

Appendix 3

Correspondence

Department of Broadband, Communications and the Digital Economy, dated
2 May 2008, response to Telstra submission



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 – Response to Telstra submission**

In response to the Senate Committee's request that the Department of Broadband, Communications and the Digital Economy provide a response to Telstra's submission to the inquiry into the Telecommunications Legislation Amendment (National Broadband Network) Bill 2008, the Department provides the enclosed comments.

In responding the Department has focused on explaining those parts of the Bill which Telstra has queried. The Department's comments should not be interpreted as prejudging any amendments that the Minister for Broadband, Communications and the Digital Economy may consider appropriate to enhance the operation of the proposed legislation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Philip Mason'.

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

2 May 2008

**Senate Committee on Environment, Communications and the Arts:
Inquiry into the Telecommunications Legislation Amendment (National
Broadband Network) Bill 2008**

Response to the Committee's request that the Department of Broadband, Communications and the Digital Economy comment on Telstra's submission of 24 April 2008.

2 May 2008

In responding to issues raised in Telstra's submission, the approach taken by the Department of Broadband, Communications and the Digital Economy is to set out how the proposed legislation operates in the areas queried by Telstra.

The Department's comments should not be interpreted as prejudging any amendments that the Minister for Broadband, Communications and the Digital Economy may consider appropriate to enhance the operation of the proposed legislation.

The paper refers to the sections of Telstra's submission.

SECTION 2 – SCOPE OF INFORMATION TO BE DISCLOSED (531C)

The National Broadband Network Requests for Proposals, released on 11 April 2008, states that the Government intends to make available to proponents network information it considers necessary for the development of proposals.

The scope of information that carriers would be required to provide to proponents has not been specified in the Bill to provide the Minister with flexibility in determining the information that could be made available to potential proponents. The Bill requires the Minister to publicly consult on the information being requested. Given this mechanism, and the general guidance referred to by Telstra in the explanatory memorandum, the Bill does not specify limitations on the type of information that could be requested from carriers.

SECTION 3 – RESTRICTION ON USE OF INFORMATION (531G, 531K)

The Bill imposes non-disclosure obligations on all recipients of protected carrier information. These non-disclosure obligations apply to each recipient individually. For example, in the case of entrusted company officers, the non-disclosure obligations apply to each company officer individually rather than the company.

The non-disclosure obligations operate in a way that automatically ensures restriction on the use of information. This is because it would not be possible for an individual who had received protected carrier information to use it in any meaningful way without making a disclosure of that information to one or more other persons.

The approach taken in the Bill is consistent with general drafting practice not to include redundant terms in legislation. The approach adopted in the Bill is consistent with the approach adopted in other recent provisions (see for example, section

155AAA of the *Trade Practices Act 1974* and section 128 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*).

SECTION 4 – POWER TO PRESCRIBE ADDITIONAL PURPOSES OF DISCLOSURE/USE OF INFORMATION (531G(2)(e))

The Bill enables protected carrier information to be disclosed by an entrusted public official to another entrusted public official for a purpose specified in the regulations to provide the Minister with flexibility to provide for additional purposes for which protected carrier information may be disclosed. As identified in the explanatory memorandum and noted by Telstra, the provision would enable the disclosure of information for the purposes of the Government's Broadband Fibre to Schools initiative if a regulation providing for this were made. Given the dynamic nature of the broadband sector it is not possible to rule out the possibility of needing to expand the purposes for which information could be disclosed in order to achieve the Government's policy objectives.

SECTION 5 – DISCLOSURES IN BID SUBMISSIONS

Any submission made in response to the Request for Proposals will be delivered to the Commonwealth, as required by the Request for Proposals. Proposed paragraph 531K(2)(b) permits an entrusted company officer, when delivering a submission to the Commonwealth (or a variation to that submission), to disclose any protected carrier information that has been incorporated into the submission. In turn, entrusted public officials involved in the assessment of the submission would only be able to disclose protected carrier information incorporated into the submission as permitted by proposed section 531G.

SECTION 6 – COMPENSATION AND ACCOUNTABILITY (531L)

Recourse limited to a single company

Given the potential criminal liability of entrusted public officials and the civil penalty provisions that apply to entrusted company officers, the Bill does not provide a statutory right of compensation against such individuals, irrespective of whether there may be any vicarious liability on the part of their employers. The criminal and civil penalty provisions provide an appropriate level of deterrence to the individuals and proposed section 531L provides an additional level of deterrence to the company of entrusted company officers.

Proper standards of vicarious liability

Proposed paragraph 531L(1)(d) strikes a balance between the interests of carriers and the interests of companies that may be held liable for contraventions of their entrusted company officers. The definition of entrusted company officer covers individuals other than the officers and employees of the company that seeks access to the information. To facilitate the preparation of submissions in response to the Request for Proposals, the definition also covers officers and employees of companies providing services to the company and directors and employees of advisers to the company. Applying concepts of actual and apparent authority to such individuals

would not be effective, because of the lack of an employment relationship between the company and these individuals. Proposed section 531L therefore focuses on contraventions, so that a compensation order may be made against a company where a Court is satisfied that an entrusted company officer of the company had contravened proposed subsections 531K(1) or (3) with express, tacit or implied authority of the company. The concepts of express, tacit and implied authority in this context are sufficiently broad to cover contraventions by an employee of the company within that employee's actual or apparent authority. In applying to contraventions by entrusted company officers other than employees of the company, proposed section 531L would expand the potential liability of the company than would normally be the case under general principles of vicarious liability.

Need for preventative injunctions

The right to seek compensation, as provided for in proposed section 531L, provides an adequate remedy to a contravention of the prohibitions and balances the interests of carriers and the need to ensure that protected carrier information can be effectively accessed and used by entrusted public officials and entrusted company officers in connection with the National Broadband Network process. Preventative injunctions could be potentially used to delay the preparation or assessment of proposals, and therefore impact the efficient and fair conduct of the process.

Reporting regime

A reporting regime would result in carriers who had provided protected carrier information becoming aware of the identity of proponents in the National Broadband Network process. As these carriers may themselves be proponents, the provision of such information would be unfair to proponents who seek access to protected carrier information because the information would reveal not only whether a company is a proponent but also whether that company is a proponent in its own right or is part of a consortium and also the identity and nature of the company's advisers. This unfairness would be compounded if a statutory right to apply for an injunction were included in the Bill. Given the significance of the outcome of the National Broadband Network process to all proponents, the establishment of 'Chinese wall' arrangements within each carrier may not be sufficient to manage the potential risks arising from the proposed reporting regime.

SECTION 7 – RESTRICTED RECIPIENTS RULES (531N)

The making of restricted recipient rules is not mandatory because the need for any additional measures to restrict the scope of individuals to whom protected carrier information may be disclosed by an authorised information officer should reflect the information that is being sought from carriers. Given that the information to be provided by carriers would be outlined in an instrument it is considered appropriate that any appropriate rules be specified in an associated instrument at that time.

Rules such as those proposed by Telstra can be included in an instrument if considered warranted.

The Bill also includes strong sanctions against the unauthorised disclosure of protected carrier information.

SECTION 8 – SECURITY AND DESTRUCTION REQUIREMENTS (531P)

The approach adopted in the Bill in relation to restricted recipient rules and discussed above in relation to section 7 of Telstra's submission applies equally to the provisions in the Bill that enable the Minister to make rules relating to the storage, handling or destruction of protected carrier information.

Any rules specified in an instrument would reflect the nature of the network information being provided. Rules such as those proposed by Telstra can be included in an instrument if considered warranted.

SECTION 9 – ADDITIONAL PRE-CONDITIONS TO DISCLOSURE

Further pre-conditions to accessing protected carrier information may be appropriate in light of on-going engagement between carriers and Government concerning the information to be requested and suitable security measures. Proposed section 531H(4) provides for the determination of such conditions.

Any further conditions specified in an instrument would reflect the nature of the network information being provided. Conditions such as those proposed by Telstra could be included in an instrument if considered warranted.

Once protected carrier information is disclosed according to disclosure pre-conditions, protection of the information will be subject to the requirements set out in proposed Part 27A, including in any instruments made under proposed sections 531N and 531P.