

The logo for Optus, consisting of the word "OPTUS" in a bold, teal, sans-serif font.

Submission in response to the  
Department of Home Affairs  
Consultation

**Telecommunications and  
Other Legislation (Assistance  
and Access) Bill 2018**

September 2018

## Section 1. EXECUTIVE SUMMARY

- 1.1 Optus appreciates the opportunity to provide input to the Department of Home Affairs' ("the **Department**") consultation on the Exposure Draft of the Telecommunications and Other Legislation (Assistance and Access) Bill 2018 ("the **Bill**").
- 1.2 Optus considers that it is ultimately a matter for the Government to find the right balance between the fundamental principles at stake in the proposed new regime, being: the extension of the power of the state over the individual; the associated tension between privacy principles and civil liberties; and the utility of the access to communications for law enforcement and national security agencies which the Bill seeks to promote.
- 1.3 Policy in this area is the prerogative of Government and Optus will not attempt to conclude the appropriate balance, but will present comment and analysis based on a commercial and practical compliance perspective of the Bill.
- 1.4 In this context, Optus' key priorities are for the Bill to establish:
  - (a) a **practical, workable and stable legislative and policy framework**, which allows for business and compliance certainty, including appropriate protections for service providers;
  - (b) a set of arrangements which are consistent with the **privacy objectives of our customers** and which do not undermine the confidence and position of trust service providers hold in the supply of communications services to their customers.
- 1.5 Optus considers the proposed industry assistance regime as it applies to telecommunications carriers and carriage service providers (**CSPs**) is workable and provides a more detailed and specific assistance regime compared to that which already exists in the current regulatory framework.
- 1.6 The regime of industry assistance proposed by the Bill has the potential to impose a substantial cost, scheduling and resource impact on Optus, a provider that already makes a substantial 'social licence' contribution through its current levels of assistance to Government and agencies.
- 1.7 Optus observes that the current Bill provides significant attention to ensuring there are controls and checks over the agencies and their decision-making process whether to exercise their proposed legislative powers. In Optus' view, this is appropriate, but Optus also recommends the injection of a greater emphasis on due process steps to allow decision-makers to obtain and have regard to matters which the service provider is uniquely placed to advise on, including matters relating to the practical aspects of requests for assistance or notices. This would provide for greater safeguards from any potential commercial impacts and afford enhanced procedural fairness to service providers.
- 1.8 Optus is particularly concerned that the Bill should include:
  - (a) A mandatory consultation step requiring agencies to consult service providers prior to finalising and issuing a request for assistance, or issuing a Technical Assistance Notice;
  - (b) A mandatory consultation step requiring agencies to consult service providers prior to finalising and issuing a variation or revocation of a request for assistance, or issuing a variation or

revocation of Technical Assistance Notice or the revocation of a Technical Capability Notice;

- (c) Further guidance to decision-makers requiring them to have regard to information submitted by a service provider in forming judgements about whether the decision-making criteria of “reasonable and proportionate” and “practicable and technically feasible” are met for each type of assistance request or notice.
- (d) A mandatory requirement that an efficient form of contracting be established to streamline the process of agreement between the agencies and providers for the terms and conditions on which assistance is to be provided. For example a standard form contract might be mandated or determined to cover key areas, which is then only varied in pre-determined areas to insert a description of the assistance, the agreed cost and payment arrangements, and any relevant special conditions.

1.9 Optus already has major commercial, IT and network programs in flight and which are scheduled for implementation over the next three years. In practical terms, the assistance regime may disrupt these plans. Optus will need to stand prepared to initiate significant scoping and compliance programs in response to this assistance regime. It will potentially have to design and schedule its assistance obligations amongst other critical commercial activity, business plans and customer contracted commitments. The measures recommended above are designed to try and limit or smooth the potential commercial impact of the assistance regime on Optus and the other services providers subject to the regime and to assist the ‘workability’ of the regime.

1.10 Optus stands ready to elaborate on matters raised in this submission.

1.11 Communications Alliance has also made a submission to this consultation. Optus is a member of Communications Alliance and supports its submission.

## Section 2. BACKGROUND

- 2.1 The SingTel Optus Pty Ltd group companies in Australia (hereafter called “**Optus**”) serve over 11 million customers per day with a broad range of communications services, including mobile, national, local and international telephony, voice over IP, fixed and mobile broadband, internet access services and subscription television (including IPTV).
- 2.2 To deliver these services, Optus owns and operates fixed, mobile and long-haul transmission and access networks and the largest domestic fleet of satellites. These provide a set of advanced technology platforms for the delivery of services. Optus has invested over one billion dollars in each of the last seven years to improve and upgrade its networks and services.
- 2.3 Optus also has an extensive wholesale business, providing services to many other carriage service providers. In short, Optus is a provider of significant and critical national communications infrastructure and services to the Australian community and takes its responsibilities seriously.
- 2.4 Optus has also invested in required interception and delivery capability on its platforms and services and operates a specialist team, its Law Enforcement Liaison Unit, which responds to warrants for lawful interception, authorised requests for call related data and other requests for assistance from law enforcement and national security agencies. The costs of this team and the infrastructure and capability to support it are substantial.
- 2.5 In recent years, Optus has also devoted considerable time and resource to establishing compliance with the data retention regime, another landmark piece of national security legislation.
- 2.6 It is ultimately a matter for Government to find the right balance between the fundamental principles at stake in the notice and warrant regime proposed by the Bill, being: the extension of the power of the state over the individual; the associated tension with privacy principles and civil liberties; and the utility of the access to communications for law enforcement and national security agencies.
- 2.7 Optus will not attempt to conclude the appropriate balance or present a view on the absolute merits of the policy, but will observe some facts pertinent to this balance and present a commercial and practical compliance perspective on the proposals.
- 2.8 In this context, Optus’ key priority is for the Bill to establish:
  - (a) a **practical and stable legislative and policy framework**, which allows for business and compliance certainty, including appropriate protections, for service providers complying with notices and warrants; and
  - (b) a set of arrangements which are consistent with the **privacy objectives of our customers** and which do not undermine the confidence and position of trust service providers hold in the supply of communications services to their customers.
- 2.9 Optus’ experience as a ‘carrier practitioner’ and carriage service provider which provides extensive assistance to the many Australian law enforcement and national security agencies under the various existing legislative provisions informs its submission on the Bill.

## Section 3. THE ASSISTANCE REGIME

- 3.1 The Bill sets out a framework for proposals for industry assistance to be initiated and managed under three distinct categories of request or demand, each with its own characteristics:
- (a) Voluntary Technical Assistance;
  - (b) Technical Assistance Notices; and
  - (c) Technical Capability Notices.
- 3.2 Optus' comments are made from the perspective of a group of entities brought into the scope of the assistance regime as it fits within the definition of a Designated Communications Provider because of its widespread national activities as a licenced telecommunications carrier and carriage service provider.

### Voluntary Technical Assistance

- 3.3 Optus supports the inclusion of a mechanism to allow for voluntary agreement to the provision of technical assistance. The inclusion of such a mechanism in the form of the arrangement set out in Part 15, Division 2, could provide a straightforward avenue for agreement on assistance in a variety of circumstances faced by carriers and carriage service providers.
- 3.4 It is important that co-operating service providers and their staff have the protection from civil liability afforded by the proposed 317G (1)(c) and (d), given that the service provider and its staff would only be undertaking the "act or thing" at the request of an authorised Government agency. Under such a request, it is appropriate that the service provider bear no civil liability for doing the "act or thing" as long as they are operating within the bounds of, and in compliance with, the technical assistance request.
- 3.5 Optus supports the principle that a technical assistance request can be varied as provided for in section 317JA, but considers it problematic that there are no limitations on the power to vary. Optus submits that the power to vary a technical assistance request should be contingent upon the authorised person:
- (a) undertaking prior consultation with the service provider the subject of the technical assistance request; and
  - (b) ensuring that any variation does not fundamentally alter the nature of the initial assistance requested (i.e. a varied request should operate broadly within similar scope to the initial request otherwise an entire new request should be proposed for agreement); and
  - (c) ensure that any variation is technically and commercially feasible for the service provider.
- 3.6 If the power of the authorised person to vary a technical assistance request is unfettered, then a service provider is faced with the risk that a variation can be made without prior consultation leaving it with a commitment to provide assistance it may not have agreed to in the first instance and that it does not have the capability to perform. A service provider may not want to voluntarily agree to provide the varied assistance because the variation may result in: additional costs; additional technical complexities; different designs being required to be adopted which may be inconsistent with the efficient operation of the service providers network or systems; or require the service provider to provide assistance that is not technically feasible or practical. Any one of

these factors could alter the balance of the service provider's original decision to enter into a voluntary agreement and could, in fact, place the service provider in the difficult circumstance of having to meet agreed or contracted commitments which have been unilaterally varied.

- 3.7 The concerns listed in section 3.6 above, are echoed by Optus in respect of the operation of section 317JB which affords the authorised person the power to unilaterally revoke a technical assistance request. Optus agrees in principle that there should be a power to revoke, but recommends that the exercise of that power should be limited to circumstances where:
- (a) the authorised person has undertaken prior consultation with the service provider and the service provider is in a position to understand the impact of the revocation; or
  - (b) the service provider won't be unduly adversely affected by the revocation (for example, be half way through the build or execution of an 'act or thing' with no means of recouping any spent costs).
- 3.8 Optus supports the inclusion of a provision for an authorised person to enter into a contract with a service provider, as proposed by section 317K. This is an appropriate method for providing certainty to both parties about what is to be provided, by when and at what cost.
- 3.9 However, for this contracting provision to be efficient and able to be invoked in a timely manner, Optus recommends that a standard form template contract is established in advance with all potential service providers for use in these circumstances. Such an approach would allow the establishment of baseline terms and conditions, with relevant provisions relating to the scope of each request to be varied to suit each request. Optus recommends that for each technical assistance request, a schedule be added to the baseline terms and conditions, which outlines the 'service description' or deliverable, a cost schedule, and provision made for any other special conditions.
- 3.10 To this end, Optus recommends the Bill further elaborates on the contracting provisions to provide for efficient and timely contracting. This will also ensure that the voluntary assistance is not at risk of being delayed by disputes over baseline contract terms and conditions.
- 3.11 To provide necessary commercial certainty for the service provider, it should not be an expectation of the authorised person that voluntary assistance will be provided in advance of commercial contracting arrangements being agreed and settled. This will impose a discipline amongst authorised persons and service providers, to sort such matters out promptly.
- 3.12 The risk of not having a clearly stated process on (i) settling contracts; and (ii) the commencement of the provision of the voluntary assistance by the service provider, such providers may be asked to wear the full commercial risk if an authorised person insists on assistance being provided immediately in the situation where in-principle agreement has been reached on the nature of assistance but contracting terms, including cost recovery or other commercial aspects have not been settled. Such a situation may artificially place the provider in the difficult situation of having to balance and manage commercial risk versus the imperative of assisting national interest endeavours.

### **Technical Assistance Notices**

- 3.13 Optus understands that the intent of the technical assistance notice provisions is to give agencies the power to request service providers to give assistance which they are

already capable of providing. While this is not explicit in the legislative construct in Division 3, it is elaborated in the explanatory material (for example, see the second dot point on page 8 of the Explanatory Document accompanying the Bill).

- 3.14 As there is no requirement for an authorised person to consult with a service provider prior to the issuance of a technical assistance notice, the operating assumption of this notice is that the authorised person has prior knowledge of a service provider's existing capabilities. Optus contends that this assumption needs to be interrogated, as it is not clear how an authorised person can have certain and specific knowledge of a service providers capabilities without proper consultation.
- 3.15 The absence of a requirement for prior consultation creates a risk that a decision by one of the authorised persons from the national security agency or the eleven intercepting agencies might be based on an incomplete or incorrect understanding of a service provider's capabilities. This in turn creates the risk that such notices may not have the proper basis, misconstrue a provider's actual capabilities, or impose on the service provider obligations which they cannot satisfy.
- 3.16 This risk could be mitigated to some extent if there was an appeal mechanism where providers could, without risk of non-compliance with a notice, provide information about the extent of their capabilities and how that compares to the requirements in the notice.
- 3.17 It may be that the revocation arrangements in section 317R could be used by a service provider to submit information to a decision maker so that the decision maker is required to reconsider whether a notice is practical or technically feasible. It would, however, be better if an arrangement is proposed which is designed to ensure procedural fairness for providers and to ensure decisions are made in the first instance with the benefit of a solid knowledge of the provider's actual capabilities.
- 3.18 In the absence of further legislative prompting about consultation, information gathering or an immediate appeals mechanism, it is difficult to see how the decision-making criteria in section 317P can be addressed in a comprehensive manner by authorised persons considering whether to issue a notice. Without information derived from the provider itself, there will always be the risk of a distorted or incorrect outcome of the authorised person's consideration of whether compliance with the notice is practicable and technically feasible as required by section 317P(b). Such information could also assist inform whether requirements imposed by the notice are reasonable and proportionate as required by section 317P(a).
- 3.19 Section 317Q sets out powers to vary a technical assistance notice and section 317R sets out powers to revoke such notices. Optus is concerned that provisions which allow decision-makers to vary or revoke notices without the need to be informed through consultation with the service provider of matters which may affect the practicality, reasonableness or technical feasibility of such a notice, end up creating undue commercial risk for the service provider and has the potential for notices to be extended well beyond the realms of the initial scope. Neither of these outcomes are desirable.
- 3.20 Optus has expressed similar views in relation to varying or revoking technical assistance requests, as set out in this Submission at paragraphs 3.5 to 3.7. It is also noted that section 317W creates an obligation to consult with a provider before issuing a Technical Capability Notice.
- 3.21 The imperative to ensure that a provider has a prior opportunity to provide information regarding the practicality, reasonableness or technical feasibility of a proposed assistance notice is given increased significance because of the jeopardy created by the compliance and enforcement provisions of Division 5, sections 317ZA to 317ZE. In effect, if an assistance notice is misconstrued because of a misunderstanding by the decision-maker about a service provider's actual capabilities, the service provider will

bear both the commercial risk as well as the compliance and enforcement risk of the decision. In Optus' view, this is not a reasonable outcome for service providers.

- 3.22 Given that commercial, market and technical circumstances for carriers and carriage service providers can change rapidly and significantly, there is a strong case for the Bill to be amended to afford the right for service providers to actively seek a variation to a request or notice. To trigger such a variation, service providers should be required to submit evidence which demonstrates that the practicality, reasonableness or technical viability of the assistance has been adversely affected by new and changed circumstances. It would be best if there was legislative recognition of this avenue, perhaps by a new section or by an addition to section 317Q and/or section 317R.

### **Technical Capability Notices**

- 3.23 It is proposed that the Attorney-General may determine procedures under the new section 317S. The Bill and the accompanying explanatory document create the impression that the main category of procedures envisaged relate to co-ordination and co-operation between agencies. Optus supports the implicit concept that the relevant agencies should be co-ordinated and as efficient as possible in the way they approach service providers and industry seeking assistance.
- 3.24 Optus contends that it would also be useful for the Attorney-General to determine some procedural guidance for how and when the relevant agencies should undertake prior consultation with service providers when considering the practical aspects of matters for which they may request the Attorney-General to issue a technical capability notice. In particular, in some scenarios, the mandatory 28-day consultation set out in section 317W will be inadequate. As such, it would be preferable for authorised persons to contact a service provider under a protocol set out in the Bill which allows an early opportunity for service providers to prepare. To illustrate Optus' concerns, 28 days will likely be inadequate for a service provider to pull together a comprehensive response if the assistance required is of a complex nature where design options will need to be articulated and evaluated, costing and equipment information will need to be sourced from multiple vendors, resource availability will need to be determined as well as a project schedule being developed.
- 3.25 That said, Optus supports the concept of the proposed section 317W consultation requirements. It is critical that the parameters of a Technical Capability Notice such as the compliance period, the duration of the notice and the specification of assistance have due regard to the input supplied by the affected service provider.
- 3.26 Optus supports the concept set out in section 317Y whereby a service provider should be consulted in any decision to vary a Technical Capability Notice. Optus recommends that this concept be extended to make consultation with the affected service provider a pre-requisite for a decision to revoke a Technical Capability Notice under section 317Z.
- 3.27 If prior consultation does not occur before a decision to revoke a notice is made, there is a chance that the service provider will bear the full commercial risk of that decision. To afford the service provider due process, it should have a mandated opportunity to put information before the decision-maker about whether the prospective decision will leave the provider with stranded investment, a half built capability, and any on-going commitments to purchase equipment or services from other vendors which had only been procured to support the assistance mandated by a technical capability notice.
- 3.28 While it is conceivable that some provision for redress in the event of a revocation of a notice might be made in the terms and conditions on which help is provided, as per section 317ZK, it is not clear whether it will be possible for service providers to negotiate a full and comprehensive set of terms to cover the necessary eventualities. It is



therefore important to inject a mandatory consultation step into the decision-making process to revoke a Technical Capability Notice.

### **General Comments on Assistance Regime**

- 3.29 Optus advocates that express language be included in the bill, that permits a service provider to not comply with an assistance request or notice, only to the extent that the assistance request or notice requires a service provider to do an act that would place that service provider in breach of a law in a foreign jurisdiction.
- 3.30 In respect of the requests and notice powers under the Assistance Regime, the Bill should set out a speedy and efficient mechanism whereby a service provider or authorised person can refer an assistance request or notice to a judicial body for review in the event of a dispute. Ensuring there is a speedy judicial oversight mechanism will allow, for example, a quick determination on the contested scope of a Technical Assistance Notice, or assess whether the criteria of 'reasonable and proportionate' and 'practicable and technically feasible' are satisfied.

### **Division 6 – Unauthorised Disclosure of Information**

- 3.31 Optus notes the offence which section 317ZF seeks to establish in relation to unauthorised disclosure of information and does not dispute the general intent, however, it is observed that the length and complexity of the drafting makes it a difficult section to grapple with and fully understand. If there is an opportunity available to promote a simpler exposition of the offence, this should be explored.

### **Division 8 – General provisions**

#### **Immunity**

- 3.32 Optus strongly supports the immunity from civil liability which is proposed under section 317ZJ. This is an important protection for providers and their staff working in good faith to assist law enforcement and national security endeavours under either of the forms of notice. Optus advocates the position that these immunity provisions should extend in their application to not only the service provider, but also any third parties that the service provider is required to engage to comply with an assistance request or notice.

#### **Terms and conditions on which assistance is given**

- 3.33 Optus welcomes the clarification provided by section 317ZK (3) and section 317ZK (15) that compliance with either form of notice should essentially be undertaken by the service provider on a no profit-no loss basis, unless agreed otherwise. It is important that service providers be compensated for the cost of providing assistance and recognition given to the concept that in some cases compensation might extend to the opportunity cost being borne by service providers in providing the requested assistance. This is because it is possible that, on occasion, compliance with a notice will require substantial resources or investment by the service provider, which will inevitably create disruption to the service provider's normal commercial business and interests.
- 3.34 From Optus' point of view as a service provider with some experience in contracting with the Commonwealth in relation to assistance under the Telecommunications (Interception and Access) Act, it will be beneficial if there is legislative guidance for a type of standard form contract to be developed which can cover key aspects of the terms and conditions between the relevant agency and a service provider. Any action that can narrow down the number of aspects that are reasonably pre-determined and which don't have to be negotiated and agreed when a notice is imminent or is being issued will be to the advantage of all parties involved.

- 3.35 In support of the above view, Optus contends that a service provider could be faced with the prospect of having to negotiate forms of agreement with up to 11 different intercepting agencies listed in section 317B as well as the domestic and national security agencies which will have powers under the Bill. Given the commonality of the potential assistance a service provided will be providing, it does not seem unreasonable for the Bill to set out a simple and streamlined contracting method which is to be used by all parties.
- 3.36 A simple and streamlined contracting method has the benefit of removing potential time delays and limiting sources of dispute between the parties, whilst also allowing the parties to focus on the subject matter of the notices and assistance requests.

Ends.