

Mr Robert Oakeshott MP
Joint Committee on the National Broadband Network
Parliament House
CANBERRA ACT 2600

26 May 2011

By e-mail: jcnbn@aph.gov.au

Dear Mr Oakeshott,

Re: Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011

The Urban Taskforce is a non-profit organisation representing Australia's most prominent property developers and equity financiers. We provide a forum for people involved in the development and planning of the urban environment to engage in constructive dialogue with both government and the community.

We appreciate the opportunity to make a submission to your inquiry in relation to the above-mentioned bill.

Our comments are set out below.

1. There is no obligation on the NBN Co to respond to requests for the issue of a statement about the non-installation of optical fibre lines

The bill prohibits a development from installing a line in the project area unless the line is an optical fibre line. It also prohibits a developer from installing a fixed-line facility in the project area for a real estate development project if the facility is not a fibre-ready facility.

An exception from these requirements applies when NBN Co has issued a statement to the effect that neither it nor any other NBN corporation has installed, is installing, or proposes to install, optical fibre lines in the project area.¹

There is no obligation on the NBN Co to respond to a request for such a statement in any particular timeframe.² In fact there is no obligation on the NBN Co to respond to a request to issue a statement at all.

There is no right to appeal to the Administrative Appeals Tribunal for any failure to respond to a request or an inappropriate response.

There is no obligation on the NBN Co to publish statistics on its performance in this regard.

The absence of such provisions is cause for serious concern. We urge the committee to recommend that such provisions be included.

2. Even if a statement is formally refused, the NBN Co is still not compelled to actually deliver an optical fibre line.

Even if a statement (referred to above) is formally refused, the NBN Co is still not compelled to actually deliver an optical fibre line. There is a significant risk that the NBN Co will assert that it will install infrastructure, but fail to do so.

If the NBN Co, and its preferred technology, is to be given this privileged position in legislation, there needs to be a commensurate mechanism for the subsequent conduct of the NBN Co to be reviewed. That is, **there needs to be an ability to seek a review of an applicant to seek a**

¹ s 372E(3); s 372F(3).

² s 372J.

review in the Administrative Appeals Tribunal of any subsequent refusal or inability of the NBN Co to install optical fibre lines in relation to the project.

3. The transitional arrangements fail to protect pending projects from arbitrary changes in the “legislative instrument”

The existing transitional arrangements in proposed section 372P only relate to projects that were underway prior to the commencement of the legislative provisions. They offer no protection for businesses who, after the commencement of the legislation, act in reliance of an absence of a legislative instrument, or an existing legislative instrument, which may be later amended. Additionally, they offer no protection from businesses who have been acting in reliance on their existing land use approvals, and made irreversible investment decisions, but nonetheless, have not reached the thresholds set out in the bill.

We do not support the proposal for the Minister to be given a new power to unilaterally vary the conditions set out in a legislative instrument at any time. This power is inconsistent with the approach taken for land use approvals (such as development consents/planning permits, mining leases, etc) generally which, once issued, cannot normally be varied other than by application of the benefitting party. Where a development consent has already been issued, a subsequent change in policy on, say, dwelling density, does not impact on the consent. It may affect new consents, but not old ones. Similarly, changes to the building code cannot affect projects that have already received final tick-off.

The risk premium required to secure debt and equity finance to develop land will increase if the conditions relating to a development may be varied at will by the regulator. Any financier will factor in the potential that additional costs could be imposed which may nullify the benefits of the ‘locked-in’ regulatory conditions secured through a development approval. **The Minister’s power to unilaterally vary conditions could even reduce the development potential of some land and reduce or remove feasibility of some projects.**

The proposed section 372P should be amended to provide that the civil penalty provisions will be taken not to have been contravened where:

- a legislative instrument is imposed after a development consent/planning permit has been issued; or
- a legislative instrument is amended after a development consent/planning permit has been issued;

and the conduct of the person would have not been in breach of the civil penalty provisions if it had been carried out at the time the consent/permit was issued.

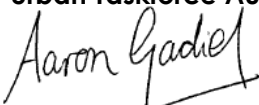
A provision of this kind needs to be in the Act. It is not enough that the Department promise this will be dealt with in the legislative instrument. That’s because a bank or investor can have no certainty that future legislative instruments will contain such a provision.

4. The publicly available information is incomplete in a crucial respect

We should note that the publicly available documentation is not complete. The proposed “legislative instrument” to be made by the Minister has not been available to industry or the wider community. We ask that the full copy of all relevant material, including the proposed legislative instrument, be made available to the Parliament and the wider community in draft form for comment before the bill is debated.

Thank you for the opportunity to make a submission.

Yours sincerely
Urban Taskforce Australia



Aaron Gadiel
Chief Executive Officer