TELSTRA CORPORATION LIMITED

Submission to the Senate Standing Committee on Environment and Communications inquiry into the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019*

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CONTENTS

Executive Summary

This submission gives Telstra's views on the Regional Broadband Scheme (RBS) and the Statutory Infrastructure Provider (SIP) regime contained in the bills under review by the Senate Committee. Telstra has no comments to make on changes to the Superfast Network Obligations.

The RBS should not be applied to the Enterprise market

The RBS is a tax, and as such there should be absolute clarity in how it applies. Without clarity of application, persons liable for the tax are at permanent structural risk of non-compliance, Government cannot rely on the amount to be collected, and all parties face significant ongoing and unwarranted administration and other costs. Unfortunately the draft RBS is fundamentally unclear in its application to the Enterprise market. The best solution is to apply it only to residential markets.

In residential broadband markets, a single local access line generally provides a single broadband service to a single customer in a single, distinct and clearly defined premises, with minimal changes in these arrangements over time. In Enterprise (large business) markets, an end user may have multiple broadband services delivered to a single premises or multiple adjacent or non-adjacent premises, with these arrangements subject to constant flux in ways that are not transparent to carriers.

In the Enterprise sector carriers often have limited visibility of the number of premises served by their superfast infrastructure, even where they are providing retail broadband services using that infrastructure, in particular because in many cases there is privately-owned in-building cabling between the carrier's network and the end user's broadband access points. It is not possible for the end points of every length of privately-owned cabling to be recorded and published in real time on a monthly basis.

It would be both principled and logical to apply the RBS only to residential markets. The purpose of the RBS is to provide a level-playing field for the NBN where its residential nationally-averaged pricing includes a cross-subsidy to pay for its loss-making rural services. However, unlike its residential services, NBN Co's Enterprise services are provided on a geographically de-averaged basis meaning a cross-subsidy is not necessary. Moreover, because NBN does not account separately for its Enterprise business, there is no evidence or certainty that any cross-subsidy is actually being paid by NBN Co.

If the charge cannot be limited to residential markets it should be based on services rather than premises. Carriers always know how many services they are supplying because services are billed for, eliminating the information problem associated with the premises model. However, as further consultation would be needed to determine and settle the necessary legislative changes, the current commencement date of 1 July 2020 would need to be pushed back, probably to 1 July 2021.

Telstra supports the introduction of a SIP regime but some improvements should be made

Telstra supports the SIP regime because it will provide certainty that all premises in Australia can access superfast broadband infrastructure, but we suggest the legislation be amended so that: it is clear that installation of public mobile infrastructure does not trigger the obligation; the Minister's power to designate SIPs is more limited; SIPs are required to support voice services on satellite infrastructure; and the timeframes for non-NBN carriers to notify the ACMA of SIP infrastructure are aligned with corresponding NBN timeframes.

The installation of almost any telecommunications infrastructure could trigger the SIP obligations as they are currently drafted, but SIPs are required to install a much more specific type of infrastructure to the premises they connect. This legislative mis-match could result in the installation of public mobile networks under contract to a developer attracting SIP obligations to install superfast broadband connections to every premises in the coverage area. We therefore propose the legislation be amended so that only contracts to supply fixed (including fixed wireless and satellite) broadband services attract the SIP obligations.

The Minister's power to designate service areas is unnecessarily broad. It could be exercised in future to shift responsibility for infrastructure deployment from NBN Co to another carrier, or to designate Telstra as the SIP where it had previously deployed network in fulfillment of the USO, thereby effectively "upgrading" the voice USO to a broadband USO in respect of existing infrastructure. In exercising this power, the Minister should be required to make decisions consistent with NBN Co being the primary SIP nationwide, and not designate a SIP that has not already installed qualifying infrastructure.

The requirement for a SIP to provide voice capability should be extended to satellite as well as fixed wireless and fixed network infrastructure. The legislation currently carves out satellite from this requirement, presumably because NBN Co's Sky Muster technology is not intended for voice calls. To accommodate the deployment of future satellite technology that is intended for voice calling, the Minister should be given the power to exempt networks from this requirement on a temporary basis only so that future legislative changes are not required to ensure voice is provided over satellite.

The timeframes for non-NBN carriers to notify the ACMA about the installation of infrastructure that attracts the SIP obligations should be aligned with the timeframes that apply to NBN Co. Non-NBN carriers have 10 business days to notify the ACMA, but NBN Co has 10 business days after the end of the month in which it declares a rollout region ready for service to notify the ACMA of this fact. All carriers should be given 10 business days after the end of the month in which infrastructure installation is completed or a contract has been entered with a developer for the installation of infrastructure.

01 Introduction

This submission gives Telstra's views on the Regional Broadband Scheme (RBS) and the Statutory Infrastructure Provider (SIP) regime contained in the bills being reviewed by the Senate Standing Committee on Environment and Communications.[1] We have no comments to make on changes to the Superfast Network Obligations made by these bills.

Telstra gave views on the RBS and SIP regime to an inquiry by this Committee into previous versions of these bills conducted in 2017.[2] Fundamentally our views have not changed – many of the same problems are apparent in the current bills. In the intervening period we have worked closely with officers of the Department of Communications and the Arts to explain these problems, but it has proven impossible to find solutions within the confines of the policies the legislation seeks to enact. Fortunately we believe it is possible to address these problems by revising the policies themselves in a way that still delivers on their intent.

02 Regional Broadband Scheme

2.1. The RBS is a tax to which the principle of clarity must apply

The Explanatory Memorandum to the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019* (**Charge Bill**) acknowledges that the Bill is a taxation measure.[3] It is well established that taxation measures must be clearly defined and unambiguous in their implementation[4], so that:

- persons liable to pay the tax are not at structural risk of non-compliance;
- the Government has a high degree of certainty about the amount to be collected; and
- the administration costs for taxpayers and collection agencies alike are minimised.

Taxes that are not clear in theory and in practice can impose substantial and unreasonable risks of financial penalties on those liable to pay them, and divert valuable resources within all parties to continuous debate, negotiation and potentially litigation of liability.

2.2. Residential and Enterprise (large business) markets have different characteristics

Residential broadband markets are characterised by relatively simple structures and relationships. Generally a single local access line provides a single broadband service to a single customer in a single, distinct and clearly defined premises. In high-density Multiple Dwelling Units (MDUs) there may be more than one fibre line provider competing to serve the MDU, but there will usually be a single local access line serving each unit. The units in a MDU building are seldom reconfigured.

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[1] *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019* and the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019.*

[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/TelcoBills2017/Submissions.

[3] Explanatory Memorandum to the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019*, p. 2.

[4] For example, see *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55, where Barwick CJ said: *"It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax."*

Enterprise markets are far more complex. An end user may have multiple broadband services delivered to a single premises or multiple adjacent or non-adjacent premises. There may be several distinct access networks daisy-chained to bring the broadband service from the core network of the RSP to the end user. Enterprise end users are far more likely than residential customers to reconfigure their premises (expand, contract, combine) and usage requirements over time, and are readily able to do so through their own Local Access Networks on the customer side of the network termination point without the need to involve or inform their Retail Service Provider (RSP).

2.3. Carriers will be unable to report accurately on premises in the Enterprise sector

The RBS levy will be payable by carriers in respect of "chargeable premises associated with a local access line". This gives rise to several distinct (though inter-related) problems which are particularly difficult to resolve in relation to Enterprise markets. These problems are much less significant in residential markets for the reasons set out at 2.2 above. If carriers cannot report accurately on the number of chargeable premises in each month, the tax cannot operate effectively and will not fulfil its purpose.

2.3.1. "Premises" is not defined in the legislation, and is an uncertain term in the industry

The application of the term "premises" to Enterprise market structures including office blocks, shopping centres and business parks is fundamentally unclear. For example, the legislation does not define whether a single corporate entity leasing two floors of an office building has one or two premises, let alone deal with the myriad subtle variations in the way telecommunications infastructure is installed, owned and operated within these kinds of Enterprise settings.

The explanatory material accompanying the legislation has been amended to provide additional guidance about the application of the RBS, but this guidance is incomplete because it suggests outcomes for just a few of the large number of different possible scenarios that realistically apply in enterprise markets and in many cases wrongly assumes the liable carrier has complete knowledge of the number of premises within scope.[5]

The draft legislation provides for the Minister to define what is and/or is not a "premises" for the purpose of the tax.[6] Presumably the drafters have not simply included the necessary definitions in the legislation because they are not confident of covering every variation in circumstance, and prefer to allow questions to arise in practice before they are answered. We are therefore faced with the prospect of endless uncertainty as new circumstances arise, are questioned and eventually settled via Ministeral instrument.

2.3.2. Carriers cannot always know how many premises are served by their infrastructure

Carriers often have limited or no visibility of the number of premises served by their superfast infrastructure, particularly where they do not own the local access lines connecting individual customers. There is no market requirement for a carrier providing connectivity to a building to know anything about what happens within the building if they do not also own the cabling within the building, including the number of local access lines, premises and end users of designated broadband services.

[5] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019*, pp. 181-186.
[6] Section 79A of the *Telecommuncations Legislation Amendment (Competition and Consumer) Bill 2019.*

Despite carriers' inherent lack of knowledge about the structure of networks beyond the edge of their own network, the RBS regime requires perfect visibility of the number of premises ultimately served to calculate liability accurately. That is because the draft legislation deems privately-owned cabling to be a "local access line" in order to prevent tax avoidance by the deliberate transfer of local access lines to private ownership.[7] Thus, a carrier who provides broadband services to end users in a building is liable for each "premises" served even where the service is provided over privately-owned cabling.

Carriers in many cases do not know the number of chargeable premises within scope where a customer has a complex set of arrangements within a single building that are subject to changes over time. For example, where a customer has a communications room on one level of an office building to which a carrier terminates fibre, and offices on different floors served by separate lengths of in-building cabling, some of which may be under the same lease and some under different lease arrangements, it is not clear how the carrier can be certain of the number of chargeable premises in any given month.

It seems the only way for carriers in this situation to calculate their liability accurately is for comprehensive information about the networks and premises beyond the edge of their own network to be made available to them. In our view it is not possible for every length of privately-owned in-building cabling and the legal circumstances of every individual "premises" connected by that cabling to be somehow robustly recorded in real time and made publicly available.

Conceivably, the Commonwealth could require private owners of any customer cabling which qualifies as "local access lines" under the RBS regime to compile, update and provide the necessary information to allow carriers to accurately calculate their tax liability. However, that would impose a substantial administrative burden on businesses, bodies corporate, public institutions and individuals, which are currently permitted under the *Telecommunciations Act 1997* to install, own and use their own customer cabling with minimal regulatory requirements. This problem is not addressed under the current approach.

2.4. The best solution is to remove the charge from Enterprise altogether

2.4.1. Applying the charge only in residential markets would be principled and logical

We have pointed out previously that this tax was originally conceived of as applying exclusively in residential superfast broadband markets.[8] That scope was entirely consistent with the stated purpose of the tax, which was to create a level-playing field for the NBN as it competed for profitable residential markets in which to provide services that are nationally priced. The national pricing of its residential broadband services is the critical point, because it is that which creates the inevitable cross-subsidy from profitable areas (defined as the NBN's fixed line footprint) to loss-making areas (defined as the NBN's other footprints).

In contrast, NBN Co charges higher prices for Enterprise services in regional areas than in CBD and metropolitan areas.[9] There is, therefore, no inherent cross-subsidy to loss-making areas in NBN Co's

[7] Section 76A(4) of the *Telecommuncations Legislation Amendment (Competition and Consumer) Bill 2019.*

[8] Telstra submission to the previous Senate inquiry into earlier versions of these bills, 14 July 2017, p. 9. Available at: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/TelcoBills2017/Submissions

[9] See NBN Co's pricing for UNI Zones at: https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/sell/wba/nbn-enterprise-ethernet-charges-subject-to-price-confirmation.pdf.

pricing of Enterprise services. Applying a tax on NBN Co's Enterprise market competitors, to support a cross subsidy that NBN Co does not itself apply, would therefore place competitors at a distinct competitive disadvantage. Consequently, rather than level the playing field, it actually tilts the playing field unfairly and unreasonably in NBN Co's favour.

It might be argued that the tax delivers no advantage for the NBN in Enterprise markets because NBN Co is also required to "pay" the tax, as provided for by the legislation.[10] But this ignores the fact that NBN Co does not actually pay any tax, rather, it is just assumed that NBN Co sets prices above its costs plus an amount equal to the RBS. Given there is no requirement for NBN Co to account separately for its Enterprise business, there is no way to ascertain whether its Enterprise service pricing actually includes a cross-subsidy for its loss-making services. In contrast, NBN Co's Enterprise competitors must actually pay real money, leaving them at an unreasonable structural disadvantage.

2.4.2. Applying the charge only in residential markets need not result in under-recovery of funds

The tax is levied in order to recover the $9.8 billion in losses that the NBN is expected to incur over 30 years in providing services in its fixed wireless and satellite footprints.[11] Despite the fact that this analysis is clearly out of date and should be redone, the current draft legislation includes a cap on the charge of $7.10 per chargeable premises per month, indexed annually to CPI.[12] Any concern that if the tax is not levied on Enterprise it will under-recover due to the lesser number of chargeable premises in scope, would be easily dealt with either by including a mechanism in the cap to account for a reduction in the expected number of charges payable, or by resetting the cap altogether as part of broader exercice to update the NBN loss-making services analysis.

Moreover, the Enterprise sector is likely to be a relatively small proportion of the overall superfast broadband market. As at June 2018, there were 2.3 million active businesses in Australia, but only around 55,000 of these were medium or large "Enterprises" with 20 employees or more.[13] In contrast, NBN Co expects to connect 8.6 million premises by mid 2023.[14] If each "Enterprise" business has four premises on average, Enterprise accounts for just 2.5% of the total RBS take. As the vast majority of these "Enterprise" businesses have less than 200 employees, we expect the average number of premises per Enterprise is likely to be less than four.

2.5. If the charge cannot be limited to residential markets, it should be based on services rather than premises

All carriers know what and how many services they are providing to their customers, because that is the basis on which customers are charged. In contrast, as explained above, carriers serving Enterprise customers via third party local access networks (e.g. privately-owned in-building cabling) in many cases cannot know how many chargeable premises they would be liable for under the tax. Even if Enterprise customers were served by carrier-owned networks, the lack of clarity and visibility of what is a "premises" in the Enterprise segment would make calculating liability inherently uncertain. Accordingly, if the charge cannot be limited to residential markets, it would be far more reliable to anchor the tax on the number of eligible services provided.

[10] Explanatory Memorandum to the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019*, pp. 28, 35.
[11] Explanatory Memorandum to the *Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019*, p. 12.
[12] Explanatory Memorandum to the *Telecommunications (Regional Broadband Scheme) Charge Bill 2019*, p. 3.
[13] ABS, 8165.0 - *Counts of Australian Businesses, including Entries and Exits, June 2014 to June 2018*.
[14] NBN Co, *Corporate Plan 2020-23*, p. 49.

Telstra does not propose a services-based tax to replace a premises-based tax in order to reduce our financial liability. Indeed, it may be that we are liable to pay a higher total amount under a services-based tax, but if so that is a price we are willing to pay in order to secure the certainty and clarity which is unachievable with a premises-based tax. We expect that the cost to Telstra of uncertain liability and the risks associated with it under a premises-based tax would be higher than the cost of a larger monthly bill under a services-based tax.

Moving to a services-based approach would require industry consultation and further careful development and probably significant redrafting of the proposed legislation. At the very least the currently drafted commencement date of 1 July 2020 would need to be pushed back, probably to 1 July 2021. This delay could be avoided by removing the charge from Enterprise altogether, as discussed in section 2.4 above.

03 Statutory Infrastructure Provider regime

3.1. Telstra supports the introduction of the SIP regime

Telstra supports the introduction of the SIP regime because it will provide industry and consumers with certainty that all premises in Australia can access telecommunications infrastructure that supports the delivery of superfast broadband. We do, however, have several suggested changes to the draft legislation consistent with our previous submission to the Senate Environment and Communications Legislation Committee.

In particular, Telstra considers that:

- the legislation should be amended to make it clear that the installation of public mobile infrastructure does not trigger the SIP obligations;
- the Minister's power to designate service areas is overly broad, and should be appropriately limited in the legislation;
- the requirement for the wholesale service provided by the SIP to include voice telephony capability should extend to satellite services; and
- the timeframes for ACMA notification by non-NBN carriers should be extended to align with the timeframes for ACMA notification by NBN Co.

3.2. The installation of public mobile infrastructure should not trigger the SIP obligations

Under the draft SIP legislation, a carrier is required to nominate as the SIP where it installs network infrastructure to enable the supply of "eligible services" to premises in the whole of a real estate development project or building redevelopment project, and the installation was carried out under a contract. "Eligible services" include a "listed carriage service" which includes "a carriage service between a point in Australia and one or more other points in Australia". Accordingly, the installation of almost any telecommunications network infrastructure could trigger the requirement to nominate as the SIP.

Once a carrier becomes a SIP it is required to connect premises to a "qualifying fixed-line telecommunications network" and, if that is not reasonable, to a "qualifying telecommunications network", so that the CSP can provide "qualifying fixed wireless carriage services" or "qualifying satellite carriage

services". In effect, there is a legislative mis-match between the (broader) kinds of telecommunications network infrastructure that can trigger the requirement to nominate as the SIP, and the (narrower) kinds of telecommunications network infrastructure to which a SIP is required to connect premises.

Telstra is concerned that as a result of this legislative mis-match it may be required to nominate as the SIP where it installs mobile infrastructure under a contract with a developer to improve mobile coverage in a new development, even though it will not be required under that contract to connect end-user premises to this infrastructure. If Telstra is required to nominate as the SIP in these circumstances, it would also need to install a qualifying telecommunications network in order to fulfil its SIP obligations, even though this was not the intention of the contract with the developer.[15]

We therefore propose the SIP legislation be amended so that a carrier does not become the SIP to supply high speed broadband throughout an estate where it has only agreed to improve mobile coverage under contract with a developer. More specifically, we propose that a carrier should be exempt from the requirement to nominate as the SIP in relation to infrastructure installed to supply mobile services if the contract with the developer does not include the requirement to deliver fixed wireless broadband services. If it does include that requirement, the SIP obligations should apply.

We acknowledge that it would be possible for a carrier in these circumstances to seek an exemption under sections 360H, 360P and/or 360Q. However, we believe our suggested amendment is more efficient and it also clarifies the operation of, and is consistent with the intent of, the SIP legislation.

3.3. The Minister's power to designate service areas is unnecessarily broad

Under section 360L of the draft legislation, the Minister may declare that a specified area is a "designated service area" and that a specified carrier is the SIP for the designated service area. Designated service areas are carved out of the NBN Co's SIP responsibilities.

Telstra is concerned that the Minister's power in section 360L is too broadly framed. For example, it could be exercised in future to shift responsibility for infrastructure deployment from NBN Co to another carrier, or to designate Telstra as the SIP where it had previously deployed network in fulfillment of the USO, thereby effectively "upgrading" the voice USO to a broadband USO in respect of existing infrastructure.

We acknowledge that any Ministerial determination made under section 360L would be a legislative instrument, and would therefore be subject to the consultation, disallowance and sunsetting requirements under the Legislation Act.

We also acknowledge the examples in the Explanatory Memorandum which suggest that section 360L may be used to designate real estate development projects where infrastructure was installed before the commencement of the regime, and are serviced by a single superfast fixed-line network provider (other

[15] A similar issue arises in relation to telecommunications infrastructure installed to meet the Universal Service Obligation (**USO**). Non-NBN carriers other than Telstra can choose whether to deploy infrastructure – and will consider the requirements of the broadband SIP when deciding whether and what kind of network to deploy. Telstra, as the USO provider, is required to deploy network sufficient to support the USO telephony service. In effect, the combination of the USO and the SIP would "upgrade" Telstra's voice USO to a broadband USO in new service areas. Telstra is separately pursuing an appropriate exemption from the SIP nomination obligations to address this issue.

than NBN Co). In such cases, it may be appropriate for the network provider to be the SIP for the area and so the Minister would be able to determine this.

However, to increase industry certainty in relation to the Minister's power under section 360L, we believe the legislation should be amended to provide that:

- The Minister must consider the extent to which the proposed exercise of power is consistent with NBN Co being the primary SIP nationwide.
- The Minister must only exercise the power under section 360L in circumstances where a carrier (other than NBN Co) has already installed superfast network infrastructure in the relevant area. In other words, the Minister cannot exercise the power under section 360L to require a carrier (other than NBN Co) to become the SIP for an area and to install superfast network infrastructure in that area.
- The relationship between "nominated service areas" and "designated service areas" should be clarified. Under the current draft legislation, nominated service areas and designated service areas are excluded from "interim NBN service areas" and the "general service area", and designated service areas are excluded from nominated service areas. We believe the draft legislation should be amended so that nominated service areas are also excluded from designated services areas, so the Minister's designation does not result in overbuild of an existing nominated service area.

3.4. The requirement that the wholesale service provided by the SIP should include voice telephony capability should extend to satellite services

Under the SIP legislation, the SIP for a service area must, on reasonable request by a CSP, connect end user premises to a qualifying telecommunications network so the CSP can provide qualifying carriage services to the end-user at the premises.

Section 360Q(1A) provides that the wholesale service provided by the SIP must enable end users to make and receive voice calls. However, section 360Q(1B) provides that this requirement does not extend to satellite services supplied by the SIP.

Telstra understands that the current NBN satellite may not be suitable for voice, but that does not preclude the possibility that NBN Co (or another carrier) may deploy satellite technology more appropriate to voice in the future.

Accordingly, Telstra proposes that, rather than a complete statutory carve out, section 360Q(1B) should be amended to provide that the Minister has discretion to exempt satellite services on an interim basis until a viable technical solution is developed that is satisfactory to customers. In this way, the legislative regime will be set up to contain consistent requirements across fixed-line, fixed wireless and satellite technologies, with short-term relief for satellite provided through a Ministerial exemption that can be removed when appropriate.

3.5. The timeframes for ACMA notification by non-NBN carriers should be extended to align with the timeframes for ACMA notification by NBN Co

Telstra welcomes the requirement for carriers to notify the ACMA where they are the SIP. This will help improve awareness – for developers, consumers and carriers – about who has infrastructure responsibility in a particular area.

However, Telstra notes the timeframes for notification by non-NBN carriers to the ACMA (under sections 360H(2) and (4) and sections 360HA(1) and (3)) are quite tight. Non-NBN carriers are required to notify the ACMA within 10 business days of completing installation of the infrastructure or within 10 business days of entering into a contract for a real estate development project or a building redevelopment project.

This contrasts with the extra time NBN Co has to notify the ACMA where it is the SIP in a provisional interim NBN service area, i.e. within 10 business days after the end of the month in which NBN Co issues a statement that a rollout region has gone RFS.

Given the SIP regime is due to begin on the designated day, NBN Co may not need to notify the ACMA of a provisional interim NBN service area and may not, therefore, get the benefit of this extra time in practice. However, Telstra still proposes that non-NBN carriers be given a more reasonable timeframe in which to notify the ACMA that they are the SIP, for example, within 10 business days of the end of the month in which infrastructure installation is completed or within 10 business days of the end of the month in which a contract is entered into for a real estate development project or building redevelopment project.