

The Senate

Environment, Communications
and the Arts Legislation
Committee

Telecommunications Legislation
Amendment (National Broadband Network
Measures No. 1) Bill 2009

August 2009

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Abbreviations

AER	Australian Energy Regulator
ARA	Australasian Railway Association
BCA	Business Council of Australia
DBCDE	Department of Broadband, Communications and the Digital Economy (the Department)
ENA	Energy Networks Association
FTTN	Fibre-to-the-Node
FTTP	Fibre-to-the-Premises
NBN	National Broadband Network
PIA	Privacy Impact Assessment
RFP	Request for Proposals
WSAA	Water Services Association of Australia

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).

1

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.

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

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

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

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

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.

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 happy⁴⁴ 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

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

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

Additional Remarks – Coalition Senators

1.1 The Coalition believes there are a number of flaws in the government's proposed National Broadband Network (NBN) proposal. This notwithstanding, the Coalition will consider this bill on its merits and in conjunction with the government's latest policy on the NBN.

1.2 Primarily, Coalition Senators are concerned about the potential cost of this project and the fact the government arrogantly refuses to conduct any cost benefit analysis.

Senate order for the production of documents

1.3 Coalition Senators note that upon the introduction of this bill in the Senate on 25 June 2009, debate was adjourned 'to the next day of sitting after the presentation of documents relating to the National Broadband Network tender process pursuant to an order of the Senate of 13 May 2009.'¹

1.4 This order of the Senate requires that before further consideration of this NBN bill and any other NBN legislation that the government provide to the Senate, copies of the Australian Competition and Consumer Commission's (ACCC) report to the Expert Panel and the Expert Panel's report to the government. These reports relate to the Government's initial NBN proposal and Request for Proposal (RFP) process and the decision not to proceed with the proposal the ALP took to the last election and instead propose a \$43billion fibre-to-the-premises option predominantly to be funded by government debt.

1.5 Coalition Senators still believe that this order of the Senate should be complied with and call on the government to provide these reports to the Senate to facilitate further consideration of this current bill.

Consultation

1.6 The Coalition is concerned by the overwhelming weight of evidence that indicated the government did not consult stakeholders about the content of this bill prior to its introduction.

1.7 Coalition Senators are disappointed that utilities only became privy to potential obligations proposed by this bill after the bill was introduced. In evidence to the committee, Mr Claude Piccinin, Deputy Executive Director, Water Services Association indicated that he was made aware of the bill through the media.

1 See Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4274.

Senator MINCHIN - From the perspective of your industry, I would like to know when and how you learnt of the existence of this bill?

Mr Piccinin—The way I learnt about it is that I was sitting at my desk on a Friday afternoon, minding my own business, winding down and looking forward to the weekend, when a journalist asked, ‘Would you care to comment on this?’ and I said, ‘What?’ It was a total surprise, shall we say.

Senator MINCHIN — You found out from the media —

Mr Piccinin — Indeed.

Senator MINCHIN — presumably after the bill had already been introduced?

Mr Piccinin—Indeed - yes.²

1.8 Mr Brett Hughes, Director, Policy, Australasian Railway Association, stated in evidence to the committee that ‘the rail industry is concerned about the lack of dialogue with government on this issue, which potentially has very significant impacts to the industry directly and Australia as a whole.’³

1.9 Further, it is surprising that in the time since the introduction of the bill those utilities that may be compelled to provide information have not been formally approached about their willingness or otherwise to cooperate.

1.10 Coalition Senators note that the Department of Broadband, Communications and the Digital Economy (the Department) has now met with some stakeholders to discuss their concerns, but remains opposed to any improvements to the bill to address stakeholder concerns.

1.11 Coalition Senators highlight our concerns about the Department’s lack of consultation on this legislation – particularly given that the government argues it is pivotal to the NBN implementation study.

1.12 The legislation was introduced almost three months after the announcement of the NBN Mark II proposal and the government should have been consulting with stakeholders over this period and as the bill was drafted. It is disappointing that the first stage of a project that will involve such a massive expenditure of taxpayer funds was not conducted in a cooperative and proactive way.

Compulsion

1.13 The Coalition notes that there was no evidence presented to the committee that carriers and utilities would not be prepared to cooperate with the government in providing information for the implementation study on a voluntary, commercial basis.

2 Mr Claude Piccinin, *Committee Hansard*, Canberra, 4 August 2009, p. 7.

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

Consultation timelines

1.14 The Coalition believes that the concerns expressed to the committee about the timelines for consultation have merit and should be further considered.

1.15 Submissions and/or evidence from Integral Energy, Energy Networks Association and the Water Services Association of Australia raised concerns with the timelines in the bill, both in relation to the consultation on the draft instrument and the timeline for the provision of required information.⁴

1.16 Given that the project is already experiencing delays and that it took four months to even appoint the lead advisers for the implementation study, the Coalition does not believe the arguments presented by the Department about their restrictive timelines have merit when they are being imposed at the expense of stakeholders.

1.17 Firstly, in relation to the period for consultation on any instrument to require the provision of information, the Coalition supports the recognition by the government that the existing consultation period is too short and that this bill amends section 531C(4) to extend the consultation period from three to five business days. However, given this bill will affect both carriers and utilities the Coalition is sympathetic to the arguments presented to the committee that further consultation should be required.

1.18 We are inclined to support an increase in the consultation period to 10 business days. The government has not proven in this first step on the NBN Mark II proposal that they will be proactive in their engagement with stakeholders. Therefore to ensure that all stakeholders are given adequate time to consider any proposed instrument, we support calls for a further amendment to 531C(4).

1.19 The approved period for the provision of information remains unchanged by this bill at not less than 10 days. However, there was also evidence presented to the committee that this period should be extended.

1.20 Further, Coalition Senators also believe that the requirement that the minimum 10 day requirement for the provision of information should be extended to take account of the concerns raised by utilities about providing required information.

1.21 Integral Energy highlighted their concerns during the committee's hearing into the bill.

Senator MINCHIN — Again, the bill provides for 10 working days for providing the information, the consultation having occurred. I think you recommend 20—working days, I assume. Would you like to expand on that?

4 See for example, Integral Energy, *Submission 8*; Water Services Association of Australia, *Submission 2*; and Energy Networks Association, *Submission 5*.

Mr Englund — Depending on the scope of the information required it may be relatively easy to deliver what the department wants. However, as I averted to in my last response, most of our asset information is contained within our GIS systems and is relatively easy to deliver, but about 30 per cent of our asset information, which largely relates to ducts underneath our larger metropolitan areas—we service the Parramatta, Liverpool areas and Western Sydney, into the Blue Mountains and down to the South of New South Wales—a lot of the assets were acquired pre-1990. We only have those in a scanned document format. They are not 100 per cent accurate and if, for example, the department is looking to acquire that information in a particular format or, perhaps more pertinently, they are looking to understand what level of capacity a particular electricity duct has, that would take us some time to acquire because we do not necessarily keep all of that information up to date. If they wanted cost information in addition to that, that would be another order of magnitude, because we would probably have to custom build something to deliver that.

Senator MINCHIN — It sounds as if even 20 working days might be —

Mr Englund — It would be pushing it but we are trying to be helpful.⁵

1.22 Similar concerns were expressed by the Water Services Association of Australia in relation to the difficulties in providing information about easements in the 10 day period.⁶

1.23 Officials from the Department confirmed at the hearing that the penalties for not complying with the timeframes could be onerous for carriers and utilities.

Senator MINCHIN — But if it is 10 days then I can imagine a minister being inclined to sign-off on 10 days. If you supply the information on the 11th day you are prima facie guilty of an offence under this bill, is that correct?

Mr Mason — It is a breach.

Senator MINCHIN — You have contravened the act. And the maximum penalty for contravening this act, as I understand, is \$250,000?

Mr Mason — Yes. It depends on the nature of the party in some ways because for a carrier it is a carrier licence condition.⁷

1.24 The Coalition believes that the views of stakeholders should be considered and the time to provide information should be extended to accommodate the difficulties utilities may have in obtaining and preparing the information required.

5 Mr Anthony Englund, *Committee Hansard*, Canberra, 4 August 2009, p. 4.

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

7 Mr Philip Mason, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

Immunities

1.25 During the inquiry, Coalition Senators questioned the Department about whether they had considered providing some level of immunity from civil penalties for carriers and utilities who inadvertently do not provide accurate information.

Senator MINCHIN — Thank you. The other issue that attracts my interest is a request made by some for the bill to provide a mechanism by which suppliers of information are granted an immunity from civil action based on any inaccuracy in the information provided that may incur damages to a third party. Has that been considered and rejected? Has it not been considered at all? Are there difficulties from your point of view in such an immunity?

Mr Mason — It is an issue that we are very aware of. It was something that was actually considered last year in the context of Part 27A generally. We understand the sensitivity from the perspective of information providers but the other side of it is that there does need to be an incentive, we think, for information providers to provide the best quality information that they can. We would be concerned if there was too much immunity or too great an immunity that they may be perhaps a little lax in checking the details or the accuracy of it, which could have consequences for network planning and so forth.

Having said that, we recognise that there are sometimes limitations to carrying databases. For example, some of the utilities have indicated a lot of their infrastructure is quite old and it may not be that well recorded. So that is the countervailing one. In terms of how that can be dealt with in practice, it needs a degree of understanding, I suppose, on the part of the Commonwealth in seeking information from the implementation study and potentially, if it gets that far, from the national broadband network company in relation to the quality of the information. It is potentially open to the information providers to state limitations to the information when they provide it, as well.

Senator MINCHIN — Yes, that is true. I know Senator Lundy expressed some surprise, but it is clear from evidence, particularly from utilities, that there is quite a bit of legacy network information that is stored on papyrus or something and not exactly well documented. Even with the best of endeavours, some of these utilities may have considerable difficulty supplying information which they could vouchsafe to be absolutely accurate. It would be unfortunate if they then paid a penalty for that. I understand you are sensitive to that, and that is something we may be able to pursue.⁸

1.26 Coalition Senators note that the Department has considered this issue and they think it unnecessary to include any immunity from civil liability in relation to the

8 Mr Philip Mason, *Committee Hansard*, Canberra, 4 August 2009, p. 42.

provision of this information. However, we see strong merit in giving further consideration to including immunity for unintended inaccuracies in the information provided in the legislation to allay some of the concerns of utilities who have indicated they are willing to cooperate.

Costs

1.27 Utilities raised with the committee the issue of the costs associated with the provision of information that may be required by the government and the actual ongoing costs associated with the potential use of their infrastructure.

1.28 The Explanatory Memorandum states:

Any potential detriment to carriers and utilities if required to provide the information is outweighed by the national importance of the NBN to be planned and rolled out as efficiently as possible so that the economic and social outcomes that the NBN will facilitate are maximised. As identified above, the cost of making this information available is not considered onerous.⁹

1.29 We believe that the Explanatory Memorandum is potentially misleading as there is no evidence to support these assumptions regarding the costs to utilities or carriers of providing the information it may require.

1.30 As noted in the Majority Committee Report, four submissions to the inquiry raised concerns about the costs to utilities in providing information and that they would anticipate compensation to cover reasonable costs.

1.31 To highlight the validity of these concerns, Mr Hughes of the Australasian Railway Association told the committee that:

According to the legislation, railways will be required to provide information on land infrastructure and other facilities under their control. I am sure that you will appreciate that there are millions of pieces of information which may be requested varying from digital location information to the size of ducts. There are over 44,000 kilometres of rail track in Australia and countless stations, terminals, offices, yards, sidings, depots and other facilities. A simple question such as the boundaries of land under railway control represents an enormous amount of work to answer with any degree of accuracy. Yet this is exactly what the rail industry fears could be required under the legislation. If such information is required without due regard to reasonableness or compensation, it will impose an unacceptable burden on the Industry.¹⁰

9 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 16.

10 Mr Hughes, *Committee Hansard*, Canberra, 4 August 2009, p. 18.

1.32 While the Coalition notes that it is the government's intention to seek information on a cooperative and commercial basis there is currently no mechanism that requires consideration of compensation under a mandatory requirement to provide information.

1.33 Further consideration should be given to whether this 'intention' of the government should be formalised in the legislation. If the government is confident that it can undertake commercial arrangements to obtain the information it requires, there can be limited concern about inserting a provision in the bill that will require reasonable costs being recompensed under a compulsory demand for information.

Security of information

1.34 One of the key concerns of Coalition Senators is the protection of sensitive information about assets and infrastructure provided to an authorised information officer. This is of particular concern given that the information of these utilities and carriers is of national security interest and the definition of who can potentially access any information is being broadened.

1.35 Protection of the integrity of information should be the paramount focus of the government throughout this process. While we support the government having flexibility in relation to the procedures for the protection of the information, we do believe that the stakeholders should be consulted about these protection and control regulations as suggested by Integral Energy.¹¹

1.36 In its submission to the inquiry, Energy Networks Association noted that the broadening of the definition of entrusted company officer in the bill 'carries with it infrastructure security and commercial implications, as well as possible risks, for businesses providing this type of information to a range of entities.'¹²

1.37 We are concerned about the broad scope of people who could have access to the information over the life of the NBN Co. and that this bill gives the government the ability to impose obligations on carriers and utilities for a decade.

1.38 Integral Energy also raised their concerns in the committee hearing about the potential for the Australian Competition and Consumer Commission or the Australian Energy Regulator gaining access to information provided to the Commonwealth for the purposes of the NBN.¹³ Upon questioning of the Department about this issue, they advised that though they understood the concerns the intention was not to broaden the scope of the information to be provided broader than for the 'purposes of designing a network.'¹⁴

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

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

13 Mr Englund, *Committee Hansard*, Canberra, 4 August 2009, p. 4.

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

1.39 However, and as mentioned in the majority report, Telstra pointed out in evidence to the committee that the scope for which information is to be provided is much broader than in the existing Act, and 'the language needs to be tightened up quite significantly in terms of the current legislation to make sure that information provided is strictly for the building of the NBN and that it is much more specific than it currently is.'¹⁵

1.40 The Coalition believes that the ten year sunset clause serves only to compound the level of concern about the procedures in place for the protection of any information that could be sought by the government.

Competitive neutrality

1.41 Coalition Senators are concerned that the government is blindly consumed by the anticipated social and economic benefits of the NBN upon delivery which assumes that the project will actually commence, let alone be completed.

1.42 This is evident throughout the Explanatory Memorandum, particularly in relation to competitive neutrality.

1.43 The Explanatory Memorandum states:

In relation to competitive neutrality it is recognised that any framework that compels the provision of information from one commercial entity to another, particularly where they may compete in some way, raises issues of competitive neutrality. However, where such considerations arise, they must be balanced against the larger public policy objectives of the Government's NBN policy, which, in the longer term, delivers benefits to consumers and the economy generally that will outweigh any competition concerns arising from accessing the information.¹⁶

1.44 The Coalition believes that this explanation ignores the potential costs that will be imposed on utilities, carriers and taxpayers and is a statement that is based on broad generalisations rather than a detailed or rigorous analysis of the costs involved. As highlighted in the majority report, the Business Council of Australia's submission to the inquiry states:

Information compulsorily acquired from a private business in support of the NBN company under Part 27A will almost certainly be of commercial value. The proposed Bill therefore confers a competitive advantage on the NBN company and is likely to have an impact on competition in the wholesale market for telecommunication services. As such we would

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

16 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 12.

expect to see a rigorous cost–benefit analysis in support of the Bill in accordance with the COAG agreement.¹⁷

1.45 The Coalition agrees with the concerns of the Business Council of Australia and we have serious concerns about the apparent lack of certainty surrounding the issue of competitive neutrality in the context of this bill and the NBN Co. going forward.

1.46 The Explanatory Memorandum further states that "The provision of network information to the NBN Company would be subject to a further decision by the minister, thereby allowing any competitive neutrality issues to be considered further."¹⁸

1.47 We have considerable concerns about leaving these considerations in the hands of the minister. We therefore believe that further consideration should be given to limiting this bill to the provision of information for the implementation study only.

1.48 Should it be determined after the implementation study that the NBN Co. requires this information, the government should come back to the Parliament to get approval.

1.49 Given there are so many details still to be finalised in regards to this project, we do not support giving the minister carte blanche powers with a ten year sunset clause.

1.50 In this we concur with the Business Council of Australia, who concluded in their submission:

The proposal raises a number of issues in relation to competitive neutrality principles agreed by all governments at COAG and therefore warrants a net benefit assessment.

The assessment should take into account the likely impacts on competition resulting from the provision and use of information under Part 27A, in particular the possible consequences resulting from the broad definition of information that can be required and the time period of up to 10 years.¹⁹

1.51 We believe this bill should be for the purposes of the implementation study only and support the sunset of this requirement in June 2010.

17 Business Council of Australia, *Submission 9*, p. 7.

18 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 16.

19 Business Council of Australia, *Submission 9*, pp 10-11.

Recommendation

That the government further consider the concerns of stakeholders and refine the bill to accommodate these concerns, including through the reconsideration of the ten year sunset clause.

Senator Simon Birmingham

Senator Judith Troeth

Senator Nick Minchin

August 2009

Appendix 1

Submissions Received

- 1 Optus
- 2 Water Services Association of Australia
- 3 Australasian Railway Association
- 4 Unwired
- 5 Energy Networks Association (ENA)
- 6 Office of the Privacy Commissioner
- 7 Telstra
- 8 Integral Energy
- 9 Business Council of Australia

Appendix 2

Public Hearings

Canberra, 4 August 2009

Integral Energy

Mr Anthony Englund, Policy Manager

Mr Daryl Skene, Asset Information Manager

Australasian Railway Association

Mr Brett Hughes, Director Policy

Water Services Association of Australia

Mr Claude Piccinin, Deputy Executive Director

Telstra Corporation Ltd

Mr Geoff Booth, Group Managing Director, National Broadband Engagement

Mr William Gallagher, General Counsel, Public Policy & Communications

Department of Broadband, Communications and the Digital Economy

Mr Philip Mason, Assistant Secretary, Networks Policy and Regulation,
National Broadband Network & Fibre Rollout Regulation Reform Branch

Ms Trudi Bean, Senior Executive Lawyer, Infrastructure and Digital Economy
Services

Ms Pip Spence, First Assistant Secretary, Networks Policy and Regulation

Mr Don Markus, General Counsel

Unwired Australia Pty Ltd

Mr David Havyatt, Manager Regulatory and Corporate Affairs

