

Chapter Five

Establishment of NBN Co Limited

5.1 One of the terms of reference for this inquiry was for that the committee's investigations include:

2. b) the ownership, governance and operating arrangements of the NBN company and any NBN related entities.¹

5.2 This chapter considers the establishment of the government corporations which will underpin the company established by the government to build and operate the National Broadband Network, including legislation, other legal documents and funding arrangements.

NBN Legislation

5.3 At the time of reporting, no legislation outlining the way in which the NBN will be rolled out, managed and funded has yet been introduced into the Parliament. This includes the promised legislation that was to outline the governance framework for the NBN Co. The only legislation that has been introduced has been somewhat tangential to the proposal itself, specifically:

- The Telecommunications Legislation Amendment (National Broadband Network Measures-Network Information Bill) 2009 was introduced into the House of Representatives on 19 August 2009. The Bill would 'enable the Minister to require telecommunications carriers and utilities to give information to the Commonwealth about their telecommunications networks'.² This followed the inquiry into a virtually identical bill by the Senate Standing Committee on the Environment, Communications and the Arts, the report of which was tabled in the Senate on 17 August 2009.
- The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 was introduced into the House of Representatives on 15 September 2009. The Bill seeks to amend the regulatory framework of the telecommunications industry in an attempt to improve regulation and competition while the NBN is being built. As discussed in chapter eight, however, the Bill is not required for the building or operation of the NBN.

1 Senate Select Committee on the National Broadband Network, Terms of Reference, http://www.aph.gov.au/Senate/committee/broadband_ctte/tor.htm, accessed 15 November 2009.

2 Mr Jonathan Chowns, *Bills Digest No 22:2009-10: Telecommunications Legislation Amendment (National broadband Network Measures – Network information) Bill 2009*, 7 September 2009.

5.4 Legislation relating to the governance of NBN Co and the installation of fibre in greenfields developments have been mentioned in various media,³ and were also listed on the Department of Broadband, Communications and the Digital Economy's website. The government has since stated that these bills will not now be introduced into parliament until 2010.

Establishment of NBN Company

5.5 As noted in the committee's previous report, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon Stephen Conroy, announced the establishment of the NBN Company Limited (NBN Co) on 7 April 2009.⁴

5.6 The company was prescribed as a Government Business Enterprise (GBE) in August 2009, and has two shareholders: the Minister for Broadband, Communications and the Digital Economy, and the Minister for Finance and Deregulation.⁵

5.7 Although the legislation to provide the governance framework of the NBN Co has not been forthcoming, a Constitution for the company has been established. The Constitution of NBN Co remains very basic, and offers little indication of the way in which the company is to be operated or of its objectives.

The NBN Co Board

5.8 Under clause 12 of NBN Co's Constitution, the Board of the company was established and given the power to appoint the CEO, in consultation with the Commonwealth. Company directors are appointed by the Commonwealth under clause 5.4, for a maximum term of three years, and are eligible for reappointment.⁶ The remuneration package for directors is set by the Remuneration Tribunal.⁷

5.9 On 24 July 2009, Mr Michael Quigley was appointed as the 'Executive Chairman' of NBN Co.⁸ Mr Quigley is an electrical engineer with substantial experience in the telecommunications sector; his appointment was reported in *The Australian* as 'giv[ing] the [NBN] project some much needed credibility'.⁹

3 See for example: James Riley, 'NBN Co authorised to acquire assets now: Conroy', *IT Wire*, 19 October 2009, at: <http://www.itwire.com/content/view/28628/127/> (accessed 28 October 2009).

4 Senate Select Committee on the National Broadband Network, *Second Interim Report: Another Fork in the Road to National Broadband*, May 2009, p. 39.

5 Mr Michael Quigley, *Committee Hansard*, Canberra, 1 October 2009, p. 58.

6 Constitution of ACN 136 533 741 Limited, clause 5.5.

7 Constitution of ACN 136 533 741 Limited, clause 5.7.

8 Senator the Hon Stephen Conroy, 'Mike Quigley appointed Executive Chairman of NBN Co', *Media Release*, 25 July 2009, at http://www.minister.dbcde.gov.au/media/media_releases/2009/067.

9 Jennifer Hewatt and Michael Sainsbury, 'Hiring of Mike Quigley brings credibility to broadband', *The Australian*, 27 July 2009.

5.10 Mr Quigley is presently both the Chairman and the Chief Executive Officer of NBN Co.¹⁰ At the Supplementary Estimates hearing in October 2009, Senator Minchin raised concerns about this model from a corporate governance perspective, and was informed by the minister that Mr Quigley would be performing both jobs:

...just in the start-up phase. We thought that it would work best in this manner but I am a fan—as you have heard me say many times on corporate governance—of a chair and an executive being separate figures. But just in the short term—for three months or six months—we are just seeing how we go. But there is no question we will move to a chair and a CEO as separate individuals.¹¹

5.11 In terms of timing, the minister told the Environment, Communications and the Arts Committee that the arrangement is not anticipated to last longer than 12 months.¹²

5.12 Clause 5.4.1 of the NBN Co constitution provides that there is to be a minimum of three and a maximum of nine Company Directors. At the Supplementary Estimates hearing, the minister stated that there are currently five board members, plus the minister, and that the minister is hoping to fill two more positions in the near future.¹³

NBN Co staffing

5.13 Details of staffing numbers were provided at the Supplementary Estimates hearing in October 2009. At that time, the NBN Co had 13 full-time employees and 25 contracted staff, whose locations were spread between Sydney, Canberra and Melbourne.¹⁴

5.14 The Committee is disturbed by the preparedness of the government to commit to the \$1.95 million annual salary of NBN Chairman, Mr Michael Quigley, when the viability of the project remains unknown and Implementation Study is yet to be completed. Compounding this, the government has also agreed to \$450,000 in total annual fees for the five part-time NBN Co directors, in addition to the exorbitant

10 Mr Quigley, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 61.

11 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p 61.

12 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 61.

13 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p 62.

14 Mr Quigley, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 64.

annual salary of \$450,000 recently announced for the new NBN Co Government Relations Manager, Mr Mike Kaiser.

Government Funding

5.15 Estimates also heard that the working capital of NBN Co was \$60,000,010, comprised of two separate funding injections of \$10 million and \$50 million, plus the start-up capital of \$10. The appropriation of this funding was made under the Building Australia Fund (BAF) legislation following the processes established in that legislation.¹⁵

5.16 There was a total of \$2 billion on which the ministers had the authority to draw for NBN Co. This was from the original \$2.4 billion that formed the previous Communications Fund, with the minister noting that \$400 million of that had been 'earmarked for the Glasson recommendations'.¹⁶

5.17 Under clause 9 of the NBN Co constitution, the Commonwealth has the authority to increase the company's maximum share capital.

Future funding strategy

5.18 The minister told Estimates that, at this stage, the \$2 billion in the BAF is the maximum equity that the government has agreed to put into NBN Co. However, Mr Murray, Executive Director of Policy and Governance at the Department of Treasury explained that:

Even though the government is committed up to the whole \$43 billion, the proposal is that 49 per cent would come from the private sector over the eight-year period. The assumption has been made that the other 51 per cent would have around a 50-50 debt-equity ration...That leaves you with an equity funding by the government of about \$11 billion.¹⁷

5.19 Taking the \$2.4 billion originally provided in the BAF, that leaves the government a shortfall of \$8.6 billion. In order to raise the additional \$8.6 billion that the government has agreed to contribute to the NBN, the government has indicated that it is likely to issue 'Aussie Infrastructure Bonds'.¹⁸

15 Mr Mark Heazlett, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 65.

16 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 66.

17 Mr Richard Murray, Executive Director, Policy and Governance, Department of the Treasury, *Committee Hansard*, Canberra, 1 October 2009, p. 5.

18 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Hansard*, 19 October 2009, p. 66.

5.20 At this stage, the government has indicated that it is not in a position to give the committee any further information about the structure or timing of the bonds. Treasury informed the committee that:

No further indication on the timing of the first issuance of Aussie Infrastructure Bonds (AIBs) is available from the 2009-10 Budget.

The structure and form of AIBs will be informed by the National Broadband Network implementation study, including the volume of the task and the timing of financing requirements. Consideration of AIB issues will continue in parallel with the implementation study.¹⁹

5.21 At the committee's public hearing on 20 July 2009 in Canberra, Mr Lyon, the Executive Director of Infrastructure Partnerships Australia warned that:

The use of Treasury issuance in the form of Aussie Infrastructure Bonds is an appropriate way to raise public debt to fund the public component of the project, but the use of debt must always be prudently managed within the context of the broader economic management of the Commonwealth's balance sheet.²⁰

5.22 In this regard, Treasury stated that:

An addition of \$8.6 billion to the borrowing program, spread over (say) four years, would represent an increase of only \$2.15 billion per annum. An adjustment of this magnitude would be very manageable.²¹

5.23 Despite this assurance from Treasury, the committee remains deeply concerned at the lack of detailed information regarding the government's proposal to issue Aussie Infrastructure Bonds. The committee draws attention again to principles outlined by the Productivity Commission in this regard:

„,bonds, if structured appropriately, can provide a level of market-based discipline to the project. To achieve this, the bonds need to be serviced from income generated by the infrastructure project rather than from general tax receipts.²²

5.24 The committee highlights that in order for this principle to operate, the NBN Co must be a commercially viable entity. Alternatively, the Commission states the bonds could be just another government bond, noting that in this instance:

...the crucial issue is the cost of borrowing via these bonds compared with the cost of standard Government debt raising. Such bonds may be less liquid and involve higher transaction costs. ... Should the Government

19 Department of Treasury, Answers to Questions taken on Notice, 1 October 2009, p. 8.

20 Mr Brendan Lyon, Executive Director, Infrastructure Partnerships Australia, *Committee Hansard*, 20 July 2009, p. 18.

21 Department of Treasury, Answers to Questions taken on Notice, 1 October 2009, p. 7.

22 Productivity Commission, *Submission 87*, p. 8.

provide tax concessions on the bonds to make them more attractive to purchasers, it should fully account for the cost of the concessions.²³

5.25 As clearly expressed by the Commission, the bottom line is the overall cost of the borrowings, noting that:

...tax concessions may not appear on the Government's balance sheet. The key issue for Government is the cost of borrowing, taking into account all concessions.²⁴

5.26 The committee once again urges for the government to ensure the Implementation Study remains on schedule for February 2010, and provides in-depth detail of how the NBN Co will be funded through issuance of AIBs.

Objects of association

5.27 At the time of reporting, the objects of association for the NBN Co are:

..to roll out, operate and maintain a national wholesale broadband network while working closely with the Commonwealth during the implementation study in order to facilitate the implementation of Australian Government broadband policy and regulation.²⁵

5.28 The minister has stated on a number of occasions that NBN Co is intended to run as a commercial operation, and run profitably.²⁶ At Supplementary Estimates the minister agreed with a question put to him by Senator Minchin that the Directors of NBN Co are have the ordinary fiduciary obligations to shareholders under Corporations Law.²⁷

5.29 The committee highlights that these statements of the objects of NBN Co seem to be directly contradictory with the Constitution of NBN Tasmania Limited.

Establishment of Tasmania NBN Co

5.30 To date, Tasmania is the only state or territory in Australia in which the NBN rollout has begun. On 24 July 2009, the Minister for Broadband, Communications and

23 Productivity Commission, *Submission 87*, p. 8.

24 Productivity Commission, *Submission 87*, p. 8.

25 Constitution of ACN 136 533 741 Limited, clause 4.1.1.

26 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p 67.

27 Senator the Hon Stephen Conroy, Senate Standing Committee on Environment, Communications and the Arts, *Supplementary Estimates Proof Hansard*, 19 October 2009, p. 67.

the Digital Economy announced the establishment of Tasmania NBN Co Ltd (NBN Tasmania) to rollout the NBN in Tasmania.²⁸

5.31 NBN Tasmania is a wholly owned subsidiary of NBN Co. Its constitution is substantially more developed than that of NBN Co, likely because of the stage of NBN development in Tasmania. Clause 4.4 of NBN Tasmania's constitution provides that:

The objects of the company are:

- (a) to implement the NBN in Tasmania consistently with the Commonwealth's plans for the NBN in each other State or Territory from time to time;
- (b) to facilitate the **accessibility** and **affordability** of broadband services for Tasmanians;
- (c) subject to relevant legislation, to set prices for the Company's products and services;
- (d) to provide a direct optical fibre connection to an agreed target number of Tasmanian premises; and
- (e) to maximise the public benefit to Tasmanians through the existence of the NBN as a widely available broadband network in Tasmania.²⁹

5.32 There are two sections within those objects that appear to conflict with the government's statements made regarding the NBN Co and its network operation. The first perceived conflict is the fact that NBN Tasmania seems to have the power to set prices for its products and services. Legislation that (at the time of reporting) is due for Senate consideration seeks to entrust that power to the ACCC, granting the regulator the ability to set prices up front. The committee asks the question: how will these conflicting roles be resolved?

5.33 The committee also notes that the NBN Tasmania's object of providing accessible and affordable broadband services appears to be quite contradictory to the minister's comments about the NBN aiming to be a commercially viable company.

5.34 Mr Andrew Connor, the spokesperson from Digital Tasmania acknowledged the perception of a conflict.³⁰ However, he also pointed out that:

... anyone's definition of 'affordable' is different... As for the monthly cost, some figures have been touted of \$200 per month just for an internet service, but what you are getting is a platform to provide you with a wealth of services, which I am sure you know about. I will just run through a couple of them. If you add up current services into a home, you have phone, internet for data and pay television, and there are other services we do not even have yet. When it makes videoconferencing available and when it

28 Senator the Hon Stephen Conroy, 'Tasmania NBN Co Limited Established', *Media Release*, 13 August 2009 at http://www.minister.dbcde.gov.au/media/media_releases/2009/075/.

29 Constitution of ACN 138 338 271 Limited, clause 4.4, emphasis added.

30 Mr Andrew Connor, *Committee Hansard*, Hobart, 8 October 2009, p. 4.

makes hosting of your own femtocell for your mobile phone in your own home possible, that is another value-adding, so it will value-add to the proposition.³¹

5.35 The committee notes that the minister has committed to ensuring that 'every house, school and business in Australia will get access to affordable fast broadband.'³² The committee urges the government to expediently bring forward governance legislation for the NBN Co to ensure there is consistency between the company and any wholly-owned subsidiary companies that are currently established, or those established in the future. The confidence of the industry, the market and the Australian population is highly dependent on this consistency.

NBN Tasmania flying blind?

5.36 The committee is concerned that the roll-out in Tasmania has apparently commenced in what is virtually an information vacuum. Apart from stating in which towns the fibre will be first deployed, neither the State nor the Federal Governments have provided any form of implementation plan.

5.37 Although NBN Tasmania has a constitution, there is no structured Business Plan to inform the public how this GBE will ensure that it will provide the 'accessibility and affordability' in broadband services to which its constitution refers. With services due to commence in July 2010, Tasmanians remain ignorant of the prices they will have to pay to access broadband. Details of the level of Federal funding for the Tasmanian roll-out are also sketchy, with the Treasury only willing to state that it had provided for 'an investment in the early rollout ... in Tasmania' in 2009-10.

5.38 Given the size of Tasmania, the anticipated roll-out time of five years, and the fact that the first services are now not scheduled until July 2010, the committee is sceptical that the government can maintain the national roll-out will take only another three years.

5.39 The committee is critical of this lack of detail relating to NBN Tasmania, a company that is already in operation, yet without a business plan, without an implementation plan and without any future funding guarantee documented.

Recommendation 2

5.40 That the government releases a detailed Business Plan for Tasmania by 31 December 2009 that includes: an implementation plan that details which towns will be connected by fibre and which will miss out; Commonwealth funding details for the Tasmanian roll-out; pricing details for Tasmanian

31 Mr Connor, *Committee Hansard*, Hobart, 8 October 2009, p. 4.

32 http://www.minister.dbcde.gov.au/media/media_releases/2009/022, accessed 5 October 2009.

consumers; and the percentage of aerial vs underground fibre connections to the premises.

Committee view

5.41 At this stage, very little is known about the structure of NBN Co, the legislation underpinning its governance, or the way in which the investment bonds will be structured and the timing of their issuance.

5.42 There is concern about how debt arrangements will be managed and at the levels of debt the Government will be required to underwrite to fund the project.

5.43 The committee is deeply concerned that these critical details are not established for a GBE that has been granted responsibility for the government's largest nation-building infrastructure project.

5.44 The committee highlights other worrying indications, including the apparent conflict in the goals of the parent company and its subsidiaries.

5.45 The committee urges the government to expediently provide the Implementation Study report for public scrutiny. A project of this magnitude demands transparency and accountability of all decisions, particularly those relating to the governance and funding of the GBE that has been established to undertake and successfully complete the project.

Recommendation 3

5.46 That the government expediently bring forward the legislation that will provide the governance and funding framework for the NBN Co Ltd.

