

Investigation report

File No.	ACMA2021/561
Entity	Optus Internet Pty Limited
ACN	083 164 532
Relevant Legislation	<i>Telecommunications Act 1997</i> Telecommunications Service Provider (NBN Service Migration) Determination 2018

Findings

The Australian Communications and Media Authority (**the ACMA**) holds the view that between 21 September 2018 and 31 December 2020, Optus Internet Pty Limited (**Optus**) contravened:

- > subsection 14(2) of the *Telecommunications Service Provider (NBN Service Migration) Determination 2018 (the Determination)* on 24,039 occasions
- > subsection 14(3) of the Determination on 34,258 occasions; and
- > subsection 15(1) of the Determination on up to 34,258 occasions.

As a consequence of those contraventions, the ACMA also holds the view that Optus contravened subsection 101(1) of the *Telecommunications Act 1997 (the Act)*.

Background

1. On 12 July 2021, Optus wrote to the ACMA about gaps it had identified in the line capability testing of some customers on 50mbps and 100mbps NBN plans and in notifying customers as required under the Determination.
2. On 28 July 2021, the ACMA commenced an investigation into Optus's compliance with subsections 14(2), 14(3) and 15(1) of the Determination.
3. On 25 January 2022, the ACMA wrote to Optus setting out the ACMA's preliminary view that Optus had contravened these provisions and consequently subsection 101(1) of the Act. Optus was invited to respond by 2 February 2022.
4. On 3 February 2022, Optus responded to the ACMA's invitation advising that it did not wish to make further submissions at this time beyond the matters that have been covered in previous correspondence to the ACMA.
5. This report presents the findings of this investigation. In forming its view, the ACMA has considered the information provided by Optus on 12 July 2021, 13 September 2021, 28 October 2021, 9 December 2021 and 3 February 2022.

Findings and reasons

6. Optus supplies internet, landline and mobile services to the public. It is a carriage service provider (**CSP**) within the meaning of the Act. Optus's internet and landline services are supplied to consumers, using among other things, an NBN ethernet product. As such, Optus is considered an NBN CSP within the meaning of the Determination.
7. The Determination is made under subsection 99(1) of the Act. As such, it is a service provider rule as defined in section 98 of the Act. As a CSP, Optus is required to comply with the service provider rules set out in the Determination in accordance with subsection 101(1) of the Act.

Compliance with subsection 14(2) of the Determination

8. Subsection 14(2) of the Determination states that as soon as practicable, and in any event within 20 working days, after a next-generation NBN broadband service becomes operational the NBN CSP supplying the service must either:
 - a. confirm the maximum attainable speed (**MAS**) of the service identified in the line capability data relating to the service; or
 - b. perform, or arrange for the performance of, line capability testing in relation to the service.
9. On 30 July 2021, the ACMA sought information from Optus about its compliance with subsection 14(2) of the Determination.
10. Optus responded to the ACMA on 13 September 2021, advising that it had reviewed data in relation to customers receiving any form of next-generation NBN service at a newly migrated premises for the first time, covering the period from the commencement of the Determination (21 September 2018) to 31 December 2020. From that review, Optus advised that 24,039 customer orders were assessed more than 20 working days from the date their NBN service became operational. Optus explained that this failure was due to a number of technical issues, principally around Optus's IT systems having difficulty matching MAS data of individual NBN services from an external source to Optus customers and analysing the data in a timely manner.
11. Based on the information provided by Optus, including its admissions, the ACMA has formed the view that Optus contravened subsection 14(2) of the Determination on 24,039 occasions between 21 September 2018 and 31 December 2020. Optus failed to either confirm the MAS of a next-generation NBN broadband service in the line capability data, or perform, or arrange for the performance of, line capability testing, within 20 working days after each service became operational.

Compliance with subsection 14(3) of the Determination

12. Subsection 14(3) of the Determination¹ states that if the line capability data referred to in paragraph 14(2)(a) or the line capability testing referred to in paragraph 14(2)(b) indicates that the part of the network unique to the consumer is not capable of providing the applicable speed, then the NBN CSP must, as soon as practicable, and in any event within 5 working days, advise the consumer:
 - a. of the MAS of the part of the network unique to the consumer; and
 - b. that they may, at no cost, move to a lower speed tier plan at a lower price that reflects the MAS; and
 - c. that they are free to exit the consumer contract which the NBN CSP has entered into with the consumer, without cost.
13. On 30 July 2021, the ACMA sought information from Optus on the number of customers that Optus failed to suitably notify of their MAS on their NBN service because of the technical issues it had experienced.
14. In its response to the ACMA on 13 September 2021, Optus advised that it failed to notify relevant customers of their MAS in respect of the following orders between 21 September 2018 and 31 December 2020:

¹ We note that paragraph 14(3)(b) of the Determination has been amended with effect from 14 December 2020. The above excerpt reflects the provision prior to this amendment as it applied at the relevant time. Some of the breaches occurred after this amendment. However, the change in wording does not affect our findings, which relate to the requirement to notify the customer within 5 days, rather than the content of the notifications.

- > 24,039 orders that were assessed more than 20 working days from the date the service became operational
 - > a further 10,219 orders that were assessed within 20 working days from the date the service became operational, but which were not sent communications within 5 working days of assessment.
15. Based on the information provided by Optus, including its admissions, the ACMA has formed the view that Optus contravened subsection 14(3) of the Determination on 34,258 occasions between 21 September 2018 and 31 December 2020 by failing to notify a consumer of the MAS and remediation options within 5 working days.

Compliance with subsection 15(1) of the Determination

16. Subsection 15(1) of the Determination states that an NBN CSP must not charge a consumer for an NBN service unless:
- a. the service is operational; and
 - b. in relation to a next-generation NBN broadband service, either:
 - i. the MAS identified in the line capability data relating to the service under paragraph 14(2)(a) or the line capability testing under paragraph 14(2)(b) indicates that the part of the network unique to the consumer is capable of providing the applicable speed; or
 - ii. 10 working days have passed since the NBN CSP advised the consumer of the matters set out in subsection 14(3) and the consumer has not requested that the NBN CSP provide an available remedy.
17. On 30 July 2021 the ACMA sought information from Optus on whether Optus charged any consumers for an NBN service in circumstances where the conditions in section 15 of the Determination were not met, and if so, how many customers were so charged.
18. In its response on 13 September 2021, Optus indicated that it charged all customers (34,258) that were not suitably notified of their MAS on their NBN service because of the technical issues it faced. Optus also explained that some of these customers were provided with a complimentary speed pack, and consequently would have been paying for a speed tier lower than that on which their service is provisioned.
19. Based on the information provided by Optus, the ACMA has formed the view that Optus contravened subsection 15(1) of the Determination on up to 34,258 occasions between 21 September 2018 and 31 December 2020 by charging customers for an NBN service in circumstances where it was not permitted to do so.

Compliance with the section 101(1) of the Act

20. Under subsection 101(1) of the Act, Optus must comply with the Determination.
21. Optus has not complied with applicable requirements of the Determination as set out above. Therefore, the ACMA has formed the view that Optus has contravened subsection 101(1) of the Act because it did not comply with the Determination as set out in paragraphs 11, 15 and 19.