

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

Submission in response to  
exposure draft

**Telecommunications  
Legislation Amendment  
(Competition and  
Consumer) Bill 2017**

and

**Telecommunications  
(Regional Broadband  
Scheme) Charge Bill 2017**

Public Version

February 2017

# INTRODUCTION

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1. Optus welcomes the opportunity to comment on the exposure drafts for the *Telecommunications Legislation Amendment (Competition and Consumer Bill) 2017* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2017*. These two Bills form part of the telecommunications reform package which will implement the main legislative components of the Government's response to the Vertigan review.
2. While Optus agrees with the original policy intentions the Bills are attempting to implement, we have concerns over the drafting of some elements of the Bills. We recommend a small number of amendments to the Bills to address these concerns.
3. Optus' comments below relate to:
  - (a) Amendments to level playing field rules;
  - (b) Statutory Infrastructure Provider (SIP) regime; and
  - (c) Regional Broadband Scheme.

## AMENDMENTS TO LEVEL PLAYING FIELD RULES

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4. Optus generally supports the proposed amendments to level playing rules set out in Parts 7 and 8 of the *Telecommunications Act 1997* (the Act), which seek to make the rules clearer and more effective. However, there are two qualifications to our support; these are discussed below.

### Removal of small business

5. Optus does not agree with the removal of networks solely servicing small business customers from the scope of the obligations under Part 8 of the Act. This amendment is inconsistent with the principle that superfast broadband network infrastructure should operate on the basis of a level playing field.
6. Further, there is a risk that it will encourage alternate investment in such networks and create islands of customers that effectively have no choice of supplier. 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. Optus recommends this amendment is reversed.

### Functional separation undertakings

8. The amendments to Part 8 will enable an operator of an alternate superfast network to implement functional separation, under an undertaking approved by the ACCC, as an alternative approach to operating on a structurally separated basis.
9. Optus considers that a properly constructed functional separation regime can act as an appropriate alternative to full structural separation in certain circumstances, which include those contemplated by Part 8. However, we recommend one change to the provisions of the Bill. Whilst the Bill sets out the key obligations to be included in any functional separation undertaking, we note that it does not sufficiently guarantee non-discrimination in the terms of supply between an entities own retail business unit and wholesale customers. The Bill requires

that any functional separation undertaking must supply services if requested by a wholesale customer and do so on terms that was published on its website at the time the request was made. By contrast the provisions of schedule 1 Part 9 of the Telecommunications Act that relates to a Functional Separation undertaking by Telstra requires that there should be “equivalence in relation to the supply by Telstra of regulated services to Telstra’s wholesale customers and Telstra’s retail business units”.

10. Optus proposes a similar obligation is adopted in the Bill.

## STATUTORY INFRASTRUCTURE PROVIDER (SIP) REGIME

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11. Optus welcomes the proposed amendments establishing a SIP regime that will create a legal obligation on NBN Co to connect every premise to its network. The SIP regime is appropriate given the role and policy objectives of the NBN and it will remove the uncertainty inherent from the fact that current obligations are set out in a Statement of Expectations that can be changed from time to time.

## REGIONAL BROADBAND SCHEME

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12. The Explanatory Notes state that the Regional Broadband Scheme amendments implement the reforms outlined in the Government’s response to the independent cost-benefit analysis and review of the regulatory arrangement of the NBN (Vertigan Report).<sup>1</sup>
13. Optus agrees with the policy position outlined by the Government in its response. However, it is not clear how the proposed Bills are consistent with this stated policy. Further, Optus has concerns whether the requirements imposed on industry could be implemented in practice.
14. Optus has the following concerns with the proposed Bill:
  - (a) Extending the levy beyond the scope of current NBN regulations is inconsistent with stated Government policy and the recommendations in the Vertigan Report; and
  - (b) Extending the levy to corporate and government superfast broadband networks introduces several significant implementation issues which do not appear to be considered in any of the supporting documents. The arrangements in their current form appear unworkable.

### **Approach appears inconsistent with NBN policy**

15. Optus believes that the proposal to extend the broadband levy regime beyond existing NBN regulations to include corporate and government superfast broadband networks is:
  - (a) Inconsistent with stated NBN policy;
  - (b) Not supported in any form by the Vertigan review; and
  - (c) Counter to the Government’s response to Vertigan.
16. To provide more context, it is useful to recall the discussions around the recommendations relating to reform of the competitive protections to NBN Co made in the Vertigan review.

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<sup>1</sup> Explanatory Notes, p.1

17. The Government stated in its response that it intended to ensure that NBN regulations did not unnecessarily restrict competition in telecommunications markets. The Government noted that the NBN reforms over 2009-11 compromised the competitive neutrality of the communications industry which sought to provide competitive protections to NBN Co in commercially attractive areas so that non-commercial services could be funded through an internal cross-subsidy.<sup>2</sup> The Government noted that this model is unsustainable in the long run. The Government sought to establish a more competitive regulatory framework and to deliver competitive neutrality for NBN Co and other industry players.
18. The reforms to the 'protected' services relate to services covered by the existing Parts 7 and 8 of the *Telecommunications Act 1997*. It is these provisions that protected NBN Co from competition in commercially attractive areas so that non-commercial services could be funded through an internal cross-subsidy. The Vertigan Report made clear that its review only looked at **networks captured** by Parts 7 and 8, specifically stating:

*On the basis that **high-speed networks servicing business customers are not subject to special regulation under Parts 7 or 8, the panel has not concerned itself with these networks**. Telecommunications service providers have generally been responsive to the needs of larger business customers and can have every incentive to remain so. Consistent with this observation, no special intervention in support of those customers should be considered.*<sup>3</sup> [emphasis added]
19. The Vertigan Report makes the clear connection between deployment of networks captured by Parts 7 and 8 and the potential to undermine the internal cross-subsidy used by NBN Co to provide services in non-commercial areas through deployment of high-speed residential networks using the 1km exemption.<sup>4</sup> The Vertigan Report also notes that recommendations to "remove restrictions on competition may exacerbate that erosion."<sup>5</sup> After discussing the pros and cons of various forms of levies, the Report concludes that "it would be far better to have some form of levy scheme than to continue restrictions on the development of competition so as to protect any NBN co cross-subsidy".<sup>6</sup>
20. It is clear from a reading of sections 7 and 8 of the Vertigan Report that the removal of Parts 7 and 8 of the Telecommunications Act from **high-speed networks servicing residential customers** is directly linked to the identification of the internal NBN Co cross-subsidy and the recommendation for a levy on competing non-NBN Co residential high-speed broadband networks.
21. The Vertigan Report and the Government's response provide no justification for the application of a NBN cross-subsidy levy to networks that were never covered by Parts 7 and 8 of the Telecommunications Act.
22. Consequently, Optus finds that the proposed Bills are not consistent with the Government's response to the Vertigan review. Further, the Bills should not rely on the Vertigan recommendations or the Government's response to support the proposed application of the NBN-levy to corporate superfast broadband networks.
23. Optus recommends that corporate services are removed from the scope of the levy.

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<sup>2</sup> Explanatory Notes, p.4

<sup>3</sup> Independent cost-benefit analysis of broadband and review of regulation; Volume I – National Broadband Network – Market and Regulatory Report, (Vertigan), p.74

<sup>4</sup> Vertigan, p.103

<sup>5</sup> Ibid.

<sup>6</sup> Vertigan, p.106

### The reforms needs to distinguish between protected and contestable services

24. Optus supports making in the internal NBN Co cross-subsidy explicit; and supports the introduction of a levy on NBN-replacement residential high-speed broadband networks. This position is consistent with the recommendations of the Vertigan Report and the Government's response.
25. In order to properly implement these policies, there is a need to distinguish between NBN Co's protected monopoly services and its future plans to deploy services in contestable non-residential markets. These terms are defined below.
  - (a) **Protected services** relate to residential services delivered over high-speed broadband networks covered by Parts 7 and 8 of the Telecommunications Act. It is these services where the monopoly protection is granted to ensure that NBN Co has sufficient metro revenue to cover the loss-making regional network.
  - (b) **Contestable services** are services in markets where NBN Co has never been granted monopoly protection. NBN Co has not yet deployed services in these areas, but we are aware that NBN Co may have future plans to do so; and in doing so it will be competing with in-place services. The original NBN legislation never extended to these services. There are no cease sale or separation obligations for these services. These are services from which there was no expectation NBN Co would acquire an internal cross subsidy.
26. As outlined above, the Vertigan Review and the Government's response recommended reform to the protected services on the proviso that any foregone subsidy revenue by NBN Co is recovered from non-NBN Co providers of residential high-speed broadband networks. The reform of Parts 7 and 8 has the potential to deprive NBN Co the opportunity to acquire metro revenue required to fund the regional cross-subsidy (referred to as cherry-picking).
27. However, the proposed Bill extends the application of the NBN levy beyond revenues from protected services to future revenue from services in contestable markets. The Department has explained that the intent of the levy is to protect all future revenue contained in NBN Co's Corporate Plan. This goes well beyond the intention of the Vertigan Report and the Government's response. Moreover, extension of the NBN levy to contestable revenue is not related in any way to the reforms of Parts 7 and 8.
28. Of most concern to Optus is the extension of the levy to government and corporate services provided over superfast fibre networks that have never been included in any NBN-related instrument, and which are not covered by Parts 7 and 8 of the Telecommunications Act. Extension of the NBN levy to business is directly counter to the Vertigan Report.
29. The application of the levy to contestable services is likely to give NBN Co an advantage over commercial operators and damage existing competition in the market, directly counter to the competitive neutrality rules.
30. Furthermore, it is unclear whether there are any benefits to end-users from NBN Co entering into business markets when such markets are served by multiple high speed fibre broadband FTTP networks. For example, businesses in business parks typically have a choice of existing services from the major business FTTP networks such as Telstra, Optus, Macquarie, Vocus, NextGen and other TPG-Group companies. Allowing NBN Co to deploy a network in competition with existing fibre networks is unlikely to provide any end-user benefit nor provide any additional competition. In addition, there is a mature and well-functioning wholesale market enabling larger business network wholesalers selling capacity to other business networks to facilitate competition in downstream retail business market. There is no requirement under current legislation, and no requirement under changes proposed in these Bills to Part 8 of the

Telecommunications Act, for separation between wholesale and retail arms of business networks. This adds further complications to the implementation of the proposed levy rules.

### **Extending obligations to business lines creates difficulties**

31. The basis of the levy charge is a chargeable service associated with a local access line. A carrier who owns the local line is liable to pay the tax if the line is used to supply a designated broadband service to a customer in Australia.<sup>7</sup> A designated broadband service is a service over a local access line that is technically capable of download speeds of 25Mbps or more.<sup>8</sup>
32. Local access line is defined as a part of a local access network and has the meaning generally accepted within the industry. Lines on the customer side of the boundary of a telecommunications network do not comprise local access lines.<sup>9</sup>
33. In the context of a residential high-speed broadband network, these definitions pose little problem. For households, there is typically only one local access line connected to the household at any one time. And the household acquires only one service over that access line. For example, the proposed Bill clarifies that where:
  - (a) two or more broadband services are supplied by different providers to the same customer using the same or different access lines during different parts of the month, only the last service is chargeable.<sup>10</sup>
34. These clarifications again make sense in a residential sense, where at any one time a household will likely only have one service. But, there is no clarification how the Bill will operate in a business environment. Business connections adds a magnitude of complexity not currently envisaged in the drafting of the Bill.
35. There are multiple scenarios relevant for business products that present implementation issues for the Bill, including:
  - (a) two or more broadband services are supplied by different providers to the same customer using the same or different access lines during whole of the month;
  - (b) two or more broadband services are supplied by the same provider to the same customer using the same or different access lines during whole of the month;
  - (c) two or more broadband services are supplied by different providers to two or more customers using the same access lines during whole of the month; and
  - (d) broadband services are supplied over one access line by a provider to the building entry point and the building owner provides services to its own tenants.
36. It is not clear for any of these scenarios how many levy charges the carrier would be liable for. Different interpretations of the Bill provisions would lead to different outcomes.

### **Interaction with NBN Co business lines**

37. Extending the levy obligation beyond the current scope of all NBN regulations will result in the levy obligations being inconsistent with the wholesale-only design of the residential NBN. There is no obligation for any network owner to cease supplying business services over existing or

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<sup>7</sup> Draft Bill, s.94, p.140

<sup>8</sup> Draft Bill, s.76, p.128

<sup>9</sup> Telecommunications Act, s.158

<sup>10</sup> Draft Bill, s.94(2)-(3), p.141

future communications networks. Under the Definitive Agreements (DAs) there is no requirement for Telstra to cease business services over networks connected to business premises. Similarly, the Optus-NBN Co deal allows Optus to continue serving business customers in HFC areas. And there are no other regulatory obligations for any other carrier to structural separate or cease supplying services over their business networks.

38. Should NBN Co extend its remit beyond its current residential focus, it will be a late entrant into the competitive business market. It will face competition from multiple dedicated FTTP business networks; that are both vertically integrated and active and effective wholesalers. It is likely that NBN Co and several other carriers provide access lines to the same building and the same businesses.
39. It is therefore possible that NBN Co could be receiving revenue from broadband services in a building; while at the same time, non-NBN Co carriers are paying the levy for services to the same customer at the same time.<sup>11</sup> This would appear to be counter to the justification for the levy – NBN Co has not foregone any revenue.
40. Optus notes there is no discussion of this issue in any of the explanatory documents.

#### *Vertical integration of business networks makes implementation difficult*

41. As noted above, there is no obligation to separate in any form the wholesale and retail arms of business networks. The obligation to collect the levy appears to fall on carriers (ie, the network owner)<sup>12</sup> where any CSP provides service over that line. Optus can see further complications due to this requirement.
42. One complication is the definition of an access network. The Bill requires the generally accepted definition within the industry. It is not clear whether this definition is the definition of the carrier or the view of its downstream CSP. For example:
  - (a) Telstra supplies access network leases to wholesale customers for connectivity to data centres or exchanges. Telstra (the carrier liable for the levy) would consider these lines part of its access network, but its wholesale customers would not. The Bill is not clear on whose definition of access network is relevant.
43. More importantly, under commercial contracts the carrier has no visibility or knowledge of the use of the lines by the wholesale CSP. The carrier does not know whether its 'access' line is being used as a part of the access or core network by its wholesale customer.
44. There could also be an inconsistency depending on whether the CSP supplies carriage services to itself or acquires it from another carrier. The above example occurs because the CSP acquires services from another carrier. But if that CSP is a vertically integrated carrier and supplies network links to its own data centre or exchange, there would be no question that the link is not part of the access network. No levy would be attached.

#### **Implementation difficulties over Carrier reporting obligations**

45. The draft Bill proposes reporting obligations on carriers. Carriers are obliged to report to the ACCC the total number of designated broadband service provided by CSPs over their local access line during July 2017. From 2018-19, annual reporting obligations begin. The proposed Bill imposes strict liability offences, with a fine of \$9,000 per day.

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<sup>11</sup> Assuming NBN Co receives an offset certificate under s.98.

<sup>12</sup> Draft Bill, s.94(1)(a)

46. Optus sees difficulties with implementation of these obligations. As noted above, there are many scenarios which pose problems for a carrier trying to calculate how many taxable services are provided over its local lines.
47. Further, the lack of visibility of wholesale carriers (who are liable for the levy) over the activities of their wholesale CSP adds further complications. Optus has presented a small selection of the uses of access lines that would appear problematic above. The wholesale carrier has no visibility as to the use of the line – in addition to not knowing whether the line is being used in an access network. It is not clear how a wholesale carrier could practically comply with its obligations.