



Submission in response to
the Australian Competition
and Consumer Commission

**Regional Mobile
Infrastructure Inquiry –
Report on Preliminary
Findings**

Public Version

May 2023

EXECUTIVE SUMMARY

1. Optus welcomes the opportunity to provide comments on the preliminary findings from the ACCC's Regional Mobile Infrastructure Inquiry. Ensuring the legislative framework, including land access and approval rules, are appropriately set to promote investment is vital to ensuring that Australia's social and economic objectives can be reached.
2. Optus acknowledges the findings that regional, rural, and remote consumers experience a quality of service that can be significantly different from urban consumers. Improved regional connectivity, service reliability, and achieving broader regional development goals can all result from investment in competitive networks and alternative technologies. It is through these competitive networks and alternative technologies that better access, affordability and reliability in telecommunications services can be achieved for regional, rural and remote areas. Such investment is also necessary to underpin the Government's national Digital Economy objectives and promote regional development with broader economic and social benefits to regional communities.
3. To achieve this, Government policy around the roll-out of mobile infrastructure in regional areas should be consistent with the following:
 - (a) Taxpayer dollars should no longer be used to subsidise a single carrier – Government should be looking to support coverage of more than one provider, to get greater outcomes for communities more broadly.
 - (b) Efforts to support greater multi-carrier solutions go beyond Government funding programs and should be reflected in Government Department and Agency procurement and development processes.
 - (c) Government assistance focuses on delivering competitively neutral outcomes, which addresses the historical issues in regional network funding.
 - (d) Government should look to assist in the streamlining of land access arrangements nationally to help facilitate new and improved coverage and greater capacity.
4. Not all of these factors will be directly relevant to this Inquiry, but this is the broader policy context in which findings should be made.
5. We support the preliminary finding on the complexity of operating across multiple planning jurisdictions and that access to land may be significantly affected by a range of planning and approval processes. In Optus' experience, this is one of the major impediments to the deployment of regional infrastructure.
6. Optus supports the ACCC making additional findings on the extent to which land access and rental decisions made by state and local governments, statutory bodies and government-owned businesses are consistent with the non-discrimination rules in the *Telecommunications Act*. These rules prevent processes and charges that are inconsistent with those applied to other utility assets. Notwithstanding Federal Court cases that confirm this, we find telecommunications assets are often treated in a manner inconsistent with comparable utility assets across many states. Optus submits the ACCC recommend that State and Territory land managers conduct audits on their compliance with the obligations under the *Telecommunications Act*.
7. Optus agrees with the preliminary finding that temporary disaster roaming (TDR) is technically possible. Any possible solution would be bespoke to the Australian market and Australian MNOs, as there currently exists no international standardised solution

supported by the MNOs, vendors or handset manufacturers. Optus remains committed to working with the other MNOs to develop a viable solution. We also support further work to identify alternative solutions that could deliver the same policy outcomes.

8. Any TDR solution should be based on non-discrimination principles, so that all traffic is treated in the same manner during an emergency. After all, life and death decisions should not depend on which mobile network people subscribe. Second, any TDR solution should utilise existing emergency communications assets to the maximum extent possible, like the National Messaging Service and the recently announced PSMB capability which received \$10m funding.

BARRIERS TO REGIONAL INFRASTRUCTURE STILL ENDURE

9. The Australian market has a long history of barriers to competitive infrastructure investment in regional Australia. Over twenty years ago, Optus and Vodafone provided input into the 2002 Senate Inquiry into the Australian Mobile Market¹ observing that between 1997 and 2002, at least \$800 million had been provided to Telstra from Government for its regional CDMA network. This infrastructure was then re-used by Telstra for its 4G network; and now for its 5G regional network.

10. Optus observed in 2002 that:

Most of the funding has either been dissipated for little demonstrable gain or has supported the incumbent. In those instances where funding has been made available for competitive infrastructure on a contestable basis, the funds, almost without exception, have supported Telstra infrastructure. In addition, such tenders are not truly contestable, as no other carrier can match Telstra offerings because of its existing presence and scale.²

In Optus' view, considerable opportunities to support new technologies, and new entrants into regional Australia have been wasted. In bolstering the incumbent's already dominant position, ongoing prospects to promote competition in regional Australia has been considerably undermined. But worse, some funding has actually promoted anti-competitive behaviour and destroyed competition in emerging markets.³

11. These Government subsidies amounts to over \$1.3 billion in 2022 dollars. It should come as no surprise that Telstra has a regional coverage advantage – since the taxpayer funded assistance to Telstra has been substantially disproportionate to any other mobile network provider.
12. Australian regional communities are still experiencing the consequences of these decisions. And some 20 years later the vast share of the Government 'competitive' regional mobile funding continues to flow to Telstra, which further supports its regional monopoly. The ACCC has noted that Telstra has been awarded more than 80% of mobile blackspot sites.⁴

¹

https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/Completed_inquiries/2002-04/telenetwork/submissions/sublist

² Optus, 2002, sub.91d, p.12

³ Optus, 2002, sub.91d, p.13

⁴ ACCC, 2002, Mobile Infrastructure Report

13. This history is important as it provides the reasons why commercial multi-carrier solutions are rarely seen across regional Australia. Australia is one of the few markets globally where the dominant mobile provider has such a large network coverage advantage over the rest of the market. This regional dominance, which extends to over 1 million square kilometres, is used by Telstra as a key marketing differentiator and is key to its corporate identity.
14. Telstra strongly defends this advantage. It does not offer full network access to all its wholesale partners. Telstra's wholesale network covers 98.8% of the population, around one million square kilometres less than its retail coverage.⁵ Optus notes that Telstra did not offer its full network to TPG in the recently proposed regional network merger, providing coverage only to 98.8% -- the same as its wholesale network service. The ACCC opposed the proposed network sharing arrangement on the basis that it would entrench Telstra's regional dominance and significantly lessen competition.
15. It should not be surprising that Telstra's willingness to wholesale its network only extends to the extent of the Optus mobile network – which remains Telstra's only true competition. Any attempt by challenger networks to expand into the “exclusive” zone is seen as a threat and treated as such.
16. This means there are few opportunities for industry to work together to increase overall coverage, as only the incumbent operator can meaningfully increase overall coverage due its much larger geographical area. Telstra remains focused on defending and cementing its coverage advantage. Recently, Telstra and ARTC entered an exclusive arrangement for coverage over the Government's inland rail project. It is unclear why a government owned entity would enter such an exclusive infrastructure arrangement.
17. These market dynamics help in understanding why Australia is an outlier on cooperative regional network sharing. Markets where all MNOs have similar network size are often more willing to work together to expand the overall industry coverage.
18. Optus submits the ACCC should make additional findings on the extent to which Telstra's regional dominance and legacy of Government-funded networks continues to act as a barrier to competitive regional infrastructure investment.

INCONSISTENT APPROACH TO LAND ACCESS IS A BARRIER TO REGIONAL INVESTMENT

19. The ACCC observes there are issues around the approach to land access and development approval for mobile infrastructure. The ACCC notes views that streamlining and reforming state and territory planning rules may better facilitate infrastructure deployment, including reforms to access costs to Crown land.
20. This section briefly outlines the obligations contained in legislation and confirmed numerous times by the both the Federal and High Courts, yet often remain unheeded in the manner in which State and Territory property managers operate. This likely reflects a lack of knowledge of these laws. The industry has advised State and Territory land managers of these obligations numerous times over many years, but this could be enhanced by training and advice from the Federal Government itself on the applicability of Commonwealth law.

⁵ <https://www.whistleout.com.au/MobilePhones/Guides/Telstra-network-coverage-vs-ALDI-Woolworths-Belong-Boost>

21. Optus submits the ACCC should make further findings and recommendations on the manner in which State and Territory departments and entities act in a manner consistent with obligations under the *Telecommunications Act* to not discriminate against telecommunications assets. Further, the ACCC should recommend that State and Territory land manager audit the manner in which they are compliant with the obligations, and that the Federal Government provides specific training on the relevant Commonwealth law.

Obligation not to discriminate against telecommunications

22. The *Telecommunication Act* makes ineffectual any State or Territory law or action under a law that could have the effect (directly or indirectly) of discriminating against a carrier or class of carrier. Specifically, clause 44 in Schedule 3 *Telecommunications Act 1997* (Cth) states that State and Territory laws have no effect to the extent that the law discriminates against a particular carrier or carrier in general.
23. This clause has a body of precedent supporting its application to State and Territory planning decisions and rent setting processes. For example, the High Court has stated that the provision allows for a wide interpretation of discrimination.⁶ Further, the focus is on the effect of the action, namely whether exercise of a power leads to discrimination against a carrier or call carriers generally. The proper approach is to examine the operational effect or result of the outcome of the exercise of power.⁷
24. The Federal Court provided more guidance on the application of this clause in 2016. The Court directly addressed the question whether setting rents on Crown land by approximating the market rent that would be paid on private land – ie., the use of market rent benchmarks – is permitted. The Court rejected the argument that setting higher rents for carriers than other business on the basis of market rents for communications leases in the private market is permissible.⁸ The use of market rent to set Crown land rents discriminated against carriers and was inconsistent with the cl.44 of Schedule 3 of the *Telecommunication Act 1997* (Cth). The Court found that:
- (a) The non-discrimination clause can be seen as a mechanism to promote and protect the long term interest of end users and to promote accessible and affordable services.⁹
 - (b) Non-discrimination is broad and absolute. It does not allow an exception to the prohibition against the law of the State or Territory discriminating against carriers.¹⁰
 - (c) While individuals and corporations are allowed to discriminate against carriers, the Act expressly prohibits discrimination against carriers under State and Territory legislation. It is clear that the legislative intention is to treat individuals and corporations differently from State and Territory governments.¹¹
 - (d) State and Territory governments charging carriers higher rents on the basis that carriers are charged more rent in the private market seems precisely the type of conduct that clause 44 is designed to prevent.¹²

⁶ *Telstra v Hurstville City Council* (2002) 118 FCR 198

⁷ *Optus Networks v Rockdale City Council* (2005) 144 FCR 158

⁸ *Telstra v Queensland* [2016] FCA 1213, para. 148

⁹ *Ibid.*, para. 141

¹⁰ *Ibid.*, para. 142

¹¹ *Ibid.*, para. 146

¹² *Ibid.*, para. 147

25. Optus submits that the judicial interpretation of clause 44 makes very clear the types of charges that can and cannot be levied on carriers. The use of benchmarking of private market rates for communication leases to set rents for Crown land is not permissible

Inconsistent treatment to land access and approvals

26. Optus encourages the ACCC to go further in its findings and recommend that State Government entities audit the extent to which land access fees and approvals processes are consistent with non-discrimination obligations under the *Telecommunication Act*. The burden should lie with the State body to justify how their processes and charges are consistent with the *Telecommunications Act*.
27. The Preliminary Report notes that, for example, NSW National Parks and Wildlife Service (NPWS) charges annual fees for all telecommunications facilities located on reserved land. It is not clear the extent to which NPWS charges the same fees for other utility assets on Crown land, like electricity transmission lines, or underground gas pipes. In so far as these are charged under a different rate, it raises questions whether NPWS charges are permissible. Optus encourages the ACCC to inquire or make observations over the extent to which these telco-specific fees are consistent with non-discrimination obligations under the *Telecommunications Act*.
28. The discriminatory treatment of telecommunications assets compared to other comparable utility assets, such as electricity, gas and water, is one of the main cost impediments to deployment of telecommunications sites and greater mobile coverage. The impact of this discrimination is more keenly felt in areas that have marginal economics for deployment.

TEMPORARY DISASTER ROAMING SHOULD BE PROVIDED ON NON-DISCRIMINATORY BASIS

29. Optus welcomes the ACCC finding that temporary disaster roaming (TDR) is technically feasible although there are questions of complexity, risk and cost that will need to be further considered against alternative solutions.
30. Optus agrees that work is required before industry and Government can start to move to discussions about practical implementation of TDR. Optus, together with the mobile industry, is committed to working collaboratively to investigate the feasibility of various technical options to deliver TDR. While it is a technically complex conversation, it is one we are committed to due to the important of such a service to the safety of all Australians.
31. As industry works towards developing the technical concepts required to provide TDR, Optus believes the following principles should form the basis of future discussions:
- (a) **TDR traffic is treated on a non-discriminatory basis.** We can all agree that the safety of Australians should not depend on the mobile network to which they subscribe. In times of true emergency, the intent of TDR is to enable all Australians to be able to make critical calls and messages.
 - (b) **A non-commercial solution should be preferred.** No carrier should be permitted to make TDR a commercial solution. That is, while the costs of implementing TDR should be borne by Government (similar to the way in which data retention costs were treated), carriers should not 'sell' TDR functionality to Government.

- (c) **Existing Government safety schemes should be utilised** to the extent possible (like the recently announced emergency messaging service and the \$10m funding of PSMB) to assist in the supply of TDR. For example, TDR raises issues around congestion not just in the access network but also the core network. The extent to which any PSMB stand-alone core could be used to mitigate against TDR core congestion should be examined.
32. Optus remains committed to working with industry and Government to examine how a TDR solution could be delivered.