

Appendix 2

Correspondence

Department of Broadband, Communications and the Digital Economy, dated
1 May 2008, responses to questions on notice



Australian Government

**Department of Communications,
Information Technology and the Arts**

our reference: 2008/464

Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

**Inquiry into the Telecommunications Legislation Amendment (National
Broadband Network) Bill 2008**

In response to the Senate Committee's questions of 23 April 2008 concerning the inquiry into the Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, the Department of Broadband, Communications and the Digital Economy provides the enclosed response.

The Senate Committee has also requested the Department to provide a response to Telstra's submission; this response will be provided shortly.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Philip Mason', written over a horizontal line.

Philip Mason
Assistant Secretary, Regulatory and Technical
National Broadband Network Taskforce
Department of Broadband,
Communications and the Digital Economy

1 May 2008

Senate Committee on Environment, Communications and the Arts

Inquiry into the Telecommunications Legislation Amendment (National Broadband Network) Bill 2008

Department of Broadband, Communications and the Digital Economy's response to the Committee's additional questions of 23 April 2008

1a. How tightly will access to the information be managed?

At a minimum protected carrier information will only be available to proponents who lodge a \$5 million bond, in the form of an unconditional and irrevocable bank guarantee in favour of the Commonwealth, and a proponent Confidentiality Deed by 23 May 2008, as set out at clause 8.1 of the National Broadband Network Request for Proposals, issued by the Government on 11 April 2008. Access to the information will also depend on any other conditions made by the Minister under proposed subsection 531H(4).

The arrangements to be implemented by recipients of protected carrier information will need to be sufficiently robust to ensure that the prohibitions on disclosure of network information are not contravened whilst at the same time enabling the protected carrier information to be accessed by proponents for the purposes of the Request for Proposals process. The Bill also provides for the Minister to make a legislative instrument that makes rules relating to the storage, handling or destruction of protected carrier information (s531P).

1b. Who will determine when a particular entrusted company officer or public official requires access to specific information?

Subject to any restricted recipient rules made by the Minister that limit or restrict the entrusted company officers to whom protected carrier information can be disclosed (proposed section 531N), once a decision has been made by an authorised information officer to disclose protected network information to an entrusted company officer as permitted by proposed section 531H, the entrusted company officer is responsible for determining whether protected carrier information can be disclosed to another entrusted company officer as permitted under proposed section 531K. Protected carrier information could only be disclosed by an entrusted company officer to another person if that person were an entrusted company officer, as defined in proposed section 531B, and the disclosure were authorised by proposed section 531K.

Similar arrangements apply to the situation where protected carrier information is disclosed by an authorised information officer to an entrusted public official as permitted by proposed section 531G. In considering whether the protected carrier information can be disclosed to another person, the entrusted public official must be satisfied that the person is an entrusted public official, as defined in proposed section 531B, and that the disclosure of the protected carrier information is authorised under proposed section 531G.

In this way, each authorised information officer, entrusted public official and entrusted company official is individually responsible for ensuring that any disclosure of protected carrier information that they make is permitted under proposed Part 27A.

2a. Will all parties have equal access to information, or will they need to present a separate request?

It is the intention that all protected carrier information submitted to an authorised information officer would be disclosed to an entrusted company officer of a proponent that has met the pre-qualification requirements set out at clause 8.1 of the National Broadband Network Request for Proposals, issued by the Government on 11 April 2008, and any other conditions made by the Minister under proposed subsection 531H(4).

2b. How is this made clear in the bill or explanatory memorandum?

The explanatory memorandum states that an important consideration in terms of making protected carrier information available to proponents is to maximise competitive tension in the National Broadband Network assessment process. The explanatory memorandum further states that it is essential for certain information held by carriers, particularly network information, in addition to what is already available publicly or through commercial sources, to be made available to proponents so that they can accurately design and cost their proposed network.

The Department considers that it is implicit from these statements that the information would be provided to all proponents.

The Bill does not address this point specifically as it is a matter that relates to the conduct of the National Broadband Network competitive assessment process as opposed to the operation of the proposed legislation.

3a. Will all designated information supplied in accordance with a written instrument be disclosed to a company making a submission, or will they be required to specify the information required?

See the response to question 2a.

4a. What role in the process is envisaged for state and territory officials in the RFP evaluation process?

The evaluation of proposals for the National Broadband Network, as detailed in clause 10 of the Request for Proposals, does not include a role for State and/or Territory officials.

The Government has appointed a Panel of Experts to assist it with the evaluation process and to assess Proposals.

The Panel of Experts will be assisted by Government agencies, including the Australian Competition and Consumer Commission, the Department of Foreign Affairs and Trade and the Attorney-General's Department, and specialist advisers.

The Australian Competition and Consumer Commission will provide the Panel with advice on issues such as wholesale access services and prices, access arrangements, proposed legislative or regulatory changes and the likely impact of Proposals on pricing, competition and the long-term interests of end-users in the communications sector. The Department of Foreign Affairs and Trade and the Attorney-General's Department will provide advice on the degree to which Proposals are consistent with Australia's international obligations.

The Attorney-General's Department will also coordinate an assessment of the national security implications of Proposals in consultation with national security and law enforcement agencies to be provided to Government to inform the final decision-making process.

4b. Has any consideration been given to expanding the definition of 'entrusted public official' to include state and territory officers, to allow them to participate in this process or to assist in the development of state and territory network planning?

The Department appreciates that that state and territory governments are currently planning or progressing significant broadband initiatives. It is possible that state, territory and local governments may wish to engage with likely proponents for the National Broadband Network, particularly regarding integration of current broadband or telecommunications initiatives and future priorities and requirements for state and territory government jurisdictions.

The process for evaluation of proposals is set out in clause 10 of the Request for Proposals. The Panel will be extremely limited in its capacity to engage with stakeholders while proposals are being assessed, given this could be seen as influencing the independence of the process or the eventual outcome.

The definition of 'entrusted public official' is considered appropriate given the arrangements for assessment of proposals for the National Broadband Network discussed at question 6 above.

In addition to national proposals, clause 9.3 of the National Broadband Network Request for Proposals permits stand-alone State or Territory based proposals to be lodged. It is possible that State and/or Territory Governments may wish to participate in the preparation of a stand-alone proposal. To enable this, the definition of 'entrusted company officer' in proposed section 531B includes individuals either directly employed by a body politic or engaged to provide services to a body politic (proposed paragraphs 531B(i) - (o)).

With respect to making the information available to assist states and territories in planning it is important to note that the focus of the proposed legislation is to facilitate the implementation of the National Broadband Network. The collection of network information for other purposes such as network planning is a matter that would need to be considered by Government.

5a. What is the nature and extent of any liabilities the Commonwealth may be exposed to or indemnification given by the Commonwealth to companies required to provide information should that information ultimately be misused or inappropriately provided to competitors?

The Bill does not provide for the Commonwealth to be subject to any liability where protected carrier information is misused by an entrusted company officer. Similarly, the Bill does not provide for the Commonwealth to indemnify a carrier that has provided protected carrier information.

The Bill does provide the right for a carrier to take action against a company in the Federal Court for the unauthorised disclosure of protected carrier information by an entrusted company officer of the company in circumstances where the company expressly, tacitly or impliedly authorised or permitted the contravention (proposed section 531L).

6a. How does the information that may be provided and released impact on matters of national security?

The Department of Broadband, Communications and the Digital Economy has worked, and continues to work, closely with the Attorney-General's Department and other national security and law enforcement agencies to deal with any national security risks by ensuring, to the greatest extent possible, that the information sought does not give rise to such risks.

6b. How are any national security matters specifically protected under the proposed legislation?

The Bill provides that the Minister has the power to make legislative instruments under proposed subsections 531H(3) and (4) to specify information that a company would be required to provide at the time it notifies an authorised information officer that it is considering or intending to make a submission in response to the Request for Proposals, and conditions that would have to be satisfied, prior to an authorised information officer being able to disclose protected carrier information to an entrusted company official of the company.

The Bill would also allow the Minister to specify, by legislative instrument, rules relating to the storage, handling or destruction of protected carrier information to mitigate the risk of unauthorised disclosures or the mishandling of carrier information (s531P).

These provisions, together with the power in proposed section 531N for the Minister to make restricted recipients rules, would enable any national security issues to be appropriately managed. However, as noted in question 6a above, the Department has been working with the Attorney-General's Department and other national security and law enforcement agencies to deal with any national security risks by ensuring, to the greatest extent possible, that the information sought does not give rise to such risks.

If it were considered appropriate for instruments to be made under these provisions, they would be developed in consultation with the Attorney-General's Department and

any requirements would be tailored to match the sensitivity of the information to be sought from carriers.

7a. How does the scope of information potentially required under this legislation compare to similar international examples for the building of broadband networks, particularly Singapore?

It is understood that the process for the roll-out of a new broadband network in Singapore does not include specific legislative or regulatory arrangements to enable proponents that have qualified to participate in the process, to obtain information about existing telecommunications facilities.

The Department of Broadband, Communications and the Digital Economy is not aware of any other examples of specific legislative arrangements introduced overseas to facilitate the roll-out of a broadband network on a large scale.

7b. If greater powers are being sought than internationally, why is this necessary?

The decision by the Australian Government to conduct a competitive assessment process for the deployment of a National Broadband Network to deliver services to 98 percent of homes and businesses, for which the Government has committed to contribute up to \$4.7b and make changes to the regulatory regime considered necessary to facilitate the investment, distinguishes the National Broadband Network process from other broadband deployments.

The extent to which the Government's objectives for the National Broadband Network are met will depend in part on the process generating sufficient competitive tension to encourage proponents to submit high quality proposals. It is expected that a truly competitive process will facilitate the submission of proposals that are robust, accurate and efficient in terms of the need for Government funding and the scope of regulatory changes sought to facilitate the investment.

To maximise competitive tension in the process, it is essential for certain information held by carriers, particularly network information, in addition to what is already available publicly or through commercial sources, to be made available to proponents so that they can accurately design and cost their proposed network.

8a. Have any companies indicated that requirements to provide this information could impact on their investment decisions. If so, in what way?

As part of discussions with carriers regarding the type of information that may be requested, certain carriers have advised the Department that if the information requested would allow competitors to identify their customers and/or the detailed nature of the services that they were providing, then their commercial interests could suffer and hence impact on their investment decisions.

While the final form of any information request is a matter that would be determined following public consultation the Department does not envisage that information which would enable a carrier's customers to be identified or provided detailed information regarding the nature of the services they are providing would be sought.

