

Chapter 1

Introduction

1.1 On 23 June 2017, the Senate referred the provisions of the following bills to the Senate Environment and Communications Legislation Committee for inquiry and report:

- Telecommunications Legislation Amendment (Competition and Consumer) Bill 2017 ("CC Bill"); and
- Telecommunications (Regional Broadband Scheme) Charge Bill 2017 ("RBS Bill").¹

Conduct of the inquiry

1.2 In accordance with its usual practice, the committee advertised the inquiry on its website and wrote to relevant individuals and organisations inviting submissions. The date for receipt of submissions was 14 July 2017.

1.3 The committee received 15 submissions, which are listed at Appendix 1. The committee also held a public hearing for this inquiry in Canberra on 10 August 2017. A list of witnesses who appeared at the hearings is at Appendix 2.

1.4 The public submissions and transcript of evidence are available on the committee's website at www.aph.gov.au/senate_ec.

1.5 The committee thanks all of the individuals and organisations that contributed to the inquiry.

1.6 The committee was initially required to report by 8 August 2017. However, to facilitate the public hearing, the committee sought an extension of time to report. The Senate agreed to extend the reporting deadline to 6 September 2017.²

Scope and structure of the report

1.7 This report comprises three chapters:

- The remaining sections of this chapter provide background information relating to the development of the bills as well as an overview of the structure and provisions of the bills. Comments on the bills made by the Senate Standing Committee for the Scrutiny of Bills are summarised at the end of the chapter.

1 *Journals of the Senate*, 22 June 2017, p. 1542.

2 *Journals of the Senate*, 8 August 2017, p. 1607.

- Chapter 2 examines the principal issues raised by stakeholders relating to the overall intent and specific provisions of the bills.
- Chapter 3 discusses matters related to particular provisions that would delegate legislative powers to the executive. The committee's overall findings on the bills are provided at the end of that chapter.

Note on references

1.8 In this report, references to the committee *Hansard* transcript are to the proof transcript. Page numbers may vary between proof and official *Hansard* transcripts.

1.9 The written submissions provided by various stakeholders and the *Hansard* transcript differ in the abbreviations used when referring to NBN Co Limited, with 'nbn', 'nbn co', 'nbn Co' and 'NBN Co' all used. For consistency, 'NBN Co' is used whenever the company is referred to in this report.

Background

1.10 The bills follow the cost-benefit analysis and review of regulatory arrangements for the National Broadband Network (NBN) undertaken by the panel chaired by Dr Michael Vertigan AC (the Vertigan Panel). The Vertigan Panel produced the following three reports:

- *A statutory review under section 152EOA of the Competition and Consumer Act 2010* (June 2014);
- *Volume I: National Broadband Network market and regulatory report* (August 2014); and
- *Volume II: The costs and benefits of high-speed broadband* (August 2014).

1.11 The government's response to the Vertigan Panel's recommendations was outlined in a policy statement released in December 2014 entitled *Telecommunications Regulatory and Structural Reform*.

1.12 The bills seek to implement key measures of the government's response to the Vertigan Panel's recommendations. The bills would amend the broadband regulatory framework by:

- making amendments to network rules that apply to superfast carriage services provided to residential and small business customers other than the NBN;
- establishing a Regional Broadband Scheme (RBS) to provide for the funding of NBN Co satellite and fixed wireless services for rural and regional areas; and
- establishing statutory infrastructure provider (SIP) obligations.

Overview of the bills

1.13 The CC Bill proposes amendments to the *Telecommunications Act 1997* (Tel Act), the *Competition and Consumer Act 2010* (CCA) and the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (TCPSS Act).

1.14 The CC Bill comprises five schedules, as follows:

- Schedules 1 and 2 contain proposed amendments to the 'superfast network rules' provided for in Parts 7 and 8 of the Tel Act.
- Schedule 3 contains the amendments that would establish a regime of SIP obligations.
- Schedule 4, in conjunction with the RBS Bill, would establish the RBS.
- Schedule 5 contains an amendment that would alter arrangements for determining the 'designated day' for the purposes of Telstra's structural separation.³

1.15 It is proposed that the amendments in the bills would commence on the day after Royal Assent.

1.16 The following paragraphs provide a brief summary of the proposed amendments. Further details on how the proposed amendments are intended to operate can be found in the respective explanatory memorandums (EMs) for the bills.

Amendments to the superfast network rules

1.17 Parts 7 and 8 of the Tel Act, which were introduced in 2011, contain network rules that apply to superfast carriage services provided to residential and small business customers other than the NBN. The rules require operators of such networks to supply a Layer 2 bitstream service to access seekers (Part 7) and that the networks are structurally separated (Part 8). Among other exemptions, the rules do not apply to superfast networks that existed prior to 1 January 2011 or to subsequent extensions of less than 1 kilometre of such networks.

1.18 The overall intent and design of the rules seeks to ensure that the structural changes brought about to the industry through the creation of NBN Co and the structural separation of Telstra would not be undone by other new networks operating

3 Structural separation refers to the separation of a company's retail and network infrastructure businesses. Telstra's structural separation involves the migration of Telstra's fixed line voice and broadband services to the NBN. For more information, see Department of Communications and the Arts, 'Telstra's separation framework', www.communications.gov.au/what-we-do/internet/competition-broadband/telstras-separation-framework.

in the same way that had previously given rise to concerns about the state of competition in the market.⁴

1.19 Part 1 of schedule 1 to the CC Bill proposes that Part 7 of the Tel Act would be repealed. Following the repeal of Part 7, access to specific wholesale services on superfast broadband networks would only be mandated if the services are declared by the Australian Competition and Consumer Commission (ACCC).

1.20 Various amendments to Part 8 of the Tel Act and the CCA are also proposed. Specific proposals contained in the bill include:

- amending the exemption under subsection 156(4) for network extensions of less than 1 kilometre from a point on the infrastructure of a network as it stood immediately before 1 January 2011;
- changing the exemption under subsection 156(3) of the Tel Act for networks that, prior to 1 January 2011, were being rolled out in stages as part of a real estate development project, so that the exemption will only apply until 30 June 2018;⁵
- providing that the Part 8 rules no longer apply to local access lines that are part of a telecommunications network used to supply superfast carriage services to small business customers—this change is intended to create 'greater flexibility for network operators in the supply of superfast carriage services to small business customers';⁶
- providing a process for voluntary functional separation undertakings to be submitted and considered by the ACCC—this process would also for a telecommunications business other than NBN Co and Telstra to have both network/wholesale and retail operations;⁷
- providing the ACCC with the power to provide a class exemption from the Part 8 rules for small start-up networks with fewer than 2,000 retail residential customers on all fixed-line networks (this threshold could be extended, by regulation, to 12,000 retail residential services);⁸

4 Explanatory Memorandum (EM), CC Bill, p. 2; Carrier Licence Conditions (Networks supplying Superfast Carriage Services to Residential Customers) Declaration 2014, Explanatory Statement, pp. 1–2.

5 The EM for the CC Bill notes that real estate development projects will instead be covered by proposed new section 143E and that the Minister will be able to grant exemptions for specific new developments or class of developments under certain circumstances. See EM, CC Bill, p. 4.

6 EM, CC Bill, p. 5.

7 EM, CC Bill, p. 5; The Hon Paul Fletcher MP, Minister for Urban Infrastructure, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 9.

8 EM, CC Bill, p. 6.

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- changing the offence provisions in Part 8 from criminal offences to civil offences, while also introducing a formal warning and infringement notice regime;⁹ and
 - providing that key decisions by the ACCC under the amended Part 8, such as the decision not to accept an undertaking, will be subject to merits review by the Australian Competition Tribunal.¹⁰

1.21 It is intended that the existing rules would be grandfathered—that is, the new rules would apply to 'local access lines that come into existence on or after 1 July 2018, or that are altered or upgraded after that date and as a result become capable of being used to supply a superfast carriage service'. Other superfast fixed-line networks will continue to be subject to the current wholesale-only obligation in section 143 of the Tel Act.¹¹

1.22 Taken together, the repeal of Part 7 and the changes to Part 8 are intended to ensure that, with limited exemptions, 'in future superfast residential networks would either be subject to a class exemption granted by the ACCC, operating on a functionally separated basis approved by the ACCC, or operating on a wholesale-only basis'. This is intended to 'make the default structural separation requirement clearer and more effective as a baseline for the industry, while at the same time creating new commercial and competitive opportunities'.¹²

Statutory infrastructure provider regime

1.23 Schedule 3 to the bill would introduce a SIP regime that is intended to 'provide industry and consumers with certainty that all premises in Australia will have access to infrastructure that supports the delivery of superfast broadband services'.¹³

1.24 Currently, a ministerial statement of expectations provides a requirement for NBN Co to rollout the NBN. The CC Bill proposes that connection and supply obligations will instead be imposed by legislation, with this statutory regime to be administered by the Australian Communications and Media Authority (ACMA).

9 On this proposal, the EM notes: 'Although criminal penalties can be invoked for breaches of some competition laws, they are usually applied in relation to conduct that is especially egregious (e.g. cartel conduct). The Government therefore considers civil penalties more appropriate in the context of Part 8'. EM, CC Bill, pp. 6–7.

10 EM, CC Bill, p. 7.

11 EM, CC Bill, p. 3. Further information about the grandfathering arrangement is provided at pages 3–4 of the EM for the CC Bill.

12 EM, CC Bill, p. 3

13 EM, CC Bill, p. 21.

After the NBN rollout is complete, NBN Co will be the default SIP for all of Australia, although in particular circumstances other carriers could become a SIP.¹⁴

1.25 The SIP obligations would impose connection and supply obligations on SIPs (that is, NBN Co and alternative providers). Specifically, the SIP for a service area must, on reasonable request by a carriage service provider on behalf of an end-user at premises in the service area, connect the premises to a qualifying telecommunications network in order that the carriage service provider can provide qualifying carriage services to the end-user at the premises. The SIP obligations require services with a peak download speed of at least 25 megabits per second (Mbps) and a peak upload speed of at least 5 Mbps, and carriage services that can be used by end-users to make and receive voice calls. If it is not reasonable to provide fixed-line services, the SIP 'must provide a fixed wireless or satellite technology solution'.¹⁵

1.26 In its submission, NBN Co highlighted the importance, from its perspective, of the requirement for requests from service providers to be 'reasonable'. NBN Co explained:

The Bill reflects the Government's clear intention that premises in Australia have ready access to superfast broadband, however, it also acknowledges the practical reality, important to [NBN Co] as a SIP, that there may be limitations to the provision of access in some instances. The Bill therefore requires a SIP to connect premises to a qualifying network on reasonable request from a carriage service provider. This concept of reasonableness will ensure that [NBN Co] responds appropriately to [retail service provider] requests (on behalf of an end user) for a superfast broadband connection where the network is available, while acknowledging there may be instances where [NBN Co] is constrained in its ability to meet a particular request or where multiple requests are made unreasonably for connections to a premises.¹⁶

1.27 In addition, the CC Bill proposes that the Minister will have a reserve power to set standards and rules that SIPs must comply with and/or benchmarks that SIPs must meet or exceed.¹⁷

14 The EM notes that, for example, a carrier could become a SIP if it has a contract to provide infrastructure in a new development. EM, CC Bill, p. 8.

15 EM, CC Bill, p. 9.

16 NBN Co, *Submission 7*, p. 1.

17 The matters about which the Minister may set standards, rules or benchmarks are outlined in proposed section 360U and 360V of the Tel Act. The relevant EM acknowledges the matters that could be specified 'are broad', including timeframes for connecting premises and rectifying faults, as well as rules regarding how premises must be connected and how complaints must be addressed. CC Bill, schedule 3, item 7 (Tel Act, proposed sections 360U and 360V); EM, CC Bill, p. 10.

1.28 On how providers covered by the SIP obligations would be identified, the EM for the CC Bill states the following:

The [CC] Bill provides that, as the NBN rolls out, NBN Co will become the default SIP for each area which it declares to be 'ready for service'. These areas are termed 'interim NBN service areas' in the Bill. NBN Co will also be required to declare interim NBN service areas for all areas that, prior to the Bill coming into force, it has already declared to be ready for service. To ensure enhanced transparency about the service status of an NBN rollout area, the Bill would require NBN Co to notify the ACMA when it declares an interim NBN service area.

...Following completion of the rollout, NBN Co will be the default SIP for the 'general service area' which, as a default, will be all of Australia. However, 'nominated service areas' that are covered by other SIPs will be excluded from the general service area.¹⁸

1.29 The CC Bill also provides a complaints process that includes a requirement for a SIP to notify a service provider within five days if it refuses a request to connect premises to its network. In turn, the service provider is required to provide the notice to the end user. The relevant EM advises that this process seeks to address the concern that 'end-users frequently have little visibility, when a request for a service is rejected, of why the request has been rejected and whether the rejection was caused by the actions of a retail provider or a wholesale provider'.¹⁹

Targets for NBN Co

1.30 As part of the SIP regime, proposed section 360S of the Tel Act would provide targets for NBN Co that are expressed as intentions of the Parliament. These statements set out that the Parliament expects NBN Co to take all reasonable steps to ensure that the telecommunications networks operated by NBN Co are used to supply qualifying fixed-line carriage services to customers in Australia:

- are capable of being used to supply fixed-line carriage services with peak download speeds of at least 50 Mbps and peak upload speeds of at least 10 Mbps to at least 90 per cent of premises in areas that, according to NBN Co's website, are serviced by those networks; and
- that NBN Co's fixed-line networks are capable of being connected to at least 92 per cent of premises in Australia.²⁰

18 EM, CC Bill, pp. 8–9.

19 EM, CC Bill, p. 10.

20 CC Bill, schedule 3, item 7 (Tel Act, proposed section 360S); EM, CC Bill, p. 10.

Regional Broadband Scheme

1.31 The RBS Bill and schedule 4 to the CC Bill propose the introduction of an industry charge to fund non-commercial fixed wireless broadband and satellite broadband for regional areas as part of an RBS. At present, losses associated with these services are funded by an internal cross-subsidy within NBN Co.²¹ Under the proposed RBS, carriers would be required to pay a charge for each premises on their network with an active fixed-line broadband service that enables a download speed of 25 Mbps or more, with the charge calculated on a monthly basis. The funds raised by this charge would be quarantined in a special account, which will be used to pay eligible funding recipients and to cover the administration costs associated with the scheme.

1.32 The EM for the CC Bill outlines the rationale for introducing the charge and how the funding mechanism is intended to operate as follows:

The purpose of the charge is to sustainably fund the net costs of NBN Co's fixed wireless and satellite networks, which provide access to essential broadband services predominantly in regional Australia. The charge was foreshadowed by Government in its December 2014 response to the...Vertigan Review.

Rolling out superfast broadband infrastructure to regional Australia is very expensive. NBN Co's fixed wireless and satellite networks are expected to incur a net cost of \$9.8 billion (in net present value terms) over thirty years. NBN Co currently funds these net costs through an internal cross subsidy from its fixed line networks. The monies collected from the Scheme will be used to fund NBN Co's net costs for constructing and operating fixed wireless and satellite network infrastructure, replacing the company's opaque internal cross subsidy. The funding assistance will be in the form of contracts and/or grants made by the Secretary of the Department to NBN Co.²²

1.33 The Minister who introduced the CC Bill in the House of Representatives indicated that the RBS is intended to make the existing cross-subsidy within NBN Co transparent and to require 'all fixed-line broadband carriers to contribute equitably to the cost of providing regional broadband services'. The Minister added:

Once established the Regional Broadband Scheme will provide certainty for regional Australians that their essential broadband services will be maintained and upgraded into the future.²³

21 The Hon Paul Fletcher MP, Minister for Urban Infrastructure, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10.

22 EM, CC Bill, p. 11.

23 The Hon Paul Fletcher MP, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10.

1.34 Liability for the charge would commence on 1 July 2018, with the charge collected one year in arrears (that is, from 2019–20). In 2019–20, the financial impact (on an underlying cash basis) is estimated to include revenue of approximately \$30 million and expenditure of approximately \$29 million. In the years leading to 2019–20, approximately \$700,000 is expected to be spent on administrative costs related to establishing the RBS.²⁴

Entities covered by the charge

1.35 The EM for the CC Bill explains that carriers will have to pay the charge for premises to which a carriage service provider provides a broadband service during the whole or part of a month using a local access line that is technically capable of providing a download speed that is normally 25 Mbps or greater.²⁵ The RBS would not cover mobile broadband services, fixed wireless broadband services or satellite broadband services.²⁶

1.36 Three categories of exemptions from the charge are proposed. These are:

- an exemption for small networks—carriers with less than 2,000 potentially chargeable premises during the whole or a part of a month are exempt from paying the charge on those premises;
- an exemption for lines transitioning to the NBN or being decommissioned under certain agreements, such as the lines transitioning to NBN Co from Telstra under the revised Definitive Agreements; and
- a transition period to assist smaller carriers—the first 25,000 residential and small business premises covered by the charge will be exempt for the first five years of the RBS to 'lessen the burden on smaller carriers and help them transition to paying the charge'.²⁷

Charge amounts

1.37 The EM for the RBS Bill explains that the RBS is intended to require all carriers, including NBN, to contribute funding at an initial rate of approximately \$7.10 per month, per chargeable premises.²⁸ The charge is imposed on an annual basis

24 EM, RBS Bill, p. 4.

25 EM, CC Bill, pp. 12–13.

26 The EM notes that while such services are not intended to be captured by the RBS, it is intended that the RBS provisions 'capture a line that runs most of the way to the premises but is then connected to the premises over a short distance using wireless or mobile technology'. EM, CC Bill, p. 13.

27 EM, CC Bill, pp. 13–14.

28 EM, RBS Bill, p. 2.

(each financial year) and comprises a base component (initially \$7.09 per month) and an administrative cost amount (initially \$0.01266 per month).²⁹

1.38 Although specific base component and administrative cost amounts are set in the bill and indexed, the bill proposes that the Minister would have the power, by legislative instrument, to change the base component and/or the administrative cost amount following receipt of advice from the ACCC.³⁰ However, this discretion is limited by clause 17A of the RBS Bill, which applies an upper limit on the monthly charge that can be set by the Minister. This upper limit, referred to as the 'combined component cap', is set at \$10 for the first financial year and for future years would be indexed to the consumer price index. The legislative instrument would be subject to disallowance.³¹

Pass through to wholesale customers

1.39 When the bills were introduced in the House of Representatives, the Minister explained that customers on NBN Co's networks 'will not experience price rises as the charge is already embedded in NBN Co's pricing'. The Minister observed that, once the rollout of the NBN is complete, it is expected that NBN Co will have 'around 95 per cent of the fixed-line market, which means it will continue funding the bulk of the cost for providing broadband to regional Australia'. The Minister added that, for non-NBN entities, 'it will be up to these networks to decide whether some or all of the charge is passed on'.³²

29 The base cost would be indexed annually to the consumer price index. The administrative cost will range between \$0 and \$0.01266 for the first five years, and then be indexed annually based on the charge applied in the fifth year. The RBS Bill provides that, in the fifth year, the administrative cost would be either \$0 or another amount determined by the Minister. According to the proposed statutory formula for the administrative cost for year 6 and onwards, if another amount has not been set the cost would remain at \$0 for future years. See RBS Bill, clauses 16(5)–(7).

30 RBS Bill, clauses 12(4)–(6), 13, 16(8)–(10) and 17.

31 It is proposed that the period for disallowance would differ from the ordinary process set out in the *Legislation Act 2003* to 'maximise opportunity' for parliamentary scrutiny of any determinations made (EM, RBS Bill, p. 71). This proposed modification to the usual disallowance process is discussed in Chapter 3.

32 The Hon Paul Fletcher MP, Second Reading Speech, CC Bill, *Proof House of Representatives Hansard*, 22 June 2017, p. 10. In its May 2017 final determination on prices and other terms and conditions for wholesale high speed internet services supplied by non-NBN fixed line networks, the ACCC decided that non-NBN networks would be permitted to pass on the proposed RBS charge to their wholesale customers. See ACCC, *Superfast Broadband Access Service and Local Bitstream Access Service Final Access Determination joint inquiry: Final decision report*, May 2017, p. 24.

Payments to eligible funding recipients

1.40 To fund the fixed wireless and satellite networks supported by the RBS, the CC Bill would provide that the Secretary of the Department of Communications and the Arts, on behalf of the Commonwealth, may enter into a contract with, or provide a grant to, certain operators of fixed wireless and satellite networks for the purposes of:

- the connection of premises to fixed wireless or satellite networks;
- the supply of eligible services to carriage service providers to enable them to provide fixed wireless and satellite broadband services; or
- fixed wireless or satellite facilities.³³

1.41 Networks would be eligible to receive funding if their fixed wireless and satellite networks are capable of peak download speeds of at least 25 Mbps. The relevant EM notes:

Whilst it is envisaged that NBN Co will be the only eligible funding recipient at the Scheme's commencement, there is flexibility for the Minister to declare other eligible funding recipients if required.³⁴

1.42 The EM goes on to provide further details about the funding arrangements, including a proposed mechanism to offset a funding recipients charge liabilities against their funding entitlement.³⁵

Reporting requirements and review

1.43 The CC Bill contains proposed reporting obligations for carriers to assist with the operation of the RBS:

- The first reporting obligation is a once-off report to the ACCC to 'give the ACCC a snapshot of the high speed, fixed line broadband market at it stands during November 2017'. This report is intended to assist the ACCC to provide advice to the Minister about the base component of the RBS charge.
- The second reporting obligation is an annual report to the ACMA on information necessary to enable the carrier's charge liability to be assessed and the charge collected.³⁶

1.44 The CC Bill also establishes information gathering powers for the ACCC and ACMA for certain information relevant to the RBS.³⁷

33 EM, CC Bill, p. 17.

34 EM, CC Bill, p. 17.

35 EM, CC Bill, pp. 17–18.

36 EM, CC Bill, p. 14.

1.45 The RBS would be subject to a statutory review. Specifically, the CC Bill includes a provision that would require a review of the amendments enacted by schedule 4 of the CC Bill to be conducted during the first four years of the RBS or as soon as practicable afterwards. This review must involve public consultation.³⁸

Establishing the 'designated day' for Telstra's structural separation

1.46 Schedule 5 to the CC Bill would alter arrangements for the 'designated day' for the purposes of Telstra's structural separation.³⁹ At present, the designated day is either 1 July 2018 or another date specified by the Minister. The bill would change the date specified in the Tel Act to 1 January 2020 while retaining the ministerial discretion to set a different date. The relevant EM states that this change 'better reflects the date by which the NBN rollout is now expected to be completed'.⁴⁰

Reports of other committees

1.47 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee). The Scrutiny Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety.

1.48 The Scrutiny Committee commented on the bills in its *Scrutiny Digest No. 8 of 2017*. In relation to the CC Bill, that committee is seeking advice from the Minister in relation to the proposed modified disallowance procedures, provisions which exempt certain instruments from disallowance and a strict liability offence. In relation to the RBS Bill, that committee commented on the proposed delegation to the executive of legislative power in relation to taxation and the proposed modified disallowance procedures.⁴¹ These matters are discussed in Chapter 3.

37 The ACCC and ACMA would also be authorised to disclose information to certain government entities and the Regional Telecommunications Independent Review Committee. EM, CC Bill, p. 18.

38 CC Bill, schedule 4, item 13 (*Telecommunications (Consumer Protection and Service Standards) Act 1999*, proposed section 102ZFA); EM, CC Bill, p. 19.

39 The designated day is the date from which Telstra will be subject to structural separation obligations set out in its structural separation undertaking. EM, CC Bill, p. 19.

40 EM, CC Bill, p. 19.

41 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest*, No. 8 of 2017, August 2017, pp. 33–40.