

The Senate

Standing Committee on
Environment, Communications
and the Arts

Telecommunications Legislation Amendment
(National Broadband Network) Bill 2008

May 2008

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Acronyms and abbreviations

ATUG	Australian Telecommunications User Group
DBCDE	Department of Broadband, Communications and the Digital Economy
NBN	National Broadband Network
RFP	Request for Proposals

Chapter 1

Introduction

Background

1.1 The Telecommunications Legislation Amendment (National Broadband Network) Bill 2008 (the bill) was introduced to the Senate on 19 March 2008 and referred to the Standing Committee on Environment, Communications and the Arts (the committee) on 20 March 2008, for report by 7 May 2008. On 7 May, the committee tabled an interim report indicating it would report by 9 May 2008.

Conduct of the inquiry

1.2 The committee advertised the inquiry in *The Australian* and invited written submissions by 17 April 2008. Details of the inquiry were placed on the committee's website and the committee also wrote to a number of organisations and stakeholder groups inviting written submissions.

1.3 The committee received submissions from seven organisations. The committee wrote to the Department of Broadband, Communications and the Digital Economy (DBCDE) with questions about the bill, and also asked the department to respond to the submission from Telstra. DBCDE replied on 1 May and 2 May respectively to those requests, and the replies are attached as appendices two and three.

1.4 The committee thanks those who participated in this inquiry.

Background to the bill

1.5 The bill 2008 amends the *Telecommunications Act 1997* (the Act) to provide for specified information to be provided by telecommunications carriers to the Commonwealth, so that this information can be disclosed to companies who are considering or intend to make a submission relating to the creation or development of a National Broadband Network (NBN).

1.6 The government's broadband network objective is to facilitate the roll out of a high speed network servicing 98 per cent of Australian homes and businesses which is subject to open access arrangements. The policy will involve the competitive evaluation of independent proposals by a panel of experts appointed by the government.

1.7 High quality proposals will be necessary in order to ensure a truly competitive process. To facilitate the development of such proposals it is necessary for certain information, particularly network information, which is not currently public or available through commercial sources be made available to proponents so they can accurately design and cost their proposed network.

As the owner of Australia's largest fixed customer access network – elements of which are likely to form part of any fibre-to-the-node network – Telstra is at an advantage to other potential proponents of a national broadband network if it has sole access to information that is essential for the preparation of competitive proposals. Knowledge of other non-Telstra infrastructure that could form part of a national broadband network, such as that used for backhaul, is also relevant.¹

1.8 The bill is intended to address these issues by inserting a new part 27A into the Act. Part 27A would set out a scheme for the provision of information as specified by the minister in a disallowable instrument, and for the protection of the information that is provided by the carriers. This information would then be made available under certain conditions to companies wishing to participate in the process of lodging proposals to provide new broadband services under the government's policy.

The bill

Obligation to provide information

1.9 The bill would allow the minister to make a disallowable instrument specifying particular information to be provided by specified carriers, the manner and form the information is to be supplied in and a time limit for providing it. Following the commencement of an instrument made by the minister, the specified carriers would be obliged to provide the information to an authorised Senior Executive Service officer, known as an 'authorised information officer'.

Disclosure and protection of 'protected carrier information'

1.10 The government is committed to ensuring that any information provided is not misused.

Importantly, the legislation includes strong legislative safeguards to carriers, which guard against the misuse of sensitive network information. The Bill, and any subordinate instruments ... are not intended to override and protections under the *Privacy Act 1988* for personal information.²

1.11 Information gathered under the new part 27A and provided to bidders in the process is termed 'protected carrier information'. Such information is provided to an authorised information officer. It may then be passed on to other officials assisting the process. The range of such officials, termed 'entrusted public officials', is defined in item 531B of the bill.

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

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

1.12 Division 3 of part 27A specifies that protected carrier information in the possession of an entrusted public official may not be disclosed to another person unless it is for the purpose of advising government decision making or to facilitate the preparation of a proposal.

1.13 A company may receive protected information if a designated request for proposal notice has been published and the company has notified an authorised information officer in writing that the company is considering providing a proposal in the broadband bidding process. A person who has received such protected information is termed an 'entrusted company officer'. They must not disclose the information unless it is for the purpose of preparing or varying a submission, or is contained within such a submission, unless the information has been made publicly known.

1.14 There are thus provisions in the bill that require that neither the public sector nor company officials can disclose the information beyond the circumstances set out in sections 531G, H and K. These relate primarily to the process of making and assessing bids in the broadband network tender process.

Consultation obligations under part 27A

1.15 In order to meet the government's deadline of November 2008 for a roll out of a NBN the bill contains provisions intended to minimise the potential for consultation requirements and legal action to delay the necessary steps in the process.

1.16 Authorised information officers are not required to consult with carriers prior to disclosing protected information. However, a carrier would be consulted prior to the Minister making an instrument (subsection 531(C)). The bill also contains a provision that would prevent a court ordering a stay of decision by an information officer or entrusted public official.

Nature of 'designated information'

1.17 The department, DBCDE, provided additional information on the nature of the types of information likely to be specified as 'designated information' in an instrument.

1.18 The department envisages that the information may include:

- core optical fibre transmission network information, for example locations such as towns between which optical fibre operates;
- microwave radio core transmission networks;
- location points of interconnection; and
- details about the network servicing customers, from the exchange to the premises, including:
 - locations of telephone exchanges;
 - line lengths from exchanges to pillars,;

- line lengths from pillars to homes;
- information concerning equipment in the Customer Access Network; and
- information regarding physical space in underground conduits.

1.19 An instrument could also specify information regarding the geographic extent of the area in which a network is able to provide carriage services. An instrument could also specify information regarding other types of carriage services that they offer over their customer access networks.

1.20 It is not envisaged that there would be multiple requests for information by way of making an instrument and it is anticipated that an instrument would seek information from carriers that have deployed significant network infrastructure.³

3 DBCDE, *Submission 4*, p. 2.

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**

Coalition Senators' additional comments

Coalition Senators do not oppose the passage of this legislation and welcome the recommended amendments proposed in the Committee's report. However, Coalition Senators do hold concerns relating to:

- the conduct of this inquiry;
- the effectiveness and nature of the disclosure and safeguard provisions contained within this Bill; and
- general failings of the policies and processes being applied in relation to the development of the National Broadband Network (NBN).

Conduct of this inquiry

Coalition Senators believe it is regrettable that this inquiry was conducted in the shadow of the Request for Proposals (RFP) issued by the Government, with the associated confidentiality and gag provisions that are applied to it. Indications from industry suggest this caused a level of reluctance from interested parties to making submissions to the inquiry. Concerns were held that such public comment, especially offered voluntarily, could jeopardise other commercial interests related to the RFP.

The overlapping of the introduction of this Bill with the work of the Panel of Experts, the calling for submissions on future regulatory or structural settings and the release of the RFP highlight the chaotic, shambolic and frantic approach being applied to the development of the NBN. These issues are further explored herein.

As a result of these factors limited submissions were received. This prompted the Committee to pose a number of questions to the Department of Broadband, Communications and the Digital Economy (DBCDE).

Subsequent to the lodging of these questions a late submission from Telstra was received on 24 April 2008, detailing a number of concerns with the proposed legislation and outlining possible amendments to the Bill. DBCDE was then asked to provide specific responses to the issues raised and amendments proposed by Telstra.

However, responses were not received to the two requests of DBCDE until after each of the deadlines requested by the Committee. As a consequence this information explaining key components of the legislation and responding to Telstra's concerns was received within days of the reporting deadline set by the Senate.

Coalition Senators were of the opinion that the response of DBCDE to Telstra's submission inadequately addressed all of the issues raised and that hearings were warranted to explore the issues with Telstra. Further, Coalition Senators understood that other industry experts and companies would be willing to provide evidence about the Bill and associated NBN processes if called to do so.

Given these factors and that the Committee was unable to meet the original reporting date set by the Senate anyway, Coalition Senators argued that an interim report be tabled, hearings be held and a final report lodged within eight days of the original reporting date. Government Senators rejected this move, blocked the potential for public hearings on this Bill and extended the reporting date by just two days.

After several years of attacking Coalition Senators over accountability and the conduct of Senate committees, along with countless promises from Labor's leaders to adhere to higher standards of accountability and transparency, Coalition Senators are amazed at the breathtaking hypocrisy of the Government in blocking public hearings into the forced provision of such sensitive information by private companies and the investment of billions of dollars in taxpayer funds.

Government Senators blocked public hearings and a reasonable extension to the reporting deadline citing the need to have the legislation passed during the sittings in the week beginning 12 May 2008. This is not only reflective of the hasty and rushed approach to all aspects of the NBN but also of the lack of parliamentary sittings scheduled by the Rudd Government in the first half of 2008. It highlights their avoidance of scrutiny at all levels.

Issues with the Bill

Like much of the NBN process this Bill leaves more questions unanswered than it answers. It requires for specified information to be provided to the Commonwealth by telecommunications carriers so this information can be disclosed to companies considering lodging a proposal to build the NBN. However, despite being a Bill requiring the release of specified information, it fails to actually specify what information is to be released.

Instead, such information is to be contained in a later disallowable instrument to be issued by the Minister. Consultation with telecommunications carriers on the content of the instrument is provided for under section 531(C) but Optus states in their submission to this inquiry that they are:

... very concerned the consultation period under section 531C(1) may be too short. The section proposes a mere 3 business days for consultation on the draft instrument to determine that specified information is 'designated information'. Optus proposes this section be amended to provide for 5 business days.

Commensurate with the Government's desire to rush all aspects of the NBN to suit their political purposes, even this very reasonable request for an extra two days to consider the draft instrument has been rejected out of hand. Coalition Senators urge the Government to reconsider their stance on this point.

As previously mentioned, Coalition Senators welcome the limited amendments incorporated in the report into this Bill. The three amendments strengthen the safeguards in the Bill that will hopefully ensure smooth and satisfactory provision of the information required for companies participating in the RFP process.

In addition to these amendments Coalition Senators believe the Bill should be further amended in the following terms:

- to encourage the timely and voluntary provision of information (subject to appropriate confidentiality deeds) as has been volunteered by companies such as Telstra and Optus;
- to expressly limit the scope of the instrument to requiring information necessary for the construction of the NBN and Broadband Fibre to Schools initiatives;
- strengthening the recourse against the Government or recipient parties for disclosing entities who may be damaged by the misuse of information provided by them; and
- tightening rules in relation to the destruction or return of information provided by carriers.

Coalition Senators also note the unprecedented nature of this legislation, with the DCBDE acknowledging in correspondence to the Committee that it 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.

This statement again highlights the highly interventionist nature of the NBN policies adopted by the Rudd Government, requiring unprecedented legislative powers and the significant contribution of taxpayers funds.

Development of the National Broadband Network

The development of the NBN is increasingly being criticised by telecommunications carriers, companies and commentators as a shambolic process driven by the Government's desire to appear to be fulfilling its election promise as quickly as possible, regardless of the best approaches to regulation, structural reforms or the provision of public funds.

\$4.7 billion of taxpayer funds, all of it savings meant for other purposes contained in either the Communications Fund or the Future Fund, is being dangled as the investment carrot in this process. It ignores the fact that in many areas commercial broadband services would be provided anyway, but commits public funds to such areas while ensuring that Australians living in rural or remote areas, where public subsidies to encourage infrastructure investment might be justified, will miss out altogether or be forced to wait until 2012 for broadband services.

In terms of financial management, the Government is unaware of whether it wishes to provide these funds as part of an equity arrangement where it owns shares, debentures or trust units in the project. Alternatively, it has left open the possibility funds may go towards grants for the creation of the networks, grants for the supply of the service, purchase of assets for the network or indeed any other incidental or ancillary purpose related to the NBN.

This total lack of Government direction in relation to the NBN extends to the regulatory environment that will dramatically impact on competition and pricing issues, as well as issues around structural separation. Rather than outlining what is required in these areas, the Government has invited proponents to make suggestions. Such suggestions are being made in tandem with the development of proposals, meaning a disconnect is likely to exist between the structure of many proposals and the regulatory regime eventually settled on by the Government, or that such changes could significantly benefit a particular bidder.

At a minimum, the regulatory framework should be finalised and made public as a first step. Resolution of the regulatory framework should be assisted by the Australian Competition and Consumer Commission, the Productivity Commission and Infrastructure Australia, all of whom have been sidelined in the current process. Then a request for tender could be issued, allowing companies the opportunity to bid against a known commodity and still deliver an outcome by 2012.

Failure to get these issues right might well see the Government achieve their promise of an NBN, but the question will be at what cost? A lessening of competition will result in higher access costs for Australian businesses and families, meaning the expenditure of \$4.7 billion could leave Australia worse off, not better off. Coalition Senators believe that less politically motivated haste and more sound consideration of the policy issues at stake is required by the Government.

Senator Simon Birmingham
Senator for South Australia

Senator the Hon Rod Kemp
Senator for Victoria

Senator Stephen Parry
Senator for Tasmania

Appendix 1

Submissions received

1. Australian Telecommunications Users Group (ATUG)
2. Information Economy Directorate, Department of Further Education, Employment Science and Technology, Government of South Australia
3. Department of Industry and Resources, Government of Western Australia
4. Department of Broadband, Communications and the Digital Economy
5. Telstra
6. Optus
7. NSW Department of Commerce

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.

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.