
The Parliament of the Commonwealth of Australia

An Advisory Report on the
Telecommunications Legislation
Amendment (Fibre Deployment) Bill 2011

Joint Committee on the National Broadband Network

June 2011
Canberra

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Chair's Foreword

Through this inquiry, the committee was presented with a number of issues that were outside the scope of the terms of reference. However, the committee concluded that these issues were important and should be reported to the Parliament, and are therefore included in various sections of the report.

Through this report, the Parliament is able to gain an overview of industry and community views associated with possible enactment of the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill), and also the main views related to the Government's *Fibre in New Developments* policy which underpins the proposed legislation.

While the committee made a number of additional findings, the main provisions of the Bill are supported by the majority of the committee. Where the committee found areas of dispute, these were less about the Bill and more about the underlying policy that has led to this Bill.

Major findings of the report include:

- Internal customer service protocols should be put in place within NBN Co to ensure that the timeframe for issuing statements is completed within benchmarked customer service timeframes.
- NBN Co should commit to specific timeframes, to publish its performance on the fibre rollout against timeframes and that these commitments be subject to regulatory oversight.
- Investigation into the possible impact on risk premiums of regular changes in development regulations with appropriate measures to be put in place to anticipate this type of outcome and rectify any negative consequence.

In relation to the Bill's possible impact on competition in the existing fibre provider market in new developments, the committee acknowledged the views put forward by fibre industry groups. These industry groups highlighted the potential adverse impact that the Government's existing *Fibre in New Developments* policy may have for smaller existing fibre providers, and the committee is urging the Government to review these concerns.

Taking into consideration the findings and recommendations of the Australian Government Competitive Neutrality Complaints Office report when it is released, it is important that the Government investigate (with a view to rectifying if necessary) the degree to which the rollout of the National Broadband Network has the potential to diminish competition in the fibre provider market.

I thank those who contributed to this inquiry by providing submissions or appearing in person before the committee.

Mr Robert Oakeshott MP

Chair



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Committee Membership

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Deputy Chair Mrs Yvette D'Ath MP

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| | Mr Luke Hartsuyker MP | Senator Carol Brown |
| | Mr Ed Husic MP | Senator Doug Cameron |
| | Hon Sussan Ley MP | Senator Mary Jo Fisher |
| | Ms Michelle Rowland MP | Senator Scott Ludlam |
| | Mr Mike Symon MP | Senator the Hon Ian Macdonald |
| | Hon Malcolm Turnbull MP | Senator the Hon Ursula Stephens |

Participating Members

| | |
|--|---|
| Senator the Hon Eric Abetz | Senator Steve Hutchins (from 24.3.2011 until 30.6.2011) |
| Senator Judith Adams | Senator the Hon David Johnston |
| Senator Chris Back | Senator Barnaby Joyce |
| Senator Guy Barnett (until 30.6.2011) | Senator Helen Kroger |
| Senator Cory Bernardi | Senator Gavin Marshall (from 24.3.2011) |
| Senator Catryna Bilyk (from 24.3.2011) | Senator the Hon Brett Mason |
| Senator Mark Bishop (from 24.3.2011) | Senator Anne McEwan (from 24.3.2011) |
| Senator the Hon Ronald Boswell | Senator Julian McGauran (until 30.6.2011) |
| Senator Sue Boyce | Senator the Hon Nick Minchin (until 30.6.2011) |

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| Senator the Hon George Brandis SC | Senator Claire Moore (from 24.3.2011) |
| Senator David Bushby | Senator Fiona Nash |
| Senator Michaelia Cash | Mr Paul Neville MP (from 10.5.2011) |
| Senator the Hon Richard Colbeck | Senator Kerry O'Brien (from 24.3.2011 until 30.6.2011) |
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| Senator Trish Crossin (from 24.3.2011) | Senator Helen Polley (from 24.3.2011) |
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| Senator the Hon Alan Ferguson (until 30.6.2011) | Senator Scott Ryan |
| Senator Concetta Fierravanti-Wells | Hon Bruce Scott MP (from 26.5.2011) |
| Senator Mitch Fifield | Senator the Hon Nigel Scullion |
| Senator Michael Forshaw (from 24.3.2011 until 30.6.2011) | Senator Glenn Sterle (from 24.3.2011) |
| Senator Mark Furner (from 24.3.2011) | Senator the Hon Judith Troeth (until 30.6.2011) |
| Senator the Hon Bill Heffernan | Senator Russell Trood (until 30.6.2011) |
| Senator Gary Humphries | Senator John Williams |
| Senator Annette Hurley (from 24.3.2011 until 30.6.2011) | Senator Dana Wortley (from 24.3.2011 until 30.6.2011) |
| | Senator Nick Xenophon |

Committee Secretariat

Committee Secretary Mr Peter Stephens

Inquiry Secretary Ms Stephanie Mikac



Terms of Reference

On 12 May 2011, the Joint Committee on the National Broadband Network resolved to adopt for inquiry the provisions of the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011, as referred by the House of Representatives Selection Committee on 10 May 2011.



List of Abbreviations

| | |
|--------|---|
| ACCAN | Australian Communications Consumer Action Network |
| ACCC | Australian Competition and Consumer Commission |
| ACMA | Australian Communications and Media Authority |
| Act | <i>Telecommunications Act 1997</i> |
| ADSL | Asymmetric Digital Subscriber Line |
| AGCNCO | Australian Government Competitive Neutrality Complaints Office |
| Bill | Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 |
| BOT | Build-Operate-Transfer |
| CA | Communications Alliance |
| CCTV | Closed Circuit Television |
| Cwlth | Commonwealth |
| DBCDE | Department of Broadband, Communications and the Digital Economy |
| EM | Explanatory Memorandum |
| FTA TV | Free-to-Air television |
| FTTB | Fibre-to-the-Building |
| FTTN | Fibre-to-the-Node |

| | |
|----------|--|
| FTTP | Fibre-to-the-Premises |
| GFOA | Greenfield Fibre Operators of Australia |
| HIA | Housing Industry Association |
| IPTV | Internet Protocol Television |
| Mbps | Megabits per second |
| Minister | Minister for Broadband, Communications and the Digital Economy |
| NBN | National Broadband Network |
| NBN Co | NBN Co Limited |
| RF | Radio Frequency |
| RIS | Regulation Impact Statement |
| RSP | Retail Service Provider |
| TV | Television |
| UDIA | Urban Development Institute of Australia |
| ULLS | Unconditional Local Loop Service |
| USO | Universal Service Obligations |
| USP | Universal Service Provider |
| UTA | Urban Taskforce Australia |



Recommendation

Part 1 – General Amendments

Recommendation 1

The committee recommends that the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 be passed.

Introduction

- 1.1 The Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill) was preceded by a similar bill which was introduced into the Senate in March 2010, but lapsed on the proroguing of the 42nd Parliament. The Fibre Deployment Bill 2010 shared a similar purpose to the Bill under inquiry, that is, to 'ensure fibre-ready and fibre infrastructure installation in new developments.'¹ This Bill differs from its predecessor in that the Fibre Deployment Bill 2010 'was more dependent on subordinate legislation for activation of the key provisions in the Bill', while the current Bill includes those key provisions.²
- 1.2 This Bill intends to facilitate the fibre rollout of the National Broadband Network (NBN) by ensuring that fibre-ready passive infrastructure is installed in new developments within the fibre footprint of the NBN. This can be undertaken either by a fibre provider (chosen by the developer) or NBN Co as the 'fibre infrastructure provider of last resort in new developments'³ in the long term, if required.⁴

Background

- 1.3 In April 2009, the Government established NBN Co Limited (NBN Co)⁵ to design, build and operate the NBN. The NBN will offer a high-speed
-

1 New developments are also referred to as Greenfields developments.

2 Department of Broadband, Communications and the Digital Economy (DBCDE), *Submission 8*, p. 2.

3 Regulation Impact Statement (RIS), p. 5; Bill, Explanatory Memorandum (EM), p. 2.

4 RIS, pp 5 and 6.

5 NBN Co Limited (NBN Co) was established by the Government on 9 April 2009 as a company under Corporations Law. NBN Co operates under the Commonwealth *Authorities Companies Act 1997*, NBN Co, 17 December 2010, *Corporate Plan: 2011-2013*, p. 12.

national broadband service in the form of a wholesale only, open-access network. The NBN is planned to be rolled-out across Australia in accordance with the Government's NBN policy, NBN Co's Corporate Plan and the Statement of Expectations⁶ issued by the Stakeholder Ministers to NBN Co.⁷

1.4 NBN Co's Corporate Plan states that its objectives for the NBN are to:

- establish a network design which is an open access, wholesale only, national network
- rollout fibre to 93 per cent of premises (including Greenfields developments) to provide for download internet speeds of 100 [Megabits per second] Mbps,⁸ and provide fixed wireless to four per cent of premises and satellite to three per cent of premises at a speed of at least 12 Mbps
- offer uniform national wholesale pricing over the network, from a point of interconnect to a premises on a non discriminatory basis
- 'the expected rate of return should, at a minimum, be in excess of current public debt rates.'⁹

1.5 In June 2010, following stakeholder consultation,¹⁰ the Government announced that NBN Co would be the fibre infrastructure provider of last resort in new developments. This would require NBN Co to provide at no cost, the fibre in new developments (that are within the NBN long term fibre footprint) where a developer¹¹ did not opt to use an alternative fibre infrastructure provider.¹²

6 The Government's Statement of Expectations was released on 20 December 2010 by the Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy and Senator the Hon Penny Wong, Minister for Finance and Deregulation. The document outlines the main elements of the Government's National Broadband Network Policy in the form of expectations on the delivery of services to be provided by NBN Co.

7 NBN Co, 17 December 2010, *Corporate Plan: 2011-2013*, p. 12.

8 Megabits per second is a measurement of transmission speeds. NBN Co, 17 December 2010, *Corporate Plan: 2011-2013*, p. 156.

9 NBN Co, 17 December 2010, *Corporate Plan: 2011-2013*, p. 12.

10 The Government undertook extensive consultation (with the telecommunications industry, State, Territory and Local Governments, developers, builders and telecommunication consumers) and concluded that the provision of fibre-ready passive infrastructure at the development stage of new developments ensures efficiency in the installation process. RIS, p. 5.

11 Under this Bill a developer that is a constitutional corporation is required to install passive, fibre-ready infrastructure. RIS, p. 13.

12 Fibre-ready passive infrastructure includes trenching, conduits and access pits, also known as 'pit and pipe', RIS, p. 5.

-
- 1.6 In December 2010, the Government announced its implementation and transitional arrangements for this policy. Transitional arrangements under the implementation strategy provided that Telstra will service infill developments of less than 100 premises pending NBN Co's fibre rollout.¹³
- 1.7 To enable NBN Co to be the fibre provider of last resort in all new developments within the fibre footprint, it would negotiate with developers for the transfer of ownership of infrastructure through contractual arrangements. NBN Co would install fibre at no cost.¹⁴
- 1.8 In the event that NBN Co would be unable to service developments immediately, developers could request other telecommunications providers to provide infrastructure in their estate.¹⁵
- 1.9 It is estimated that 150 000 new dwellings and approximately 60 000 other types of premises (commercial, industrial and government) are constructed annually. NBN Co has calculated that 94 per cent of these new premises (or around 197 000) will be within the fibre footprint.¹⁶
- 1.10 The cost of installing fibre-ready infrastructure has been estimated at about \$800 per lot or building unit. The cost of retrofit of fibre where no passive infrastructure has been supplied is estimated to be approximately \$1300 a lot or unit.¹⁷
- 1.11 The Government's policy carries the assumption that most developers will install fibre-ready infrastructure in new developments, with the risk that a small percentage of developers will not. If this number were up to five per cent, the Government estimates this would cost \$12.8 million per annum¹⁸ to retrofit.¹⁹
- 1.12 To ensure that developers (who are constitutional corporations) install fibre-ready infrastructure in new developments, there are 'civil penalties'²⁰ attached to the sale or lease of land where passive fibre-ready infrastructure is not installed.²¹
-

13 RIS, p. 5.

14 RIS, p. 5.

15 RIS, p. 5.

16 RIS, p. 6.

17 RIS, p. 6.

18 This estimate is arrived at from the number of new premises built (197 000 per annum). RIS, p. 6.

19 RIS, p. 6.

20 EM, p. 2.

21 RIS, p. 13.

- 1.13 The legislation will be reviewed in five years to assess if it is still required. Review will involve consultation with carriers including: NBN Co, developers, consumer groups, and State and Territory planning bodies.²²

Overview and purpose of the Bill

- 1.14 The legislative intent of the Bill is to amend the *Telecommunications Act 1997* (Cwlth) to ensure 'that developers have fibre-ready passive infrastructure installed for the future provision of fibre, potentially for use by any fibre provider.'²³
- 1.15 Other key provisions of the Bill will:
- require developers that are constitutional corporations to install fibre-ready passive infrastructure in developments in the long term fibre footprint of the NBN;
 - provide Ministerial authority to determine specifications for fibre-ready passive infrastructure, if required;
 - 'provide for NBN Co to issue a statement that premises are not in the NBN's long term fibre footprint;
 - allows carriers to access passive infrastructure that is owned by non-carriers, and provides for the Australian Competition and Consumer Commission to be the default arbitrator;
 - enable the Minister to specify developments in which fixed lines must be optical fibre and determine specifications for such lines, if necessary;
 - provide for statutory and Ministerial exemptions from the requirements to install fibre-ready facilities or optical fibre lines; and
 - enable the Australian Communications Media Authority to develop technical standards for customer equipment and cabling for connection with the NBN and other superfast networks, on its own initiative or if directed by the Minister.'²⁴

22 RIS, p. 13.

23 DBCDE, *Submission 8*, p. 2.

24 DBCDE, *Submission 8*, p. 1.

Financial impact of the Bill

- 1.16 The financial impact of the Bill will be met through funding accorded to NBN implementation and is expected to be 'small'.²⁵

Policy underpinning the Bill

- 1.17 The policy on *Fibre in New Developments* underpins the provisions contained in the Bill. This policy was announced by the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy (the Minister) on 20 June 2010, with further enhancements announced to the policy on 9 December 2010, reiterated on 15 June 2011 and further updated on 22 June 2011.²⁶ This policy also reflects the Government's Statement of Expectations.²⁷
- 1.18 Further to an earlier announcement on 20 June 2011, on 9 December 2010, the Minister announced 'very significant changes to the way telecommunications infrastructure and services [could be] provided in new developments.'²⁸
- 1.19 New developments encompassed residential, commercial, industrial, government and other types of developments and constructions 'regardless of the number of lots, premises or units involved, whether they are broadacre greenfield or brownfield infill.'²⁹
- 1.20 The Ministerial statement on *Fibre in New Developments*³⁰ reiterated that from 1 January 2011:
- NBN Co Limited would be the wholesale provider of last resort in new developments within or adjacent to its long term fibre footprint and meet the associated cost of this obligation.

25 EM, p. 4.

26 S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Refined arrangements for fibre in new developments*, media release, Parliament House, Canberra, 15 June 2011; S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Fibre in new developments: policy update*, media release, Parliament House, Canberra, 22 June 2011.

27 Minister for Broadband, Communications and the Digital Economy and the Minister for Finance and Deregulation, *Statement of Expectations*, 20 December 2010, p. 6.

28 DBCDE, Statement by the Minister for Broadband, Communications and the Digital Economy (Ministerial Statement), *Fibre in New Developments*, 9 December 2010, p. 1.

29 DBCDE, Ministerial Statement, *Fibre in New Developments*, 9 December 2010, p. 1.

30 DBCDE, Ministerial Statement, *Fibre in New Developments*, 9 December 2010.

- Developers and on their properties, property owners would be responsible for trenching and ducting.
 - Telstra would be the retail provider of last resort. Telstra would not have infrastructure responsibilities.
 - Developers could use any fibre provider of choice on the proviso they meet NBN specifications and open access requirements.³¹
- 1.21 NBN Co would be responsible for fibre installation for all premises in the fibre footprint which are at the development stage.³² These include:
- 'all broadacre developments;
 - all infill developments where it has fibre that is ready for service and capable of connection; and
 - new approved infill developments of 100 or more premises.'³³
- 1.22 The earliest practical date of effect of NBN Co's responsibilities occurred on 1 April 2011.³⁴
- 1.23 The policy also provides detail about the role of NBN Co and Telstra in new developments, pre-existing service applications, expectations on developers, and the role of competing fibre providers. The main elements of these are:
- NBN Co can choose the operational arrangements under which it services new developments, 'including sub-contracting and build-operate-transfer [BOT] arrangements' enabled through its own tender process arrangements.³⁵ NBN Co will 'establish a panel of appropriately qualified and experienced providers who can bid to install fibre on its behalf.'³⁶
 - Telstra is responsible for the delivery of infrastructure and services for infill developments of less than 100 premises, pending NBN rollout. In this circumstance, Telstra will generally provide copper infrastructure or depending on the timing of NBN rollout may provide a 'high quality

31 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 1.

32 This includes responsibility for installation of fibre infrastructure in a development for backhaul to a point of interconnect. DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 2.

33 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 2.

34 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 2.

35 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 2.

36 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 3.

wireless service as an interim solution.’ Telstra is also retail provider of last resort for standard telephone services.³⁷

- The policy sets out four scenarios and handling arrangements, which do not override existing developers’ contractual arrangements, but take into account the developers requests for infrastructure for developments that will not be completed before 1 January 2011.³⁸ These are:
 - ⇒ For lots where Telstra has installed passive fibre-ready infrastructure, but has not provided a fixed line, NBN Co will have access to this infrastructure on commercial terms with NBN Co subcontracting to deliver fibre to the premises.³⁹
 - ⇒ In developments that are design-ready, but do not yet have passive fibre infrastructure installed and require services from 1 January to 30 June 2011, NBN Co will subcontract to deliver fibre through a BOT arrangement. Subject to any existing legal arrangements between a provider and the developer, for efficiency, Telstra may, in arrangements with NBN Co, build the infrastructure.⁴⁰
 - ⇒ In developments that are design-ready but do not yet have passive fibre infrastructure installed and require services after 1 July 2011, developers can redirect requests to NBN Co for fibre service delivery as determined by the NBN Co. This is subject to any existing legal arrangements between a provider and the developer. For efficiency, Telstra may, in arrangements with NBN Co, build the infrastructure.⁴¹
 - ⇒ For those developments ‘land-banked’ (approved for development some time ago and have not proceeded to completion), developers will be required to re-lodge their requests with NBN Co. This is subject to any existing legal arrangements between a provider and the developer. For efficiency, Telstra may, in arrangement with Telstra, build the infrastructure.⁴²
- From 1 January 2011, for all new developments, developers are expected to ensure the installation of fibre-ready passive infrastructure in line with NBN Co specifications. Developers will meet the cost of this

37 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 3.

38 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 3.

39 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 3.

40 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 3.

41 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 4.

42 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 4.

infrastructure. Where a developer does not provide this infrastructure, NBN Co is not required to provide services to these developments.⁴³

- NBN Co will provide its specifications for use to developers that opt to use NBN Co. NBN Co infrastructure specifications will also be provided to the Communications Alliance⁴⁴ with the aim of endorsement.⁴⁵
- NBN Co will require through contract the transfer of ownership of infrastructure as a condition of serving a development.⁴⁶
- Developers can ‘source fibre from competing fibre providers’ and ‘providers can compete to provide infrastructure in new developments.’ They could do this ‘by offering more tailored solutions to developers or more expeditious delivery.’⁴⁷
- ‘Where the installed infrastructure meets NBN Co specifications, NBN Co may seek to acquire the infrastructure, but this is a commercial decision for NBN Co.’⁴⁸
- To ensure all consumers have access to the same service outcomes as serviced by NBN Co, providers are legally required to build to NBN specifications to offer a Layer 2 service on an open access basis. ‘Providers who fail to do this will otherwise risk being overbuilt when NBN Co rolls out the network in their area.’⁴⁹

Scope of the Inquiry

1.24 The aim of this inquiry was to examine the legislative and practical consequences of the Bill, rather than the underlying policy intent of the proposed legislation.

1.25 While the majority of contributors to the inquiry agreed with the general premise of the Bill, a number of commercial fibre providers and industry groups raised concerns about the Bill’s potential to:

43 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

44 The Communications Alliance (CA) is a peak industry association representing the telecommunications sector with its main role to create and maintain the ‘self-regulatory Codes, Guidelines and Standards to which the industry adheres. The CA sets industry standards and is a member of Standards Australia. *Converge Networks, Exhibit 4*, p. 1.

45 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

46 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

47 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

48 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

49 DBCDE, Ministerial Statement, Fibre in New Developments, 9 December 2010, p. 5.

- stifle competition in the Greenfield fibre provider market in the medium to long term;
 - potentially exclude commercial fibre providers from the market place if developers preferred to wait for NBN Co to lay fibre at no charge; and
 - limit the telecommunications services available to developments with less than 100 premises within the fibre footprint that are awaiting the NBN rollout.
- 1.26 These issues have been included in this report as they are relevant in the broader context of the rollout and future operation of the NBN.

Conduct of the Inquiry

- 1.27 The Bill was introduced into the House of Representatives on 23 March 2011 and referred by the House of Representatives Selection Committee to the Joint committee on the National Broadband Network for inquiry on 10 May 2011. The committee subsequently resolved to adopt the inquiry on 12 May 2011.
- 1.28 The inquiry was announced and submissions invited through the issue of a media release on 13 May 2011 and an advertisement in *The Australian* on 18 May 2011. Submissions to the inquiry were invited to be received by 20 May 2011.
- 1.29 The committee received 20 submissions and 4 exhibits to the inquiry which are listed at Appendix A. The committee held two public hearings on 16 May 2011 in Sydney and 17 June in Canberra. Witnesses who appeared before the committee and gave evidence to the inquiry at these public hearings are listed at Appendix B.

Report structure

- 1.30 Chapter 2 outlines the key proposed amendments included in Schedule 1, Part 1 of the Bill and outlines the issues presented in relation to these provisions.
- 1.31 Chapter 3 outlines the issues raised in relation to the potential impact of the proposed Bill on the Greenfield fibre provider market.

Part 1 – General Amendments

Introduction

- 2.1 The Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill) consists of Part 1 – General Amendments and Part 2 – Other Amendments. Both Parts 1 and 2 will amend the *Telecommunications Act 1997* (Cwlth) (the Act).

Summary of key provisions

- 2.2 Proposed Part 1 of Schedule 1 will amend the Telecommunications Act to ‘support the deployment of optical fibre and optical fibre-ready passive telecommunications infrastructure in specified real estate development projects.’¹
- 2.3 Proposed Part 2 of Schedule 1 will amend the Telecommunications Act to repeal proposed sections 372ZC and 372ZE to ensure there is no repetition in the definitions of ‘optical fibre lines’ and ‘NBN Corporation’, should the Telecommunications Legislation (National Broadband Network Measures-Access Arrangements) Bill 2010 be enacted before the Bill.²
- 2.4 A summary of the key provisions and discussions of issues raised through the inquiry in relation to these provisions follows.

1 Explanatory Memorandum (EM), p. 1.

2 EM, p. 51. The Telecommunications Legislation (National Broadband Network Measures-Access Arrangements) Bill 2010 was passed by the House of Representatives on 1 March 2011 and the Senate on 25 March 2011.

Proposed Part 20A – Deployment of optical fibre etc

- 2.5 Proposed Part 20A consists of proposed new Divisions 1 to 6 and amendments to provisions in Part 21 of the Telecommunications Act.

Proposed Division 2 – Deployment of optical fibre lines

- 2.6 **Proposed Division 2 of Part 20A** requires the deployment of optical fibre lines to specified building lots and building units.³
- 2.7 **Proposed section 372D** provides that the Minister may make exemptions by legislative instrument from the optical fibre line requirement in sections 372B and 372C. This will enable the Minister to make conditional and unconditional exemptions for the deployment of fibre for copper installation.⁴
- 2.8 **Proposed subsection 372D(3)** enables the Minister, through a legislative instrument, to confer powers or functions on the Australian Communications and Media Authority (ACMA) to determine whether conduct is exempt in terms of laying fibre or copper. For example, 'if such an instrument provides an exemption where particular equipment requires a copper line, the ACMA would be required to certify this.'⁵

Proposed Division 3 – Installation of fibre-ready facilities

Background

Proposed Subdivision A – Installation obligations

- 2.9 **Proposed Subdivision A** provides that where passive fibre-ready infrastructure has been laid, that the installation of fibre optic lines 'at a later date, quickly, at lower cost and with minimum inconvenience to the community' may occur.⁶

3 EM, p. 19.

4 EM, p. 24.

5 EM, pp 24 and 25.

6 EM, p. 25.

- 2.10 **Proposed Section 372J** enables NBN Co Limited (NBN Co) 'to issue a written statement if a new development is outside the long term fibre footprint and will not have optical fibre lines installed by NBN Co or other NBN Co contractor. This will provide a process for developers to gain information to clarify whether their projects may be subject to these rules.⁷

Discussion

- 2.11 The Urban Taskforce Australia (UTA) raised the following concerns:

- 'There is no obligation on the NBN Co to respond to a request for such a statement in any particular timeframe. 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 [for] an inappropriate response.
- There is no obligation on the NBN Co to publish statistics on its performance in this regard.⁸
- There needs to be a mechanism of review by the Administrative Appeals Tribunal of any subsequent refusal or inability of the NBN Co to install optical fibre lines in relation to the project.⁹

- 2.12 The UTA suggested that provisions be included in the Bill which address these concerns.¹⁰

- 2.13 The Department of Broadband, Communications and the Digital Economy (DBCDE) commented:

In the absence of an exemption, the default under the Bill is that a constitutional corporation would need to have fibre-ready passive infrastructure installed in any new development in Australia prior to sale or leasing. Some of these developments could in practice be in areas where NBN Co will provide services by wireless or satellite. In these circumstances, it could be wasteful to require the installation of fibre-ready passive infrastructure in these areas.¹¹

- 2.14 The DBCDE also commented that in comparison to other providers, NBN Co 'is in the best position to confirm a locality is in its long term fibre

7 EM, p. 31.

8 Urban Taskforce Australia (UTA), *Submission 11*, p. 1.

9 Urban Taskforce Australia (UTA), *Submission 11*, p. 1.

10 UTA, *Submission 11*, p. 1.

11 Department of Broadband, Communications and the Digital Economy (DBCDE), *Submission 8*, p. 3.

footprint, it is logical that it should be able to confirm an area is not covered.’ This power is not expected to affect other providers, ‘because if they were to provide fibre in such an area, they would be able to deal’ with passive fibre-ready infrastructure requirements in their contract with the developer.¹²

Concluding comments

- 2.15 NBN Co is under obligation by the Government to perform its duties as outlined in its Corporate Plan and in line with the relevant Government policies. More broadly, NBN Co is established under Corporations Law and operates under the Commonwealth Authorities Companies Act and so its directors have a legal and commercial obligation to its customers and stakeholder Ministers and through them to the Parliament.
- 2.16 However, the committee notes the concerns raised by the UTA in regard to the responsive issue of statements. The committee suggests that internal customer service protocols should be put in place within NBN Co to ensure that the timeframe for issuing statements is completed within benchmarked customer service timeframes.
- 2.17 According to the DBCDE, the proposed sections in Division 3 are intended to require developers to put in place passive fibre-ready infrastructure to enable fibre to be laid to facilitate the rollout of the National Broadband Network. The committee acknowledges that this is the intent of proposed Division 3 and also notes that NBN Co will need to issue statements to ensure eventual efficient fibre deployment.
- 2.18 The committee proposes that NBN Co should commit to specific timeframes, to publish its performance against those timeframes, and that these commitments be subject to regulatory oversight.

Proposed Subdivision B – Sale of building lots and building units

- 2.19 **Proposed Subdivision B** ensures that fibre-ready facilities are installed in new developments to enable fibre rollout to occur quickly, economically and with less disruption than a full retrofitting.¹³
- 2.20 Constitutional corporations (eg. Pty Ltd and Inc. business entities and statutory authorities) may not sell or lease lots or units in new

12 DBCDE, *Submission 8*, p. 3.

13 EM, p. 28.

developments, 'unless there are fibre-ready facilities installed within or in proximity to the lots or units.'¹⁴

- 2.21 This restriction does not apply if there is an exemption arising either from:
- ⇒ 'a legislative instrument made by the Minister under proposed section 372K; or
 - ⇒ a contract for the installation of lines or fixed-line facilities being in place, or the installation of lines or fixed-line facilities having commenced, or civil works otherwise having commenced in a development as provided for under proposed section 372P; or
 - a statement has been issued by NBN Co under proposed section 372J in respect of the particular project.'¹⁵
- 2.22 There is no restriction on the 'off-the-plan' sale or lease of lots and/or units.¹⁶

Proposed subdivision C – NBN Co may issue statement about the non-installation of optical fibre lines

- 2.23 **Proposed subdivision C** provides that NBN Co may issue a statement about the non installation of optical fibre lines. The purpose of this is to clarify whether a new development is outside the NBN's long term fibre footprint. Where a new development is outside the long term fibre footprint, it would not be necessary for fibre-ready facilities to be installed.¹⁷
- 2.24 **Proposed section 372JA** provides that NBN Co is obliged to maintain a register (by electronic means that is accessible to the public) of all statements issued in accordance with proposed subsection 372J(1). This will enable developers and their customers 'to ascertain whether the fibre-ready facility requirement and, for constitutional corporations, the fibre-ready installation requirement, apply in relation to a particular project.'¹⁸

Proposed Subdivision D - Exemptions

- 2.25 **Proposed subsection 372K(1)** enables the Minister (by legislative instrument) to exempt certain new developments from:

14 EM, p. 28.

15 EM, p. 29.

16 EM, p. 29.

17 EM, p. 31.

18 EM, p. 32.

- the fibre-ready facility requirement; and
 - the fibre-ready installation requirement for constitutional corporations.¹⁹
- 2.26 These exemptions could be used to exempt a project that may still be receiving one or more basic utilities outside the proposed long-term coverage of the rollout of the NBN by an NBN corporation. 'Section 589 of the Act would enable the Minister to incorporate by reference coverage maps or other guidance prepared by an NBN corporation and the like to specify or ascertain exempt projects.'²⁰
- 2.27 **Proposed subsection 372K(1)** would enable the Minister, where appropriate 'to permit the installation of fixed-line facilities other than fibre-ready facilities where appropriate.'²¹
- 2.28 **Proposed subsection 372K(9)** provides that an instrument under subsection (1), (3), (5) or (7) may confer functions or powers on the ACMA. For example, 'an exemption instrument could provide for the ACMA to determine whether specified circumstances under which an exemption was to operate (such as remoteness or that a locality was outside NBN Co's long term fibre footprint) were applicable.'²²

Proposed Division 4 – Third party access regime

Background

- 2.29 **Proposed Division 4** establishes a 'framework for carriers to seek access to non-carrier fixed-line facilities with a view to supporting the rollout of optical fibre.' The provision of access may be commercially negotiated or failing agreement, arbitrated by an agreed arbitrator or the Australian Competition and Consumer Commission (ACCC) as the default arbitrator.²³
- 2.30 Proposed Division 4 also enables the Minister to:
- issue exemptions through a legislative instrument.

19 EM, p. 33.

20 EM, p. 33.

21 EM, p. 33.

22 EM, p. 33.

23 EM, p. 34.

- confer functions or powers on the ACCC in relation to an exemption.²⁴
- 2.31 **Proposed subsection 372NA(1)** enables the ACCC to make a code (by legislative instrument) which sets 'out conditions that are to be complied with' in relation to the provision of access under Division 4.²⁵

Discussion

- 2.32 The ACCC commented that the facilities access regime which would be established under the Bill is 'very similar to the facilities access regime currently available to carriers under Schedule 1 of the Telecommunications Act.'²⁶
- 2.33 In addition, the ACCC stated that while it could make a code relating to access, commercial agreements have been preferred to the current facilities access code made by the ACCC in 1999 under Schedule 1 of the Telecommunications Act. The ACCC stated:

Under the Bill, the ACCC may, by legislative instrument, make a code relating to access. The development of this type of code would require the ACCC to balance the benefits that might be available to the relevant stakeholders from such a code with any regulatory burden. In the main, commercial agreements have been preferred to the current facilities access code which was made by the ACCC in 1999 (the 1999 Code) under Schedule 1 of the Telecommunications Act 1997. If it decides whether to make a code under the Bill, the ACCC would also consider whether to modify the 1999 Code or issue a new code.²⁷

Concluding comments

- 2.34 The committee acknowledges the ACCC's comments that even though proposed Division 4 specifies the ACCC may make a code for the facilities access regime, 'commercial agreements' are preferred format. In addition, the ACCC has stated that it may revise or replace the 1999 Code established under the Telecommunications Act.
- 2.35 The committee acknowledges that the ACCC is required to fulfil its obligations under proposed Division 4 and supports the ACCC's role as stated in this regard.

24 EM, p. 34.

25 EM, p. 37.

26 Australian Competition and Consumer Commission (ACCC), *Submission 13*, p. 2.

27 ACCC, *Submission 13*, p. 2.

Proposed Division 5 – Exemption of certain projects

Background

- 2.36 **Proposed Division 5** sets out exemptions for pending projects which meet certain criteria from the optical fibre line requirement under proposed Division 2. A limited exemption is provided from the ‘fibre-ready facility requirement’ and the ‘fibre-ready installation requirement’ under proposed Division 3 for pending projects which meet certain criteria.²⁸
- 2.37 Proposed sections in Division 5 enable exemptions in certain circumstances where it would be unreasonable to apply the rules contained in the Bill. Such circumstances include where contracts have already been entered into by developers, or where it would be too costly or inconvenient for developers to halt works or the ‘installation of fixed lines or facilities in their developments.’²⁹

Discussion

- 2.38 The UTA put the view that the transitional arrangements in proposed section 372P (included under Division 5) relate to those projects which were underway before the commencement of the legislative provisions and offer no protection for businesses. The UTA stated:

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.³⁰

- 2.39 Additionally, the UTA does not support Ministerial authority under the Bill to vary the conditions of a legislative instrument. The UTA stated:

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

28 EM, p. 38.

29 EM, p. 38.

30 UTA, *Submission 11*, p. 2.

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.³¹

2.40 The UTA puts the view that 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.' The UTA stated:

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.³²

2.41 The UTA suggested that an investor requires certainty and in this respect that proposed section 372P 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.³³

2.42 The UTA was also critical that the proposed legislative instrument was not available to industry or the wider community as part of the accompanying documentation to the Bill.³⁴

Concluding comments

2.43 The committee notes the concerns presented by the UTA and believes these issues should be reconciled with the proposed provisions and relevant policy to ensure there is no unintended consequence arising.

2.44 The committee believes that the issue raised in regard to the possible impact on risk premiums of regular changes in development regulations requires further investigation and that appropriate measures be put in

31 UTA, *Submission 11*, p. 2.

32 UTA, *Submission 11*, p. 2.

33 UTA, *Submission 11*, p. 2.

34 UTA, *Submission 11*, p. 2.

place to anticipate this type of outcome and rectify any negative consequence.

Proposed Division 6 – Miscellaneous

Background

- 2.45 **Proposed Division 6** creates new definitions to support the operation of proposed Part 20A as well as the legislative instruments made by the Minister therein contained. Proposed Division 6 clarifies that State and Territory laws ‘operate concurrently with proposed Part 20A of the Act to the extent that they are not inconsistent with the Bill.’³⁵
- 2.46 **Proposed section 372W – Fibre-ready facility** creates a definition of ‘fibre-ready facility’ and covers the two categories of:
- an underground fixed-line facility that is used in connection with an optical fibre line as specified by legislative instrument; and
 - any other fixed line facility used in connection with an optical fibre line as specified by legislative instrument.³⁶
- 2.47 The purpose of this section is to enable the Minister to ‘specify other types of fixed-line facilities, including above ground facilities, as fibre-ready facilities individually or by class.’ The Explanatory Memorandum provides that:
- Because fibre-ready facilities are for use in connection with optical fibre cabling they will necessarily need to be designed and installed with that purpose in mind. In the case of underground fibre-ready facilities, for example, this would include ducting with gentle enough angles to allow the ready deployment of fibre. More detailed specifications could be set out in industry codes or standards, carrier specifications or in a Ministerial instrument.³⁷

35 EM, p. 39.

36 EM, p. 43.

37 EM, p. 44.

Discussion

2.48 The Greenfield Fibre Operators of Australia (GFOA) is opposed to Ministerial authority to set standards and specifications according to NBN Co requirements as this could limit competition. The GFOA explained:

... the Minister wants NBN Co to be a monopoly and that he will therefore either set standards and specifications that only suit NBN Co network design and business or be silent and allow NBN Co standards and specifications to become the default standards and specifications as uncertainty overcomes the property development industry.³⁸

2.49 In addition, GFOA commented that these standards prohibit innovation in Greenfield developments and do not permit affordable deployment of free to air television (FTA TV), Pay TV (television) and the like. The GFOA stated:

NBN Co standards and specifications are not suitable for other innovative [Fibre-to-the-Premises] FTTP networks in Greenfields or networks which permit the affordable deployment of FTA TV, PayTV, utility management and other community services.³⁹

2.50 This issue is discussed further in Chapter 3.

2.51 OptiComm was of a similar view and stated:

The legislation SHOULD NOT stipulate NBN Co standards (which have never been peer reviewed) as industry wide standards. Communications Alliance standards are designed to provide a broader range of options and encourage innovation within the industry.⁴⁰

2.52 TransACT stated it was concerned about the Minister's authority to set NBN Co specifications and standards by legislative instrument and would prefer the Communications Alliance (CA) to set the standard, but that timing may be an issue in this case. TransACT stated that it:

... is concerned about the potential for the Minister, under these provisions, to specify NBN Co specifications or guidelines by legislative instrument, thereby imposing inflexible and anti-competitive requirements on infrastructure competitors of the NBN Co. While TransACT would prefer to see CA industry

38 Greenfield Fibre Operators of Australia (GFOA), *Submission 1*, pp 5 and 6.

39 GFOA, *Submission 1*, pp 5 and 6.

40 OptiComm, *Submission 10*, p. 2.

endorsed codes or standards applied in the Bill it understands that timing may preclude that from occurring.⁴¹

2.53 TransACT suggests that provisions should be included in the Bill which allow a developer to adhere to the chosen or alternate fibre providers specifications or guidelines. TransACT commented that 'in this instance, these guidelines are well established, as... fibre infrastructure providers have been successfully adhering to relevant CA codes for more than five years.'⁴²

2.54 Telstra responded to the issues GFOA raised in regard to standard setting and commented that the concerns raised by the GFOA are not relevant to the content of the Bill. Telstra stated:

Any concerns relating to standard setting in this area has already been addressed in previous legislation. The standard making powers in the Bill refer to standards ensuring the interoperability of **customer equipment** with the NBN or other superfast networks, rather than with the standards required of the network builder. The Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011, in amending Part 21 of the Telecommunications Act 1997 provided the Australian Communications and Media Authority (“ACMA”) with powers to make technical standards relating to layer 2 bitstream services. There are general powers for the making of Codes and Standards under sections 117 and 118 of the Telecommunications Act which can be used by the Communications Alliance and the ACMA to make the type of codes and standards that the GFOA Document is referring to. Hence concerns raised by the GFOA Document are not relevant to the content of the Bill.⁴³

2.55 The DBCDE stated that the Bill does not set out technical specifications for fibre infrastructure in new developments, but rather gives 'the Minister some powers to make instruments to do so with regard to passive infrastructure and to optical fibre lines in specified developments' if necessary. The DBCDE explained:

For fibre infrastructure to be able to serve its purpose (e.g. to allow the ready deployment of fibre) and operate at an appropriate level (e.g. in terms of speeds) across the many new developments

41 TransACT, *Submission 12*, p. 14.

42 TransACT, *Submission 12*, p. 15.

43 Telstra, *Submission 3.2*, p. 5.

constructed in Australia each year, some degree of standardisation may be required. These provisions provide a reserve power to fast-track this standardisation process if required, noting that normal standardisation can sometimes be time consuming and subject to gaming.

The Government's policy in relation to specifications was set out in the 9 December 2010 Policy Statement: NBN Co will provide specifications for use where a developer wishes to use NBN Co. The specifications will also be provided to the Communications Alliance with a view to having these specifications endorsed for general use by industry as soon as possible.⁴⁴

2.56 This policy is also reflected in the Government's Statement of Expectations for the NBN and NBN Co.⁴⁵

2.57 The CA has indicated it has worked closely with NBN Co since it was established and a range of telecommunications companies across Australia to:

Define the reference architecture of the NBN, designing wholesale product descriptions and a range of other technical and operational issues.⁴⁶

2.58 The CA stated it is presently reviewing all of its standards, codes and guidelines documents to identify which will need to be revised 'to take account of the changed industry circumstances flowing from the NBN rollout.'⁴⁷ The CA advised:

The Operations Working Group, for example, is reviewing the NBN Co Pit and Pipe specification to determine whether it would be appropriate to define a Communications Alliance standard for fibre deployment. It is anticipated that a range of other NBN-related issues will be reflected in revised standards codes and guidelines during coming months.⁴⁸

44 DBCDE, *Submission 8*, p. 2.

45 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy and Senator the Hon Penny Wong, Minister for Finance and Deregulation, 20 December 2010, *Statement of Expectations*, pp. 6 and 7.

46 Comverge Networks, *Exhibit 4*, p. 1.

47 Comverge Networks, *Exhibit 4*, p. 1.

48 Comverge Networks, *Exhibit 4*, p. 1.

Concluding comments

- 2.59 The DBCDE has stated that the Bill does not set out technical specifications for fibre infrastructure in new developments, but rather gives ‘the Minister some powers to make instruments to do so with regard to passive infrastructure and to optical fibre lines in specified developments’ if necessary.
- 2.60 The committee also acknowledges the points made by Telstra that the Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Act 2011, in amending Part 21 of the Telecommunications Act 1997 provided the Australian Communications and Media Authority with powers to make technical standards relating to layer 2 bitstream services.
- 2.61 The committee is of the view that a number of comments made by contributors in this part are not relevant to the Bill. The committee has outlined further the concerns of contributors in this area in Chapter 3.

Amendments to provisions in Part 21 – Technical regulation

Background

- 2.62 The **proposed amendments to provisions in Part 21** enable the ACMA to ‘set standards for customer equipment and customer cabling to be connected to the NBN or other superfast telecommunications networks.’ The Minister is also enabled ‘to direct the ACMA to make technical standards under Division 3 and update directions powers in Division 9.’⁴⁹
- 2.63 The proposed amendments to provisions in Part 21 will ensure that ‘the ACMA has sufficient powers to make technical standards’ if so required. This will ‘assist with the operation of the NBN or other superfast telecommunications networks.’⁵⁰

49 EM, p. 48.

50 EM, p. 48.

Discussion

- 2.64 Comverge Networks suggested that the Bill should not include provisions for standard setting by the Minister, rather it should be a body such as the CA. Comverge Networks stated:

Essentially it has taken the country years to evolve away from the old days of Telecom setting the monopoly standards to a broad-based, albeit fractious industry grouping collaboratively arriving at standards. At this stage there are numerous bodies capable of setting these standards, including the Communications Alliance who are standing ready and able.

While we acknowledge and intensely disliked the frustrations in the process this is far better than forcing the industry to accept what we believe would be throwback and feature specific standards proposed by NBN Co. To illustrate by referring to a similar field (not standards), we highlight that the basic services proposed by NBN Co tie the country to the days of xDSL (as opposed to a modern fibre network) and further note the mandatory bundling of data and voice services is not a practise seen on the more open style networks operated by the industry.⁵¹

- 2.65 Comverge Networks recommended:

... that the Bill ensures the continuing collaborative standards setting process with those numerous clauses allowing the political setting of standards to be struck out.⁵²

Concluding comments

- 2.66 The comments made by the DBCDE and Telstra in reference to proposed Division 6 also apply to proposed Amendments to Part 21.
- 2.67 The committee acknowledges the view put forward by Comverge Networks about the standard setting role of the CA.

General comments about the Bill

- 2.68 Several contributors to the inquiry were generally supportive of the certainty the Bill provides to developers.

51 Comverge Networks, *Submission 6*, pp. 5 and 6.

52 Comverge Networks, *Submission 6*, pp. 5 and 6.

2.69 Telstra stated that the Bill provides clarity on the obligations of developers and infrastructure providers in new developments which ‘will facilitate a more streamlined application of the Government’s policy objective of achieving fibre rollout in new developments.’ Telstra stated:

As the Universal Service Provider for Australia, Telstra has a substantial interest in achieving such certainty. Telstra requires certainty of its obligations and role in providing standard telephone services to Australians on request. Telstra is also aware that the developer community is seeking policy clarity to enable them to plan and build new homes and business premises for the broader Australian community.⁵³

2.70 The Housing Industry Association (HIA) stated that it supported the following elements of the Bill.

- ‘Incorporating ‘fibre-ready’ infrastructure in new developments where the NBN Co roll-out has not yet proceeded to the area; and
- Incorporating full fibre infrastructure in new developments where the NBN Co has completed its roll out and provided services to existing homes to the area (as is currently the case for copper facilities).’⁵⁴

2.71 The UDIA welcomed the ‘regulatory certainty that legislation will provide’ and stated that in general ‘the development industry is very supportive of the opportunity for improved telecommunications services to be made available in Greenfield sites offered by the NBN.’⁵⁵

2.72 The HIA stated that the operation of the legislation and the impact on new developments with less than 100 premises and on those with greater than 100 premises that elect to wait for the NBN may slow down land release across Australia. The HIA recommended that supporting regulations and other information be provided to the relevant stakeholders in a timely manner. The HIA stated:

Uncertainty around the operation of this legislation and the subsequent impact on developments with less than 100 lots/dwellings and on developments with more than 100 lots that elect to await the delivery of fibre by the NBN, has the potential to slow down the release of much needed land supply in all regions of Australia. Therefore the Bill, supporting regulations and other information needs to be provided to the residential building and

53 Telstra, *Submission 3.2*, pp 3 and 4.

54 Housing Industry Association (HIA), *Submission 7*, p. 1.

55 Urban Development Institute of Australia, *Submission 9*, p. 2.

development industry in a timely manner to ensure there is no negative impact on housing affordability as a consequence of delayed processes.⁵⁶

- 2.73 TransACT commented that the potential impacts of the Bill within the NBN framework need to be considered. TransACT stated:

TransACT believes that the Committee needs to consider not only the potential impacts of specific provisions within the Fibre Deployment Bill, but the greater impact of how this piece of legislation, together with the government's overall NBN policy framework, looks to enshrine the NBN Co as the monopoly provider of fixed-line services in Australia potentially displacing the private sector from the market.⁵⁷

Concluding comments

- 2.74 The committee notes that there is general support for the Bill. The committee acknowledges the broad concerns highlighted by various contributors to the inquiry, especially the Greenfields fibre providers.
- 2.75 Some of the issues raised throughout the inquiry relate to the Government's policy which underpins the Bill and so do not have any legislative consequence associated with the Bill.
- 2.76 The committee acknowledges that the Bill will provide certainty for developers with the broad aim of requiring the installation of passive fibre infrastructure in new developments in anticipation of the arrival of the NBN.

Recommendation 1

- 2.77 **The committee recommends that the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 be passed.**

⁵⁶ HIA, *Submission 7*, p. 1.

⁵⁷ TransACT, *Submission 12*, p. 17.

Potential impact on the Greenfields fibre provider market

Introduction

- 3.1 Where relevant, the issues raised in the context of the proposed new sections of the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill) have been included in Chapter 2. This chapter outlines the remaining competition issues which relate to the policy which are complementary to and underpin the proposed Bill.
- 3.2 A number of contributors to the inquiry were concerned about the impact on competition in the Greenfields fibre provider market the Bill may have in combination with the Government's *Fibre in new Developments* policy. The issues contributors raised follows.

NBN Co as fibre provider of last resort

- 3.3 As previously outlined, in addition to requiring developers to install passive fibre-ready infrastructure in new developments, the policy intent underpinning the Bill is to:
- Enable NBN Co Ltd (NBN Co) to be the fibre provider of last resort in new developments, including broad acre estates, urban infill and urban renewal projects within its long term fibre footprint. This will give developers the option to use NBN Co and other fibre providers to install fibre infrastructure for new developments.

- Enable Telstra to have a transitional role for providing services for infill developments of less than 100 premises that do not yet have fibre. Developers will also have the option to use other telecommunications providers. Telstra will be the retail provider of last resort.
- 3.4 The Greenfield Fibre Operators of Australia (GFOA)¹ raised concerns that the Bill in combination with the relevant policy enables NBN Co to be the 'first choice provider' in Greenfield developments, rather than the fibre provider of last resort. The GFOA stated that this will serve to diminish competition in the Greenfields fibre provider market.²
- 3.5 In respect to the potential to diminish competition for Greenfields fibre provision, the GFOA raised the following issues:
- 'It appears to be the intent of Government and NBN Co, that it plans and needs to be the monopoly provider of [Fibre to the Premises] FTTP in Greenfields developments;
 - NBN Co is in fact promoting itself as the "Provider of first choice", not "last resort";
 - The Australian Government is ignoring its own Competitive Neutrality Policy for Government Owned Businesses³, like NBN Co. The policy dictates that no competitive advantages should be given to Government Owned Business over private sector competitors by virtue of their public sector ownership, nor by using their fiscal or legislative powers;
 - The Fibre Deployment Bill should not aid to prevent or inhibit private sector competition, impose unknown costs or time burdens on the development industry or impose NBN Co network design standards and specifications on the telco industry (such as GFOA);
 - The Government should fund deployment of FTTP that meet industry standards and specifications for performance and if operated by "Open Access" "Wholesale only" carriers not just NBN Co providing the fibre, pits and pipes are preferably vested in the [Universal Service Obligations] USO Co or Local Authority or other public institution not to be sold off at some time in the future.'⁴
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1 The Greenfield Fibre Operators of Australia (GFOA) 'is an alliance of the leading fibre-to-the-premises carriers who are network operators in Greenfields across Australia.' The GFOA has six members: OPENetworks, Service Elements, TransACT, Comverge, Broadcast Engineering Services (Australia) and Pivit. GFOA, *Submission 1*, p. 1.

2 The GFOA, *Submission 1*, pp 1 and 2.

3 Other GFOA members that provided submissions to the inquiry also made similar comments about competitive neutrality.

4 GFOA, *Submission 1*, p. 1.

- 3.6 The GFOA cautioned that Competitive Neutrality Policy and the competition reforms of the past twenty years are at risk if 'the Bill is not amended to provide for protections and encourage competition in deployment and operation of fibre networks in Greenfields.'⁵
- 3.7 These views were reiterated by OPENetworks, Comverge Networks and TransACT separately to the GFOA.⁶
- 3.8 To remedy the concerns outlined by the GFOA, it advocated:
- Fostering competition 'in network pricing and services and innovation by allowing and encouraging existing and future carrier operators in Greenfields
 - 'Fix industry (not NBN Co) standards and specification for FTTP networks by mandating [Communications] Alliance standards and specifications as ratified by the [Australian Communications and Media Authority] ACMA.
 - Adhere to the relevant aspects of Australian Government Policy for Competitive Neutrality.
 - Direct NBN Co to focus on Brownfields and, in Greenfields, to be the provider of last resort and only where commercial carrier/ operators are unable or unwilling to deploy FTTP networks that:
 - ⇒ Meet industry standards and specifications developed by Comms Alliance and ratified by ACMA and which meet or exceed the performance targets of the NBN (at least 100mbps) at operational prices that are less than NBN Co's published prices for comparable products;
 - ⇒ Are operated by licensed carriers on an "open access" wholesale only basis";
 - ⇒ Are funded by either Government, the USO Fund or NBN Co to the same extent of \$1500 per lot in the new development;
 - ⇒ Where ownership of the pits, pipes and fibre is transferred to USO Co or Local Councils (in preference to NBN Co) to allow for future access subject to a license to those carriers to use the network pit, pipes and fibre only for the provision of services to [Retail Service Providers] RSPs at prices capped by [the Australian Competition and Consumer Commission] ACCC regulation and to Public Utilities or

5 GFOA, *Submission 1*, p. 6.

6 GFOA, *Submission 1*; OPENetworks, *Submission 4*, Comverge Networks, *Submission 6*, TransACT, *Submission 12*.

Local Councils and Authorities for the benefit of the public or the communities under development.

- Release more back haul black spot contracts to fix the major impediment to providing advanced broadband in non-metro areas of Australia.⁷

3.9 Telstra commented that the GFOA's concerns do not relate to the Bill, but to Government policy and have either been addressed through consultation or should be considered separately to the Bill. Telstra stated:

the GFOA ... does not appear to raise concerns with the content of the Fibre Deployment Bill itself (namely the optical fibre requirement, the fibre ready facilities requirement, the fibre ready installation requirement and the facilities access regime to fixed line facilities owned by non-carriers). Rather it goes to aspects of Government policy which, while being important, have either been addressed through consultation or should be considered separately to the Bill in question. We do not believe these concerns should not cloud the Joint Committee's understanding and support for the passage of the Bill itself which, in Telstra's view, will provide much needed certainty to the developer and infrastructure community on the provision of fibre and fibre ready facilities in new developments.⁸

3.10 The Government responded to the concerns raised in respect to the impact on competition and stated:

The GFOA argues that there will be less competition if NBN Co dominates the new developments market. As noted, the government's policy does not preclude competition to provide infrastructure in new developments, or even to provide competing infrastructure in such developments. The practical reality, however, as evidenced by current practice, is that there will generally be a single fixed line network operator in a development. This will be the case regardless of whether the development is serviced by NBN Co or another provider. Recognising this, a key objective of the NBN policy is to create the circumstances for robust retail level competition, whether on the NBN platform (which is subject to specific regulation) or on

7 GFOA, *Submission 1*, pp 6 and 7.

8 GFOA, *Submission 3.2*, p. 5.

another platform (which would be subject to the level playing field rules).⁹

- 3.11 The GFOA has indicated that two of its members have lodged complaints with the Australian Government Competitive Neutrality Complaints Office (AGCNCO) situated within the Productivity Commission. The AGCNCO is yet to report on the matters raised.¹⁰

RF Signal installation

- 3.12 OptiComm highlighted the importance of maintaining competition in the Greenfields fibre provider market and commented that fibre providers offer immediate options not currently available for 'free' through NBN Co. These include:

... the delivery of Free-to-Air and Pay TV over the single fibre to the premises negating the need for unsightly antennas within an estate, the provision of community CCTV and the delivery of new and exciting applications like IPTV¹¹, Smartgrid and eHealth.¹²

- 3.13 In respect to the RF (Radio Frequency) issue, the Urban Development Institute of Australia (UDIA) commented that NBN Co policy provides that it will not 'install an RF signal in any fibre networks that they or their agents install.' This is in contrast to developer practice to have a 'clean roof' policy, 'piping free-to-air and pay-tv into homes through an RF signal as part of their fibre rollout.'¹³ The UDIA stated the impact of NBN Co's policy is that developers or the new homebuyer will be required to pay for these items in addition to the fibre ready infrastructure. The UDIA commented:

NBN Co's policy not to install RF signals means that now developers are faced with the dilemma of either going back to a policy where they need to install aerials on rooftops (at the cost of about \$1,000 per dwelling), or use a private fibre provider who can put an RF signal through the fibre they install rather than using

9 The Department of Broadband, Communications and the Digital Economy (DBCDE), *Submission 8*, p. 5.

10 DBCDE, *Submission 8*, p. 3.

11 Internet Protocol Television is television delivered through a broadband internet connection instead of a television cable or wireless.

12 OptiComm, *Submission 10*, p. 2. This issue was also raised by Mr Anthony White, *Submission 2*.

13 OptiComm, *Submission 10*, p. 2. This issue was also raised by Mr Anthony White, *Submission 2*.

NBN Co. This is resulting in the situation whereby in some estates the developer (and therefore the new home buyer) is required to pay for everything in relation to the installation of fibre, not just the pit and pipe, which appears to be contrary to the intent of the Government's policy.¹⁴

Universal Service Obligations

3.14 There were suggestions that the funding available for Universal Service Obligations (USO) as provided to Telstra, could be made available as a subsidy to minimise the cost of fibre infrastructure in new developments,¹⁵ thereby negating any negative impact of high costs on competition amongst fibre developers.

3.15 In this respect OptiComm suggested that funds should be provided in the amount of about \$1500 per dwelling unit to create a 'level playing field' for fibre deployment in new developments. OptiComm stated:

Consideration of allocating funds, be it from the USO fund or via soft loans, to the private sector (provided they ensure they meet wholesale only, open access requirements and also deliver the same outcome as the NBN) so to level the "playing field" and provide Developers with a wider, richer choice of options. The funding should be in the order of \$1,500 per dwelling unit.¹⁶

3.16 Telstra stated that it does not receive funding under the USO for new developments, but rather receives return on the costs expended for assets over the long term use of those assets. Telstra stated:

Telstra as the [Universal Service Provider] USP for Australia receives funding for the shortfall that it incurs in providing standard telephone services. In Telstra's view, the amount of the funding is not sufficient to cover the shortfall incurred. This shortfall (between costs and revenues) occurs in high cost areas of Australia. High cost areas of Australia are predominantly in rural and regional parts of Australia where due to distance, density and terrain, the cost to supply services is greater than the amounts received from customers. Historically, Telstra would not have suffered such a shortfall in respect of most new developments as it

14 Urban Development Institute of Australia (UDIA), *Submission 9*, p. 4.

15 GFOA, *Submission 1*, p. 3.

16 OptiComm, *Submission 10*, p. 2.

would earn a positive return on the initial build costs over the long term life of those assets.¹⁷

- 3.17 Further Telstra explained that the Government has not chosen to reallocate USO funding, but has enabled NBN Co to be the provider of last resort in new developments and subsumed the cost of these developments in the overall build of the NBN. Telstra explained:

It is important to note that due to the higher cost of installing fibre rather than copper infrastructure and increasingly lower overall fixed line penetration in Australia, there is less certainty of earning a return over the longer term for the installation of fibre in new developments without some form of subsidy or other form of upfront capital contribution. Hence, the position articulated in the GFOA Document. However, the solution is not to reallocate USO funding which has generally been provided to Telstra for another set of high cost customers, not for the purpose of supplying new developments with fibre infrastructure. The Government's approach has been to provide for NBN Co to be the provider of last resort and to subsume the cost of these developments in the overall build of the NBN.¹⁸

- 3.18 The Department of Broadband, Communications and the Digital Economy (DBCDE) stated that it expected that NBN Co would adopt a similar approach to USO by recovering the cost of infrastructure over time through its general service charges. The DBCDE stated:

USO funding is directed at supporting telephony services in high-cost, typically rural and remote, areas. Moreover, the USO is directed at supporting telephony services to individual premises, not providing broadband infrastructure in developments. The department understands that Telstra has generally recovered the cost of infrastructure in new developments over time through its general charges. In this context, it is envisaged NBN Co will adopt a similar approach.¹⁹

17 Telstra, *Submission 3.2*, p. 5.

18 Telstra, *Submission 3.2*, p. 6.

19 DBCDE, *Submission 8*, p. 4.

Pricing of backhaul

- 3.19 The Government's *Fibre in New Developments* policy²⁰ in line with the 20 June 2010 policy announcement provides that NBN Co will be responsible 'for the installation of fibre infrastructure in the development including backhaul to a point of interconnect.'²¹
- 3.20 Opticomm stated that the high cost of providing backhaul is having a negative impact on competition in the Greenfield fibre provider market. OptiComm commented that there is inequity in the costs of backhaul borne by developers versus the ability of NBN Co to subsume these costs in the short term. In practice, NBN Co can provide backhaul at little or no cost to its long term operations as in some cases it may use existing infrastructure, while fibre providers must contract this in from a third party, which is most likely located at a further distance than that used by NBN Co. Opticomm explained:
- ...back haul is currently the most inequitable component facing [Fibre-to-the-Premises] FTTP operators and this legislation does not appear to address this. NBN is proposing to provide for 'free' the back haul to Greenfield estates, most likely in the future from nearby Telstra infrastructure, however alternative FTTP operators must currently seek a third party provider of back haul, who is most likely much further away than a Telstra facility and incur a much increased cost - this is not much different than the problem that the Governments Black spot program for non competitive trunk backhaul has addressed. We suggest that Greenfield back haul be treated along the same lines, perhaps funding the installation of back haul, or having NBN provide back haul to the boundary of a Greenfield estate and having operational costs a declared service to ensure cost neutrality or a soft loans scheme to finance the back haul build could be established to provide a more level playing field.²²
- 3.21 Using the pricing of backhaul as an incentive to stimulate competition in the Greenfields fibre provider market was suggested. In particular, OptiComm recommended that backhaul be made more accessible and affordable for fibre providers 'by requesting the ACCC to declare backhaul services at affordable rates.' In addition, OptiComm suggested
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20 Announced on 9 December 2010.

21 DBCDE, Statement by the Minister for Broadband, Communications and the Digital Economy (Ministerial Statement), *Fibre in New Developments*, 9 December 2010, p. 2.

22 OptiComm, *Submission 10.1*, pp 1 and 2.

these rates could be determined by the Communications Alliance (CA) or similar industry body.²³

- 3.22 The DBCDE responded to these concerns and acknowledged that NBN Co (and before it Telstra) has an obligation to provide service to all areas and that NBN Co is better able to manage the costs associated with backhaul than smaller fibre providers. The DBCDE also acknowledged that as a result of the cost and sourcing of backhaul that this limited the provision of fibre by GFOA members to locations where backhaul is readily accessible. The DBCDE stated:

The GFOA identifies the cost and sourcing of backhaul and the provision of accommodation for remote electronic equipment as key costs for its members in providing fibre solutions in some circumstances. Our observation is that the cost of backhaul has tended to limit the provision of fibre by GFOA members to locations where backhaul is readily accessible. By contrast these are costs that a large national provider like NBN Co (and previously Telstra), with an obligation to service all areas, can more readily manage.

The GFOA's claim that the Regional Backbone Blackspots Program provides a model for the provision of backhaul to new developments is not correct. This Program has focussed on providing trunk backhaul on five strategic inter-regional backbone routes. It does not relate to the provision of relatively discrete backhaul infrastructure in cities and towns to the thousands of developments that take place annually.²⁴

Services for new developments of less than 100 premises

- 3.23 TransACT stated that the Minister's statement as it applies to developments of less than 100 premises enables Telstra to determine the type of infrastructure solution that it will deploy. TransACT puts the view that this will create a digital divide between developments of less than and more than 100 premises and is uncompetitive. TransACT stated:

This process has the potential to create a 'digital divide' between developments with less than 100 premises and those with more than 100 premises, both during and after the roll out of the NBN. It

23 OptiComm, *Submission 10*, p. 2.

24 DBCDE, *Submission 8*, p. 4.

also creates an anti-competitive and unlevel playing field for other infrastructure and service providers. It seems that Telstra could determine unilaterally that it will service a development with a fibre-to-the-node (FTTN) or fibre-to-the-building (FTTB) solution, or even a mobile voice and broadband solution, which would prevent other service providers from accessing those networks given they are not regulated. This would further entrench Telstra as the monopoly provider in these markets, while also giving it first mover advantage to acquire the end-users as Telstra Retail customers, pending migration to NBN Co's fibre network.²⁵

3.24 TransACT suggested the Bill should be amended to:

... include provisions that ensure these developments are serviced by copper from the local telephone exchange wherever reasonably possible. This would ensure the ULLS²⁶ is available to other service providers during the transitional period, prior to the NBN Co fibre deployment.²⁷

3.25 In addition, TransACT stated that there could be a situation created where another provider could 'provide a solution other than a Telstra copper solution, it may be inhibited from doing so' and disadvantage the end user from receiving a better service. TransACT suggested that the Bill and Access Bill should be amended by including provisions that create additional exemptions.²⁸

3.26 The Australian Communications Consumer Action Network (ACCAN) raised concerns about the wireless services for developments with 100 or less premises.²⁹

3.27 In particular, ACCAN commented that it had been contacted by consumers who had been provided with interim 'wireless phones [by Telstra] in circumstances where copper infrastructure will take a long time to be provided.' Telstra has advised these consumers that they will have to wait for the NBN rollout to reach them before they can have fixed-line internet service. The ACCAN stated:

Given the nine-year timetable for the NBN rollout, ACCAN is concerned that this group of people may be waiting a significant

25 TransACT, *Submission 12*, p. 13.

26 The Unconditional Local Loop Service is the copper network that runs between an end user and a telephone exchange.

27 TransACT, *Submission 12*, p. 13.

28 TransACT, *Submission 12*, p. 13.

29 Australian Communications Consumer Action Network (ACCAN), *Submission 5*, p. 1.

period of time for fibre (potentially several years) and be significantly disadvantaged.³⁰

- 3.28 The ACCAN stated that Telstra informed it that the relevant policy has not been finalised and implemented and that Telstra already provides 'interim wireless phones in circumstances where copper infrastructure will take a long time to be provided.³¹
- 3.29 The ACCAN recommended the following to remedy the situation:
- 'We would urge the Government to clearly define in what circumstances Telstra is allowed to provide wireless instead of copper and what is a reasonable period of time for such an interim measure.
 - Premises should not be left without a fixed line internet service for an unreasonably long period.
 - It is reasonable to require of Telstra that each of the premises in this situation be provided with a wireless internet service free of charge or at a discounted price. Although this type of service does not compare well with most [Asymmetric Data Subscriber Line] ADSL services, it would go some way to compensating people who find themselves in this interim situation.'³²

Concluding comments

- 3.30 The committee understands and acknowledges the views of the Greenfield fibre providers and industry groups in the context of the rollout of the NBN.
- 3.31 The committee believes the Government should examine these issues with a view to ascertaining whether there is any negative impact on competition in the fibre provider market or service outcomes for the end user in the longer term.
- 3.32 The majority of comments and views highlighted in Chapter 3 are made in response to Government policy and are outside the scope of this inquiry. As the issues raised in regard to the potential negative impact on competition in the Greenfield fibre provider market are being investigated by the AGCNCO, the committee will await the AGCNCO report.

30 ACCAN, *Submission 5*, p. 1.

31 ACCAN, *Submission 5*, p. 1.

32 ACCAN, *Submission 5*, p. 1.

- 3.33 The committee received reports that for developments of 100 premises or less, there have been instances where Telstra has provided a wireless service as there is a long wait for copper infrastructure and the NBN is pending. This level of service is not ideal and should only be an interim solution for customers.
- 3.34 The Government's 15 June 2011 statement on *Refined arrangements for fibre in new developments* clarified that pending NBN rollout, Telstra 'is responsible as provider of last resort for developments of less than 100 lots or units approved after 1 January 2011.' In addition, the refined policy stated, pending NBN rollout, Telstra will generally provide copper infrastructure. Telstra can choose to provide fibre 'and in some limited circumstances ... due to a short timeframe between construction and fibre rollout' as an interim solution, may 'provide high-quality wireless services'.³³

Mr Robert Oakeshott MP
Chair
23 June 2011

33 S Conroy, (Minister for Broadband, Communications and the Digital Economy), *Refined arrangements for fibre in new developments*, media release, 15 June 2011.



Dissenting Report

This Dissenting Report sets out the views of Coalition Members of the Committee on the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill). The Coalition recommends that the amendments referred to herein are made to the Bill.

The Bill forms part of the package of legislation concerning the establishment of the National Broadband Network (NBN).

The Bill deals with the provision of fibre to all types of new developments (including broadacre estates, urban infill and urban renewal projects.) These are generally referred to as 'greenfields sites' in the NBN context. By contrast, a 'brownfields site' is an existing premise, already connected to the existing telecommunications network, which is now to receive a new fibre connection to the NBN.

The Coalition agrees that it is highly desirable to encourage the rollout of fibre infrastructure in new developments. While it costs more to install fibre than copper in a new development, the incremental cost is much less than the cost of installing fibre in brownfields sites. The Government's stated policy is that in developments of 100 homes or less Telstra will install copper. The Coalition members believe this approach risks wasteful duplication with copper presumably being overbuilt within a few years if it is within the fibre footprint. On any view connecting greenfields developments to fibre must be a key priority given the cost advantage over brownbuild fibre overbuilds referred to above.

Coalition Members believe that, in designing the policy rules for greenfields sites, Labor has committed the same policy errors as in the rest of its NBN policy. Labor's approach to the objective of improving Australia's broadband infrastructure is to establish a government owned company to build a network; expend enormous amounts of taxpayers' money in funding the operations of that company; give that company monopoly powers; and have that company carry out every possible aspect of this enormous task.

The Coalition is opposed to this policy approach. We believe it is far too expensive; it is very bad for competition in broadband and telecommunications; and in a large part of the market it is unnecessary as the private sector can do the job faster, more efficiently and more cheaply once appropriate ground rules are established. (We have however consistently acknowledged that in rural and remote areas there is likely to be market failure and there is a strong case for public expenditure to improve broadband services.)

The policy scheme of this Bill is that:

- The Minister can declare, in respect of a new development, that any fixed line installed must be optical fibre;
- In all new developments, unless exempted, developers must install fibre-ready infrastructure (such as underground ducting or 'pit and pipe' and poles to string overhead cables) meeting specifications set by the NBN;
- NBN must (as the provider of last resort) install fibre cable in developments where developers have installed compliant fibre-ready infrastructure.

Coalition Members believe that this policy scheme unnecessarily assigns the central role to NBN Co - when the evidence the inquiry received demonstrates that there is a vigorous private market for the construction of fibre infrastructure in new developments. There are a number of competitive greenfields operators (CGOs) active in this market, and Coalition Members believe that this market should be encouraged not stifled.

Coalition Members believe this Bill should be amended for three main reasons.

- The regime established by the Bill is unnecessarily slow and bureaucratic for property developers.
- The Bill as presently drafted represents a missed opportunity to take advantage of the existence of the CGOs to impose effective competitive and cost discipline on NBN Co.
- The regime established by the Bill is damaging to competition in the market for the provision of new fibre infrastructure.

We expand further on our views below, and describe two amendments which we believe would address these issues.

Arrangements unnecessarily slow and bureaucratic for Property Developers

The regime established by the Bill is unnecessarily cumbersome, slow and bureaucratic for property developers. At a time when Australia is facing a growing housing shortage, the arrangements mandated by this Bill add expense and delay for those wishing to build new housing estates. Despite the government's rhetoric, in practical terms the Bill gives developers a very strong disincentive to deal with operators other than NBN Co.

In turn, this leaves developers at the mercy of NBN Co's responsiveness and timeliness. The NBN Co will become a bottleneck through which all property developments must pass before they can be completed and brought to market. The downstream consequences for Australians wishing to purchase new housing are likely to include increased delay and expense.

The HIA highlighted the requirement of developers for certainty about what is required, who will undertake the work and how much the work will cost and what time frame the work will be delivered. In addition, these planning decisions should be able to be made in a short period of time with ease. Otherwise there will be delay in the delivery of projects. The HIA stated:

... the legislation needs to make it very clear who is responsible for the delivery and that there are certain obligations on the provider to do that in a very timely way, otherwise it will delay development. I appreciate that there are negotiations in the feasibility and planning arrangements, but there needs to be that level of certainty for developers so they know who is going to do it, who is going to pay for it and when it can be done. It should not take more than a couple of phone calls and a meeting to sort out it being put into the critical path of the development, otherwise those projects will be delayed whilst certain things are waiting for a provider to provide that infrastructure.¹

Missed opportunity to impose competitive and cost discipline on NBN Co

The Bill as presently drafted represents a missed opportunity to take advantage of the existence of the CGOs to impose effective competitive and cost discipline on NBN Co. If there were a regime in which developers had a viable option to use a

¹ Mr Graham Wolfe, HIA, Transcript of Evidence, 17 June 2011, p. 21.

CGO to build out fibre networks in their developments, then developers would be likely to do this if the CGO could build the network more cheaply, quickly and conveniently. This would produce a more efficient outcome if it meant that infrastructure in new developments were built at lower cost than if it were done by NBN Co under a monopoly.

Evidence provided to the inquiry demonstrated that there is a nascent but increasingly active market in which a number of CGOs compete to secure contracts from developers to build out fibre networks in their developments. As the Greenfields Fibre Operators Association (GFOA) told the Committee:

We are an alliance of leading fibre to the home operators and carriers in the greenfields across Australia. Our members are OPENetworks, Service Elements, TransACT, Converge, Broadcast Engineering Services Australia and Pivit.²

The GFOA explained the achievements of its members in deploying fibre optic infrastructure to homes across Australia, in the course of the ordinary business of those members.

Since 2000, the GFOA members have been designing, building and operating advanced broadband networks in greenfields. Some have even designed optical fibre equipment that is still used throughout the world in optical fibre networks today. GFOA members connect or pass over 400,000 homes. We have a further 350,000 homes, potentially, either under development contracts or within the footprint of our existing networks capable of being connected. The members deliver high-speed data, internet, voice, free to air, pay TV and many other digital services, including CCTV, security services, building services, building management, utility management and community management services as well as a raft of other wi-fi and other forms of services. ..

It is interesting that, without having to tap into the USO funds, we have been able to spread our networks throughout the greenfields, whilst there has been no encouragement by government to address the fact that Telstra was running around using the USO funds to provide a copper network, a very antiquated network, throughout that same decade.³

Even Telstra has conceded the existence of this competitive market in the installation of fibre networks in new developments. Telstra stated:

² Mr Sparksman, GFOA, Transcript of Evidence, 16 May 2011, p 57.

³ Mr Sparksman, GFOA, Transcript of Evidence, 16 May 2011, p 58.

Traditionally as the USO provider we have been deploying copper based infrastructure at the request of developers. More recently a competitive fibre deployment industry had arisen and a number of providers, including Telstra, deployed fibre in many new developments under contract to the developer.⁴

The government's stated policy is that developers should be free to use either NBN Co, or a competing provider, to build out fibre networks in their developments. On 9 December 2010, the Minister for Broadband, Communications and the Digital Economy announced:

It has been a consistent feature of the Government's policy in new developments that there should be room for competing providers. This continues to be the case. Developers will be able to source fibre from competing fibre providers if they wish. Providers can compete to provide infrastructure in new developments, for example, by offering more tailored solutions to developers or more expeditious delivery.⁵

There is a similar statement in the Government's Statement of Expectations with NBN Co. in relation to fibre in new developments. The Statement of Expectations stipulates that NBN Co's role as a wholesaler of last resort within its fibre footprint enables it to:

... use whatever operational arrangements it chooses to service new developments, including sub-contracting and build-operate-transfer arrangements.⁶

Evidence from the GFOA highlighted the potential benefit to taxpayers of the cost efficiencies which could be achieved if NBN Co were subject to cost discipline from CGOs who may well be able to connect new premises to a fibre network more cheaply. GFOA put the view that CGOs can install fibre networks which are NBN Co fibre network equivalent or better for approximately \$1500 per lot in comparison to NBN Co's which cost approximately double that amount at \$3000 to install. GFOA stated:

NBN Co Agreements with Developers, who have already applied for 133,000 new lot connections in Greenfield developments since 1 January 2011, evidences that the cost of each connection is currently averaging over \$3000 per lot (excluding any back haul construction costs). Current prices for GFOA networks that equal or exceed the current functional performance of NBN Co networks

⁴ Telstra, Submission 1, p. 2.

⁵ Policy Statement, 9 December 2010.

⁶ Statement of Expectations, p. 6.

are up to \$1500 per lot (excluding any back haul construction costs). FTA TV and Pay TV may add \$300 per lot.⁷

TransACT stated that the approximate cost depending on choice of provider and specification used, of installation of a fibre network per premise is up to \$3500. TransACT stated:

The ballpark type numbers indicate that pit and pipe is somewhere in the order of \$500 to \$1,000 a premise and a turnkey solution is anywhere up to \$3,500 a premise depending on who deploys it and what the specification is.⁸

The Housing Industry Association (HIA) advised that developers reported a cost of installing Fibre-to-the Premises (FTTP) is in the range of \$2500 to \$3500 per premise and with additional installation costs, taxes, charges and developer margins, the cost will be up to the order of \$5000. The HIA stated:

Based on the numbers provided to HIA, the average cost to the developer per block for FTTP is in the range of \$2500 - \$3500. When combined with costs associated with the additional installation requirements within the home, and including taxes and charges and developer/builder margins, the retail cost to the consumer will be up to the order of \$5000.⁹

Under the policy framework as presently established in the Bill, developers have a very strong disincentive to choose any operator other than NBN Co. The developer faces a requirement to install fibre ready infrastructure, which will cost around \$800 per lot according to the Explanatory Memorandum. Beyond that, however, the developer has two options. The first option is to do nothing more, in the knowledge that in a few years' time NBN Co will come along and install fibre at its own expense in the development.

The second option is to contract with a CGO to install fibre in the development. Based upon the \$1500 per premises figure provided in evidence by the GFOA, this will expose the developer to an incremental \$700 per premises. It is very unlikely that developers will incur this expense if they are not required to do so. Given this economic reality, it is highly misleading for the government to claim that its policy leaves open the option for developers to engage a competitor to NBN Co.

The Department of Broadband, Communications and the Digital Economy (DBCDE) argued that it is unclear whether the costs outlined by the GFOA are based on a like with like comparison. The DBCDE stated:

⁷ Greenfield Fibre Operators of Australia, Submission 1, p. 6 and 7.

⁸ Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 41.

⁹ HIA, Submission 7.1, p. 1.

The department is not aware of the basis for the GFOA's claim in relation to NBN Co's average costs in new developments, and it is unclear whether the GFOA's claims about the costs of its networks and NBN Co's are based on a like with like comparison.¹⁰

Coalition Members believe that DBCDE's comment misses the point. The evidence suggests that there is at least the potential to realise cost savings. The way to find out whether such savings can in fact be realised is to establish a market structure in which genuine competition can operate. If developers are able to choose a provider other than NBN Co to build the network in their development, and such a provider can build the network more cheaply than NBN Co, then the market will operate accordingly and savings will be realised. The matter should be tested by the market – and the legislative framework should facilitate the operation of a market – rather than being dismissed by stroke of a bureaucrat's pen.

Damaging to competition in the market for the provision of new fibre infrastructure

The regime established by the Bill is damaging to competition in the market for the provision of new fibre infrastructure. Today, as is clear from evidence provided by GFOA there is a nascent but increasingly active market in which CGOs compete to secure contracts from developers to build out fibre networks in their developments. In some cases, the CGO builds the network and then also operates as a retail service provider, providing services over the network to residents in the development.

The regime established by the Bill damages competition for several reasons. First, by exposing CGOs to competition from a government funded operator which is prepared to install fibre at zero cost to a developer (once the developer has incurred the expense of building trenches and other 'fibre ready facilities'), the regime will effectively make it impossible for such CGOs to compete.

CGOs will be at a fundamental cost disadvantage because NBN Co is prepared to install fibre at zero cost, incurring a loss on the installation which it presumably hopes to recoup over time from service revenues.

The second reason that the regime in the Bill damages competition is because the standards for a 'fibre ready facility' (such as a pit) required to be built in greenfields developments will in practical terms be set by NBN Co. Under proposed section 372W, a fibre ready facility (which a developer has an obligation

¹⁰ DBCDE, Submission 8, p. 4.

to install) is defined as one which amongst other things satisfies such conditions as are specified by the Minister. In practical terms, this will mean that standards will be set by NBN Co, as the Minister is likely to simply set the standards which the NBN Co wants.

The Statement of Expectations makes it clear that the technical standards for fibre infrastructure will be specified by NBN Co. The statement provides that:

The Government expects NBN Co to provide guidance on technical specifications as early as possible. In doing so, NBN Co should consult with the Communications Alliance and the [Australian Communications and Media Association] ACMA, and should use the well established processes to deliver a national standard.¹¹

Despite the reference to existing industry standards setting processes (particularly the Communications Alliance which has the responsibility for determining industry wide standards under the present industry arrangements), it is clear from this that NBN Co's wishes will prevail.

The risks to competition of such an approach are profound. It is well established that a dominant operator with the power to set technical standards will use that power as a tool to maintain its dominance. It is for this very reason that the power to set technical standards, which had previously been held by the government owned monopolist Telecom Australia, was in 1989 transferred to an independent body.

A number of contributors to the inquiry put the view that the NBN fibre infrastructure requirements are not industry endorsed and provisions in the Bill further empower the Minister to impose standards according to NBN Co requirements. This will have the effect of imposing greater costs on developers to install fibre infrastructure and also change industry specification requirements without industry endorsement.

TransACT commented that anyone who has a carrier licence and is suitably accredited should be in a position to set a specification. TransACT stated that it wanted to avoid a situation where there is an 'over-engineered specification.'¹²

DBCDE's response to this concern is unpersuasive. DBCDE claims that the Bill does not impose NBN Co specifications on the industry. Rather the Bill provides 'a reserve power (to the Minister) to fast-track' the standardisation (which may be required for the NBN to operate an appropriate level or speed) process if

¹¹ Statement of Expectations, p. 7.

¹² Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 41.

required.¹³ In effect, DBCDE is conceding the point: the Minister has the final call on the standards and given the policy priority of rolling out the NBN, the Minister will set the standards that NBN Co wants.

DBCDE stated that NBN Co 'specifications will also be provided to the Communications Alliance (CA) with a view to having these specifications endorsed for general use by industry as soon as possible.'¹⁴ This is a fundamental change from the present arrangements under which the CA sets industry wide specifications; now its role is to be reduced to rubber-stamping specifications determined by NBN Co.

The third reason the Bill damages competition is because it forms part of a regime which renders unviable a business model typically used by CGOs today. Typically a developer will contract with a CGO for that CGO to build a fibre access network in a new development, and then to operate as a retail service provider, providing services over that network. The CGO is able to contract with the developer at a lower per premises cost than would otherwise be required, because it also expects to earn revenues from the delivery of services over the network.

This business model is now rendered unviable because of the provisions recently added as Parts 7 and 8 of the Telecommunications Act, as part of the package of legislative measures dealing with the NBN. These provisions impose require that the operator of a telecommunications network used, or capable of being used, to supply a superfast carriage service (over 25 Mbps) to consumers or small business:

- must offer a layer 2 bitstream service (that is, a wholesale service)
- must not offer services over that network to retail customers and may only offer wholesale services.

These two requirements are designed to suit the business model of NBN Co: an extremely large scale business, operating on a wholesale only basis, with the benefit of near limitless funding from government. But under Parts 7 and 8 they must also be met by CGOs – which in the main are relatively small scale private sector businesses.

The policy intent is, quite deliberately, to make it very hard for competitors to NBN Co to sustain their business model. Coalition Members believe this policy intent is wholly misjudged and precisely the opposite of a sensible policy approach to encouraging competition.

¹³ DBCDE, *Submission 8*, p. 2.

¹⁴ DBCDE, *Submission 8*, p. 2.

The consequence has been to weaken the market for the competitive provision of fibre networks in new developments.

First Proposed Coalition Amendment

To address the difficulties caused for the property development industry by the Bill, and to impose additional cost discipline on NBN Co, the Bill should include measures which remove the disincentive for developers to use CGOs to install fibre infrastructure.

The proposed amendment to the Bill would insert a new section **372CA Purchase of installed optical networks by NBN co.** which would be contained in Division 2 – Deployment of optical fibre lines.

Proposed new section 372CA is intended to enable developers whose development project has an installed fibre network (which is in compliance with specifications as determined by the Minister) to have the option to require NBN Co to purchase that network at a reasonable price (as determined by the Minister in consideration of certain market prices and costs).

The rationale for this amendment is:

- Give developers an incentive to use CGOs in the knowledge that if they pay a CGO a per connection basis, they will be able to recoup that cost (up to a limit specified by the Minister) by selling the connection to NBN Co
- Ensure that developers have additional choices beyond the government's default option in which when they build a new development they will install fibre ready facilities, but there will be no live network installed (meaning that residents in the development may need to wait several years - until such time as NBN Co is ready to come along and roll out fibre in the development – before they receive an active broadband service delivered over a fibre connection)
- Benefit end users – incoming residents of new developments – by maximising the likelihood that when residents move in, they will be provided immediately with an active broadband service delivered over a fibre connection
- Impose a cost discipline upon NBN Co by requiring it to purchase connections at a reasonable price which will be set at a price no greater than the NBN Co's own average cost of installing a connection. This means that if NBN Co's competitors can build connections at a lower charge than NBN Co, there will be a cost saving to NBN Co and ultimately the taxpayer.

Coalition Members of the Committee sought the views of witnesses at hearings regarding the proposed amendment. Mr Turnbull described the amendment as follows:

It has been put to us that a more efficient approach would be as follows: a developer could, if he or she chose, get an appropriately qualified firm to connect all of the premises in their new development, be it large or small, with fibre in accordance with specifications that were laid down by ACMA, in consultation with the NBN and that, if the developer did that, he or she could then require NBN to acquire that fibre from the developer at an agreed price. When I say 'an agreed price,' I mean a price that would be a rate set out either in the legislation or in regulations. The argument is that this would mean a developer could take the matter into his own hands, get on with the job, cable the development in a way that meets all the other construction timetables they have got and would not be disadvantaged financially by doing that. That has been put to us by some organisations that are no doubt members or affiliates or fellow travellers of yours. I want to see what you think about it.¹⁵

The Urban Development Institute of Australia (UDIA) stated that the amendment is a pragmatic suggestion and would provide greater certainty for developers. The UDIA stated:

... that is a pragmatic suggestion. In relation to the certainty question you asked me before, that is what is confronted by developers – how and when are things actually going to be done? Whatever brings around greater certainty for purchasers of those properties that all the utilities are actually there and are available and can be handed over to them and the greater that certainty is, the better it will be.¹⁶

OptiComm commented that the amendment would provide advantages in terms of maintaining diversity within the fibre provider market. OptiComm stated:

... there would be some advantages in what you are saying to what is currently proposed. That allows diversity in the greenfield. As I have said, we have been successful. Not only do we offer broadband and voice but we offer a number of other services that some developers find attractive. It would still allow them to do

¹⁵ Mr Turnbull MP, Transcript of Evidence, 17 June, pp 25-26

¹⁶ Mr Bruce Duyshart, Urban Development Institute of Australia, Transcript of Evidence, 17 June 2011, p. 26.

that and allow them to keep that network operating through companies like ourselves or allows them the offer to transfer that ownership to NBN Co. I think that is what you are suggesting. We would never love to build a network and see it go to someone else, but I think the concept is better than where we stand today.¹⁷

TransACT was supportive of the amendment and commented that a situation where different parties are responsible for installing a fibre network is tripartite and does not offer the best overall outcome. TransACT stated:

Essentially, we believe that having a situation where the developer puts pit and pipe into the development creates a situation where we have a tripartite type arrangement. You have the developer putting in pit and pipe and you have a fibre operator coming in subsequent to that. What we typically provide to developments is a turnkey solution. We deploy the fibre and the pit and pipe altogether to the developer. We believe that having a situation where it is pit and pipe only is not necessarily the best outcome overall

We would support that type of amendment to the legislation.¹⁸

The Minister's authority to determine a scale of payments would provide an equitable and efficient market outcome. The principal factor the Minister would take into account would be NBN Co's own average cost of installing a fibre connection. The Minister would also be empowered to have regard to:

- The typical costs of installing fibre networks (including significant regional variations in costs);
- A reasonable return to developers for undertaking installations.

This approach would also allow for fibre infrastructure specifications to be made according to agreed standards whether they are NBN Co or industry standards endorsed by the Communications Alliance, without any resulting cost pressure on developers, providing positive competition outcomes.

Second Proposed Coalition Amendment

To further address the damaging effects on competition in the market for the provision of new fibre infrastructure, another amendment to this Bill is required.

¹⁷ Mr Paul Cross, OptiComm, Transcript of Evidence, 17 June 2011, p. 31.

¹⁸ Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 40.

This amendment would add additional provisions to Parts 7 and 8 of the Telecommunications Act, to exempt from the operations of those Parts any fibre network which met the following conditions:

- The network is not owned or operated by NBN Co or Telstra
- The network was installed in a new development (defined as one in which persons had first taken up residence after the commencement date of the Bill) under a contract between the network's owner and the developer
- The network was owned and operated by the same entity which built it
- The network delivered retail services only to persons who resided in (or operated businesses in) the development.

This amendment would have the effect of preserving competition in the market for the provision of new fibre infrastructure. It would be open to CGOs to install and operate new fibre networks in new developments, without needing to meet the requirements of Parts 7 and 8 of the Telecommunications Act, which are tailored to be appropriate to the very different and much larger scale business to be operated by NBN Co.

The CGOs would continue to be subject to the other access requirements which apply under the telecommunications specific provisions of the Competition and Consumer Act. That is, other retail service providers wishing to serve residents of a development would have the legal right to obtain access over the CGO's network.

The effect of this amendment, together with the first Coalition amendment, would be to maximise the options available to developers and CGOs. They could contract on the basis that the CGO would build the network, and operate it until such time as it was sold to NBN Co; or they could contract on the basis that the CGO would continue to operate it and there would be no sale to NBN Co.

Coalition Members believe that providing maximum flexibility would best facilitate the working of the market, and in turn would produce the best outcomes for developers, CGOs – and most importantly, end users, both of the housing provided by the developer and the broadband services to be delivered over the network.

We note the statement made by the Minister for Broadband, Communications and the Digital Economy on 9 December 2010:

It has been a consistent feature of the Government's policy in new developments that there should be room for competing providers. This continues to be the case. Developers will be able to source fibre from competing fibre providers if they wish. Providers can

compete to provide infrastructure in new developments, for example, by offering more tailored solutions to developers or more expeditious delivery.¹⁹

In the Coalition Members' view, if the Minister is serious about this statement, he should readily agree to the amendment we propose.

Conclusion

Coalition Members will be moving the amendments referred to above when the bill is debated in the Parliament.

Hon Malcolm Turnbull MP
Member for Wentworth

on behalf of the Coalition Members of the Joint Committee on the National
Broadband Network

¹⁹ Policy Statement, 9 December 2010.



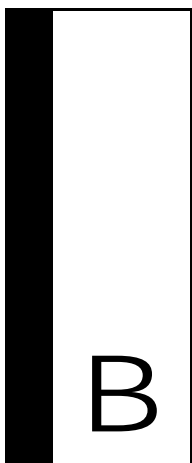
Appendix A – Submissions and Exhibits

Submissions

1. Greenfield Fibre Operators of Australia
 - 1.1 Greenfield Fibre Operators of Australia
2. Mr Anthony White
3. Telstra
 - 3.1 Confidential
 - 3.2 Telstra
4. OPENetworks
5. Australian Communications Consumer Action Network
 - 5.1. Confidential
6. COMVERGE Networks
7. Housing Industry Association Ltd
 - 7.1 Housing Industry Association Ltd
8. Department of Broadband, Communications and the Digital Economy
9. Urban Development Institute of Australia
10. OptiComm Pty Ltd.
 - 10.1. OptiComm Pty Ltd.
 - 10.2. OptiComm Pty Ltd.
11. Urban Taskforce Australia
12. TransACT
13. Australian Competition and Consumer Commission

Exhibits

1. Greenfield Fibre Operators of Australia
Statement by the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, *Fibre in New Developments*, 9 December 2010
2. Greenfield Fibre Operators of Australia
Confidential
3. Greenfield Fibre Operators of Australia
Confidential
4. Comverge Networks
Letter to Comverge Networks from the Communications Alliance Ltd. 15 June 2011



Appendix B – Hearings and witnesses

Monday, 16 May 2011 - Sydney

Australian Competition and Consumer Commission

Mr Mark Pearson, Deputy Chief Executive Officer of Regulation
Mr Michael Cosgrave, Group General Manager, Communications Group
Mr Richard Home, General Manager, NBN Engagement and Group
Coordination
Mr Rob Nicholls, General Manager, Convergence and Mobility Branch

Department of Broadband, Communications and the Digital Economy

Mr Peter Harris, Secretary
Mr Philip Mason, Assistant Secretary, NBN Implementation Division

Greenfield Fibre Operators of Australia

Mr Michael Sparksman, Chairman
Mr Benjamin Seaman, Chief Technology Officer
Mr Steven Appleby, Member
Mr Donald Yelland, Member

NBN Co Ltd

Mr Mike Quigley, Chief Executive Officer

Telstra

Mr James Shaw, Director, Government Relations
Ms Yolanda Chorazyczewski, Group Manager, Regulatory Social Policy

Friday, 17 June 2011 - Canberra

Australian Communications Consumer Action Network

Ms Teresa Corbin, Chief Executive Officer

Mr Jonathan Gadir, Senior Policy Adviser

Department of Broadband, Communications and the Digital Economy

Ms Pip Spence, First Assistant Secretary, NBN Implementation Division

Mr Philip Mason, Assistant Secretary, NBN Implementation Division

Housing Industry Association

Mr Graham Wolfe, Chief Executive - Association

OptiComm Co Pty Ltd

Mr Paul Cross, Chief Executive Officer

Mr Phillip Smith, General Manager, Carrier Relations and Regulation

Productivity Commission

Mr Michael Woods, Deputy Chairman

TransACT Communications Pty Ltd

Mr Ivan Slavich, Chief Executive Officer

Mr Peter Lee, GM Strategy, Wholesale and Regulatory Affairs

Urban Development Institute of Australia

Mr Richard Lindsay, Chief Executive Officer, UDIA National

Mr Bruce Duyshart, Member

Mr Martin Musgrave, Deputy Director, Policy, UDIA Victoria