

## **COMPETITION AND CONSUMER ACT 2010**

Undertaking to the Australian Competition and Consumer Commission  
given for the purposes of section 87B

by

**Optus Internet Pty Limited ACN 083 164 532**

### **Person giving the undertaking**

1. This undertaking is given to the Australian Competition and Consumer Commission (ACCC) by Optus Internet Pty Limited ACN 083 164 532 (Optus) of Building C, Level 4, 1-7 Lyonpark Road, Macquarie Park 2113 in the State of New South Wales for the purposes of section 87B of the *Competition and Consumer Act 2010 (Act)*.
2. Optus, among other services offered to consumers, is a supplier of retail fixed-line broadband plans supplied over the National Broadband Network (NBN).

### **Background**

#### *Optus' Internet services*

3. Since 1 September 2015, Optus has promoted and offered to consumers NBN broadband services, using fibre to the node (FTTN) and fibre to the building (FTTB) technology. Consumers can select from a range of NBN broadband plans offered by Optus with different maximum internet speeds. The maximum speeds offered by Optus reflected some of the wholesale access speed tiers that it purchases from NBN Co Limited (NBN Co).
4. Broadband services using FTTN and FTTB technologies can be subject to performance limitations to such an extent that consumers are unable to achieve the maximum speeds of the NBN Co wholesale access speed tiers. NBN Co provides performance information to Optus in relation to services supplied over FTTN and FTTB technologies after those services have been connected. Optus also independently tested some consumers' service performance after their NBN broadband services were activated.

#### *Optus Speed Plans*

5. Optus promoted and offered NBN FTTN and FTTB broadband plans as stand-alone services and in different 'bundles' with other services on the basis of providing internet speeds up to the following download and upload speeds, based on the wholesale access speed tiers offered by NBN Co:
  - a. 100 megabits per second (Mbps) download and 40 Mbps upload (100/40 Plan);
  - b. 50 Mbps download and 20 Mbps upload (50/20 Plan);
  - c. 25 Mbps download and 5 Mbps upload (25/5 Plan); and
  - d. 12 Mbps download and 1 Mbps upload (12/1 Plan),(collectively, the **Speed Plans**).
6. For the purpose of this undertaking, the definition of Speed Plan refers to the maximum speeds Optus offers to deliver to a consumer for the service they have signed up for. A Speed Plan may comprise a 'base' speed only, or a 'base' speed upgraded by a 'speed pack', which increases the maximum speed of the Speed Plan.
7. Between September 2015 and May 2016, the price to move from one speed tier to the next was \$5 or \$10, so that starting from a 12/1 Plan customers could upgrade to:
  - a. a 25/5 Plan by purchasing a "Boost" speed pack for an extra \$5 per month;
  - b. a 50/20 Plan by purchasing a "Boost Plus" speed pack for an extra \$15 per month; or
  - c. a 100/40 Plan by purchasing a "Boost Max" speed pack for an extra \$25 per month.

8. Since May 2016, the price to move from one speed tier to the next was \$10, so that starting from a 12/1 Plan customers could upgrade to:
  - a. a 25/5 Plan by purchasing a "Boost" speed pack for an extra \$10 per month;
  - b. a 50/20 Plan by purchasing a "Boost Plus" speed pack for an extra \$20 per month; or
  - c. a 100/40 Plan by purchasing a "Boost Max" speed pack for an extra \$30 per month.

#### *Bundles*

9. A bundle is a package of products and/or services the consumer purchases from Optus that includes a Speed Plan (for example, a bundle of a Speed Plan, telephony and entertainment services). Customers could upgrade to a higher tier of speed from time to time by purchasing a 'speed pack' to supplement the 'base' Speed Plan.

#### *Maximum Attainable Speeds*

10. The highest internet speed that could be delivered to each consumer given the technical capabilities of their NBN connection is defined for the purposes of this undertaking as the **Maximum Attainable Speed**. Maximum Attainable Speeds are currently measured by NBN Co and are generally made available to Optus within two weeks of activation of a Speed Plan but may also be measured by Optus. Consumers' Maximum Attainable Speeds cannot be measured prior to a consumer connecting to the NBN.
11. Maximum Attainable Speeds are affected by many factors including the length and quality of copper wiring from the consumer's premises to the node (for FTTN) or basement (for FTTB), electrical interference, and the quality and layout of cabling and copper wiring in the consumer's premises.
12. The speeds the consumer receives may be limited by the Speed Plan they have chosen. For example, a consumer who is on a 100/40 Plan and whose Maximum Attainable Speed is 65 Mbps will only receive internet speeds up to 65 Mbps download. If that same consumer is on a 50/20 Plan, they will receive internet speeds up to 50 Mbps download because their Speed Plan caps their speed, even though their NBN connection can support higher speeds.

#### *Affected Consumers*

13. For the purposes of this undertaking, consumers who, within the first two weeks of data being available to Optus for each consumer, had a Maximum Attainable Speed lower than the maximum speed of their Speed Plan are defined as Affected Consumers.

#### **Conduct of concern**

14. Between 1 September 2015 and 30 June 2017, Optus promoted the Speed Plans online, on television, in print and on radio. Optus' promotion of its Speed Plans included statements such as "**BOOST. Up to 25Mbps Download. Up to 5Mbps Upload. Our recommended choice for most customers...**" and "**BOOST MAX. Up to 100Mbps Download. Up to 40 Mbps Upload**" which represented to consumers that their NBN connections could deliver speeds up to the maximum speed of their Speed Plan.
15. Between 1 September 2015 and 30 June 2017, Optus sold 100,351 Speed Plans to consumers using the NBN's FTTN or FTTB technology. 8,789 of those 100,351 consumers (9%) were Affected Consumers.

16. Table 1 below shows:

- the number of Optus consumers on each Speed Plan who were connected using NBN FTTN technology between 1 September 2015 and 30 June 2017;
- the number and percentage (%) of consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of their Speed Plan; and
- of the total in 16(b), the number and percentage (%) of consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of lower Speed Plans.

**Table 1: Maximum Attainable Speeds of Optus FTTN consumers between 1 September 2015 and 30 June 2017**

Speed Plan	Number of consumers on Speed Plan	Number and percentage (%) of consumers on each Speed Plan with Maximum Attainable Speeds less than:			
		100 Mbps download and 40 Mbps upload	50 Mbps download and 20 Mbps upload	25 Mbps download and 5 Mbps upload	12 Mbps download and 1 Mbps upload
100/40 Plan	11,326	5,430 (48%)	2,337 (21%)	372 (3%)	10 (<1%)
50/20 Plan	5,856		1,519 (26%)	253 (4%)	13 (<1%)
25/5 Plan	40,503			1,381 (3%)	50 (<1%)
12/1 Plan	32,038				26 (<1%)

17. Table 2 below shows:

- the number of Optus consumers on each Speed Plan that were connected using NBN FTTB technology between 1 September 2015 and 30 June 2017;
- the number and percentage (%) of consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of their Speed Plan; and
- of the total in 17(b) the number and percentage (%) of consumers on each Speed Plan whose NBN connection had a Maximum Attainable Speed less than the maximum speed of lower Speed Plans.

**Table 2: Maximum Attainable Speeds of Optus FTTB consumers between 1 September 2015 and 30 June 2017**

Speed Plan	Number of consumers on Speed Plan	Number and percentage of consumers on each Speed Plan who have Maximum Attainable Speeds less than:			
		100 Mbps download and 40 Mbps upload	50 Mbps download and 20 Mbps upload	25 Mbps download and 5 Mbps upload	12 Mbps download and 1 Mbps upload
100/40 Plan	1,406	248 (18%)	116 (8%)	47 (3%)	1 (<1%)
50/20 Plan	659		99 (15%)	34 (5%)	0 (0%)
25/5 Plan	4,481			83 (2%)	0 (0%)
12/1 Plan	4,082				3 (<1%)

### **Australian Consumer Law**

18. The Australian Consumer Law (ACL) is contained in Schedule 2 to the Act.
19. Section 18 of the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.
20. Section 29(1)(b) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that services are of a particular standard, quality, value or grade.
21. Section 29(1)(g) of the ACL provides that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits.

### **Admissions**

22. By the conduct described above, from 1 September 2015 to 30 June 2017, in the promotion of each Speed Plan, Optus represented to consumers that Optus was capable of delivering internet services up to the maximum speeds of each Speed Plan when this was not the case.
23. Optus admits that the conduct described above is likely to have contravened sections 18, 29(1)(b) and 29(1)(g) of the ACL.

### **Commencement of this undertaking**



24. This undertaking comes into effect when:
  - a. this undertaking is executed by Optus; and
  - b. this undertaking so executed is accepted by the ACCC (the commencement date).
25. Upon the commencement date, Optus undertakes to assume the obligations set out in Attachment A for the purposes of section 87B of the Act.
26. This undertaking ceases to have effect after a period of three years from 1 February 2018.

### **Acknowledgments**

27. Optus acknowledges that:
  - a. the ACCC will make this undertaking publicly available including by publishing it on the ACCC's public register of section 87B undertakings on its website;
  - b. the ACCC may, from time to time, make public reference to this undertaking, including in news media statements and in ACCC publications;
  - c. the ACCC may make public reference to the information contained in the report provided by Optus as set out in Attachment A of this undertaking in the section titled 'Undertaking as to reporting', including in news media statements and in ACCC publications; and
  - d. this undertaking in no way derogates from the rights and remedies available to any other person arising from the alleged conduct.

**Executed as an undertaking**

Executed by Optus Internet Pty Limited ACN 083 164 532 pursuant to section 127(1) of the *Corporations Act 2001* by:

	
Signature of director	Signature of a director/company secretary
ALLEN LEW	PAUL O'BRIEN
Name of director (print)	Name of director/company secretary (print)
Date 7/12/2017	Date 7.12.2017

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

11/12/17

Date

and signed on behalf of the Commission:



Chairman

11/12/17

Date

**Attachment A – undertakings for the purposes of section 87B of the Act**

**Undertaking as to remediation for current Affected Consumers**

1. Optus undertakes that, for each Affected Consumer who entered into an Optus Speed Plan between 1 September 2015 and 31 January 2018, and to whom, as at the date Optus sends the email or letter set out in paragraphs (a)(i) and (b)(i) below, Optus continued to provide a Speed Plan:
  - a. for each Affected Consumer who entered into a 25/5 Plan, 50/20 Plan or 100/40 Plan as part of a bundle, Optus will:
    - i. no later than 2 March 2018, send an email or, where Optus does not have a consumer's email address, a letter to the consumer in a form approved by the ACCC, which sets out remediation options for the consumer; and
    - ii. in accordance with the remediation option selected by the consumer, allow the consumer to:
      - A. for consumers with a Speed Plan upgraded by a 'speed pack', remain on their current Speed Plan with no refund;
      - B. remain on or move to, and pay for, the 'base' Speed Plan of their bundle (ie. with any 'speed pack' removed) and:
        - i. provide a refund as set out in Attachment B; and
        - ii. where an Affected Consumer's Maximum Attainable Speed is lower than the maximum speed of the 'base' Speed Plan, provide a discount to the consumer for the remainder of their contract. The discount amount is to be determined in accordance with Attachment B; or
      - C. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract and receive a refund as set out in Attachment B;
  - b. for each Affected Consumer who entered into a 'broadband only' 25/5 Plan, 50/20 Plan or 100/40 Plan, Optus will:
    - i. no later than 2 March 2018, send an email or, where Optus does not have a consumer's email address, a letter to the consumer in a form approved by the ACCC, which sets out remediation options for the consumer; and
    - ii. in accordance with the remediation option selected by the consumer, allow the consumer to:
      - A. remain on their current Speed Plan with no refund;
      - B. move to, and pay for, a lower Speed Plan of their choice and provide a refund as set out in Attachment B; or
      - C. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract and receive a refund as set out in Attachment B; and
  - c. for each Affected Consumer who entered into a 12/1 Plan ('broadband only' or as part of a bundle), Optus will:
    - i. no later than 2 March 2018, send an email or, where Optus does not have a consumer's email address, a letter to the consumer in a form approved by the ACCC, which sets out remediation options for the consumer; and
    - ii. in accordance with the remediation option selected by the consumer, allow the consumer to:
      - A. remain on their current Speed Plan with no refund or discount; or
      - B. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract with no refund.

#### **Undertaking as to remediation for former Affected Consumers**

2. Optus undertakes that, for each Affected Consumer who entered into a Speed Plan on or after 1 September 2015 but to whom, as at the date Optus sends the email or letter set out in paragraphs (a)(i) and (b)(i) below, Optus no longer provided a Speed Plan:
  - a. for each Affected Consumer who entered into a 25/5 Plan, 50/20 Plan or 100/40 Plan, Optus will:
    - i. no later than 2 March 2018, send an email or, where Optus does not have a consumer's email address, a letter to the consumer in a form approved by the ACCC;
    - ii. where the consumer elects, refund any termination fee the consumer paid when exiting their contract; and
    - iii. where the consumer elects, provide a refund as outlined in Attachment B; and
  - b. for each Affected Consumer who entered into a 12/1 Plan, it will:
    - i. no later than 2 March 2018, send an email or, where Optus does not have a consumer's email address, a letter to the consumer in a form approved by the ACCC; and
    - ii. where the consumer elects, refund any termination fee the consumer paid when exiting their contract.

#### **Undertaking as to future consumers**

3. Optus undertakes that for a period of three years from 1 February 2018 it will not, in trade or commerce, represent that it can or will provide consumers with NBN FTTN or FTTB connections with download and upload speeds at the maximum speeds specified in the consumer's Speed Plan unless it also carries out the steps in paragraph 4 below.
4. Subject to paragraph 3, Optus undertakes for the purposes of section 87B of the Act that for a period of three years from 1 February 2018 it will:
  - a. within the first four weeks of data being available to Optus for each consumer's Maximum Attainable Speed, check each consumer's Maximum Attainable Speed. If the Maximum Attainable Speed is below the advertised maximum speed of the consumer's Speed Plan, Optus will:
    - i. notify the consumer of their Maximum Attainable Speed; and
    - ii. for each consumer who entered into a 25/5 Plan, 50/20 Plan and 100/40 Plan as part of a bundle, provide the consumer with the options to:
      - A. remain on their current Speed Plan with no refund;
      - B. move to, and pay for, a different bundle (with a lower Speed Plan) of their choice and provide a refund as set out in Attachment B; or
      - C. exit the contract (and any associated bundle) without cost and provide a refund to the consumer as set out in Attachment B;
    - iii. for each consumer who entered into a 'broadband only' 25/5 Plan, 50/20 Plan and 100/40 Plan, provide the consumer with the options to:
      - A. remain on their current Speed Plan with no refund;
      - B. move to, and pay for, a lower Speed Plan of their choice and provide a refund as set out in Attachment B; or
      - C. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract and receive a refund as set out in Attachment B; and

- iv. for each consumer who entered into a 12/1 Plan ('broadband only' or as part of a bundle), provide the consumer with the options to:
  - A. remain on their current Speed Plan with no refund or discount; or
  - B. exit the contract (and any associated bundle) without incurring any associated exit costs under their contract with no refund.

#### **Notification**

5. Optus undertakes that it will, within 20 business days of the commencement date, publish or cause to be published on its website for a period of 90 consecutive days a notice in the form of Attachment C to this undertaking, which will, subject to paragraph 7, be accessible to Affected Consumers via a link contained in a corrective notice in the top third of the:
  - a. Optus home page at: <https://www.optus.com.au/>;
  - b. Optus NBN web page at: <http://www.optus.com.au/shop/broadband/nbn>;
  - c. Optus broadband web page at: <http://www.optus.com.au/shop/broadband>; and
  - d. Optus business broadband web page at: <http://www.optus.com.au/business/broadband-internet/office>.
6. The corrective notice displayed on the web pages indicated at paragraph 5 and accessible to Affected Consumers will:
  - a. include the words:

'Did you purchase an Optus NBN plan on or after 1 September 2015? You may be entitled to a partial refund or be able exit your contract without cost.

Optus is providing remedies to consumers who purchased NBN internet plans where their fibre to the node (FTTN) or fibre to the building (FTTB) connection was not capable of delivering the speeds promised. We acknowledge that by doing so, we likely breached the Australian Consumer Law.

Optus will be contacting affected consumers no later than 2 March 2018 to offer options including a refund, moving to a lower speed plan or exiting their contract.

Click here [insert hyperlink to notice in the form of Attachment C] for more information, or contact us on [number].';
  - b. be bordered by a black box;
  - c. not be displayed as a "pop-up" or "pop-under" window;
  - d. be crawlable (i.e. its contents may be indexed by a search engine); and
  - e. be prominent in size.

7. The Optus home page which is accessible from mobile devices is known as the mobile site and is differently configured to the home page at the same URL when accessed in other ways (for example, from a computer). The corrective notice displayed on the Optus mobile site home page will comply with the same requirements as in paragraph 6, save that it will instead include the words:

'Did you purchase an Optus NBN plan on or after 1 September 2015? You may be entitled to a partial refund or be able to exit your contract without cost. Click here [insert hyperlink to notice in the form of Attachment C] for details.'

#### **Undertaking as to amendments to correspondence and contacting Affected Consumers**

8. Optus undertakes that it will only vary the content of the emails and letters to Affected Consumers set out in paragraphs 1(a)(i) and (b)(i), and 2(a)(i) and b(i), or the corrective notices at paragraphs 6 and 7 and at Attachment C, with the prior written consent of the ACCC.
9. If Optus does not receive a response from a current Affected Consumer to the communications set out in paragraph 1, Optus will call and/or SMS the current Affected Consumer in order to provide the information contained in those communications.



**Undertaking as to reporting**

**10. Between 30 April and 4 May 2018, Optus will provide a report to the ACCC setting out:**

- a. the number of current Affected Consumers for each Speed Plan falling within paragraph 1 above and for each of these categories of Affected Consumers:
  - i. the number of Affected Consumers that chose each remedy option set out in paragraph 1 above; and
  - ii. the total amount of refunds provided; and
- b. the number of former Affected Consumers for each Speed Plan falling within paragraph 2 above and for each of these categories of Affected Consumers:
  - i. the number of Affected Consumers that chose each remedy option set out in paragraph 2 above; and
  - ii. the total amount of refunds provided.

**Attachment B - remediation for Affected Consumers**

**Consumers who elect a refund**

1. Where a consumer elects to receive a refund, Optus undertakes to provide refunds in accordance with Table A and Table B below.
2. Where an Affected Consumer accepts an offer of a refund from Optus, the refund amount is to be determined by reference to the difference between the Speed Plan the consumer paid for and the fastest Speed Plan which would have allowed the consumer to receive the maximum speed of their Speed Plan.
3. Where the Speed Plan the Affected Consumer paid for and the Speed Plan which would have allowed the Affected Consumer to receive the maximum speed of their Speed Plan is the same, Optus will provide a \$50 credit to the consumer's account instead of providing a refund. For example, a consumer is on a 100/40 Plan but paying for a 25/5 Plan (ie the consumer has a complimentary speed pack) and the consumer's Maximum Attainable Speed is 30/10. The Speed Plan the consumer paid for and the Speed Plan which would have allowed the consumer to receive the maximum speed of their Speed Plan is the same (25/5 Plan). Therefore, Optus will offer the consumer a \$50 credit to their account.
4. The refund structure in Table A below applies to both broadband only Speed Plans and Speed Plans as part of bundles.

**Table A: Compensation for Affected Consumers who entered into a Speed Plan between 1 September 2015 and 30 April 2016**

Consumer's Speed Plans	Consumer's refund based on Maximum Attainable Speed (MAS)		
	MAS <100/40 and =>50/20	MAS <50/20 and =>25/5	MAS <25/5
Consumer paid for a 100/40 Plan	\$10 per month	\$20 per month	\$25 per month
Consumer paid for a 50/20 Plan		\$10 per month	\$15 per month
Consumer paid for a 25/5 Plan			\$5 per month
Consumer paid for a 12/1 Plan	No refunds applicable to 12/1 Plan		

**Table B: Compensation for Affected Consumers who entered into a Speed Plan from 1 May 2016**

Consumer's Speed Plans	Consumer's refund based on Maximum Attainable Speed (MAS)		
	MAS <100/40 and =>50/20	MAS <50/20 and =>25/5	MAS <25/5
Consumer paid for a 100/40 Plan	\$10 per month	\$20 per month	\$30 per month
Consumer paid for a 50/20 Plan		\$10 per month	\$20 per month
Consumer paid for a 25/5 Plan			\$10 per month
Consumer paid for a 12/1 Plan	No refunds applicable to 12/1 Plan		

**Consumers on bundles who move to or elect to remain on their 'base' Speed Plan**

5. Because bundles containing different 'base' Speed Plans also have different inclusions, it is not possible to 'downgrade' Affected Consumers to a bundle containing a lower tier 'base' Speed Plan without also affecting those other inclusions. Accordingly, for Affected Consumers who, for the purposes of paragraph 1.a.ii.B) of Attachment A, elect to remain on or move to the 'base' Speed Plan of their bundle (ie. without any speed pack) and who have a Maximum Attainable Speed lower than the maximum speed of the 'base' Speed Plan, Optus will reduce the ongoing price of that bundle for that Affected Consumer. Optus will discount the bundle price by the amount as calculated in accordance with Table B above for the balance of the contract term.
6. For example, if an Affected Consumer wishes to continue receiving a bundle including a 'base' 50/20 Plan but the Consumer's Maximum Attainable Speed is 40 Mbps download and 15 Mbps upload, then the monthly price for that Affected Consumer's bundle will be reduced by \$10 per month for the balance of the contract term.

## Attachment C – Corrective notice for Optus website

### Maximum NBN Speeds – Refund Offer for Optus customers

Since 1 September 2015, Optus has promoted and offered NBN internet plans using the NBN's fibre to the node (FTTN) and fibre to the building (FTTB) technology to consumers with the choice to select from a range of internet speeds.

Optus promoted NBN internet plans to consumers by highlighting the maximum speeds available to consumers on each Speed Plan. The maximum speeds promoted by Optus reflected the maximum speeds of the wholesale internet services that it purchased from NBN Co Limited.

Optus offered Speed Plans as 'broadband only' plans and also as part of bundles. Consumers paid \$80 per month for a broadband only Speed Plan which offered speeds up to 12 megabits per second download and 1 megabit per second upload. Consumers paid:

- \$5 or \$10 extra per month to move up one speed plan (25/5 mbps),
- \$15 or \$20 extra per month to move up two speed plans (50/20 mbps), and
- \$25 or \$30 extra per month to move up three speed plans (100/40 mbps).

### Optus consumers' maximum speeds

Generally, within two weeks of activation of a consumer's NBN speed plan, NBN makes available to Optus the maximum speed measurement the consumer can achieve.

Optus has reviewed the information made available by NBN and discovered it could not provide many of its consumers with internet speeds up to the maximum speed of their speed plan because the consumer's NBN connection was not capable of delivering it.

Optus accepts that this conduct was likely to have contravened the Australian Consumer Law, because NBN speed plans were promoted as delivering certain speeds where consumers could not receive those speeds. In response to concerns raised by the ACCC, Optus has provided a court enforceable undertaking to the ACCC that it will not engage in similar conduct in the future.

### Remedies available to affected Optus customers

Affected consumers may have the following options available to them:

- Remain on their current speed plan with no refund,
- Exit their plan without cost and receive a refund for the extra charges paid,
- For consumers on a 'broadband only' plan, move to a lower speed plan of their choice and provide a refund, and
- For consumers on a bundle, remain on or move to the 'base' speed plan of the bundle, receive a refund and, if applicable, receive a discount going forward.

Former Optus consumers may also be eligible to receive a refund.

If you are an affected consumer, Optus will contact you by email or post no later than 2 March 2018. If you would like further information, please contact us on [number].