



Australian Government
Department of Communications

Drew Clarke

Secretary

Ms Christine McDonald
Secretary
Standing Committee on Environment and Communications
Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms McDonald

Inquiry into the National Broadband Network (Tasmania) Bill – Submission from the Department of Communications

Thank you for inviting a submission from the Department of Communications (the Department) to inform the Committee's inquiry into the National Broadband Network Companies Amendment (Tasmania) Bill 2014.

The Australian Government (the 'Government') is committed to completing the National Broadband Network (NBN) and ensuring all Australians have access to very fast broadband as soon as possible, at affordable prices, and at least cost to taxpayers.

On 8 April 2014, the Government forwarded a new Statement of Expectations to NBN Co, confirming the recommendations made by the company in its Strategic Review to deliver broadband upgrades sooner, at less cost for taxpayers and more affordably for consumers.

The new Statement of Expectations indicates that NBN Co should proceed with the NBN rollout using an optimised multi-technology mix. This includes prioritising under-served areas so that these locations, on average, receive upgrades two years sooner than would otherwise be the case.

The multi-technology approach is expected to reduce project funding by \$32 billion, get the NBN finished four years sooner and deliver download speeds of 50 megabits per second to premises in 90 percent of the fixed line footprint by 2019.

NBN Co will determine which technologies are most cost-effective and should be utilised on an area-by-area basis. This will take place within the constraints of a \$29.5 billion public equity cap and NBN Co's other rollout parameters, such as achieving minimum network speeds, improving the speed of deployment and prioritising under-served areas where logistically and commercially feasible.

In the short term, people living in regional and remote areas of Australia stand to benefit from NBN Co allocating \$34 million to improve its satellite services.

Roll out of the NBN in Tasmania

On 26 March 2012, NBN Co announced it had entered into a construction contract with Visionstream Australia to deploy the NBN to approximately 200,000 premises in Tasmania. The four-year detailed design, construction and maintenance contract was valued at approximately \$300 million.

As stated by NBN Co to the Senate Select Committee hearing of 12 March 2014, the contract with Visionstream provides flexibility for NBN Co to change rollout technologies.

It is our understanding that NBN Co's management of the rollout in Tasmania is entirely consistent with this contractual flexibility. NBN Co and Visionstream have agreed on arrangements for the rollout which have resulted in an improved rate of progress over recent months.

As at 14 April 2014, NBN Co had issued build instructions for the fibre to the premises (FTTP) network covering 28,000 brownfields premises in Tasmania, in addition to the 36,117 brownfields premises passed by the FTTP network in Tasmania as at 21 April 2014.

NBN Co has also confirmed that it is in the process of making arrangements with Aurora Energy to trial an aerial rollout of NBN optic fibre cables from power poles. The trial will help to determine whether costs can be reduced using aerial deployment in comparison to FTTP using underground ducts and conduits and fibre to the node (FTTN).

Introduction of a specific subsection to the National Broadband Network Companies Act 2011 (NBN Companies Act)

The Department understands the purpose of the proposed amendment to the NBN Companies Act 2011 is to secure in legislation the mandatory delivery of optical fibre to 200,000 premises in Tasmania. However, the Department considers that there are a number of conceptual and implementation challenges that need to be considered in association with the proposed amendment Bill.

The NBN Companies Act was developed to constrain certain aspects of NBN Co's operations consistent with its wholesale-only, open access mandate and its public ownership during the build phase. However, the Act does not regulate NBN Co's day-to-day operations, the technologies it uses or the wholesale products it provides. These matters were intentionally left to NBN Co's commercial judgement and specific shareholder direction.

NBN Co was established as a commercial entity under the Corporations Law (complemented by Government Business Enterprise regulation) to be run on commercial lines, with products and pricing to be determined on commercial principles subject to the policy direction of the government of the day and backed up by general regulation.

One of the key objectives identified in the Revised Explanatory Memorandum to the NBN Companies Bill was for NBN Co to have “the flexibility to invest in and divest itself of assets as necessary, especially to facilitate the cost-effective roll-out of the NBN”¹. This is achieved by NBN Co first and foremost operating under the Corporations Law, as complemented by Government Business Enterprises regulation, and by ensuring the Company retains flexibility under NBN specific legislation.

Section 3(1)(a) of the NBN Companies Act states that a key object of the Act is also to provide a regulatory framework for NBN corporations that promotes the long-term interests of end-users of carriage services. A proposed amendment to the NBN Companies Act could therefore reasonably be required to demonstrate that it meets the long term interests of end-users across the nation.

NBN Co specific legislation was primarily established to prevent NBN Co from acting in ways that abuse its market power and monopoly position; not to prescribe what services or technologies it should deploy. As such, the proposed additions to NBN Companies Act in this Bill would represent an exception that operated in a distinctly different manner to the overarching intent of the entity-specific legislation that applies to NBN Co.

As a general principle, successive governments have avoided specifying technologies in telecommunications legislation on the grounds that industry and the market are best placed to determine the appropriate technologies to use in any given area, taking account of environmental circumstances and market conditions. This is reflected in the Government’s decision to support NBN Co’s adoption of a multi-technology mix.

The Government through its Statement of Expectations expects that the NBN Co Board and management will monitor the capabilities required to implement a multi-technology mix NBN. In this context, the proposed amendment to the NBN Companies Act would represent a conflicting direction to NBN Co which is inconsistent with the original intent of the broad NBN Co model (being established under Corporations Law) and the Act.

Some further technical issues of note with the current draft of the Bill follow:

- By requiring NBN Co to build the NBN “in a way that involves [no] fewer than 200,000 premises of end users in Tasmania being connected to the network by optical fibre to the premises”, the Bill could have the effect of making the connection of 200,000 premises in Tasmania a priority, over and above the rollout to other under-served areas in the rest of Australia.
- The resourcing requirement may delay the rollout plan in other parts of Australia and conflict with the NBN Co Board’s responsibility to achieve the rollout on the most cost-effective basis.

¹ NBN Companies Bill Revised Explanatory Memorandum, p18. Available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4495%22#ems>.

- It is unclear from the drafting of the Bill whether ‘being connected’ refers to end-users adopting services on the NBN, as ‘connected’ is not defined in the Bill. NBN Co as a wholesale-only provider has no capacity to compel end-users to take up services on its network or to accept compulsory installation of connection equipment at end-user premises. NBN Co would not be in a position to guarantee this outcome and meet the target required by the Bill.
- The explanatory memorandum to the NBN Companies Bill states that: “200,000 is the number of premises specified by the NBN Co in its media release of 26 March 2012.” However, the media release refers to “around 200,000 homes and businesses”. The number of premises of end-users is not explicitly specified in the media release. The Department recommends updating the explanatory memorandum to clarify this by aligning its language.

In summary, the Bill if enacted would create a number of significant policy and commercial challenges and conflict with the overarching governance framework of legislation, regulation and company responsibilities established to provide oversight for the NBN rollout.

The Department looks forward to elaborating on the matters outlined in the submission at the Committee’s request.

Yours sincerely


Drew Clarke
30 April 2014