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# The Fair Share Debate in Australia: Should large digital platforms pay for digital infrastructure?

## A. Introduction – The Fair Share Debate

The "fair share" debate considers the question of who should pay the costs associated with constructing and maintaining telecommunications infrastructure, in circumstances where the data traffic driven by large content providers is growing and telecommunications operators' costs are increasing.

In recent times, particularly in the EU, this debate has intensified as telecommunications companies face challenges in funding network upgrades essential for meeting connectivity targets. Outside the EU, the US has considered the concept alongside its universal service fund (USF), but the US Department of Commerce, through its National Telecommunications and Information Administration, has also urged caution in adopting fair share, referencing risks to competition, consumer prices, and net neutrality.[1] In the UK, the regulator, Ofcom, has also considered, but ultimately determined not to pursue, the idea of its communication service providers charging content application providers for traffic carriage, citing a lack of evidence that it is necessary.[2]

While there has been robust debate in Europe, in Australia the issue has garnered less attention and has little support. This paper examines the background to the telecommunications infrastructure landscape in Australia, which appears to be at least part of the reason why the debate has failed to gain traction here; the current state of telecommunications infrastructure investment in Australia; views of the telecommunications operators on fair share; and how the Government has approached a similar concept in the News Media Bargaining Code.

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[1] Submission by the National Telecommunications and Information Administration to the European Commission's Consultation on *The future of the electronic communications sector and its infrastructure* in May 2023 - https://www.ntia.gov/other-publication/2023/united-states-comments-european-consultation-future-electronic

[2] Ofcom statement, *Ofcom revises net neutrality guidance*, 26 October 2023 - https://www.ofcom.org.uk/internet-based-services/network-neutrality/ofcom-revises-net-neutrality-guidance/#:~:text=We%20set%20out%20our%20views,matter%20for%20Government%20and%20Parliament.

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## B. Background: Telecommunications infrastructure and services in Australia

Australia's publicly owned telecommunications services provider, then known as Telecom Australia, was privatised over the period from the late 1990s stretching to approximately 2011, and, from the 1990s, the Australian telecommunications market has gradually opened up to competition.

*Telecommunications infrastructure: fixed line and mobile*

At the current time, following a rollout of more than four years over the late 2010s and early 2020s, Australia's fixed line telecommunications infrastructure used for retail telecommunications services (both voice and data) is predominantly provided by the Australian Government owned nbn Co Limited (**NBN Co**). NBN Co provides coverage through a combination of cable, fixed wireless and satellite infrastructure. It is a "wholesale only" provider, meaning it supplies retailers and does not directly supply services to consumers.

There are three mobile network owners (**MNOs**), with networks that service almost all Australians, namely, Telstra (the former Telecom Australia), Optus (owned by Singtel) and TPG/Vodafone.

*Retail service providers*

NBN Co provides "layer 3" fixed line services to retail service providers, which those providers use to supply consumers, pursuant to a regulatory regime established under Australia's Competition and Consumer Act 2010 (**CCA**).

In addition, each of the three MNOs provide (to a greater or lesser extent) services to other retail service providers to allow them to resell mobile services. Mobile services are not subject to a regulatory access regime and therefore the three MNOs have a level of discretion as to the reseller services that they offer and the pricing. Telstra has the network with the highest level of coverage and it does not provide any other service provider with full access to its mobile network.

*Retail providers*

Telstra, Optus and TPG/Vodafone are the primary retail service providers (both fixed line and mobile) in Australia, though the service provider market is crowded, with many service providers serving the retail market.

*Regulators*

There are two primary regulators for the telecommunications sector. The Australian Competition and Consumer Commission (**ACCC**) regulates the sector from an antitrust and consumer protection perspective and the Australian Communications and Media Authority (**ACMA**) also regulates telecommunications consumer protection, including being the regulator responsible for (amongst other consumer protections) enforcement of the universal service obligations.

## C. Key consumer protections: Universal service obligations

A key, and longstanding consumer protection, is the voice Universal Service Obligation (**USO**), which guarantees all Australians access to standard fixed line telephone phone services (in homes and also payphones). The USO is funded through a telecommunications industry levy (**TIL**) levied on carriers that have eligible revenue of at least $25 million, with the amount of their levy determined through an assessment of their revenues.

In 2018 the USO was modernised and extended from the provision of voice services to the provision of access to fixed line broadband services to all Australian homes and businesses. This new broadband access regime is known as the Universal Service Guarantee (**USG**). The USG and USO are delivered by Telstra.

In addition, in 2020, the Government implemented what amounts to an infrastructure provider of last resort regime, the Statutory Infrastructure Provider (**SIP**) regime. Regulatory obligations are imposed on SIPs to connect premises to broadband services that meet certain speeds, among other obligations. NBN Co is the default SIP nationally, though in some cases (eg, new housing developments) a different SIP may be appointed.

## Net neutrality sparks initial debate over fair share

In Australia, what little debate there has been on fair share has been interlaced with discussions of net neutrality. However, regulating for net neutrality is another concept for which there has been little support – primarily because both the Australian Government and the ACCC appear satisfied that retail service providers abide by the principles of neutrality in providing access to all content and apps, without (other than by providing zero rated access in some cases during the early phase of availability of streaming services) favouring, or blocking, any particular services or apps.

Historically, prior to the wide availability of streaming services, most Australian retail service providers offered capped data plans, which became costly as streaming services became increasingly popular. To counter this, initially, some internet service providers would offer zero rating models, under which downloading or streaming certain content would not count towards the data cap.

For example, when Netflix first arrived in Australia in 2015, it entered an unmetered streaming arrangement with one of the then largest retail service providers, however there were complaints that this resulted in slowing broadband speeds for all users of that service. It also sparked the initial interest in the net neutrality debate – and whether streaming service providers should also pay for the use of infrastructure – at that the time, the most vocal telecommunications sector supporter was Optus.

The question of whether fees should be directly imposed on streaming service providers arose again in June 2019 when NBN Co conducted a review of the pricing that it would charge to retail service providers, and consulted over 50 such providers on whether there should be additional charges imposed on video streaming traffic.[3] This was generally interpreted as NBN Co flagging its support for a proposal to impose higher rates on customers and was dubbed a “Netflix tax”. The concern amongst most industry stakeholders was that the suggestion threatened net neutrality. NBN Co moved away from the proposal when only two retail service providers indicated support during that review process.[4]

## Ongoing lack of support for a fair share regime

[3] NBN Co media release, *NBN Co Consults with the Telcos to Bring New NBN Benefits to More Australians*, 20 June 2019, https://www.nbnco.com.au/corporate-information/media-centre/media-statements/nbn-co-consults-with-telcos-to-bring-new-nbn-benefits-to-more-australians

[4] NBN Co, RMID0821 Pricing Review Consultation Paper 2, September 2019, https://www.nbnco.com.au/content/dam/nbnco2/2019/documents/media-centre/pricing-review-2019-consultation-paper-2.pdf.coredownload.inline.pdf

In the context of Australia's complex telecommunications infrastructure regulatory regime, and in circumstances where the Government has met the costs of ensuring that all Australians have access to high speed fixed line services, there has been little appetite from either the Australian Government or the key regulators, the ACCC and the ACMA, to support the imposition of a regulatory fair share regime.

This issue was publicly canvassed most recently in late 2023, when the Government announced a public consultation on potential reforms to the regulation of the delivery and funding of universal telecommunications services, particularly in the more remote and less-populated areas of Australia, given the relatively high costs of providing and supporting those services and the likely limited revenue from the provision of those services (given these areas are sparsely populated).

While the question of fair use was not directly addressed in the consultation paper, in its March 2024 submission, TPG/Vodafone argued that if the Australian Government continued to require the USO to be funded by the TIL, as it currently is, over-the-top (**OTT**) service providers, as well as the large digital platforms, should contribute to the TIL, on the basis that, as a fundamental part of the digital ecosystem, they cannot operate without telecommunications infrastructure, particularly given the revenues they generate. TPG/Vodafone also contended that Australia is lagging behind other jurisdictions in introducing such reforms, with reference to the debates being had in the US, EU and South Korea.[5]

No other telecommunications network operators, nor the primary Australian telecommunications sector industry body, Communications Alliance, made a submission to the consultation that referenced the fair share debate.

In responding to the feedback it received from stakeholders, the Australian Government did not mention any possibility of regulatory action being taken with regard to fair share. The Australian Government appeared to remain firmly of the view (which is also the view of the streaming service providers) that telecommunications infrastructure providers should recover the value of their investments – and make their profits – from the charges that they impose on consumers for the use of their services.

## Positions of Australia's top telecommunications providers

While there is limited Australian Government or regulator support, some of Australia's largest telecommunications providers have continued over time to voice support for adopting an approach similar to the "fair share" concept being discussed in Europe.

As indicated above, it appears likely that TPG/Vodafone would be supportive of the implementation of fair share regulation. In addition to TPG/Vodafone's submission to the USO consultation, in August 2023, Optus and TPG/Vodafone both publicly commented in one of Australia's leading business newspapers, the Australian Financial Review, that the costs of infrastructure (presumably referring primarily to their own mobile infrastructure but also their enterprise infrastructure, as their complaints extended to cloud services) were becoming unsustainable and hinted that fair share rules similar to those being discussed in the EU should be adopted in Australia. Both bemoaned the fact that traffic over their networks was increasing exponentially and yet their revenues were declining.

[5] TPG Telecom, public submission to the Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Better delivery of universal services: Discussion Paper,* March 2024 https://www.infrastructure.gov.au/sites/default/files/documents/bdus2024-tpg-telecom.pdf p 8.

The continuation of such circumstances, it was argued, would mean that infrastructure providers would simply cease investing. On the other hand, at that time, Telstra indicated a preference for a different approach, namely the implementation of commercial agreements with individual companies, though that support was lukewarm at best.

Optus pursued its arguments further in its submission to the Senate Economics References Committee Inquiry into the Influence of International Digital Platforms in September 2023, which considered the nature and extent of international digital platforms operated by large overseas-based multinational technology companies and their power and influence over markets and public debate. Its submission outlined the exponential growth in traffic, the strains placed on telecommunications networks, and the capital investment required to meet the demand. Optus referred to the actions of UK, Spain, France and Switzerland where Governments have implemented digital taxes or levies, and the fact that Australia is lagging behind. Optus flagged that fair share could be achieved either by way of a levy charged directly by telecommunications providers, negotiating commercial agreements, or a digital levy on streamers' revenue.[6]

The Senate tabled its report on the Influence of International Digital Platforms in November 2023, referencing Optus's submission on fair share only briefly[7] and did not feature the proposals in its recommendations. Again, this indicated that there is little political support for fair share regulation in Australia.

## Other contexts – News Media Bargaining Code

Despite the muted debate on fair share in the context of telecommunications infrastructure, the Australian Government has demonstrated a willingness to regulate to require large digital platforms to pay their "fair share" in other areas.

In 2021 Australia implemented its world-first News Media Bargaining Code (**NMB Code**), providing an incentive for large digital platforms to pay Australian media companies for the creation of news content as an alternative to being forced into a mandatory arbitration regime to determine the amounts that would be payable. The NMB Code applies to designated digital platforms, requiring them to (amongst other things) negotiate with Australian news media businesses to pay those businesses for relevant news content made available on their services. The NMB Code contains an arbitration process that may be triggered by the media business in the event payment negotiations fail.

No platforms or services have been designated to date. Nonetheless, the NMB Code is considered to have been a success as it resulted in bringing both Google and Meta to the negotiating table with Australian media businesses, with over thirty agreements being entered into between those platforms and Australian news businesses which had terms of between three and five years.

[6] Optus, submission to the Senate Economics References Committee's Inquiry into the Influence of International Digital Platforms, *Fair Share Contribution Submission*, September 2023, https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Digitalplatforms/Submissions p 2-3.

[7] Report of the Senate Economics References Committee on its Inquiry into the Influence of International Digital Platforms, https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/RB000119/toc_pdf/Influenceofinternationaldigitalplatforms.pdf p 51-52.

Although considered a success, the NMB Code is seen by the Australian Government as having served its purpose, with a new regulatory framework now required. In that context, the Australian Government has announced an intention to potentially adopt a new News Bargaining Incentive. While consultation has not progressed as at the time of writing (April 2025), the proposal is that this Incentive will include a new tax, together with an offset mechanism. Regulated platforms that choose to enter or renew commercial agreements with news publishers to contribute to the costs of producing news journalism will not be required to pay the new tax – essentially such agreements will offset the tax. Regulated platforms will be the larger digital platforms operating significant social media or search services irrespective of whether they carry news.

## Conclusion

While some in the telecommunications industry have called for fair share, the Australian Government has no appetite for the implementation of such a regime. Given Australia's strong level of competition in the telecommunications sector, with three MNOs and many providers of enterprise infrastructure, as well as the very significant public investment in the NBN Co infrastructure that now connects over 97% of Australians, it does not seem that position will change any time soon.

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