

Submission by the Department of Broadband, Communications and the Digital Economy to the Inquiry by the Joint Committee on the National Broadband Network into the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011

23 May 2011

In this submission the Department of Broadband, Communications and the Digital Economy sets out the main provisions of the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill). In doing so, it clarifies how the Bill operates in the light of some misunderstandings that became apparent at the Joint Committee on the National Broadband Network (NBN) hearing on Monday 16 May. The submission also addresses issues raised by the Greenfield Fibre Operators of Australia (GFOA), as requested by the Joint Committee.

Overview of the Fibre Deployment Bill

Most importantly, the Bill:

- effectively requires developers that are constitutional corporations to install fibre-ready passive infrastructure (e.g. pit and pipe) in developments in the long term fibre footprint of the NBN;
- requires passive infrastructure that is installed in new developments in the NBN's long term fibre footprint to be fibre-ready;
- enables the Minister to determine specifications for fibre-ready passive infrastructure, if required;
- provides 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 (ACCC) to be the default arbitrator;
- enables the Minister to specify developments in which fixed lines must be optical fibre and determine specifications for such lines, if necessary;
- provides for statutory and Ministerial exemptions from the requirements to install fibre-ready facilities or optical fibre lines; and
- enables the Australian Communications Media Authority (ACMA) 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.

Clarifying how the Bill operates

This Bill differs from the 2010 Fibre Deployment Bill

The Fibre Deployment Bill 2010 was introduced in the Senate in March 2010 but that Bill lapsed when the last Parliament was dissolved. The 2010 Bill was similar to the Bill currently before the Parliament in that its objective was to ensure fibre-ready and fibre infrastructure are installed in new developments. However, the activation of requirements under the 2010 Bill was more dependent on subordinate legislation. In the current Bill, the key requirements are set out in the Bill.

The Bill does not make NBN Co or Telstra 'providers of last resort'

The Bill does not specify particular roles for NBN Co or Telstra or any other particular carrier, nor does it provide for this in subordinate legislation. Rather, the Bill aims to ensure that developers have fibre-ready passive infrastructure installed for the future provision of fibre, potentially for use by any fibre provider. NBN Co and Telstra's respective roles as infrastructure providers of last resort are set out in a Policy Statement published on 9 December 2010¹.

The Bill does not require in statute the installation of fibre

The Bill itself does not require the installation of fibre optic networks, although it does provide the Minister with the ability to require fibre to be installed in specified developments, through use of subordinate instruments under Division 2.

The Bill does not impose NBN Co specifications on the industry

The Bill does not set out technical specifications for fibre infrastructure in new developments, but it does give the Minister some powers to make instruments to do so with regard to passive infrastructure (proposed subparagraphs 372W(a)(ii) and 372W(b)(ii) and (iii)) and to optical fibre lines in specified developments (proposed sections 372B(4) and 372C(4)) should it be necessary. 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 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' (p.4).

¹¹ See: http://www.dbcde.gov.au/broadband/national_broadband_network/fibre_in_new_developments

NBN Co's ability to issue statements about the fibre footprint benefits developers

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. As NBN Co (given its rollout mandate and as the fibre provider of last resort) is in the best position to confirm a locality is in its long term fibre footprint, it is logical that it should be able to confirm an area is not covered. This is not something other providers can do. As the Explanatory Memorandum to the Bill notes, it is not envisaged that the exercise of this power would affect other providers because if they were to provide fibre in such an area, they would be able to deal with pit and pipe requirements in their contract with the developer (p.31).

Vertically integrated telecommunications companies are prevented from servicing new developments

The Parliament recently passed the *Telecommunications Legislation Amendment (National Broadband Network—Access Arrangements) Act 2011* which requires that certain new superfast fixed line local access networks must be wholesale-only, and supply a Layer 2 bitstream service on a non-discriminatory basis. These provisions would generally apply in relation to new fibre networks rolled out in new developments.

These provisions were introduced to support NBN Co in delivering its national objectives and provide NBN-consistent outcomes across new networks.

Other issues raised by the GFOA

At its hearings on 16 May 2011, the Joint Committee took testimony from the GFOA and the Committee subsequently asked the department for its comments on that testimony.

Conflict with the competitive neutrality policy

The GFOA argues that the fibre in new developments policy is in breach of the Government's competitive neutrality policy and two of its members have lodged complaints with the Australian Government Competitive Neutrality Complaints Office (AGCNCO). This matter is currently being investigated by the AGCNCO and we do not propose to comment in detail on it here.

NBN Co's cost recovery model

The GFOA's chief contention is that its members are unable to compete with NBN Co because it will not charge developers upfront for the installation of fibre infrastructure, whereas they need to charge upfront. NBN Co's charging practices are in response to the demands of the developer community for fibre solutions involving the recovery of costs over time through user charges, as has been the case with Telstra and its copper infrastructure.

The purpose of, and access to, universal service obligation (USO) funding

The GFOA suggests that USO funding should be used to subsidise the provision of fibre and/or backhaul to new developments. 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.

Number of existing fibre services

Figures published by the Australian Bureau of Statistics are that by December 2009, approximately 11,000 premises had fibre-to-the-premises connections. The rate of connections was accelerating, to 13,000 in June 2010 and 24,000 in December 2010². Of these fibre connections, a considerable proportion has been built by Telstra.

Cost of fibre per lot

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.

Backhaul costs

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.

Provision of fibre in infill developments

The GFOA notes that under the government's policy small infill developments of less than 100 premises will have to wait for fibre and will likely be served by copper in the meantime. Telstra will remain responsible for providing services to these developments under the USO and must provide a connection if asked; but developers

² Australian Bureau of Statistics Cat No 8153.0 Internet Activity, Australia, Dec 2010, released 1 April 2011.

are not prevented from choosing any provider to roll out fibre in their developments. Developers may have a particular incentive to do so when the NBN rollout is not imminent in that area.

Provision of services outside the fibre footprint

Under the government's NBN policy, fibre will be available to 93 per cent of premises. The remaining seven per cent of premises will be covered by high-speed wireless and satellite solutions. Again, developers can choose any provider to roll out fibre in their developments, including in remoter areas if they wish.

Lack of competition in new developments

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