

The Senate

Standing Committee on
Environment, Communications
and the Arts

Telecommunications Legislation Amendment
(Communications Fund) Bill 2008 [Provisions]

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Committee membership

Members

Senator Anne McEwen (ALP, SA) (Chair)
Senator Andrew Bartlett (AD, QLD) (Deputy Chair)
Senator Simon Birmingham (LP, SA)
Senator the Hon. Rod Kemp (LP, VIC)
Senator Kate Lundy (ALP, ACT)
Senator Stephen Parry (LP, TAS)
Senator Ruth Webber (ALP, WA)
Senator Dana Wortley (ALP, SA)

Committee Secretariat

Dr Ian Holland, Secretary
Mr Ivan Powell, Senior Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee Address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ecita.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/ecita_ctte/index.htm

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Acronyms and abbreviations

ABG	Australian Broadband Guarantee
DBCDE	Department of Broadband, Communications and the Digital Economy
NSWFA	NSW Farmers Association
RTIRC	Regional Telecommunications Independent Review Committee
the Act	<i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i>
the bill	Telecommunications Legislation Amendment (Communications Fund) Bill 2008
the committee	Senate Standing Committee on Environment, Communications and the Arts

Chapter 1

Introduction

Terms of reference

1.1 On 19 March 2008, the Senate referred the provisions of the Telecommunications Legislation Amendment (Communications Fund) Bill 2008 (the bill) to the Senate Standing Committee on Environment, Communications and the Arts (the committee) for inquiry and report by 30 April 2008.

1.2 On 26 March 2008, in accordance with usual practice, the committee advertised the inquiry in *The Australian*, calling for submissions by 17 April 2008; the inquiry was re-advertised in *The Australian* on 1 April 2008. The committee also directly contacted a number of organisations and individuals to invite submissions. The committee received four submissions, which are listed in Appendix 1.

1.3 The committee acknowledges the Parliamentary Library for its work preparing the *Bills Digest* on the bill, which assisted the committee in considering the bill.

Background to the bill

Purpose of the bill

1.4 The bill has two purposes.

1.5 First, the bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the Act) to:

...enable money in the Communications Fund to be used for the purpose of funding the creation or development of a national broadband network...¹

1.6 The government has proposed the amendment because the Act currently prevents the Communications Fund (the fund) being used for purposes other than to implement recommendations arising from regular independent reviews of telecommunications services in regional Australia by the Regional Telecommunications Independent Review Committee (RTIRC).²

1.7 Second, the bill amends the Act to allow the \$2 billion capital of the fund to be expended for the purposes of the creation of a national broadband network. The

1 Minister for Infrastructure, Transport and Regional Development, Mr Anthony Albanese, *House of Representatives Hansard*, 13 February 2008, p. 203.

2 The RTIRC was established under the *Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Act 2005*. Commencing in 2008, the reviews will take place every three years.

government has proposed the amendment because the Act currently prevents the capital of the fund being drawn upon, which means that only the income generated by the fund may be accessed.³

1.8 In the Second Reading Speech to the bill, the Minister for Infrastructure, Transport and Regional Development, Mr Anthony Albanese, stated:

The previous government legislated to prevent funds being drawn below \$2 billion and to only allow expenditure of the revenue stream. This government is prepared to invest \$2 billion right now to fund this critical piece of national infrastructure.⁴

1.9 The minister also stated that the creation of the proposed national broadband network will fulfil the original aims of the fund:

The intent of the Communications Fund is to address the telecommunications needs of regional, rural and remote Australians. The...plan to roll out a national broadband network is fully consistent with this...⁵

History of the fund

1.10 The fund was established in September 2005 from the proceeds of the sale of the third and final tranche of Telstra shares, from which \$2 billion was set aside. It was intended that income from the fund would be used 'to support broadband services in rural and regional Australia'.⁶

On 21 March 2007, the ALP announced an election commitment to provide \$4.7 billion for the building of a national broadband network to provide broadband access to 98 per cent of Australians. Of the \$4.7 billion, \$2 billion was to be drawn from the fund.⁷

1.11 In response to this commitment, the Coalition introduced to parliament the Telecommunications Legislation Amendment (Protecting Services for Rural and Regional Australia into the Future) Bill 2007. The bill inserted s 158ZJA into the Act, which requires the minister to take all reasonable steps to ensure that the balance or

3 Ibid.

4 Ibid.

5 Ibid.

6 *Bills Digest*, 'Telecommunications Legislation Amendment (Communications Fund) Bill 2008', p.2. The fund was created by the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Act 2005*, which amended the *Telecommunications (Consumer Protection and Service Standards) Act 1999*.

7 *Transcript of press conference*, ALP Caucus Room, Canberra, 21 March 2007 p. 2.

value of the fund does not fall below \$2 billion. The amendment thus currently prevents the capital of the fund being accessed.⁸

Inquiry into the Telecommunications Legislation Amendment (Protecting Services for Rural and Regional Australia into the Future) Bill 2007

1.12 The Senate Standing Committee on Environment, Communications, Information Technology and the Arts conducted an inquiry into the provisions of the Telecommunications Legislation Amendment (Protecting Services for Rural and Regional Australia into the Future) Bill 2007.⁹ It received two submissions and made no recommendations on the bill. The report stated:

...the committee received little evidence on the bill and the two submissions it received addressed the bill in only general terms. No specific issues with the bill were identified. The committee decided not to hold a public hearing and has nothing further to report to the Senate regarding the bill.¹⁰

Outline of the bill

1.13 The bill achieves its purposes in two ways. First, it removes the s 158ZJA requirement that the minister maintain the balance of the fund at not less than \$2 billion. This will allow the funds to be accessed immediately.

1.14 Second, the bill will enable the fund to be used for purposes related to the creation of a national broadband network. This is in addition to the purpose of financing the government's implementation of the RTIRC's review recommendations.¹¹

1.15 The bill also makes provision for a number of different legal structures that might be needed to implement the national broadband network, depending on the nature of what is proposed by the successful tenderer. The bill therefore allows for Commonwealth contributions from the fund to a partnership, an unincorporated/incorporated joint venture or a trust, or by direct grant, loan or direct purchase of assets.

8 Despite the intent of the amendment, it is observed that parliament cannot bind a subsequent parliament. There is no legal impediment to the current parliament amending the *Telecommunications Legislation Amendment (Future Proofing and Other Measures) Act 2005* to alter the terms governing the fund's operation.

9 The name of the committee was changed in February 2008.

10 Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Telecommunications Legislation Amendment (Protecting Services for Rural and Regional Australia into the Future) Bill 2007 [Provisions]*, July 2007, p. 2.

11 Section 158ZE. The *Bills Digest* to the bill notes that the RTIRC's recommendations 'may [nevertheless but not necessarily] fit with the government's plan for a national broadband network' (p. 4).

Main provisions of the bill

1.16 The main provisions of the bill are as follows:¹²

Item 1 of the bill amends the Act to expand the purposes for which the fund may be used to include ‘purposes relating to the creation or development of a broadband telecommunications network.’

Items 2 to 6 insert definitions of new terms used in the bill, such as 'broadband telecommunications network'.

Item 7 expands the meaning of 'unit' to include a unit in a unit trust.

Items 8 and 9 make non-substantive changes to paragraphs 158ZI(1)(b) and (c).

Existing s 158ZH provides for the establishment of a Communications Fund Special Account (the fund account). **Item 10** amends s 158ZI to extend the purposes to which the fund account may be put as follows:

- proposed paragraphs (d), (e) and (f) will permit the acquisitions of, respectively, shares, debentures or units in a unit trust in a company or unit trust that is or will be involved in the creation or development of a broadband network;
- proposed paragraph (g) will permit financial assistance grants for the creation or development of a broadband network;
- proposed paragraph (h) will permit the making of financial assistance grants relating to the supply of a broadband service;
- proposed paragraph (i) will permit the acquisition of assets for use in connection with a broadband telecommunications network; and
- proposed paragraph (j) will permit the fund account to be used for any purpose incidental or ancillary to a purpose set out in paragraph (d), (e), (f), (g), (h) or (i).

Item 11 repeals existing section 158ZJ, which requires that the fund account be credited with \$2 billion. **Item 16** provides that the repeal of this section does not affect a credit made before the commencement of the bill.

Item 12 repeals section 158ZJA, which requires the minister to take all reasonable steps to ensure that the balance or value of the fund does not fall below \$2 billion.¹³

12 The following is adapted from *Bills Digest*, Telecommunications Legislation Amendment (Communications Fund) Bill 2008, pp 4-5.

13 This was the section inserted in 2007 in order to protect the fund from the Labor Party's election undertaking to use the fund's capital to create a national broadband network.

Item 13 amends s 158ZL to require a written agreement where one of the grants of financial assistance, provided for by the amendments in item 10, is made to a state.

Similarly, **item 14** amends s 158ZM to require a written agreement where one of the grants of financial assistance, provided for by the amendments in item 10, is made 'to a person other than a state'.

Item 15 inserts new s 158ZNA. Proposed subsections (1), (2) and (3) define the three kinds of securities that the Commonwealth may buy with monies from the fund account: broadband network shares, broadband network debentures and broadband network trust units.

Further, the item provides that none of the defined securities is affected by Division 3 of the Act or by s 39 of the *Financial Management and Accountability Act 1997* (FMA Act). Division 3 of the Act governs the management of investments in the fund; a distinction is therefore made between investments held in the fund account to generate returns, and securities purchased by the Commonwealth in an entity involved in fulfilling the purposes of the fund. Section 39 of the FMA Act governs the investment of public money, but is considered inappropriate for the intended purpose of the fund.¹⁴

14 The exclusion of s 39 of the FMA Act is not novel; a similar provision applies to the Future Fund, for example.

Chapter 2

Issues

Preliminary nature of the bill

2.1 The committee notes that the bill may be described as being of a preliminary or technical nature, insofar as it seeks only to enable the spending of the fund's capital for the creation of a national broadband network. The bill does not affect issues around future regulatory settings, competition, access, service levels and standards, tendering and other such matters. The small number of submissions received doubtless reflects the narrow scope of the bill and not the level of interest in the national broadband network more generally, which is considerable.

2.2 The committee received a submission from iiNet, a national internet service provider. Noting the preliminary nature of the bill, iiNet expressed its support:

[iiNet]...recognise that this Bill is the first piece of legislation that enables the Federal Government to fulfil its election commitment to build a National Broadband Network.

In broad terms, we support the Government's intentions relating to the deployment of the National Broadband Network.¹

2.3 Similarly, the submission from the Western Australian Department of Industry and Resources states:

To the extent the funding will support the development of infrastructure of national significance such as the National Broadband Network (NBN), the Department of Industry and Resources (DOIR) is broadly supportive of this initiative.²

2.4 Beyond these expressions of broad support for the creation of a national broadband network, the submissions of iiNet and the WA Department of Industry and Resources raised issues around competition, access and capacity, which are not able to be considered as part of the inquiry into the bill. The committee notes that opportunities to canvass these and other matters should arise as the development of the national broadband network progresses.

Effect of bill on reviews of regional telecommunications needs

2.5 The submission of the NSW Farmers Association (NSWFA) expressed concern that allowing the fund's principal capital of \$2 billion to be spent on the national broadband network will effectively prevent future reviews of regional

1 iiNet, *Submission 1*, p. 1.

2 Department of Industry and Resources, Government of Western Australia, *Submission 2*, p. 1.

telecommunications being conducted by the Regional Telecommunications Independent Review Committee (RTIRC).³

...the Association is extremely concerned that the removal of the Communications Fund will in effect remove the guarantee that further independent reviews into regional telecommunications will be carried out.⁴

2.6 On this issue, the submission of Department of Broadband, Communications and the Digital Economy (DBCDE) outlines the present schedule for reviews by the RTIRC:

On 4 February 2008, the Government extended the current Regional Telecommunications Review, chaired by Dr Bill Glasson AO, to report to the Minister for Broadband, Communications and the Digital Economy in August 2008. This extension will enable the Committee to take into account other Australian Government regional telecommunications policies, such as the National Broadband Network.

The Government is required to respond to each House of the Parliament within 6 months after receiving the report from the Committee.

2.7 The DBCDE submission states that the passage of the bill:

...will not change the reporting requirements of the...[RTIRC].⁵

Ability of bill to benefit regional Australia

2.8 The NSWFA expressed concern that the bill will enable the fund to be spent on a national broadband network, beyond its original purpose to fund regional telecommunications projects exclusively. The submission states:

The Association is concerned that the government's National Broadband Network proposal is clearly...city-focussed [sic] and...may take until 2013 to actually reach many regional areas. As such, the Association is strongly opposed to redirecting the Communications Fund to supply part of the investment required for this proposal, given that any potential benefit of the Network to rural and regional Australia is at best five years away, and may or may not have application to rural communities.⁶

2.9 The DBCDE submission provides a number of responses to this concern. First, it notes that the government's proposal for a national broadband network includes the provision of broadband services to regional Australia:

The National Broadband Network is expected to provide broadband services to 98 per cent of Australian homes and businesses, including

3 See paragraph 1.4.

4 NSW Farmers Association, *Submission 3*, p. 4.

5 Department of Broadband, Communications and the Digital Economy, *Submission 4*, p. 3.

6 NSW Farmers Association, *Submission 3*, p. 4.

regional and rural areas, with minimum downlink speeds of 12 megabits per second.⁷

2.10 Second, the DBCDE submission outlines two strategies by which the government intends to ensure that broadband services are provided to regional Australia through the national broadband network proposal. The first strategy will complement the national broadband network process:

In parallel to the National Broadband Network process, the Government is separately inviting proponents, industry, public interest groups and other interested parties to make submissions on policy and funding initiatives to provide affordable access to broadband services to remote areas that may be outside the National Broadband Network coverage area.

This could include strategies to enhance the Australian Broadband Guarantee program to achieve outcomes comparable to the National Broadband Network. Submissions will be considered by the Regional Telecommunications Independent Review Committee. Submissions are due by 5.00pm AEST 30 June 2008.⁸

2.11 The second strategy outlined relates to the Australian Broadband Guarantee (ABG):

The Government has announced it will separately fund an additional \$95 million in 2008-09 for the continuation of the Australian Broadband Guarantee.

The Australian Broadband Guarantee offers subsidised access to metro-comparable broadband services to those who would otherwise be unable to receive a metropolitan comparable broadband service. The program operates by paying a subsidy of up to \$2,750 (GST-inclusive) per premise to registered providers for every eligible premise they connect to a metro-comparable broadband service.

Effect of bill on regional telecommunications infrastructure and programs

Telecommunications infrastructure

2.12 The NSWFA submission expresses concern about the effect of the bill on the ongoing maintenance and improvement of regional telecommunications infrastructure, particularly as this relates to service standards such as the Customer Service Guarantee and the Universal Service Obligation.⁹ It asks:

In the absence of the Communications Fund, what mechanisms will the Government put in place to ensure that telecommunications service

7 Department of Broadband, Communications and the Digital Economy, *Submission 4*, p. 1.

8 Department of Broadband, Communications and the Digital Economy, *Submission 4*, p. 4.

9 NSW Farmers Association, *Submission 3*, p. 4.

providers are adequately resourced to ensure they can maintain and make repairs to the increasing number of telecommunication services on offer?¹⁰

2.13 On this issue, the DBCDE submission makes it clear that the extent to, and manner in, which the fund is to be utilised for the creation of the national broadband network is not yet known:

The purposes...[of] the Bill are not intended to prejudice any particular form of funding in a National Broadband Network, rather they are intended to cover all probable options for investing in or funding a National Broadband Network to give proponents flexibility in preparing proposals and to provide the Panel of Experts with flexibility to assess proposals on the basis of value for money with regard to the costs to the Commonwealth.

...

The final Budget implications of the National Broadband Network will depend on the proposals put forward and, ultimately, the form of the Government's contribution to the National Broadband Network.¹¹

2.14 The committee notes therefore that it is not possible or relevant to predict the 'absence' of the Communications Fund at a point in the future in order to comment on the resourcing issues raised by the NSWFA.

Telecommunications programs

2.15 A similar concern raised in the NSWFA submission was the effect of the bill on such programs as the ABG.

2.16 The committee again observes that it is not possible or relevant to consider this issue under either the terms of the bill or the terms of reference for the committee's inquiry. Nevertheless, the committee notes the intentions of the DBCDE outlined at paragraph 2.11, concerning the future funding of the ABG.

Committee view

2.17 The committee notes that the majority of submissions expressed broad support for the purposes of the bill to enable the fund to be used for the creation of a national broadband network.

2.18 The committee notes that the majority of concerns raised by stakeholders relate to considerations beyond the objects of the bill, which are to enable the capital of the fund to be utilised for the creation of a national broadband network. The scope of the bill does not extend to matters around the ways in which the fund may ultimately be expended.

10 NSW Farmers Association, *Submission 3*, p. 4.

11 Department of Broadband, Communications and the Digital Economy, *Submission 4*, p. 4.

2.19 The committee observes that issues that could not be addressed under the terms of the inquiry will be able to be considered as the process of creating a national broadband network proceeds.

Recommendation 1

2.20 The committee recommends that the bill be passed.

Senator Anne McEwen
Chair

Coalition Senators' Minority Report

Coalition Senators do not support the recommendation in the majority report and do not believe the bill should be passed.

Coalition Senators consider that there are strong arguments against both aspects of this bill, namely:

- the repeal of section 158ZJA requiring that the balance of the fund be maintained at not less than \$2 billion; and
- the amendment to section 158ZE (and associated amendments) expanding the purposes to which the money in the Communications Fund may be put to include 'purposes relating to the creation or development of a broadband telecommunications network'.

Maintaining the capital of the Communications Fund

The repeal of the requirement that the Minister take reasonable steps to maintain the Communications Fund above \$2 billion will stand as one of the first official acts of financial mismanagement by the new Labor Government. It takes savings intended to deliver in an ongoing way for Australia's future – savings that were delivered as a result of the sound economic management of the previous Government – and puts them at risk in one as yet unjustified measure.

Labor's as yet unjustified, uncosted and unplanned \$4.7 billion promise to build a national fibre broadband network intends a raid on two pots of savings for the future. Most of the funds are expected to come from the Future Fund – savings that were also delivered by the previous Government – and the Communications Fund. It leaves open the very real possibility that not just some, but all of the money in the Communications Fund could be expended on this one election promise.

This fund was established as a surety for Australians living in regional, rural and remote areas. It was a surety designed to help ensure that the communications needs of such Australians were better met into the future and the unique communications challenges faced in such areas better overcome. Establishment of the fund was a realisation that there will always be additional costs associated with the delivery of some communications services to regional Australia and a provision of an ongoing source of funds to help meet those costs.

The New South Wales Farmers Association succinctly highlighted the benefits of the fund, stating that:

The Communications Fund was established on firm and principled public policy grounds, to ensure that rural and remote communities were able to see

investments in telecommunications infrastructure where examples of inadequate services were identified.

The original purpose of the fund was to generate income to fund the Government's response to the recommendations of the Regional Telecommunications Independent Review Committee. The committee was required to commence its first review before the end of 2008, which has occurred under the chairmanship of the highly regarded Dr Bill Glasson.

Dr Glasson's committee has continued to take evidence from people living in regional areas around Australia about their many communications requirements now into the future. The Minister for Communications has even had the gall to encourage people to participate in the hearings of this review, despite his government's plans potentially stripping all hope for funding of future recommendations.

The income stream from the interest earned on the \$2 billion fund Communications Fund, invested conservatively as was the legal requirement, was expected to be approximately \$400 million every three years. It was quarantined to be used to finance the government's response to these independent reviews of regional communications services.

The funds would have been available for infrastructure upgrades in regional and remote communities such as the construction of additional mobile phone towers, the availability of broadband or even backhaul fibre capabilities. Where price was prohibitive in certain services for people living outside the metropolitan area the fund could have been targeted at means to address that price barrier, through programs such as the Australian Broadband Guarantee.

This bill puts all of that in jeopardy. It opens up the potential for the use of all of the capital in the fund on one project and offers no alternative arrangements for how such projects would be funded into the future.

Coupled with the cancellation of funding for the OPEL project, identified by the NSWFA as having a negative affect on the rollout of broadband technology in regional Australia, this stripping of the capital from the Communications Fund is a double blow for regional Australia. But worse still, this is a lasting blow, as it takes away the opportunity for guaranteed, ongoing investment in communications services on a regular basis that would have ensured regional Australia wasn't left behind.

Expanding the purposes to include a national broadband network

A core concern of the Coalition Senators and one expressed by the NSWFA is that the bill would change the use of the fund so that it is not "solely benefiting regional Australia". Far from it. The fund, though established for the sole benefit of regional Australia, could under this bill be expended in its entirety on a project which is overwhelmingly for the majority benefit of metropolitan Australia.

NSWFA expresses concerns, recognised in the majority report, that the Government's national broadband network is "city-focussed" and "may take until 2013 to actually reach many regional areas". These are not only problems associated with the use of the fund, but are flaws in the Government's overall approach to broadband policy.

Having cancelled the OPEL contract the Government is now putting all of its eggs in one ill-defined, unjustified broadband project. It has not successfully mounted a case to justify the use of \$4.7billion in public funds to build a network much of which has been and would continue to be provided by the private sector.

The Parliamentary Library Bills Digest related to this bill states that "the details of which are thin" when discussing the Government's plan for a national broadband network. Such as it has been defined, with the release of a request for proposals, it has been criticised in the *Financial Review* (12/4/08) for its "lack of clarity on key competition and regulatory issues". In the same article, Optus chief executive Paul O'Sullivan criticised the "compressed time frame" and "the lack of detail" surrounding the proposal.

Even this bill highlights the Government's uncertainty as to the approach it intends to take with \$4.7billion of taxpayers savings. In section 128ZH the bill allows for the Government's funds to be put towards shares, debentures or trust units or to go towards grants for the creation of the networks, grants for the supply of the service, purchase of assets for the network or in paragraph (j) "a purpose incidental or ancillary to a purpose set out in" the aforementioned options.

The only thing that is clear in the development of this network is that the Government is seeking a broad and blank cheque to commit these funds to an end it doesn't know how to achieve. Coalition Senators believe it would be irresponsible in the extreme to grant the Government this blank cheque with taxpayer savings.

Conclusion

The Parliamentary Library Bills Digest states that:

...the Bill leaves open the possibility that the original focus on telecommunications in rural, regional and remote Australia will be abandoned. It is possible that the Communications Fund could be applied largely to a broadband network in areas not originally intended to be assisted by the Communications Fund. It is also possible that the Government may commit the entire Communications Fund to the national broadband network leaving nothing in the Fund for its response to the RTIRC.

This possibility is unacceptable to Coalition Senators. Australians living in rural and regional areas deserve better than to see funds committed to their future well being squandered on an ill-conceived Labor Party election promise.

It is clear from that considerable work is still required on best practice structures and achievability of the proposed national broadband network and it would be precipitous

at best to support the allocation of valuable funds and savings towards this unknown outcome at present.

Coalition Senators stand by the original intention of the Communications Fund and agree with the NSWFA that:

...any withdrawal, dilution or diversion of the fund and any future interest earned, could have devastating consequences for farm businesses, farm families and rural communities.

For these reasons we recommend that the Bill not be passed.

Senator Simon Birmingham
Senator for South Australia

Senator the Hon Rod Kemp
Senator for Victoria

Senator Stephen Parry
Senator for Tasmania

Appendix 1

Submissions received

1. iiNet Ltd
2. Department of Industry and Resources, Government of Western Australia
3. NSW Farmers Association
4. Department of Broadband, Communications and the Digital Economy

