Chapter Two

Inquiry issues

Support for the bill

2.1 The committee invited submissions from over 45 organisations within the utilities and telecommunications sectors, and including Commonwealth, state and territory governments. Nine written submissions to this inquiry were subsequently received, which were generally supportive of the government's new policy objective to provide a fibre-to-the-premises (FTTP) broadband network to 90 per cent of Australian businesses, homes and schools.

2.2 The two major telecommunications infrastructure owners and operators, Telstra and Optus, were both supportive of the requirement to access accurate information about existing telecommunications and utility infrastructure and the consequent need for the amendment.

2.3 Optus was most positive in their support, stating in their brief submission that they had 'no concerns' with the proposed amendments and see this bill as 'a necessary piece of legislation to assist with the efficient and cost effective roll-out of the NBN.'[1] Although Telstra made suggestions for additional considerations by the government, they re-state their recent public commitment to 'engaging constructively with the Commonwealth and other stakeholders…'[2]

2.4 Similarly, in their submission, Unwired provided several suggestions for improvements to the bill, but could see no reason 'why the Bill should not be adopted in its current form.'[3] Mr David Havyatt from Unwired highlighted in his evidence before the committee that the information sought by this bill was 'particularly critical to be able to make a decision about how [the NBN] would be deployed.'[4]

Consultation on the bill

2.5 The committee notes the lack of formal consultation with utilities about the legislation prior to its introduction, which 'came as a surprise' to several submitters.[5]

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1 Optus, *Submission 1*, p. [1]

2 Telstra, *Submission 7*, p. 1.

3 Unwired, *Submission 4*, pp [1] & [5]

4 Mr David Havyatt, *Committee Hansard*, Canberra, 4 August 2009, p. 33.

5 See for example, Integral Energy, *Committee Hansard*, Canberra, 4 August 2009, pp 2 & 3; Water Services Association of Australia, *Committee Hansard*, p. 7; Australasian Railways Association, *Committee Hansard*, pp 18 & 19; Telstra, *Committee Hansard*, p. 28.

2.6 The Department indicated that it would have preferred to have undertaken wider consultations, but in practice it had not been feasible in the time available. It noted, however, that the intention to simplify access to infrastructure including that of non-telecommunications utilities, where technically feasible, was foreshadowed in the government's *National Broadband Network: Regulatory Reform for 21st Century Broadband* Discussion Paper released on 7 April 2009.[6]

2.7 While it had not been possible to consult directly with carriers and utilities potentially affected by the legislation prior to its introduction, the Department advised that it had since met with the Energy Networks Association, the Water Services Association of Australia and the Australasian Railway Association, as well as carriers.[7] The Department added that, while it had not had detailed discussions with utilities about the specific information that would be required, it had provided 'some guidance on the nature of the information to be sought.'[8]

Requirements unclear

2.8 The committee heard a number of comments from stakeholders who believed the bill should provide greater detail relating to the type of information that they might be required to provide, the format in which it might be required and also the use to which that information may be put. Concern was also expressed that, without greater clarity, it was difficult for stakeholders to determine what resource imposition the requirement to provide information might have on their organisation.

2.9 Perhaps greatest concern was raised by utility representative organisations, which may be in part due to their not previously being required to provide such information to the Department.

2.10 The Australasian Railway Association (ARA) was 'concerned about the uncertainty … of this legislation'.[9] In particular, as the bill did not specify how the information was to be provided, ARA believed this opened the possibility that utilities would be asked to provide physical access to their infrastructure so that observations of their infrastructure could be made for information purposes. ARA submitted it was concerned about the safety of workers and the security of railway operations. Although safety is carefully regulated by state legislation, ARA's concern was that Commonwealth legislation retained primacy over state legislation.

2.11 Water Services Association of Australia (WSAA) raised an identical concern at their appearance before the committee when they were asked to expand upon their

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6 See *National Broadband Network: Regulatory Reform for 21st Century Broadband* Discussion Paper, 7 April 2009, pp 9-10.

7 Mr Philip Mason, Department of Broadband, Communications and the Digital Economy (DBCDE), *Committee Hansard*, Canberra, 4 August 2009, p. 38.

8 Ms Pip Spence, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 39.

9 Mr Brett Hughes, ARA, *Committee Hansard*, Canberra, 4 August 2009, p. 18.

reference to third-party access in their submission. Mr Claude Piccinin stated concern that:

> …the bill only dealt with the provision of information. It was left unspoken what arrangements would be made in respect of actually accessing our infrastructure.[10]

2.12 However, quite early in proceedings, the committee was able to clarify on the record that the purpose of this bill was to require access to information only; physical access to infrastructure assets and corridors was a completely separate issue and not the subject of this amendment.

2.13 In their submission, Energy Networks Association (ENA) were concerned regarding the lack of detail on the 'control procedures for the release of information'[11] to other parties, without which it would be difficult for them to gauge the risk of any such release.

2.14 Giving evidence at the public hearing, Telstra stated their belief that the scope of information required was rather broad:

> …the 'language [of the bill] needs to be tightened up quite significantly … to make sure the information is strictly for the building of the NBN and … the type of information … clearly specified.[12]

2.15 In continuation, Mr William Gallagher gave the example of the bill currently referring to 'things ancillary to either the building of or the provision of services over the NBN'[13] as being purposes for which the information could be used. However, Mr Gallagher moments later acknowledged that the current bill is an improvement on the previous legislation, admitting that '…although we say it needs to be tightened – [now] there is at least some attempt to contain the nature of the information that can be requested.'[14]

Timelines for consultation and supply of information

2.16 Concerns were raised with the committee about the time allowed both for consultations on any draft instrument requiring the provision of network information and for the provision of the information itself.[15]

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10 Mr Claude Piccinin, WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 12.

11 Energy Networks Association, *Submission 5*, p. 2.

12 Mr Geoff Booth, Telstra, *Committee Hansard*, Canberra, 4 August 2009, p. 27.

13 Mr William Gallagher, Telstra, *Committee Hansard*, Canberra, 4 August 2009, p. 28.

14 Mr Gallagher, Telstra, *Committee Hansard*, Canberra, 4 August 2009, p. 28.

15 See WSAA, *Submission 2*, p. 2; ENA, *Submission 5*, pp 1-2; Integral Energy, *Submission 8*, p. 2.

2.17 ENA considered the five day timeframe to be 'particularly onerous' on energy network businesses, and, while recognising that this timeframe is designed to be a 'safety-net' should commercially cooperative processes fail, it noted there was no mention of proposed timeframes for these negotiations to take place. Given the implementation timeframe for the NBN and the likelihood that information would be requested in the near future, ENA considered that there should be consultations between the government and energy network businesses to 'mitigate the risk of being required to provide unavailable or onerous information requests'.[16]

2.18 The WSAA considered that, while the five day consultation period would be sufficient for providing information about recent assets and in relation to metropolitan infrastructure, for legacy assets and regional water utilities, two weeks would be more appropriate.[17]

2.19 WSAA also noted it could take even longer to provide advice on land and easement availability because of the need to assess future infrastructure requirements at the time of the request. In addition, while assets registers contained information on existing infrastructure, information on works under construction is located elsewhere, which would make accessing this information more complex and time consuming.[18]

2.20 Integral Energy argued that the five day consultation timeframe should be extended to fifteen days to give businesses a 'realistic opportunity' to ensure information requested was both 'directly relevant' and 'capable of being delivered', particularly given the potential civil penalty for failure to comply.[19]

2.21 Similarly, Integral Energy argued that the minimum ten day timeframe for providing information should be extended to twenty working days, noting that it was 'unrealistic' to expect infrastructure businesses to have all the requested information at hand and in the format required.[20]

2.22 The ARA concurred with the view that the consultation period on the draft instrument and the time for the provision of network information should be doubled.[21]

2.23 While acknowledging that the timeframe was still of concern to some people, the Department considered that the increase from three to five days allowed for comment on a draft instrument was a 'reasonable' extension.[22] Further, there was an

16 Energy Networks Association, *Submission 5*, p. 2.

17 Mr Piccinin, WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 9.

18 WSAA, *Submission 2*, p. 2.

19 Integral Energy, *Submission 8*, p. 2.

20 Integral Energy, Submission 8, p. 2; See also Mr Anthony Englund, Integral Energy, *Committee Hansard*, Canberra, 4 August 2009, p. 4.

21 ARA, *Committee Hansard*, Canberra, 4 August 2009, p. 22.

22 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

underlying assumption that by the time the point at which consultations on an instrument is reached, commercial discussions already would have taken place about the nature of the information being sought. The Department also noted that the timeframe is the 'mandatory time frame' but this would not 'preclude informal discussions about instruments as well.'[23]

2.24 With respect to the provision of information, the Department observed that the ten day period was a minimum amount of time and that 'a longer period can be provided.'[24]

2.25 The Department indicated that any extension to the proposed consultation period would put pressure on its timeframes. A similar proposal to extend the time for providing requested information would raise the same concern.[25]

Committee view

2.26 The committee notes that the time for consultation on a draft instrument has been extended from three to five business days and that the time for providing information is a *minimum* of ten business days.

2.27 Notwithstanding the concerns raised by submitters, the committee considers that, given the discussions that are likely to have taken place about the nature and format of the information required before the issuing of any instrument, and the need to ensure the NBN Implementation Study is not unduly delayed.

Compensation for provision of information

2.28 Four submissions raised concerns about the cost impost on utilities required to provide information under the extended regime and proposed the bill should require the government to provide compensation to cover reasonable costs incurred.[26]

2.29 ENA considered that without knowing the level of detail and type of information required, utilities would be unable to determine the cost of providing the information, particularly in the timeframes proposed. ENA noted that there is 'no discussion on the ability for an entity to recover or be reimbursed for these costs.'[27]

2.30 Integral Energy concurred with other submissions that they should be able to recover the full costs of providing requested information.[28] Integral Energy observed

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23 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

24 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

25 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

26 See for example, WSAA, *Submission 2*, p. 3; ARA, *Submission 3*, p. 3; Integral Energy, *Submission 8*, p. 3; ENA, *Submission 5*, p. 2.

27 ENA, *Submission 5*, p. 2.

28 Integral Energy, *Submission 8*, p. 3.

that as the bill provides for a 'wide range of possibilities as to the information' it was difficult to 'narrow down specific costs as a result.'[29] However, it expected to be reimbursed for the costs it incurred in supplying information either voluntarily or compulsorily.[30]

2.31 The WSAA also expressed an expectation that its members would be recompensed for the costs incurred in assembling, collating and providing information in the form required.[31]

2.32 The ARA indicated that it believed the legislation should be amended to include protections from 'unreasonable impacts on railways and unreasonable costs'.[32]

2.33 When questioned on the costs incurred to provide information under the RFP process, Telstra indicated that the costs were 'internal costs' such as management and staff time in extracting the information from different databases and systems. In relation to the current bill, Telstra had not developed a position on whether suppliers of information should be recompensed for doing so.[33]

2.34 The Department advised that the lack of an explicit compensation provision in the legislation was a reflection of the nature of the regime envisaged. There was the intention and preference to obtain information on a voluntary, commercial basis and that 'decisions parties make between themselves would be a matter for them to the extent that they would be compelled to provide information as a last resort.'[34]

2.35 The Department advised that any payment for the provisions of information from carriers and utilities to the Implementation Study on a cooperative or commercial basis would be made from the budget for the NBN implementation on the authority of a departmental delegate.[35]

Committee view

2.36 While the bill does not make compensation a requirement where information is sought on a mandatory basis under Part 27A, the committee notes that it is the government's intention to seek information on a cooperative and commercial basis in the first instance. Were information to be sought on a mandatory basis, the appropriateness of compensation would be a matter that might then require further consideration.

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29 Mr Englund, Integral Energy, *Committee Hansard*, Canberra, 4 August 2009, p. 3.

30 Mr Englund, Integral Energy, *Committee Hansard*, Canberra, 4 August 2009, p. 3.

31 WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 8.

32 Mr Hughes, ARA, *Committee Hansard*, Canberra, 4 August 2009, p. 22.

33 Mr Gallagher, Telstra, *Committee Hansard*, Canberra, 4 August 2009, p. 25.

34 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 40.

35 DBCDE, Answer to question on notice, dated 7 August 2009.

Information security implications

2.37 Two main areas of information security that were raised with the committee: one relating to the general use, disclosure, storage, handling and destruction of any information provided under this bill; the other relating to the potential implications for national security that the broad provision of information may have.

General use, disclosure, storage, handling and destruction of information

2.38 Overall the committee notes that there was a general willingness to provide information voluntarily, provided stakeholders had confidence that there would be adequate confidentiality and security measures for information provided.

2.39 ENA submitted that the broadening of the definition of an entrusted company officer 'carries with it infrastructure security and commercial implications, as well as possible risks', adding that:

> This is also exacerbated by the fact that the businesses appear to have no control over whom the authorised information officer chooses to give the information to.[36]

2.40 ENA also stated that it would be 'prudent' if information automatically became 'protected network information' as soon as it was received by the authorised information officer, rather than wait until the officer had reviewed it and provided a written undertaking to the fact. It was suggested that creating greater confidence for businesses could subsequently promote a 'freer flow of information'.[37]

2.41 In commenting on the ability of the Australian Competition and Consumer Commission (ACCC) to access the information, Integral Energy believed that the bill did not clearly state the purpose for which the ACCC could gain that access. Noting that the both ACCC and also its subsidiary, the Australian Energy Regulator (AER), already have strong information gathering powers:

> Integral Energy submits that the Bill should make it explicit that the ACCC and … AER, may not use that information for the purpose of undertaking the economic regulation of essential infrastructure businesses.[38]

2.42 Mr Piccinin from WSAA also expressed his views quite categorically that, in relation to the information provided, '[T]he security is not negotiable.'[39] His submission was one example where concerns extended to the broad scope and extent

36 Energy Networks Association, *Submission 5*, p. 2.

37 Energy Networks Association, *Submission 5*, p. 2.

38 Integral Energy, *Submission 8*, p. 3.

39 Mr Piccinin, WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 12.

of availability of information being perceived as having potential 'national security implications.'[40]

Concerns unfounded

2.43 In stark contrast to those views, Mr David Havyatt from Unwired highlighted to the committee that the telecommunications regime as it currently stands already provides 'an extensive facilities access regime whereby carriers are required to provide to each other information about their underground infrastructure and towers'. The information being requested by this bill 'could be requested by the ACCC or ACMA for the purpose of their regulatory function'.

2.44 However, through a 'quirk of drafting'[41], the government itself is not permitted to ask for that same information for the purposes of developing public policy relating to critical national infrastructure such as the NBN, and consequently requires this amendment to do so.

2.45 Mr Havyatt highlighted that there are ongoing relationships between water and electricity utilities, the railways and the telcos, through the common use of infrastructure and telecommunication services. His evidence also negated the concerns for national security, stating that:

> …a large amount of the information that people are claiming is necessarily part of national security is actually physically available already, be that in topographical maps, or just by physically sighting.[42]

Committee view

2.46 The committee acknowledges the concerns of stakeholders and the necessity to provide them with the confidence that their information will be dealt with the appropriate levels of security and confidentiality.

2.47 However the committee believes that both the existing measures under Part 27A of the Act and those contained within the amendment provide adequate measures for use, disclosure, storage, handling and destruction of information provided to the authorised information officer. As clearly stated by the minister in the Second Reading Speech:

> The Bill imposes safeguards and limitations on the permitted purposes for which information may be disclosed and used. …
>
> Provisions in Part 27A … allow the Minister to make rules in subordinate legislation about the storage, handling and destruction of network

40 WSAA, *Submission 2*, p. [2]

41 Mr Havyatt, *Committee Hansard*, Canberra, 4 August 2009, p. 30.

42 Mr Havyatt, *Committee Hansard*, Canberra, 4 August 2009, p. 31.

> information, which are intended to protect the confidentiality and security of network information.[43]

2.48 Similarly, the committee draws attention to the fact that existing penalty provisions for misuse of information are retained. Any breach of non-disclosure prohibitions by an entrusted public official remains a criminal offence under the *Crimes Act 1914* and a similar breach by an entrusted company officer would be a contravention of a civil penalty provision.

2.49 Despite comments that the government should make the instrument available to the sectors for comment, the committee highlights that witnesses stated that they were very happy[44] with consultations they had recently had with the Department. In particular, Mr Piccinin from WSAA commented on the provisions within instruments created previously under Part 27A:

> …in discussions with the department we were pointed in the direction of the existing instrument with respect to telecommunications. They said that that would be translated across to our infrastructure … So long as that is done we do not have a problem in respect to how [the instrument] would handle the security aspect …[45]

2.50 Finally, the committee notes that, when questioned about information provided to the Department under the previous RFP requirements of Part 27A, and the perception that proponents could now use that information to build their own broadband network, the Department confirmed that:

> Those proponents do not have the information any more … They have handed it back or they have destroyed it.[46]

2.51 The committee strongly believes that the existing provisions and those in the proposed amendment contain appropriate security and confidentiality provisions for stakeholders to have confidence in the information gathering process.

Competitive neutrality

2.52 In its submission, the Business Council of Australia (BCA) expressed the view that the government's decision to proceed with this legislation raised a number of competitive neutrality issues that required further justification. BCA submitted 'that information compulsorily acquired from a private business in support of the NBN

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43 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4273.

44 See for example, Mr Hughes, ARA, *Committee Hansard*, Canberra, 4 August 2009, p. 20.

45 Mr Piccinin, WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 13.

46 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 38.

company under Part 27A will almost certainly be of commercial value' and would therefore confer 'a competitive advantage on the NBN company'.[47]

2.53 Telstra also expressed concern that the current drafting of the description of information that may be collected under the regime is 'broad and very uncertain' and could be interpreted to extend to 'business plans and other information concerning the way in which a carrier intends to use its physical network infrastructure commercially'. Disclosure of this kind of information to the NBN company, Telstra argued, would 'raise serious issues of fairness and competitive neutrality'.[48] To mitigate this potential, Telstra proposed limiting the scope of the information that may be required to be provided under the legislation.

2.54 However, on the issue of competitive neutrality, Unwired observed that the current regulatory regime already provides for an extensive facilities access regime whereby telecommunications carriers are able to access each other's infrastructure and are required to provide information about their infrastructure to other carriers.[49]

2.55 The Department agreed that the bill would need to cover information on the location, physical and functional characteristics of network facilities as proposed by Telstra, but indicated that the legislation was not limited to this type of information. It advised, however, that it was not envisaged that the kind of information detailed in Telstra's submission would be sought because of commercial and competitive concerns. In terms of safeguards, the Department noted that any request for information to be provided to the NBN company would need to be via an instrument that would be subject to consultation and ultimately disallowable.[50]

Splitting of bill

2.56 The Opposition raised the feasibility of splitting the bill to provide that the current legislation only apply in respect of the Implementation Study and that a separate bill be required should the need to provide information to the NBN Company be established.

2.57 The Department advised that while the proposed regime does not have a specific legislative trigger, it does require a decision to be made by the government for information to be provided to the NBN Company.[51]

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47 BCA, *Submission 9*, p. 7.

48 Telstra, *Submission 7*, p. 2

49 Mr Havyatt, Unwired, *Committee Hansard*, Canberra, 4 August 2009, p. 30.

50 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 43.

51 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 39.

Committee view

2.58 The committee does not support the suggestion that the bill be split in respect of its application to the Implementation Study and NBN Company, as it would potentially unnecessarily delay the NBN process if it became clear information should be provided to the NBN Company.

2.59 The committee notes that the parliament can make an in principle decision that the NBN Company can be provided with access to information if it is found to be appropriate and for the minister to exercise that judgment. The government would need to make a conscious decision to provide information to the company.

2.60 The committee also notes that if it is appropriate to provide information to the company, there will be strong and effective protections in place. The NBN Company would not have the power to request information directly itself, but would always have to request it through the Commonwealth.

Other issues raised in submissions

Privacy Impact Statement

2.61 In her submission to the Committee, the Privacy Commissioner suggested that it was unclear whether the 'protected network information' to be disclosed by carriers and utilities would include 'personal information' as defined by section 6(1) of the *Privacy Act 1988* and suggested that consideration be given to undertaking a Privacy Impact Assessment (PIA).[52]

2.62 Noting that it is not envisaged to seek information of a personal nature at this stage, the Department indicated that, as the bill provides a head of power rather than the specific type of information that may be requested, it would be more appropriate to determine whether a privacy impact assessment was required once an instrument is prepared.[53]

Civil immunity concerns

2.63 In their submission, Telstra raised the issue of carriers and utilities being 'exposed to the possibility of liability' as a result of complying with the requirement to provide information. It was pointed out to the committee that some records may be unintentionally and unknowingly inaccurate for a variety of reasons.

2.64 Expanding on this issue before the committee, Mr Booth stated that Telstra would always provide their information on a 'best efforts basis', but highlighted that their network has been deployed over several decades. Consequently, 'we could not

52 Office of the Privacy Commissioner, *Submission* 6, p. 1.

53 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, p. 42.

categorically guarantee' the accuracy of their records, which 'maybe incorrect, physically, or a road verge or a road [may have] been moved'.[54]

2.65 Mr Piccinin from WSAA gave the example of over 400 water utilities in Victoria having been amalgamated into 15 in recent years, stating that in the process of such a wide scale rationalisation program, records of the infrastructure could 'get[s] lost along the way.'[55]

2.66 Similarly, Mr Hughes from the ARA commented that it would be unreasonable if a business provided information 'in good faith', and was penalised when that information was subsequently found to be inaccurate. [56]

2.67 When questioned by the committee on the issue of liability, the Department acknowledged it as an issue of which they were highly aware when drafting this amendment and also the existing Part 27A. The Department also stated that information providers had the option of stating any limitations to the information they provide. Although remaining sensitive to concerns, the Department highlighted the necessity to balance these concerns with an incentive for information providers 'to provide the best quality information' to effectively inform the network planning processes. [57]

Concluding remarks

2.68 The committee notes that there is general support for the government's decision to deploy a FTTP broadband network to 90 per cent of Australian homes, businesses and schools. The committee also notes that the objective of this bill is to amend Part 27A of the *Telecommunications Act 1994* to facilitate the planning work of the Implementation Study and subsequently the roll-out of the NBN.

2.69 The committee has been made aware of a range of concerns and issues raised during the course of this inquiry. While noting that there could have been greater sector involvement in the drafting of this bill, which may have minimised these concerns, the committee acknowledges the time constraints under which this bill was drafted and introduced by the Department. The committee is also satisfied with the level of consultation with utilities and carries since the bill was introduced into the Senate, and the undertaking by the Department for ongoing consultation as instruments and/or rules are drafted in the future.

54 Mr Booth, Telstra, *Committee Hansard*, Canberra, 4 August 2009, p. 29.

55 Mr Piccinin, WSAA, *Committee Hansard*, Canberra, 4 August 2009, p. 15.

56 Mr Hughes, ARA, *Committee Hansard*, Canberra, 4 August 2009, p. 23.

57 Mr Mason, DBCDE, *Committee Hansard*, Canberra, 4 August 2009, 42.

Recommendation

2.70 The Committee **recommends** that the bill be passed.

Senator Anne McEwen
Committee Chair