include terms and conditions of supply, including whether relating to price or a method of ascertaining price (s. 360U(1)). The Minister can now also designate that a standard is a designated compensable standard (s. 360U(3B)).
  - (b) A SIP is not required to comply with performance benchmarks set by the Minister to the extent the benchmark is inconsistent with an access agreement, so long as the access agreement was entered into before the commencement of the benchmark and the access agreement has not been varied (s. 360U(10) and s. 360U(16)).
  - (c) There is new power to the Minister to set performance benchmarks for SIPs relating to supply of eligible services or connection of a premises (s. 360U(11)). The Ministerial benchmark instrument can also confer power on the ACMA to make an instrument (s. 360U(14)).
  - (d) There is a new obligation on a SIP to meet or exceed Ministerial performance benchmarks (s. 360U(15)).
  - (e) Amendment to the Minister's power to make SIP Rules to also include terms and conditions (whether relating to price or a method of ascertaining price or not) and for the SIP to give the ACMA information or report on a matter in the Rules to the ACMA (s. 360V(1)).
16. Optus has concerns relating to the operation and relationship between differing regulatory instruments, such as access agreements, a special access undertaking and any Ministerial Determination dealing with SIP standards, rules and performance benchmarks.
17. Firstly, it is unclear to Optus why compliance with any Ministerial Determination standards, rules or performance benchmarks would be delayed. The requirements provide that a Ministerial Determination relating to standards, rules or benchmarks would not take effect where there is an existing access agreement in place – a Ministerial Determination will only take effect in the future if an access agreement is varied or a new access agreement is entered into.
18. Therefore, if WBA5 is signed prior to the Minister making any such Determination there will be an unnecessary extended delay before the Determination has any effect. As NBN Co has extended WBAs in the past well beyond the expected two-year period, it could take longer than two years for any Ministerial Determination to come into force for NBN Co. At a minimum, additional clarity is required on whether extension of an agreement is considered a variation.
19. Now that the NBN is built and fully operational, Optus considers there should be no delays in addressing wholesale service standards, particularly for NBN Co as supplier of wholesale fixed line services for the vast majority of Australians. The proposed legislation should be amended so that any Ministerial Determination on standards, rules or benchmarks can take effect sooner (particularly for NBN Co), to reassure end-users experience the benefits of minimum performance standards and benchmarks for NBN services.

20. We further note the proposed amendment to the Minister's power to include price or a method of ascertaining price in any Ministerial Determination. The Minister already has power under Part XIC of the *Competition and Consumer Act 2010* (CCA) to issue a Ministerial Pricing Determination dealing with principles related to price-related terms and conditions relating to standard access obligations (s. 152CH). Such a Ministerial Pricing Determination would apply to regulatory action for services that attract standard access obligations, which includes services supplied over both NBN and non-NBN networks. It is not clear, therefore, why further amendment to the SIP regime is needed to include this apparently duplicative power. Optus considers at the minimum it should be clearly set out in any explanatory material the interaction between these Ministerial powers in the CCA and the Telecommunications Act, although preferably legislative duplication should be avoided.

### **New provisions relating to compensation**

21. Proposed changes include:
- (a) The Minister can make compensation rules (s. 360VH).
  - (b) A SIP must pay damages to a customer where the SIP contravenes a designated compensable standard or designated compensable rule (s. 360VB(1)&(2)). But if the customer receives some other credit/payment for the same matter under other means, this can offset any damages under the SIP rules (s. 360VD(4)). A customer could sue the SIP for damages in court (s. 360VD(5)).
  - (c) If a SIP believes something has occurred that may result in being liable to pay damages, then the SIP must decide within 14 days whether to accept liability (s. 360VE(1)). If the SIP does not accept liability, it must provide a customer written notice of this within 14 weeks (s. 360VE(3)). A credit to the customer's account (or some other way) must be paid within 14 weeks of deciding to accept liability (s. 360VE(4)&(5)).
22. Optus supports a framework where there are financial incentives for NBN Co to comply with Ministerial standards, rules or benchmarks. This is similar to what has been in operation with the Customer Service Guarantee. However, we note that the effectiveness of such rules is likely to be reduced given the potential multi-year delay in its application to NBN Co (see comments above).

### **New TIO powers**

23. Proposed changes include:
- (a) TIO can issue a written certificate that the SIP contravened a designated compensable standard or designated compensable rule which is prima facie evidence of the matters in the certificate (s. 360VF(1)&(2)). Although the TIO must consent to the conferral of these powers (s. 360(4)).
  - (b) It notes that this division does not otherwise affect the operation of the TIO scheme or affect a customer's right to complaint to the TIO (s. 360VG).
  - (c) TIO can investigate SIP connection complaints (TCPSS Act changes).
  - (d) New power for the TIO Scheme to provide for the TIO to investigate/make determinations/give directions relating to complaints about SIP connections (s. 128(5A)).

- (e) In deciding whether to grant an exemption to or direct a C/CSP to join the TIO Scheme, or make a determination regarding a class of CSPs, the ACMA must have regard to whether the C/CSP is a SIP (s. 129(2)(d) & s. 130(3)(d) & s. 131(3)(d)).
24. Optus supports the TIO being able to take action where network operators, such as NBN Co, are responsible for poor customer experience (such as, delays in connecting premises). We note that historically there have been problems where NBN Co delayed making premises serviceable (that is, the customer could not place an order) yet this was not addressed by any service standard or regulatory requirements.

### **New ACMA powers and delegation of powers**

25. The proposed changes include:
- (a) New power for the ACMA to undertake compliance audits of a SIP for the purpose of determining if a SIP has complied with the Part (s. 360XAH).
  - (b) The Minister may make rules to be complied with by the ACMA in relation to the ACMA making available information on the ACMA's website (if the ACMA was to be provided to with information under the SIP Rules); give the Minister copies of such information or making available of explanatory material or information that is likely to assist SIPs in complying with the Part (s. 360XAI).
  - (c) Adds some of the new powers given to the Minister to the list of powers that can be delegated to the ACMA, including the power to declare a C/CSP as a SIP and declaring multiple C/CSPs as SIPs. The ACMA can then further delegate any of the powers delegated to the ACMA by the Minister, to an ACMA staff member (s. 360ZA(1)-(6)).
  - (d) New power for the Minister to delegate any of the Minister's powers to a Departmental SES employee (s. 360ZA(7)).
26. Optus noted in its previous submission on the SIP Ministerial standards, rules and benchmarks that the ability to delegate powers to the ACMA may assist in more quickly addressing wholesale service issues. That said, Optus notes wholesale service standards are being considered by the ACCC as part of the NBN Special Access Undertaking process, following on from the ACCC's inquiry into wholesale service standards, including whether record keeping and reporting rules should apply to NBN Co for quality of service and performance metrics.
27. Optus has long advocated for the ACCC to impose record keeping and reporting requirements on NBN for quality of service metrics, as a monopoly faces little incentive to maintain quality of service levels when it has no competition. Such transparency may highlight areas that need specific measures implemented to address poor performance.
28. Optus supports provisions that may assist the ACMA in dealing with certain wholesale service standard issues quicker. However, given the overlapping roles between the ACMA and ACCC in regulating the NBN, the ACMA should be required to consult with the ACCC prior to making rules. Similarly, we consider that there should be some capability for the ACCC to also refer matters to the ACMA for consideration under the ACMA's delegated powers.

## ADDITIONAL CHANGES

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29. Optus notes there are additional changes included in the Bill, not related to the SIP framework. This includes proposed new disclosure powers for the ACMA and other amendments relating to the deployment of optical fibre.

### **Other amendments – new disclosure powers (ACMA Act)**

30. Proposed changes to the ACMA Act would give the ACMA significant new disclosure powers, including:
- (a) Amendments requiring that an ACMA official must disclose authorised disclosure information if requested by the Secretary of the Department or an authorised APS Departmental employee for the purpose of advising the Minister (s. 59B(1A)).
  - (b) New powers that an ACMA official may disclose authorised disclosure information, summaries or statistics related to a C/CSP regarding customer complaints, customers in financial hardship, customer service; faults and service difficulties; rectification of faults and service difficulties; service activation and provisioning; service connections; performance characteristics of services; customer appointment keeping or another matter determined by the Minister (s. 59DA).
31. Optus considers that such broad powers should be subject to a proper RIS process, including identifying the specific issue that needs to be addressed by such provisions and weighing up whether any benefits will outweigh the compliance costs of implementing measures to meet these requirements.
32. Reporting of quality-of-service metrics is relevant where a provider does not face competitive pressure to improve quality of service. This is why Optus has previously argued that NBN Co should be subject to quality of service record keeping and reporting rules under Part XIC. NBN Co is the ubiquitous monopoly provider of wholesale fixed line services and does not face the same incentives and competitive constraints to address quality of service issues as a provider operating in a competitive retail market.
33. Retail telecommunications providers face competition in fixed line services which provide compelling incentives to improve performance and attract and retain customers. Therefore, there does not seem to be a clear problem identified that would be addressed by these provisions. That is not to say there may not be justification for these powers, but rather that these have not been adequately explained at this stage.
34. We note the ACCC already has the ability to make record keeping and reporting rules and related disclosure directions, that could apply to NBN Co or other wholesale providers of superfast services (or indeed any other CSP) where information under such rules or directions would be relevant to one of the functions specified in the legislation (s. 151BU(4), CCA). The ACCC has criteria that it must take into account in issuing such rules and related disclosure directions. It is not clear whether these proposed provisions for the ACMA include any specific criteria or that an exercise of this power is for a specific purpose or benefit.