

## Chapter 2

### Stakeholder views and key issues

2.1 This chapter examines the proposed amendments contained in the bills in detail. The chapter starts by presenting a summary of stakeholders' overall positions on the bills as well as additional information received during this inquiry that is relevant for considering the intent and structure of the bills.

2.2 The majority of the chapter is devoted to examining the evidence received from stakeholders that commented in detail on specific proposed measures. The three categories of measures contained in the bills are addressed in separate sections. The committee's views on the issues raised in evidence about particular proposed measures are outlined at the end of these sections while the committee's overall conclusions on the bill can be found at the end of the chapter.

2.3 In conducting this inquiry, the committee has focused on evidence received during this inquiry that specifically addresses the provisions of the bills. Nevertheless, the committee is cognisant that this inquiry follows a recent Productivity Commission (PC) inquiry into the telecommunications universal service obligation (TUSO). Several stakeholders referred to the PC's report and the committee has noted comments in the PC's report that are relevant to the measures contained in the bills. Notwithstanding this, the committee emphasises that the government is currently considering the PC's report as part of a separate policy development process which does not have any direct implications for parliamentary consideration of the bills.

#### Overall views and other comments on the bill

2.4 Submissions from consumer groups and regional industry or community organisations were supportive of the bills, particularly in relation to the Regional Broadband Scheme (RBS) and statutory infrastructure provider (SIP) obligations. For example, strong support for the bill was given by the Regional, Rural and Remote Communications Coalition (RRRCC), which represents 20 consumer, regional and agricultural industry organisations.<sup>1</sup> The RRRCC submitted that it welcomes the package of bills and 'would like to see it enacted as soon as possible'.<sup>2</sup>

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1 These organisations are: AgForce Queensland, Australian Communications Consumer Action Network (ACCAN), Australian Forest Products Association, Better Internet for Rural, Regional & Remote Australia, Broadband for the Bush Alliance, Cotton Australia, Country Women's Association of Australia, Country Women's Association of New South Wales, Country Women's Association of South Australia, GrainGrowers, Isolated Children's Parents' Association, National Farmers' Federation (NFF), National Rural Health Alliance, Northern Territory Cattleman's Association, NSW Farmers, The Pastoralists' Association of West Darling, Queensland Farmers' Federation, Ricegrowers' Association of Australia, Victorian Farmers Federation and WAFarmers.

2 Regional, Rural and Remote Communications Coalition, *Submission 1*, p. 1.

2.5 Telstra supports the overall intent of the bills; however, it has various concerns with how aspects of the bills have been drafted, such as the scope of particular provisions.

2.6 Businesses affected by the RBS focused on that aspect of the bill. Several of these businesses do not support the RBS in its current form, arguing that the RBS should not proceed while the government is considering the future of the TUSO and that the charge should be broadened to cover mobile and fixed wireless broadband. Optus, which supports the policy intention of the RBS but shares some of Telstra's concerns about the scope of the RBS as drafted, countered some of these arguments.

2.7 The Department of Communications and the Arts (the department) provided a written submission and made officers available to answer questions about the bills at the committee's public hearing. One of the key points made in the department's evidence is that the three categories of measures proposed in the bills (the amendments to the superfast network rules, the SIP regime and the RBS) 'work together as an integrated package'. The department provided the following evidence providing background regarding why the measures are being introduced and how they work in concert:

Australia has an open and competitive telecommunications marketplace but this is being held back by excessive regulation. The proposed changes to the carrier separation rules address this. However, the growth of competition in the market place will put pressure on the ability of NBN Co Limited...to deliver fixed wireless and satellite services in regional areas. The proposed Regional Broadband Scheme responds to this. [NBN Co] is intended to provide access across Australia to better broadband and 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.<sup>3</sup>

### **Proposed changes to the superfast network rules**

2.8 Proposed amendments contained in schedules 1 and 2 to the CC Bill that attracted significant comment in submissions include:

- the removal of Part 8 regulatory obligations for networks servicing small business customers; and
- changes to the exemption under subsection 156(4) of the *Telecommunications Act 1997* (Tel Act) 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.

2.9 The following paragraphs examine the evidence received on these proposed amendments.

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3 Department of Communications and the Arts, *Submission 10*, p. 1.

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*Application of superfast network rules to residential customers only*

2.10 The department explained that the basis for removing the application of wholesale-only rules to networks servicing small business customers is that 'there is usually strong infrastructure competition to service small business customers'. This also reflects the general intent that changes to the carrier separation rules 'will create competitive and commercial opportunities'.<sup>4</sup>

2.11 Vocus Group supports the proposed changes. It argued that Part 8 should not capture networks that have been constructed for the purpose of servicing business customers, and which only service business customers. Vocus explained that such networks serve small business customers and there are practical difficulties involved in distinguishing between businesses that are small businesses and businesses that are not small businesses.<sup>5</sup>

2.12 Superloop, which owns and operates metropolitan fibre networks in Australia and elsewhere in the Asia Pacific region, also supports this change. Superloop provided the following evidence highlighting issues with the current legislation and the need for change:

The definition of small business, which refers to the definition in the Fair Work Act being an employer of fewer than 15 people, was flawed. There are many successful, sophisticated business entities within Australia that employ less than 15 people—Superloop itself had fewer than 15 employees at the time it listed on the Australian Stock Exchange with a market capitalization of approximately \$90 million. While the restriction on supply applies to small businesses, it is a disincentive to investment in network expansion and creates a hurdle in contracting for the supply of superfast services for businesses outside major metro areas where such businesses employ less than 15 people. There is also a risk to carriers in contracting to a business that is only just above the threshold of 15 employees, if the departure of employees bringing that customer into the definition of a small business.<sup>6</sup>

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4 Department of Communications and the Arts, *Submission 10*, p. 2.

5 Vocus Group, *Submission 4*, p. 3.

6 Although it supports the proposed change, Superloop considers there would be merit in defining the term 'residential customers' to exclude certain types of accommodation where residents obtain services from the accommodation provider (such as hospitals, hostels, hotels and motels, aged care facilities, university colleges and halls of residence, and purpose built student housing accommodation facilities). Superloop, *Submission 15*, p. 2.

2.13 Optus submitted that it 'generally supports' the proposed repeal of Part 7 and the amendments to Part 8. However, Optus advised that it does not support the proposed removal of Part 8 obligations in relation to networks solely servicing small business customers. Optus argued that this proposed amendment could risk the creation of 'islands of customers that effectively have no choice of supplier'. Optus explained:

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.<sup>7</sup>

2.14 Telstra advised that it supports the proposed exemption of business customers from the superfast network rules; however, it expressed concern that the exemption is drafted to exempt networks marketed exclusively as a business network (proposed section 143H). Telstra argued that this drafting approach 'does not reflect the commercial reality that almost every network will have mixed uses'.<sup>8</sup>

2.15 To address this issue, Telstra called for proposed section 143H to be redrafted to instead focus on 'how the network is used, or proposed to be used, as opposed to how the network is marketed'. Furthermore, Telstra argued that the word 'exclusively' in the phrase 'the network is marketed by the carrier exclusively as a business network' in proposed paragraph 143H(1)(b) should be either omitted or replaced with a lower threshold, such as 'wholly or principally'.<sup>9</sup>

2.16 Telstra also commented on proposed section 156A, which is a deeming provision intended to capture circumstances where, on or after 1 July 2018, the use of a line changes from wholly or principally supplying services to non-residential customers to residential customers. Telstra expressed concern about the implications that may arise because of changes in use. It argued:

Network operators have limited direct knowledge of rebuilding or alteration works being undertaken by owners of buildings connected to their networks: e.g. a carrier will not necessarily know, or have reason to know, that the owner of a factory has converted the building into residential accommodation. The nature of the service plans (e.g. residential or business plan) that are supplied at such premises may not change as a result of the

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7 Optus, *Submission 13*, p. 8.

8 Telstra provided the following examples to illustrate its concerns: '[W]here a network supplies services to business customers in a business park which is located within a residential suburb, even though the use of lines to supply services to a small number of residential customers is minor, it is hard to see that the network is not also being marketed to residential customers (given products are sold using the network). Another example where we envisage a mixed use network would be caught by the [superfast network obligations] is in a predominantly commercial area where there are shops downstairs along the street but where people live upstairs'. Telstra, *Submission 9*, pp. 22–23.

9 Telstra, *Submission 9*, p. 23. Telstra noted that 'wholly or principally' is currently used in section 141 of the Tel Act as part of the definition of a superfast broadband network.

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change in use. Telstra does not monitor what customers do in the millions of premises connected to our network—nor should we.<sup>10</sup>

*Evidence from the department*

2.17 In response to written questions on notice, the department addressed Telstra's concerns about the application of proposed section 156A of the Tel Act if, on or after 1 July 2018, the use of a line changes from wholly or principally supplying services to non-residential customers to wholly or principally supplying services to residential customers.

2.18 The department explained that the intent of proposed section 156A is to preserve the underlying principle that 'networks servicing residential customers should be wholesale-only...on the basis they can constitute access bottlenecks that inhibit retail competition' in situations where residential customers reside in converted business premises. The department's evidence confirmed advice provided in the explanatory memorandum (EM) for the CC Bill that carriers' obligations would not be affected by incidental changes in use on a network that occur without the network operator's knowledge. The department advised:

Such change in use is accommodated by paragraph 142C(1)(c), which casts the wholesale-only obligation on local access lines that are used, or proposed to be used, to supply a superfast carriage service wholly or principally to residential customers, or prospective residential customers. Where a carrier operates lines targeting business customers, for example, and a business customer on any line becomes a residential customer, the carrier would not have to comply with subsection 142C(2) if the line was still principally used to supply superfast carriage services to business customers...[W]here a line services a single customer and that customer becomes a residential customer, the carrier would be exempt from subsection 142C(2) if the total number of residential customers serviced by the network is minor.<sup>11</sup>

2.19 The department considers that proposed section 156A relates to 'edge cases' and is 'not expected to be heavily used'. Furthermore, the department commented:

It is...worth noting that as part of its structural separation, Telstra is generally expected to exit the market for supplying infrastructure for residential broadband. It is unclear why, then, Telstra would wish to service residential customers in a building that has changed use. If Telstra were to service such customers, it is not clear why it should not do so on a separated basis like any other carrier.<sup>12</sup>

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10 Telstra, *Submission 9*, p. 23.

11 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 3. See also Explanatory Memorandum (EM), CC Bill, pp. 124–25.

12 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 3.

2.20 The department made a similar observation about Telstra's structural separation in response to Telstra's concerns about the implications of the mixed use of networks for proposed section 143H (the exemption for networks marketed as business networks).<sup>13</sup>

2.21 The department also responded to Telstra's position that the term 'exclusively' in proposed paragraph 143H(1)(b) should be replaced with a lower threshold, such as 'wholly or principally'. The department explained that an exemption has been proposed for networks exclusively marketed as a business network to allow for a minor number of residential customers, as it is acknowledged that 'there may be a small number of cases where the customer has changed but the carrier operating the network is not aware of the fact'. This proposed exemption, however:

...is deliberately worded to be made available for networks that are marketed exclusively as business networks on the basis that the policy position in the Bill is that local access lines used to supply superfast carriage services to residential customers should generally operate under structural or functional separation.<sup>14</sup>

2.22 When considering Telstra's evidence on this matter, the department emphasised that the CC Bill 'seeks to balance the importance of ensuring residential customers living in areas serviced only by business networks are not prevented from accessing broadband services with the potential gaming by carriers to use networks to service both residential and business customers'. In the department's view, amending the phrase 'the network is marketed by the carrier exclusively as a business network', to replace 'exclusively' with 'wholly or principally', as suggested by Telstra, would 'not be consistent with the policy objectives of the legislation'. The department warned that such a change would enable carriers to 'roll out substantial integrated local access networks where only a bare majority of customers (50% plus one, for example) need to be business customers'.<sup>15</sup>

2.23 Finally, the department emphasised that, as with proposed section 156A, the provisions exempting networks marketed as business networks 'are not expected to be heavily used'.<sup>16</sup>

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13 In the department's view, Telstra's concerns: 'fail to recognise the underlying policy that networks servicing residential customers should be wholesale-only (i.e. structurally separated) and that any carriers wishing to market (and operate) a network as both a business and residential network should undertake structural or functional separation for local access lines used to service residential customers'. Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

14 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

15 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), pp. 4–5.

16 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 4.

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### ***Proposed changes to the '1 kilometre exemption'***

2.24 The changes to the 1 kilometre exemption rule would mean that, for superfast networks that existed prior to 1 January 2011, network extensions of less than 1 kilometre would, from 1 July 2018, only be available for networks that are being transferred to NBN Co under contracts (the Definitive Agreements). Any other extensions would need to be used to supply services on a structurally separated (wholesale-only) basis as the default or be covered by a functional separation undertaking approved by the Australian Competition and Consumer Commission (ACCC).

2.25 Certain exemptions are provided, including for lines installed to connect premises that are in 'close proximity' to networks. The EM for the CC Bill provides the following guidance on the term 'close proximity':

It is envisaged the close proximity would facilitate the connection of existing network infrastructure in the street to premises, but not the extension of that network infrastructure to allow connection in a new location where the network is not already 'in close proximity'.

Close proximity has a meaning affected by proposed new section 162, which empowers the Minister to determine, by legislative instrument, when premises are, or are not, in close proximity to a local access line...<sup>17</sup>

2.26 In response to written questions on notice, the department provided the following additional explanation about the effects of replacing the '1 kilometre exemption' with the close proximity rule as proposed by the CC Bill:

The close proximity rule differs from the 1km exemption in that it provides for connection to the existing network, not extension of the network *per se*. For example, if the network passed a house it could connect the premises but if the network had to be extended to service a new apartment block nearby, that would be an extension. Judgment may be required in some instances to differentiate between a connection and an extension. This would be a matter for the ACCC as the regulator in the first instance and the court if necessary.

Proposed section 143F in the CC Bill extends the close proximity rule to include networks built between 1 January 2011 and 1 July 2018. As with the existing close proximity rule, the rule simply allows a carrier to operate networks, including connecting premises, under the separation laws that applied at the time the network was built. This is consistent with the decision to grandfather rules applying to networks when they were established. It does not provide an exemption for extending a network.<sup>18</sup>

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17 EM, CC Bill, p. 94.

18 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 2.

2.27 Telstra and TPG Telecom oppose the proposed changes to the 1 kilometre exemption for network extensions after 1 July 2018 and the related exemption proposed for lines that are in 'close proximity' to networks. TPG Telecom provided the following summary of how it expects the proposed change to affect its operations:

The effect of this is that if we extend our pre-existing network to connect premises that are not in close proximity to infrastructure of our network as it stood before 1 July 2018, we are prohibited from providing retail services on the network unless we functionally separate our company. The term 'close proximity' is not defined, except to say that it may be determined by the Minister. Until the Minister makes a determination, it is uncertain how far our network can be extended to connect new premises, however, given that the...CC Bill proposes repealing the 1km exemption, it appears likely that the Minister will determine 'close proximity' will be less than 1km.<sup>19</sup>

2.28 Telstra submitted that, in its view, the existing 1 kilometre rule 'strikes the right balance in permitting modest extensions to be made to existing superfast networks to meet consumer demand, while being unlikely to pose a material threat to NBN Co's business case'.<sup>20</sup> TPG Telecom argued that the proposed change 'will curtail fixed-line network expansion except where carriers are willing to be wholesale only or incur the costs of functional separation', thus creating inefficiencies and distorting competition.<sup>21</sup> Telstra also expressed concern that the interpretation of the 'close proximity' test based on the guidance provided in the EM (see paragraph 2.25 above) 'may result in divergent outcomes in similar situations which consumers will find difficult to understand and accept'.<sup>22</sup>

2.29 Telstra argued that if the 1 kilometre rule 'is not to be retained in full, it should at least apply to any other networks...which are, like the Telstra and Optus [hybrid fibre co-axial (HFC)] networks, subject to commitments by the network owner to decommission them or transfer them to NBN Co'. Telstra argued that retaining the rule for these networks, such as its fibre networks in greenfield estates, 'would enable modest extensions to be made to these networks to meet consumer demand for superfast services pending the deployment of the NBN'.<sup>23</sup>

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19 TPG Telecom, *Submission 2*, p. 7.

20 Telstra, *Submission 9*, p. 18.

21 TPG Telecom, *Submission 2*, p. 8.

22 The following example was provided to illustrate Telstra's concerns: '[W]hile the exemption appears to allow a new premises that is the result of a subdivision on a block in a street that is already connected to the network to be provided, it would appear not to allow a premises to be connected where land adjacent to that street is rezoned and the infrastructure has to be extended to that development in order to supply services to a premises'. Telstra, *Submission 9*, pp. 18–19.

23 Telstra, *Submission 9*, p. 21.

2.30 Despite these alternative drafting suggestions, Telstra concluded that:

The existing '1km rule' has a degree of arbitrariness about it, but at least it was fairly straightforward to apply and the permitted maximum distance was long enough to allow a consistent and coherent connection approach in the same general area.<sup>24</sup>

*Evidence from the department*

2.31 The department noted that removal of the 1 kilometre exemption was recommended by the Vertigan Panel due to concerns that the exemption:

...advantaged carriers with pre-2011 network over those who build networks after 2011, especially those with larger network footprints, and enabled carriers with pre-existing networks to roll out large extensions which were not subject to wholesale-only requirements, designed to protect residential consumers.

2.32 The department added that 'experience has shown that such networks can form local access bottlenecks that restrict consumer choice'.<sup>25</sup>

*Committee view on schedules 1 and 2 to the CC Bill*

2.33 The committee supports the overall intent of the proposed amendments to the Tel Act and the CCA contained in schedules 1 to 2 of the CC Bill. The committee has considered the evidence received from industry stakeholders on specific drafting issues; however, after taking into account the evidence received from the department regarding these matters and the overall intent of the CC Bill, the committee has not been convinced of the need for amendments.

**Statutory infrastructure provider regime**

2.34 As explained in Chapter 1, schedule 3 to the CC Bill would establish SIP obligations to be administered by the Australian Communications and Media Authority (ACMA).

2.35 Before examining the evidence received on the proposed SIP regime during this inquiry, it is instructive to note that the proposed SIP obligations have also been examined by a public inquiry conducted by the PC. In the final report of its recent inquiry into the TUSO, the PC recommended that the role of NBN Co and other designated providers as SIPs should be clearly defined in legislation 'as a matter of priority'.<sup>26</sup> In doing so, the PC commented that the proposed SIP regime 'would assist

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24 Telstra, *Submission 9*, p. 21.

25 Department of Communications and the Arts, Answers to questions on notice (received 22 August 2017), p. 2.

26 Productivity Commission, *Telecommunications Universal Service Obligation*, Report no. 83, April 2017, p. 265.

in providing greater confidence to the community about [NBN Co's] role with respect to the provision of wholesale broadband services'.<sup>27</sup>

### ***Overall stakeholder views on the proposed SIP regime***

2.36 The Australian Communications Consumer Action Network (ACCAN) 'strongly supports' the proposed SIP regime. It provided the following summary of the problems the SIP regime is expected to address and the specific benefits associated with the introduction the SIP regime in the form proposed by the bill:

ACCAN does not believe that the current framework governing the delivery of broadband services is in the interest of consumers. Too often consumers have no transparency or assurance over their service, get passed between retailer and wholesaler and could potentially be left without access to any network.

Broadband services are essential services that should be underpinned by standards and conditions. ACCAN believes the [CC Bill] is in the interest of consumers as it puts in place the architecture that could be used to establish a framework that:

- Ensures access to a superfast network to all premises,
- Provides transparency and accountability over network providers,
- Ensures that networks need to exceed minimum performance levels and timeframes for connection and fault repairs, and
- Ensures that networks act in a manner which supports consumers' complaint and dispute resolution.<sup>28</sup>

2.37 ACCAN urged that the SIP regime be enacted 'as quickly as possible so the powers within the legislation can be used to protect consumers and their services'.<sup>29</sup>

2.38 Rural industry groups also support the proposed SIP regime. Cotton Australia, for example, submitted that 'regional, rural and remote consumers and businesses need legislative rights to access broadband data and voice services'. It argued that ensuring access to data networks for all premises in statute via the proposed SIP regime is 'a critical stipulation'.<sup>30</sup>

2.39 Optus and Vodafone Hutchison Australia (VHA) support the SIP regime as drafted in the bill. For example, Optus argued that the proposed SIP regime is 'appropriate given the role and policy objectives of the NBN and it will remove the

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27 Productivity Commission, *Telecommunications Universal Service Obligation*, p. 11.

28 ACCAN, *Submission 8*, p. 3.

29 ACCAN, *Submission 8*, p. 3.

30 Cotton Australia, *Submission 5*, p. 1.

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uncertainty inherent from the fact that current obligations are set out in a Statement of Expectations that can be changed from time to time'.<sup>31</sup>

2.40 Telstra supports the overall proposal for a SIP regime; however, its submission outlines some drafting concerns with aspects of the proposed regime as contained in the CC Bill.

### ***Adequacy of the speeds to be established in legislation***

2.41 Some criticism was received about the adequacy of the 25/5 Mbps speeds.<sup>32</sup> The department explained that the 25/5 Mbps obligation are the speeds set in NBN Co's 2016 Statement of Expectations and 'reflect anticipated consumer need for speed in the foreseeable future'. The department provided the following evidence in support of this conclusion:

In 2014, as part of the Vertigan cost-benefit analysis of the NBN, Communications Chambers was contracted to construct a bottom-up model of the 'technical' bandwidth required for the applications utilised by various types of household, and used this to estimate future demand. Its report estimated that by 2023 the median Australian household will have 'technical' demand (that is, generated by actual application usage) for download bandwidth of 15 Mbps. Therefore, a 25 Mbps download service is considered to be a service that will actually support most applications that people will need for the foreseeable future. This conclusion is consistent with current usage on the NBN with 29 per cent of services being 12/1 Mbps and 55 percent being 25/5 Mbps.<sup>33</sup>

2.42 The department added that SIPs can 'supply faster services in response to consumer demand'.<sup>34</sup> In addition, and consistent with NBN Co's 2016 Statement of Expectations, the department noted that the proposed SIP regime includes a further obligation 'to ensure that 90 per cent of premises in its fixed-line footprint can receive peak download speeds of at least 50 Mbps and peak upload speeds of at least 10 Mbps'.<sup>35</sup> This is one of two targets for NBN Co expressed as the intention of the Parliament (these targets are outlined in Chapter 1).

### ***Approach potentially taken by NBN Co up to the designated day***

2.43 One of the concerns expressed by Telstra is that, before the 'designated day' for Telstra's structural separation (which schedule 5 to the CC Bill would change to 1 January 2020 or another day set by the Minister), NBN Co would be able to determine when its SIP obligations apply. Telstra explained that:

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31 Optus, *Submission 13*, p. 9.

32 See Professor Mark Gregory, *Submission 14*, p. 5.

33 Department of Communications and the Arts, *Submission 10*, p. 3.

34 Department of Communications and the Arts, *Submission 10*, p. 3.

35 Department of Communications and the Arts, *Submission 10*, p. 3.

Proposed sub-section 360D(2)(b) provides that NBN Co must declare that an area is a provisional interim NBN service area if it begins to supply listed carriage services in that area. This provision does not expressly require NBN Co to declare all of the premises in a geographic area to comprise the provisional interim NBN service area. Currently, NBN Co does not define its NBN rollout regions as complete geographic areas but instead as lists of individual premises. Whilst it is clear that NBN Co will be the SIP for all premises within its footprint after the designated day, in the meantime there could be significant gaps in NBN rollout regions.<sup>36</sup>

2.44 Telstra explained that it is concerned about a possible 'Swiss cheese' effect, where most areas within a region are serviced by NBN Co but pockets are not. Telstra submitted that a possible implication of this is that Telstra would be required to meet service requests up until the designated day, after which NBN Co would be required to connect the premises and supply wholesale services.<sup>37</sup>

2.45 The department provided the following evidence in response to these concerns:

Our view of the legislation is that as NBN Co rolls out its network and it establishes an area, it would be servicing the premises in the area. If there was an issue about the ability to connect immediately, that is really a matter of the time frame for connection as opposed to their obligation to service the premises.<sup>38</sup>

### *Scope of ministerial powers*

2.46 Telstra expressed concern that proposed section 360L would provide the Minister with a broad power to declare that a specified carrier is the SIP for a designated service area. Telstra submitted:

This power is so broadly framed that it could be exercised in future to unreasonably shift responsibility for infrastructure deployment from NBN Co to another carrier: in effect, to substantially reverse the policy that NBN Co should be the primary provider of national broadband infrastructure.<sup>39</sup>

2.47 To address this concern, Telstra suggested that proposed section 360L be amended to provide that, when considering decisions under this section, the Minister must 'consider the extent to which the proposed exercise of power is consistent with NBN Co being the primary SIP nationwide'.<sup>40</sup>

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36 Telstra, *Submission 9*, p. 5.

37 Telstra, *Submission 9*, p. 6.

38 Mr Phillip Mason, Assistant Secretary, Telecommunications Competition, Department of Communication and the Arts, *Committee Hansard*, 10 August 2017, p. 20.

39 Telstra, *Submission 9*, p. 6.

40 Telstra, *Submission 9*, p. 6.

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### *Exemption for satellite services*

2.48 It is proposed that the SIP obligation relating to enabling carriage service providers to supply carriage services that can be used by end-users to make and receive voice calls would not apply if the carriage service is supplied using a satellite.<sup>41</sup> The relevant EM explains that this is to account for areas where a SIP only supplies broadband services using satellite technology and where 'voice services may be better supported by other network technologies operated by carriers who are not SIPs'.<sup>42</sup> The department's submission provides the following further details about the decision to exclude satellite from the obligation:

The requirement does not extend to broadband services provided using satellite because of the potential technical constraints of such services, particularly latency where voice calls are made involving two satellite hops. The Government's response to the Productivity Commission's Inquiry into the Universal Service Obligation will also consider the provision of voice services in NBN's satellite footprint in a technologically neutral manner.<sup>43</sup>

2.49 Organisations representing rural industries emphasised that delivery of voice services by satellite is undesirable because of concerns about reliability.<sup>44</sup> However, other stakeholders questioned whether the current limitations of satellite could be accounted for using a more flexible drafting approach.

2.50 The Telecommunications Industry Ombudsman (TIO) suggested that the proposed SIP regime should be 'future-proofed and technologically neutral'. In relation to this, the TIO questioned the exclusion of satellite services from the SIP supply obligation. The TIO argued that:

The introduction of a SIP supply obligation that introduces a lower standard for satellite than current capability may act as a disincentive for industry innovation. This would be contrary to the stated objectives of the *Telecommunications Act 1997* – to promote the long-term interests of consumers and supply diverse and innovative telecommunications services.<sup>45</sup>

2.51 Telstra also argued that the SIP supply obligation should include satellite services. Telstra acknowledged that reliance on satellite services should be reduced as a result of NBN fixed wireless services and mobile services supplied through the Mobile Black Spot Program. However, it considers it 'is likely that there will still be some end users in remote areas who can only be served by satellite and therefore will

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41 CC Bill, schedule 3, part 1, item 7 (proposed ss. 360Q(1B) and 360Q(2A) of the Tel Act).

42 EM, CC Bill, p. 133.

43 Department of Communications and the Arts, *Submission 10*, p. 3.

44 NFF, *Submission 1*, p. 2. This comment was supported by Cotton Australia (see *Submission 5*, p. 2).

45 Telecommunications Industry Ombudsman, *Submission 12*, p. 2.

need to utilise satellite provided telephony unless they are provided with voice services via an alternative network'.<sup>46</sup> Telstra added that 'the current NBN satellite may not be suitable for voice, but that does not preclude the possibility that NBN satellite technology more appropriate to voice may be deployed in the future'.<sup>47</sup>

2.52 Rather than a complete statutory exemption for satellite services, Telstra argued that the CC Bill should be amended to provide the Minister with the power to exempt satellite services from the obligation to provide voice-capable services. Telstra reasoned that this proposal:

...would provide a mechanism to exempt satellite services on an interim basis until and unless a viable technical solution is developed by NBN Co that is satisfactory to customers. In this way, the statutory regime is set up from day one in a consistent manner, with short-term relief from this technical issue being provided through a ministerial exemption that can then be easily wound back and eventually removed.<sup>48</sup>

### *Committee view on the proposed SIP regime*

2.53 The committee notes that the idea for implementing a SIP regime has received broad support from consumer and industry stakeholders. The PC has also expressed support for the introduction of SIP obligations: of particular note, the PC recommended that the role of NBN Co and other designated providers as SIPs should be clearly defined in legislation 'as a matter of priority'.

2.54 On the design of the SIP regime, the committee supports the approach taken in the CC Bill; that is, the overall framework for the SIP regime is set out in legislation while the Minister or, if these powers are delegated, the ACMA, may make legislative instruments to determine relevant standards, benchmarks and rules. The committee emphasises that the approach of legislating a SIP regime with details supported by legislative instruments is preferable to the possible alternative of the Minister introducing a SIP regime as part of carrier licence conditions.<sup>49</sup>

2.55 Regarding the proposed statutory carve out for satellite services from the voice telephony obligation, the committee accepts the reasoning as to why such an exemption is necessary at this time. The committee recognises that, from a legislative drafting perspective, there is merit in ensuring the SIP obligations are technology neutral. However, the committee has also noted the concerns expressed by the National Farmers' Federation (NFF) and shared by others about the provision of voice services by satellite. Although Telstra's suggestion to replace this statutory carve out with a discretionary power delegated to the Minister has some appeal, it is the

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46 Telstra, *Submission 9*, p. 7.

47 Telstra, *Submission 9*, p. 7.

48 Telstra, *Submission 9*, p. 7.

49 This is an option available to the Minister: see EM, CC Bill, p. 54.

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committee's preference that any future proposal regarding the treatment of voice services provided over satellite networks involves a legislative amendment to ensure the proposal receives adequate scrutiny and that those affected are consulted.

## **Regional Broadband Scheme**

2.56 The aspect of the bills that attracted the most comment in submissions is the proposed RBS. The RBS was also discussed by the PC in its recent TUSO report. As explained at the start of this chapter, in preparing this report, the committee has focused on the evidence received during this inquiry, although the PC's comments have been taken into consideration.

### ***Support for the RBS***

2.57 The proposed RBS received strong support from consumer and regional groups, including ACCAN, Cotton Australia, the NFF and the RRRCC. Essentially, the evidence received from these groups endorses the overall policy intent of the RBS: to support affordable access to broadband services for customers in rural, regional and remote Australia through funding arrangements that are sustainable and transparent.<sup>50</sup>

2.58 In outlining its support for the proposed RBS, the NFF anticipated that concerns about the scheme would be put forward by industry. The NFF submitted:

The NFF seeks to temper any concerns that investment in uncommercial telecommunications infrastructure is potentially distortionary to competition. To simplify the rationale for investment to this extent is short-sighted and fails to consider long term economic benefit to the country—even from agricultural productivity alone.

The NFF believes that both government and industry can collaboratively play a significant role in funding uncommercial infrastructure provided the framework is holistic and encompasses the suite of processes that are presently occurring in the telecommunication field. A levy is, in many ways, the most logical and equitable means of seeking an industry contribution.<sup>51</sup>

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50 NFF, *Submission 1*, p. 2; Rural Regional and Remote Communications Coalition, *Submission 2*, p. 1; Cotton Australia, *Submission 5*, p. 2; ACCAN, *Submission 8*, p. 7.

51 NFF, *Submission 1*, p. 2.

### *Industry views*

2.59 Vocus, OptiComm, TPG Telecom and VHA oppose the RBS provisions.

2.60 VHA noted the PC's criticism of the TUSO. It argued that the RBS should not be pursued 'before the future direction of the existing controversial USO arrangements has been resolved'.<sup>52</sup> Vocus similarly argued that deliberations on the RBS should not occur in isolation of considering the future of the TUSO.<sup>53</sup>

2.61 Vocus submitted that, in its view, the most appropriate way to fund the non-commercial services is through general government funding. Alternatively, Vocus argued that the costs should be recovered through an industry levy applied to a broad funding base that is technologically neutral (that is, with mobile, fixed wireless and satellite networks included).<sup>54</sup>

2.62 A particular concern is that the RBS does not apply to mobile and fixed wireless broadband networks. OptiComm and Vocus argued that fast, high data capacity mobile and wireless broadband technology is already available and is increasingly likely to become a substitute for fixed line services. Both referred to Telstra's announcement that it will provide a 5G network in 2020.<sup>55</sup> In support of the argument that the RBS should have a broader funding base, Mr Tony Moffatt, General Counsel, TPG Telecom, indicated that the RBS regime, as currently drafted, creates 'a specific incentive to find a technical way around it'.<sup>56</sup>

2.63 It was also argued that the burden of the RBS is too great for specific businesses. OptiComm explained that the RBS represents over 25 per cent of the price of wholesale broadband. It explained that the charge 'will be larger than our staff costs, larger than our backhaul costs and larger than our rent costs'. TPG Telecom also argued that the RBS would have 'significant financial and operation implications' that will damage its ability to compete.<sup>57</sup>

2.64 Telstra explained that it supported the RBS when it was first announced, however, it considers the RBS proposed in the bills 'applies far too broadly' to services that are not competitive with, or an economic threat to, NBN Co. Telstra's concerns are as follows:

- Telstra claimed that the RBS has been 'transformed from its original intention as a "anti-cherry picking measure" into an industry tax'. In particular, Telstra

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52 Vodafone Hutchison Australia, *Submission 6*, p. 1.

53 Vocus Group, *Submission 4*, p. 2.

54 Vocus Group, *Submission 4*, pp. 3–4, 6.

55 OptiComm, *Submission 11*, pp. 4, 11, 14; Vocus, *Submission 4*, p. 5. TPG also noted the upcoming arrival of 5G mobile services; see TPG, *Submission 2*, p. 6.

56 Mr Tony, General Counsel, TPG Telecom, *Committee Hansard*, 10 August 2017, p. 7.

57 TPG Telecom, *Submission 2*, p. 1.

is concerned that the proposed RBS covers enterprise and wholesale data services which do not compete with NBN Co and are not subject to any NBN-related obligations. Telstra also noted the proposed RBS covers lines that are not actually being used to provide superfast broadband services but are "technically capable" of providing those services'.

- Telstra also considers carriers might not have the information needed to determine the nature of services and the number of premises being supplied at a retail level. It considers that liability under the proposed RBS is unclear as key terms such as 'premises' are not defined. Telstra argued that the RBS should instead apply to 'services in operation'.
- Telstra further argued that industry should be provided additional time to implement the systems and processes required for administering the RBS<sup>58</sup> and that the costs associated with administering the RBS should be incurred by the public sector, not recovered from industry.<sup>59</sup>

2.65 On its proposal for the RBS to cover 'services in operation' rather than 'premises', Telstra explained that the regime as proposed in the bills 'might require individual examination of individual premises and the lines going into individuals premises' as well as an IT build to support collection of the levy.<sup>60</sup> Telstra noted that the use of the concept 'services in operation', would likely result in an increase in the number of services covered by the RBS; accordingly, if Telstra's preferred term is used, Telstra argued that the amount of the levy should be adjusted downward so that the change is revenue neutral.<sup>61</sup> In response to questioning about Telstra's evidence, representatives of Optus indicated that Optus would also support redrafting the RBS provisions so that they applied to services in operation rather than premises if the overall revenue collected remained unchanged.<sup>62</sup>

2.66 Optus also shared Telstra's concerns about the application of the RBS to fibre networks that provide services to enterprise and government customers.<sup>63</sup> However, given the higher service prices involved in these services (an estimate of the range in the price of these services given at the public hearing 'hundreds of dollars to maybe

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58 Telstra proposed that the start date of the RBS be delayed by one year to 1 July 2019 and that, if necessary, the levy amount could be increased to cover the revenue from 2018 that would be foregone. Mr James Shaw, Director, Government Relations, Corporate Affairs, Telstra, *Committee Hansard*, 10 August 2017, p. 1.

59 Telstra, *Submission 9*, pp. 9–17.

60 A Telstra representative explained that '[i]t's just simpler for our systems to use existing concepts rather than create new concepts and then build a system around them'. Mr James Shaw, Telstra, *Committee Hansard*, 10 August 2017, p. 3.

61 Mr Bill Gallagher, General Counsel, Corporate Affairs and Telstra Wholesale, Telstra, *Committee Hansard*, 10 August 2017, p. 3.

62 Mr Luke Van Hooft, Director, Economic Regulation, Corporate and Regulatory Affairs, Optus, *Committee Hansard*, 10 August 2017, p. 16.

63 Optus, *Submission 13*, pp. 4–8.

tens of thousands of dollars'), representatives of Optus acknowledged that the \$7.10 levy would be a small component of these services.<sup>64</sup>

2.67 Finally, Optus differed from several other industry submitters in that it emphasised that the RBS is not a universal service scheme. Optus also disagreed with the position put by others that the RBS should be extended to wireless providers as Optus considers these services are complementary to NBN services, rather than being a substitute. Optus also countered that any competition provided by wireless is a 'key driver to ensure NBN Co operates efficiently and continues to deliver good outcomes to customers'.<sup>65</sup>

### *Evidence from the department and NBN Co*

2.68 NBN Co provided detailed responses to concerns expressed by industry about the design of the RBS.

2.69 On the inclusion of business services in the funding base for the RBS, NBN Co commented that this is a 'critical component' of the proposed arrangements for ensuring the loss making rollout of satellite and fixed wireless networks are adequately subsidised. NBN Co argued:

Failure to include business services will mean that the contributions of residential services would be required to fund the losses [NBN Co] incurs to serve regional and rural Australia. This is not desirable, efficient or sustainable relative to the outcomes of the proposed arrangements.<sup>66</sup>

2.70 Furthermore, NBN Co advised that the internal cross-subsidy that currently supports the funding of non-commercial services for regional Australia assumed that NBN Co 'would be the primary fixed network operator supplying services to both residential and business customers'. NBN Co added that it was assumed that revenue from NBN Co's fixed line network as a whole, not just limited to the residential market, would be used to subsidise fixed wireless and satellite services'.<sup>67</sup>

2.71 NBN Co continued:

Moving to an industry wide funding model recognises that [retail service providers] who target low cost areas should contribute to the funding of the

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64 Mr Andrew Sheridan, Acting Vice President, Corporate and Regulatory Affairs, Optus, *Committee Hansard*, 10 August 2017, pp. 16–17.

65 Optus, *Submission 13*, pp. 2, 3.

66 NBN Co, *Submission 7*, pp. 2, 3.

67 NBN Co, *Submission 7*, p. 2. NBN Co's evidence on the rationale for including business services in the RBS was supported by the department. Mr Philip Madsen stated that, from the beginning, the NBN model covered 'all premises in Australia, including business and residential'. Mr Madsen remarked: 'The notion that it's now entering into the business market puzzles me'. Mr Philip Madsen, Assistant Secretary, Telecommunications Competition Branch, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 22.

higher cost areas which [NBN Co] is responsible for connecting. These low cost areas will include both business and residential customers. It is illogical that a residential connection in a low cost area will pay the RBS but a business connection in the same low cost area will not.

With growth in the competitive fixed line market and the proposed removal of level playing field obligations in relation to small business services, the importance of including business services in the funding base is heightened. While the changes to Part 8 of the Telecommunications Act support a central tenet of the Government's policy (infrastructure competition), it is important that the financial implications of this competition are understood and that loss making services remain adequately funded.<sup>68</sup>

2.72 NBN Co also directly responded to the suggestion put forward by industry participants that extending the RBS to enterprise services is beyond NBN Co's residential remit. NBN Co described these claims as 'misleading'. It submitted:

In addition to the coverage targets that NBN Co has been provided for residential and business premises (which does not distinguish between small business and larger enterprise customers), [NBN Co's] Corporate Plans and product mix reflect the fact that the network has been designed to serve all types of customers passed by the nbn™ network. Additionally, the White Paper process documented in the Definitive Agreements and the Telstra Migration Plan specifically recognise [NBN Co's] intention to develop wholesale business-grade services and that Telstra would disconnect retail business services supplied using special services from its legacy copper network as the capabilities were made available on the nbn™ network.<sup>69</sup>

2.73 In its submission, the department reiterated information contained in the EM for the RBS Bill about the intended design of the scheme. This evidence included that for the networks representing approximately five per cent of the market expected to be affected by the scheme, 'whether they choose to pass on the charge is a commercial decision for them and their retail service providers'.<sup>70</sup> In addition, the department highlighted the adjustments made following consultation with smaller carriers to 'cushion smaller carriers from the full effect of the charge and give them a sufficient period of time in which to adjust their business models to accommodate the charge'.<sup>71</sup>

2.74 The department also provided further evidence in response to specific suggestions put forward by industry. In response to questioning as to why fixed wireless are not included in the scope of the RBS, departmental officers explained these services represent only one to two per cent of the market, and that the regulatory

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68 NBN Co, *Submission 7*, p. 2.

69 NBN Co, *Submission 7*, p. 3.

70 Department of Communications and the Arts, *Submission 10*, p. 5. See also EM, RBS Bill, p. 4.

71 Department of Communications and the Arts, *Submission 10*, p. 5. These measures are discussed in Chapter 1.

burden of applying the RBS to these providers is considered to outweigh the benefits associated with their inclusion.<sup>72</sup>

2.75 Regarding Telstra's suggestion for the concept of 'services in operation' to be used in place of 'premises', the department explained that the concept of 'premises' has been used due to concerns about different ways services in operation can be interpreted. To illustrate, a departmental officer referred to a potential example involving the services supplied to a major bank:

[A] large corporate such as the Commonwealth Bank might have lines that service a particular branch, it might have lines that service its ATM network and it might have lines that service different components of its communications services. And there'd be uncertainty about whether all of those lines would be calculated or only some of them.<sup>73</sup>

2.76 Evidence given by the department also highlighted that, to be 'as clear as possible about the application of the charge', the EMs provide a detailed explanation of how the premises based charge 'would apply to a range of different circumstances, including multi-dwelling units, shopping centres and individual premises'.<sup>74</sup>

2.77 Finally, the department's evidence notes how the proposed reviews of the scheme will enable any issues that arise to be addressed. In particular, the arrangements for reviewing the amount of the charge and the overall operation of the scheme would ensure adjustments can be made so 'the charge remains sufficient to meet the reasonable net costs associated with [NBN Co's] fixed-wireless and satellite networks' and to account for any technological changes affecting the market.<sup>75</sup> NBN Co's Chief Regulatory Officer also acknowledged the potential for 'refinement' to the regime after it commences operation, noting that this would be consistent with previous experience of regulatory change in the telecommunications industry.<sup>76</sup>

2.78 The PC has also noted that the planned reviews of the RBS could enable the treatment of mobile broadband to be reviewed if it becomes evident that mobile broadband is increasingly substitutable for fixed line high speed broadband. More generally, the PC emphasised that the planned reviews would reduce the risk of a 'set and forget' approach to the RBS.<sup>77</sup>

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72 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

73 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

74 Mr Andrew Madsen, Department of Communications and the Arts, *Committee Hansard*, 10 August 2017, p. 19.

75 Department of Communications and the Arts, *Submission 10*, pp. 5–6.

76 Ms Caroline Lovell, Chief Regulatory Officer, NBN Co, *Committee Hansard*, 10 August 2017, p. 22.

77 Productivity Commission, *Telecommunications Universal Service Obligation*, pp. 325–26.

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***Committee view on the RBS***

2.79 The committee considers it is critically important to establish a scheme for adequately and transparently funding the much-needed infrastructure for rural and regional Australia that cannot be provided on a commercial basis. Of the various options available for funding these non-commercial services, the proposed RBS most clearly fulfils this objective.

2.80 Although the RBS is strongly supported by consumer and regional industry groups, certain industry stakeholders advocated for alternative options to be considered instead. As a general rule, the introduction of an industry charge is unlikely to receive universal stakeholder support and can attract points of view influenced by particular commercial interests. Nevertheless, the committee has been receptive to the various arguments relating to the RBS made by industry stakeholders. After careful consideration, however, the committee is of the view that the counterpoints made by the department and NBN Co to industry arguments are more compelling. The committee accepts that the approach taken by the government as outlined in the bills is the most appropriate method for achieving the objectives of the proposed RBS with minimal market distortion. The committee, therefore, supports the overall approach taken to drafting the RBS as outlined in the bills.

2.81 The committee, however, is sympathetic to the argument that industry may need additional time to prepare for the introduction of the RBS. In the committee's view, whether the commencement of the RBS would need to be delayed largely depends on how quickly the bills progress through the remaining stages of the legislative process. To provide industry with certainty, the committee urges prompt consideration of the bills with final consideration of the bills to occur as early as possible during the 2017 spring sitting period. Should this not be possible, however, the government should consider a short delay in the commencement of the RBS regime. The committee notes that the RBS charge could be subject to minor adjustment to ensure that a delay would be revenue neutral.

