

Chapter 2

Issues raised in the inquiry

2.1 The inquiry received a relatively small number of submissions, primarily from telecommunications companies and government departments. Only one public submission was received, from the Australian Telecommunications User Group (ATUG).

2.2 ATUG's submission expresses strong in-principle support for the bill, but the majority of the submission focuses on making suggestions on the NBN Request for Proposals (RFP) published by DBCDE rather than on the provision and protection of protected network information.

2.3 The submission by Optus was generally supportive of the bill. Optus' primary area of concern was the types of information that would need to be made available to potential respondents to the RFP. The network information requirements they identified showed broad agreement with the information DBCDE indicated the government would be seeking in its submission.

2.4 Optus also indicated concern that the consultation period of three days when the Minister for Broadband, Communications and the Digital Economy, the Hon. Senator Stephen Conroy, is making a written instrument seeking designated information is too short. They suggested it be extended to five days.

State government involvement

2.5 The South Australian Department of Further Education, Employment, Science and Technology, the Western Australian Department of Industry and Resources and the New South Wales Department of Commerce all proposed expanding the definition of 'entrusted public official' to include state and territory government officials.¹ The purpose of this amendment would be to allow state government departments to use network information obtained under the act to assist in the planning and development of state broadband networks and initiatives.

2.6 DBCDE responded to this suggestion, stating that they regard the current definition of entrusted public official as appropriate and noting (a) that the focus of the proposed legislation is 'to facilitate the implementation of the National Broadband Network' and (b) that the collection of network information to facilitate network planning would need to be considered separately by government.² State government

1 Department of Further Education, Employment, Science and Technology (SA), *Submission 2*; Department of Industry and Resources (WA), *Submission 3*; Department of Commerce (NSW) *Submission 7*.

2 DBCDE, correspondence to the committee, 1 May 2008, p. 3 (see appendix 2).

officials involved in a consortium putting forward a bid under the process would be able to receive information under the bill's definition of 'entrusted company officer'.

Issues raised by Telstra

2.7 Telstra, while supportive of an expeditious process for the NBN RFP tender process, were concerned to balance the need for information provision and administrative efficiency with national security and commercial risks that could arise from the disclosure of sensitive commercial information.

2.8 Telstra's extensive submission proposed amendments to the bill. These were all fundamentally intended to limit the likelihood of sensitive network information being used for purposes other than the preparation of submissions for the construction of a NBN as specified in the bill.

2.9 Telstra's proposed amendments would:

- limit the types of information required and what the information could be used for;
- prevent disclosure of the information in bid submissions;
- increase a company's legal recourse if information is disclosed;
- restrict the number of individuals who have access to the information; and
- mandate security and destruction requirements for the information.

Limits on type of information

2.10 Telstra proposed that the types of information able to be specified as 'designated information' under section 531C be better defined and more specific and limited to 'the type, physical dimensions and general locality of existing telecommunications networks and facilities'.³

2.11 The explanatory memorandum to the bill gives some guidance as to the types of information likely to be required,⁴ and DBCDE's submission to the inquiry provides much greater detail on the information likely to be requested. DBCDE's response to Telstra's submission highlighted the fact that the bill has been designed to allow the minister maximum flexibility in determining what information is required.⁵ Telstra's limited and non-specific definition does not appear to add much to the bill.

3 Telstra, *Submission 5*, p. 3.

4 Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, Explanatory Memorandum, p. 6.

5 DBCDE, correspondence to the committee, 2 May 2008, p. 1 (see appendix 3).

Limits on use

2.12 Telstra's submission claimed that restricting what designated information can be used for is as important as specifying to whom it can be disclosed. Telstra notes that an entrusted company official who has been provided information legally as specified in the bill is then technically free to use that information for any other purpose providing they do not disclose the information in the process. Telstra's position is in line with the intent of the bill as outlined in the second reading speech, where it was stated that the 'information can only be used for the purposes of building a broadband network.'⁶ An amendment specifying that information disclosed to a company official is to be used only for the purposes for which it is disclosed may be reasonable, if difficult to enforce.

2.13 DBCDE was concerned that the prohibition on an individual disclosing information unless it is for a purpose provided in the bill would prevent its meaningful use in other circumstances. Against this, however, should be balanced the fact that any company developing a tender is likely to have a substantial team with access to this information working to develop the tender. Such a group would be able to use protected carrier information for other purposes without further disclosing it.

2.14 Telstra also proposed amending paragraph 531G(2)(e) to limit additional uses of the information by the government. The explanatory memorandum makes it clear that the purpose of this paragraph is to increase flexibility in dealing with unforeseen circumstances and would be subject to senate scrutiny.⁷ DBCDE's submission highlights this need for flexibility. Amending the paragraph would therefore defeat the purpose of including it.

Disclosure in bid submissions

2.15 Telstra objected to the provision allowing competitors to disclose designated information in a bid submission and proposed that the paragraph be narrowed to require any bid submission to preserve the confidentiality of the protected carrier information.⁸ Given submitters have the ability to designate their own information as confidential, this may be reasonable.

2.16 DBCDE's correspondence reiterated the rules for disclosure outlined in the bill. The department may envisage the entire process as being confidential, which would prevent the public disclosure of the information and limit it to entrusted public officials assessing the submission. If this is the case, it would probably satisfy

6 Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, Second Reading Speech, *Senate Hansard*, 19 March 2008, p. 1213.

7 Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, Explanatory Memorandum, p. 24.

8 Telstra, *Submission 5*, p. 5.

Telstra's desire to protect the confidentiality of sensitive network information. However, the committee is concerned that this be clear.

Legal recourse if information is disclosed

2.17 Telstra did not regard current provisions for compensation and accountability as adequate. In its submission it sought:

- the removal of the requirement that a company authorised the offence as a precondition for compensation;⁹
- the ability to pursue compensation against public officials and individual entrusted company officers;¹⁰
- the right to seek injunctions preventing a potential breach; and
- a reporting regime which obliges an authorised information officer to disclose the identity of all entrusted company officers.

Authorisation as a precondition for compensation

2.18 Telstra's submission proposed removing the requirement for authorisation before compensation when a carrier has suffered as a result of protected carrier information being misused. The relevant provision of the bill requires that compensation may be paid where:

...the Court is satisfied that the company expressly, tacitly or impliedly authorised or permitted the contravention...¹¹

2.19 Telstra suggested this item be amended so that its effect would be to attribute liability to a company where:

...the conduct of the entrusted company officer resulting in a contravention of the bill is undertaken within the scope of his or her employment or within his or her actual or apparent authority.¹²

2.20 This proposal may have merit. Telstra's proposed amendment would seek to make a company responsible for any inappropriate actions of an entrusted company officer, while the original only allows compensation if the act was 'expressly, tacitly or impliedly authorised or permitted' by a company. Telstra argued that the standard of proof in the draft bill appears to be imported from the Criminal Code, yet is being applied to a civil action.

9 Telstra, *Submission 5*, p. 6.

10 Telstra, *Submission 5*, p. 6.

11 Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, paragraph 531(1)(d).

12 Telstra, *Submission 5*, p. 7.

2.21 Telstra pointed out that a court would be free to consider whether or not an action was authorised by a company when determining a compensation amount and the approach is consistent with the approach taken in the RFP for the NBN.

2.22 DBCDE appeared to reject Telstra's proposal in part by suggesting that Telstra's reference to 'actual or apparent authority' would risk excluding the potential actions of consultants and advisors external to the company. However, Telstra explicitly intended a revised wording that would include both employees and consultants or advisors, as they refer to 'the scope of his or her employment or within his or her actual or apparent authority' (emphasis added).¹³

2.23 DBCDE's response did not seem otherwise to address this particular proposal from Telstra to raise the standards of diligence for companies receiving sensitive network information under the bill.

Public officials and individual entrusted company officers

2.24 Entrusted public officials are subject to prosecution under the *Crimes Act 1914* for disclosing protected carrier information and it would not be appropriate to expose them to additional individual claims for compensation. Entrusted company officers are another matter. If a company officer represents a company with no significant assets, the aggrieved carrier might have no effective right to compensation. DBCDE's response did not address this issue, which requires a balance between a carrier's right to effective compensation versus the potential for particular individuals to be targeted for intimidating legal action.

Injunctions and a reporting regime

2.25 The right to seek injunctions is, in practice, unlikely to enhance the security of protected carrier information and has the potential to disrupt the rapid implementation of the bill. DBCDE's response identified the potential for preventative injunctions to delay the preparation or assessment of proposals.

2.26 A reporting regime, also suggested by Telstra,¹⁴ would have no benefit except to enable an effective injunction process as the identity of entrusted company officers can be established if a breach occurs. DBCDE's response also identified the potential for such as regime to reveal information regarding the internal structure of a company or consortium preparing a proposal.

Restricted recipients and security and destruction requirements

2.27 Telstra's final two areas of concern – restriction of recipients and security and destruction requirements – appear unnecessary as amendments. Provisions for these exist in the legislation in sections 531N and 531P and can be specified by the

13 Telstra, *Submission 5*, p. 7.

14 Telstra, *Submission 5*, p. 9.

minister making a legislative instrument. Carrier consultation would be appropriate in such a circumstance and Telstra's proposals may be appropriate for informing the development of such instruments. DBCDE's response to the Telstra submission supported this view.

Committee views

2.28 The committee is supportive of a plan that facilitates the rapid delivery of a NBN that makes high speed internet access available across Australia. The committee supports policy objectives that will deliver the best possible broadband future for Australians.

2.29 The committee understands some the suggestion made by some state governments that network information obtained under the bill be made available for other planning purposes, but the clear intent of the bill is to be a limited piece of legislation aimed specifically at facilitating the NBN tender process.

2.30 The committee notes Optus' suggestion that the consultation period be extended. However, the submissions by DBCDE and Optus clearly indicate that the types of information likely to be required are well understood, and both Telstra and Optus have indicated they are willing to provide information on a voluntary basis. As a result, it is unlikely that surprises or controversial issues will arise, meaning the three-day period should be adequate.

2.31 There are three proposals in the Telstra submission that, on the face of it, may have merit. These are:

- placing limits on the use of protected carrier information;
- requiring protected carrier information to be designated as confidential in submissions; and
- relaxing the requirement that a company have authorised or permitted the illegal actions of an entrusted company officer as a precondition for compensation in the event of a carrier experiencing loss or damage.

2.32 It appears there is potential for amendments in these three areas to increase protection for a carrier's network information without unduly impeding the efficient operation of the bill or delaying the development of the NBN.

Recommendations

Recommendation 1

2.33 That the government consider amending the bill to limit the use of protected carrier information to the purposes identified in the bill.

Recommendation 2

2.34 That the government consider amending the bill to require companies submitting tenders to designate a carrier's protected network information as confidential.

Recommendation 3

2.35 That the government consider amending paragraph 521L(1)(d) to relax the requirement that a court be satisfied that a contravention was authorised or permitted, and replace it with wording that conveys that the contravention was committed in the context of an entrusted company officer's employment or authority.

Recommendation 4

2.36 That, subject to consideration of the committee's report and recommendations, the bill be passed.

**Senator Anne McEwen
Committee Chair**

