

Chapter One

Introduction

Background

1.1 The Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009 (the bill) was introduced in the Senate on 25 June 2009 and referred to the Environment, Communications and the Arts Legislation Committee (the committee) on the same day, for inquiry and report by 17 August 2009.

Conduct of the inquiry

1.2 The committee advertised the inquiry in *The Australian* and invited written submissions by 16 July 2009. Details of the inquiry were placed on the committee's website; the committee also wrote to a number of organisations and stakeholders inviting written submissions.

1.3 Nine submissions were received by the committee, a list of which can be found at Appendix 1. Five of these respondents accepted the committee's invitation to appear at the public hearing held in Canberra on 4 August 2009, with the Department of Broadband, Communications and the Digital Economy (the Department) also appearing to answer questions.

1.4 The committee wishes to thank those who gave their time to participate in this inquiry.

Context of the bill

1.5 On 11 March 2008, the government released a Request for Proposals (RFP) to 'roll out and operate a new, open access, high-speed, fibre-based broadband network, providing downlink speeds of at least 12 megabits per second (Mbps) to 98 per cent of Australian homes and businesses.'¹

1.6 Acknowledging that, in order to build their business case, prospective proponents would require access to information detailing network infrastructure, and that the current incumbent, Telstra, would hold an unfair competitive advantage if it retained sole access to information about its network, the government introduced a bill that inserted a new Part 27A into the *Telecommunications Act 1997* (the Act).

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http://www.archive.dbcde.gov.au/2009/april/national_broadband_network_request_for_proposals_process, accessed 17 April 2009.

1.7 Part 27A required telecommunication carriers to provide specified information to the Commonwealth relating to their existing telecommunications network infrastructure. This information could then be disclosed to companies wanting to submit a bid under the RFP to provide a National Broadband Network (NBN). The provisions of the bill were restricted to requiring information from telecommunication carriers, and were to only remain in effect for one year, ceasing on 26 May 2009.

1.8 On 7 April 2009 the government announced the termination of the RFP process and the subsequent decision to establish a company, known as the NBN Co., to build and operate a wholesale only, open access, superfast broadband network that would:

...connect 90 percent of all Australian homes, schools and workplaces with broadband services with speeds up to 100 megabits per second; [and]

connect all other premises in Australia with next generation wireless and satellite technologies that will deliver broadband speeds of 12 megabits per second.²

1.9 The government also announced the commencement of an extensive Implementation Study that would ‘examine options for the operating arrangements, detailed network design, and ways to attract private sector investment for the roll-out, reporting to the government in early 2010.’³

1.10 To facilitate access to this information, the government introduced the Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009 (the bill), which amends the previous information access regime in Part 27A to include the provision of information by utilities. As stated in the Second Reading Speech:

To support the work of the Implementation Study and then, if appropriate, the roll-out of the network by the NBN company as quickly as possible, accessing information about existing or proposed things that might be used in the network, such as the ducts, pits and poles, is important.⁴

The bill

Objective

1.11 The majority of stakeholders have indicated considerable support for the government’s NBN announcement, and the government anticipates that most carriers and utilities will voluntarily provide information on a cooperative or commercial

2 http://www.minister.dbcde.gov.au/media/media_releases/2009/022, accessed 10 August 2009.

3 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4272.

4 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4272.

basis. However, to mitigate the potential risk of any delay in obtaining that information, the objective of this amendment is to ensure that the access to information will:

...facilitate the cost-effective and timely planning and roll-out of the NBN, in a manner that does not compromise the confidentiality and security of information about critical national infrastructure.⁵

Areas of change

1.12 The committee notes that there are two main areas of change in this bill when compared to the existing Part 27A of the *Telecommunications Act 1997*. The first is that this bill additionally requires information to be provided by utilities about their infrastructure, whereas currently that requirement can only be made of telecommunications carriers.

1.13 The second area of change is the purpose for which this information would be sought. The existing Part 27A required information to be provided to the Department to support the competitive process of the now terminated RFP for the 2008 NBN initiative. This was to ensure that all prospective bidders had available to them the same pool of information about existing infrastructure on which to build their business case and underpin their proposal to build the NBN.

1.14 Under the bill, the Department's authorised information officer may require information to facilitate the Implementation Study, which will examine network components, including the technology mix and deployment methodologies, the roll out schedule and costings for the NBN. In addition, the information may be subsequently used to support the roll-out of the network by the NBN Company.

Obligation to provide information

1.15 The bill amends Part 27A of the Act, by extending the information access regime to include 'the collection of information from entities that own or operate infrastructure that could be relevant to the roll-out of the National Broadband Network but that are not carriers.'⁶

1.16 As with the existing Part 27A, the bill would allow the minister to make a disallowable instrument requiring specified carriers or utilities to provide designated information in an approved manner and form. Following the commencement of an instrument made by the minister, the carriers or utilities would have an approved period of time in which to provide the information to an 'authorised information

5 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 8.

6 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4272.

officer', who is required to be of Senior Executive Service officer level within the Department and involved in the Implementation Study.

1.17 There are numerous consequential amendments and additions to the definitions within Part 27A, most relating to the inclusion of utilities within this Part.

Protected network information

1.18 The bill inserts a definition of 'protected network information' which replaces, but is closely modelled on, the previous definition of protected carrier information, reflecting that in addition to telecommunication carriers, utilities may also be required to provide network information. The definition will include all information provided to an authorised information officer, whether it is provided voluntarily or through imposition of a written instrument by the minister.

1.19 The terminology, 'protected network information' extends protection to any information provided under the existing Part 27A:

This means that all information that was protected carrier information prior to the changes made to Part 27A by this Bill will be protected network information after the commencement of this definition.⁷

Nature of designated information

1.20 The bill would limit the types of information that could be specified as designated information by the minister to:

...information about one or more existing or proposed things that could be used for, or in conjunction with, the creation of a broadband telecommunications network, the supply of carriage services using such a network, or a matter incidental or ancillary to those topics.⁸

Consultation required

1.21 Once a carrier or utility receives a copy of a draft instrument, amendments to section 531C(4) would extend the existing consultation period from three to five business days, during which time affected carriers and utilities may provide comments, which are required to be considered by the minister.

1.22 When an instrument is agreed, the approved period for the provision of information remains unchanged at not less than 10 business days. The Explanatory Memorandum lists the type of information that may be required relating to 'the location, and where appropriate the capacity to accommodate fibre' of infrastructure, which could include information of:

7 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 23.

8 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 25.

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- trenches (filled, part-filled or unfilled);
 - underground ducts;
 - conduit;
 - points of interconnection between distribution customer access network, the main network and the core transmission network;
 - backhaul transmission routes;
 - possible locations for wireless towers or space on existing towers; and
 - (in the case of relevant utilities) sewage pipes, stormwater drains and electricity poles and other overhead facilities.⁹

1.23 It is not the intention of the minister to require the provision of information held by carriers or utilities that is the personal information of customers.

Extension to penalties

1.24 While proposed section 531F very closely mirrors the provision it seeks to replace, an additional subsection would provide for penalties to apply to activities such as aiding, abetting and procuring a contravention by a carrier or utility of a requirement to provide information.

Sunset clauses

1.25 A sunset clause is inserted at section 531F that would establish a time limit for the obligation on carriers and utilities to provide information. The proposed period of 10 years is sought to cover the anticipated deployment period for the NBN, providing assurance that the obligation is not indefinite.

1.26 Section 531G also now includes a time limit of 30 June 2010 in relation to the use and disclosure of information provided by carriers and utilities for the purposes of the Implementation Study. Although the Implementation Study is anticipated to report by early 2010, the 30 June date incorporates some contingency for flexibility.

Protection of information

1.27 The bill amends Division 3 of the Act to enable the use of information for the purposes of planning and development of the NBN.

1.28 Section 531G of the Act is amended to extend the existing protections to information provided by both utilities and carriers. The section additionally provides that the minister may make a determination that imposes further conditions on the use and disclosure of information by entrusted public officials; these could for example

9 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 26.

place further restriction on the type of network information that can be disclosed or the purposes for which it can be used.

1.29 The proposed amendment to section 531H details the conditions under which an authorised information officer would be permitted to disclose protected network information to an entrusted company officer of the NBN Company or of a designated broadband company, clarifying that disclosure can only be for the purposes relating to that company's involvement in the roll-out of the NBN, or the company's eventual supply of carriage services over the network. The disclosure must comply with any restricted recipient rules made by the minister under the existing section 531N.

1.30 Section 531K maintains the non-disclosure provisions for all entrusted company officers. Also maintained is the ability of the minister to make determinations that could, for example, restrict the types of entrusted company officers to whom information may be disclosed, or the purposes for which the protected network information may be used by, or disclosed to, an entrusted company officer.

Storage, handling and destruction of protected carrier information

1.31 The minister retains the ability to make rules relating to the storage, handling and destruction of information that is provided by carriers and utilities, as outlined in section 531P of the Act. Such rules were created and came into force on 6 August 2008, requiring compliance with stringent conditions for the storage, handling and destruction of information gathered.

Note on references

1.32 All references to the committee Hansard record are to the proof Hansard copy; consequently page numbers may vary slightly between the proof and the official Hansard transcript, as published.