



Australian Government

Department of Communications and the Arts

Submission to the Senate Standing Committee on Environment and Communications Inquiry

Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 and Telecommunications (Regional Broadband Scheme) Charge Bill 2019

December 2019



Introduction

This submission has been prepared by the Department of Communications and the Arts in relation to the Telecommunications Reform Package, which comprises the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 and the Telecommunications (Regional Broadband Scheme) Charge Bill 2019.

The Government has a long-standing commitment to introduce the Telecommunications Reform Package to improve competition opportunities while better supporting provision of services to consumers, particularly in regional areas.

Together, the two Bills implement three key measures from the Government's 2014 *Telecommunications Regulatory and Structural Reform* paper:

1. They amend existing carrier separation rules in the Telecommunications Act to create new commercial and competitive opportunities for network operators.
2. They introduce statutory infrastructure provider (SIP) obligations for NBN Co Limited (NBN Co) and other carriers to ensure people in Australia can be connected to superfast networks and receive superfast broadband services.
3. They also establish the Regional Broadband Scheme (RBS) to ensure transparent and equitable funding for NBN Co's fixed wireless and satellite networks, which predominantly serve regional Australia.

The Bills were previously introduced into Parliament in 2017 and were considered in detail by the Senate Standing Committee on Environment and Communications in 2017, which recommended passage of the Bills. The Bills were subsequently passed by the House of Representatives in 2018, but had not been passed by the Senate before the 2019 election. The Government has reintroduced the Bills largely as previously introduced.

As extensive material on the Bills has been provided in their Explanatory Memoranda, this submission focusses on a number of key issues that may be of particular interest to the Committee, namely amendments made to the Bills since they were previously before the Parliament, and issues relating to the RBS. In all instances the Department is available to provide the Committee with such further assistance as may be helpful to the Committee in conducting its inquiry.

The Bills are an integrated three part package

The three key measures in the Bills work together as an integrated package. Australia has an open and competitive telecommunications marketplace but the regulatory settings could be improved. The proposed changes to the carrier separation rules address this. However, the growth of competition in the marketplace will put pressure on the ability of NBN Co to deliver fixed wireless and satellite services to regional areas. This is because NBN Co currently funds these loss-making networks through an opaque internal cross-subsidy from its profitable fixed-line networks, and greater competition will put pressure on the funds available for this cross-subsidy. The proposed RBS responds to this. The NBN is intended to provide access to better broadband across Australia and also to provide 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.



Amendments to the Bills

The following amendments have been made since the Bills were previously before the Parliament.

1. The Bills incorporate amendments moved by the Government in 2018 but not debated in the last Parliament. These are mostly fine-tuning, for example, several measures were originally scheduled to come into effect on 1 July 2018, and this date had already passed.
2. The Bills incorporate four new Government changes:
 - a. The commencement date for the SIP regime has been changed to 1 July 2020. This gives Government and industry sufficient time to put the necessary administrative and compliance arrangements in place.
 - b. The Bills introduce a limited power for the Minister for Communications (the Minister) to exempt certain networks from SIP requirements by legislative instrument. This would be used to deal with networks installed to provide services other than broadband (e.g. voice). In these cases consumers would not be worse off as NBN Co, as the default SIP, would still need to supply broadband.
 - c. A schedule changing the 'designated day' for Telstra's structural separation has been removed as the 'designated day' has been changed by Ministerial instrument.
 - d. A date change for the one-off carrier reporting to the ACCC for the RBS to three months after the legislation receives Royal Assent. Avoiding use of a specific date removes the need for any further amendments.
3. The Bills adopt three Opposition amendments moved by the Opposition when the Bills were previously before the Parliament (described in the next section).

The Regional Broadband Scheme

Policy rationale

The Government is establishing the RBS to ensure transparent and sustainable funding arrangements for NBN Co's fixed wireless and satellite networks, which provide essential high speed broadband services to regional and remote Australia. These networks are loss-making and are estimated to incur net losses of \$9.8 billion over 30 years.

Today, the full cost of subsidising the NBN fixed wireless and satellite networks is paid by NBN Co. Under the RBS, when the NBN is complete, 95 per cent of the cost will continue to be paid for by NBN Co. The remaining 5 per cent is expected to be paid for by competing NBN-comparable networks (i.e. high speed fixed-line broadband providers). These networks will pay \$7.10 per month (indexed to the Consumer Price Index) for each premises with an active superfast fixed-line service on their network.

The RBS will make NBN Co's internal cross-subsidy between its fixed-line and fixed wireless and satellite services transparent instead of opaque, and create a level playing field by spreading this cost across all NBN-comparable networks.

The RBS does not impose a new cost on users of the NBN, because the cost is already built into NBN Co's existing prices. Where the RBS applies, it will be up to these NBN-comparable networks to decide whether the charge will be passed on to their customers in part, in full, or at all.

To support competition, the RBS includes concessions to help smaller carriers adjust to paying the charge, and network owners that operate fewer than 2,000 services are exempt from paying the charge.



The RBS is strongly supported by consumer groups and regional stakeholders, including the Australian Communications Consumer Action Network (ACCAN), the Regional, Rural and Remote Communications Coalition (RRRCC), the National Farmers' Federation and others. If passed in Parliament, the RBS will ensure that essential regional broadband services are sustainably funded into the future.

The Bills adopt Opposition amendments

The Bills adopt three Opposition amendments moved by the Opposition when the Bills were previously before the Parliament, as announced by the Government in the Budget in April 2019:

1. A reduction in the RBS charge cap from \$10.00 to \$7.10 per month (indexed to CPI) – the same level as the initial charge. This will provide more regulatory and investment certainty and support market competition.
2. Addition of a concession that exempts carriers for the first 55,000 'recently connected greenfield premises' on their networks for five years. This supports greenfield carriers by providing an additional concession while transitioning to the RBS.
3. A requirement for NBN Co to provide mapping data on the rollout (available on its website) for publication on the National Map. This allows this information to be viewed alongside other datasets available on the National Map.

The Government has adopted the recommendations of the Senate Committee

The Bills were referred to the Senate Committee following their initial introduction to Parliament on 22 June 2017. In its report, tabled 6 September 2017, the Committee recommended:

- amending the RBS's disallowance provisions to allow for deemed disallowance (Recommendation 1); and
- that the Bills be passed after due consideration of Recommendation 1 (Recommendation 2).

The intention of the changes to the disallowance provisions was to further enhance Parliamentary scrutiny of relevant instruments made under the RBS and align the RBS with disallowance provisions in the Legislation Act 2003. This amendment is included in the current version of the Bills.

Concerns raised by telecommunications carriers in relation to the RBS

As the Committee's report on the previous draft legislation noted, there are a range of industry views on the operation of the RBS, in particular relating to the types of networks that should contribute to the RBS and the use of 'premises' as the basis for the charge. There does not appear to be a consistent position on or level of concern about these issues across all industry stakeholders.

These issues were comprehensively considered during consultation with industry on the draft legislation and during detailed examination of the RBS by the Senate Environment and Communications Legislative Committee in 2017. After 'careful consideration' of the Bills and industry's concerns, the Committee decided to support the approach taken by the Government in the Bills to the RBS, including both the use of 'premises' as the basis for the RBS and the inclusion of enterprise services in the charge base.

Queries have also been raised by some stakeholders about the modelling of the charge.



A summary of the Department's position on these issues is in the following sections.

Inclusion of business and enterprise services in the charge base

The policy intent of the RBS is to establish a transparent and more effective arrangement to fund NBN Co's non-commercial services through contributions sourced from owners of high-speed fixed-line broadband access networks (i.e. the NBN and NBN-comparable networks). The Government's Statement of Expectations to NBN Co explains that the network should connect to every premises in Australia, which includes all business premises. NBN Co's Corporate Plan demonstrates the company's intent to connect all residential and business premises, and this is also recognised in the SIP obligations.

Inclusion of business services (including NBN Co's business services) allows the cost of fixed wireless and satellite services to be shared proportionally across all NBN-comparable providers, and the inclusion of these additional services enables the monthly charge amount to be reduced.

It would not be equitable for the charge to only apply to residential and small business services.

Use of 'premises' as the basis of the charge

The Bills in their current form were before the Parliament for almost two years, including being passed by the House of Representatives in May 2018.

Premises is not defined in the draft legislation nor does it need to be defined as the ordinary (common) meaning of that term is well understood as any place or land used or occupied by a person or business for whatever purpose.

Premises is a concept that has been used in the *Telecommunications Act 1997* since the Act's inception and has stood the test of time. The concept of a premises is also used in instruments such as the *Telecommunications (Structural Separation – Networks and Services Exemption) Instrument (No. 1) 2011*, which was the basis for Telstra's Structural Separation Undertaking approved by the ACCC.

As part of implementation of the RBS, carriers may need to collect more information in order to determine the amount they will need to contribute towards the RBS. This is not unusual where new regulatory requirements are being implemented, and is likely to be required whether premises, or an alternative approach, is used, because any version of the charge would rely on the concept of a 'local access line'.

After taking into account recent discussions with industry stakeholders, the Department remains of the view that premises is a more tangible, precise and administratively better approach for regulators and industry for a taxation instrument than alternative approaches.

Recalculating the RBS charge is complex and should be undertaken by the ACCC

The then Bureau of Communications Research (BCR) undertook modelling for the RBS during 2015 and 2016. The current estimate for the RBS charge was developed after thorough analysis by the BCR, which included:

- Obtaining commercially sensitive data from NBN Co about premises numbers, network costs and revenues;
- Extensive desktop research into premises numbers on non-NBN networks;
- Determining NBN Co's common costs;
- Specifying and testing assumptions of derived from the data to drive the results; and



- Two rounds of public consultation with industry.

Given the complexity and thoroughness of the BCR's earlier work, the Department remains confident that this 2015/16 modelling continues to provide a reasonable basis for the RBS charge.

Updating the modelling would be a complex undertaking because of the nature and number of the inputs and steps involved. Determining common costs in particular is complex as it requires disentangling costs attributable to fixed wireless and satellite from costs for other business activities.

The Australian Competition and Consumer Commission (ACCC) will be best placed to update the RBS modelling and consider whether adjustments to the charge amount may be required (within the charge cap) once the Telecommunications Legislation Amendment (Competition and Consumer) Bill and the Telecommunications (Regional Broadband Scheme) Charge Bill are passed.

This is because section 102ZF of the Telecommunications Legislation Amendment (Competition and Consumer) Bill establishes a one-off reporting requirement for carriers to provide the ACCC with commercially sensitive information about their networks, which is a crucial input to the modelling.

This reporting will give the ACCC a snapshot of the high-speed, fixed-line broadband market as it stands soon after commencement of the Bill, which is a key component required to update the modelling.

Department's responses to concerns raised by industry stakeholders

The Department has made changes to the Explanatory Memorandum for the Bills to further clarify the operation of the RBS in complex circumstances and provide greater certainty to industry. The Minister also noted in the Second Reading Speech for the Telecommunications Legislation Amendment (Competition and Consumer) Bill 2019 that the RBS charge has been designed to accommodate complex service types. Specifically, sections 76A and 94 of the Bill allow an extended definition for 'local access line' to include customer cabling in multi-dwelling units and relate to ownership of 'local access lines' respectively. The interaction of these provisions makes clear that customer cabling to a premises inside a multi-unit building can be considered local access lines that are part of the local access network of a carrier, even if that carrier has no legal ownership of those cables.

The legislation also allows the Minister to specify a location to be taken (or not taken) as a premises for the purposes of the RBS (with the relevant conditions specified) should any uncertainties arise during implementation.

To ensure the charge amount remains fit for purpose over time, the legislation allows the Minister to adjust the charge having regard to the advice of the ACCC and subject to the charge cap, which is set at \$7.10 (indexed to CPI). The monthly charge amount per premises cannot be raised above the cap. This provides regulatory and investment certainty to industry and supports competition.

The Department is committed to continuing to work with telecommunications carriers, the Australian Competition and Consumer Commission and the Australian Communications and Media Authority to facilitate implementation of the RBS if Parliament passes the Telecommunications Reform Package.

