

National Broadband Network Companies Bill 2010

Telecommunications Legislation Amendment (National Broadband Network Measures – Access Arrangements) Bill 2010

Additional comments – Coalition senators

Coalition senators are concerned that these latest bills continue to undermine the government's repeated reassurances that NBN Co will provide 'wholesale only' services, and will not compete in any way whatsoever with retail service providers.

Based upon evidence given during this inquiry, we make the following comments and recommendations.

Wholesale Only [supply to the public] and [exemptions to wholesale only rule]

Coalition senators are persuaded by evidence provided during this inquiry, that clauses 10-16 of the National Broadband Network Companies Bill 2010 (in particular) would enable NBN Co to sell services directly to utilities and effectively compete at a retail level.

We find that the arguments advanced by utilities to support a continuing form of 'special treatment', are wanting. The utilities argue they are 'essential services' and are not currently required to hold a carrier licence to roll out services that are used internally. In some ways, it's not much more than saying 'we have always been special, we remain special, and you wouldn't want to change things in a way that risks your having to do without us'.

Granting the utilities wishes' would lead to far-from-desirable consequences:

- granting special exemptions that the utilities are seeking would be essentially a judgement call by the minister, leaving scope to expand to other organisations e.g. not-for-profits; and
- Retail Service Providers (RSPs) can arguably provide additional value-added services to the utilities, equally as or perhaps more, efficiently. The bill deprives the RSPs of these opportunities. As some said:

".... we do not think that the utilities generally have made a sufficient case to be treated specially. We believe that the retail service providers will want to provide services to the utilities of the types that they will want in the future. With issues

around the smart grids and smart metering that they want to rollout, we are talking about future networks, not existing infrastructure. We believe that there will be a market there for retail service providers to provide the type of service that the utilities want and that it can be done in a way where we add value to what the utilities are after. It is an area where there will be competition and therefore there should be no need for these organisations to deal directly with the NBN.”¹

Some industry representatives are comfortable with NBN Co selling services directly to utilities, as long as they don’t on-sell to third parties.²

However, we remain concerned that the bill is operationally ambiguous and in several aspects so vague in a new telecommunications framework, as to fail to prevent the NBN from engaging in ‘mission creep’ – that is, from extending beyond the wholesale market.

Services able to be provided by a carriage service provider

Some witnesses expressed concerns about the open-endedness of the express terms of clause 9, and its implications for the services able to be provided by a body who obtains a licence as a carriage service provider (CSP). They believe that a carrier or a carriage service provider should only be able to buy services directly from NBN Co for the sole purpose of on-supply, and not for its own internal use. If the bill were so amended, it would realise (in the view of these witnesses) the desirable outcome of preventing utilities or other large companies from becoming CSPs for the purpose of using services internally and to buy directly from the NBN.

“Yes, we believe that the framing of clause 9 at the moment would allow a large entity to get its own carrier licence and then source from NBN Co directly for self-supply. We see that as working around the intent of the principles of the NBN Co, which is to provide a wholesale only service”³

Cherry Picking [layer 2 bitstream services] and [restriction to layer 2 products]

In terms of “anti-cherry picking”, Coalition senators consider that forcing competitors to meet the technical specifications of the NBN when building a rival network, will hinder competition.

A distinction could be made between larger and smaller-scale competitors, otherwise all competitors will be required to upgrade or provide NBN Co level services, irrespective of their market size.

¹ Mr James Shaw, Director Government Relations, Telstra, *Committee Hansard*, 9 March 2011, pp. 11–12.

² Dr Paul Brooks, Director, Internet Society of Australia (*Committee Hansard*, 9 March 2011, p. 18.

³ Mr James Shaw, Director Government Relations, Telstra, *Committee Hansard*, 9 March 2011, pp. 11–12.

NBN Co already has a significant advantage as a result of its massive taxpayer equity contribution. Therefore, it is understandable that private competitors argue they should retain a right to access the relevant markets through building their own infrastructure. As a witness said:

“In a sense, the wholesale only aspect of the NBN Co is a conflict of interest in terms of dealing with wholesale customers while also having a retail customer base. But the monopoly aspect of it, when there is no risk of losing business to another network, could create a degree of complacency in terms of not further innovating the network because you really are not going to lose any business by not doing so, and that could be a concern. But it is still at the stage that it is now and we will not actually know whether that is the case for four, five or 10 years down the track. There are certainly many technical innovations that will come down the line over the next 10 to 20 years that we can forecast, and there is a lot of concern by service providers as to whether NBN Co will have any incentive at all to take on those improvements and that new technology if they are still trying to pay off the old stuff as part of trying to maintain their business case. We probably will not know for many years down the track whether that is an issue.”⁴

The requirement to provide NBN Co equivalent Layer 2 services and no higher would, for example, affect a business that currently installs Layer 3 services at a wholesale level which it makes available under an open access model. TransAct, for instance, argued that companies already providing services in excess of Layer 2 should be able to continue to do so, rather than being restricted to Layer 2 services after 25 November 2010. As TransAct said:

“I think given the way the bill is structured at present we would have to incur significant costs in order to comply with the current bill. If we are required to move from our layer 3 capability to a layer 2 capability and then also separate our wholesale and retail businesses, there is no question that there would be multimillions of dollars associated with having to do that.”⁵

“Once again, I think the principle that we have been articulating is pretty clear: NBN Co should not be entering into any area where there is potential for competitive alternative provision of service. We have said consistently that it should be a wholesale-only player at the layer 2 provision of services to retail service providers.”⁶

⁴ Dr Paul Brooks, Director, Internet Society of Australia *Committee Hansard*, 9 March 2011, p. 23.

⁵ Mr I. Slavich, Chief Executive Officer, TransACT *Committee Hansard*, 9 March 2011, p. 33.

⁶ Mr M. Krishnapillai, Director, Government and Corporate Affairs, Optus, *Committee Hansard*, 9 March 2011, p. 3.

Volume discounting

We will consider further the effect of the bill on non-discrimination between access seekers clauses.

Coalition senators note that ACCC evidence about the theoretical potential of volume discounts is somewhat persuasive, and we note further evidence that the ACCC has yet to be convinced to allow their application in practice.

We also acknowledge the view of NBN Co that areas of volume discounts are highly unlikely to be applied, because the ACCC will impose “high hurdles” on the practice. We further acknowledge NBN Co’s stated support for this approach.

We are disappointed that neither the ACCC nor NBN Co appear to have considered the effectiveness of the mechanisms proposed in the bill for the consideration of price discrimination, against previously ventilated proposals to amend those mechanisms.

Coalition senators will closely scrutinise the mechanisms proposed in the bill for approving price discrimination, prior to their passage, to ensure they are robust, transparent and in alignment with the stated aims of the NBN.

Privatisation [Commonwealth Ownership Provisions]

The milestones for any future privatisation of the NBN are so onerous as to suggest an intention that it will never be able to be sold.

It is essential that any future sale is subject to a Productivity Commission and Joint Parliamentary Committee review. However, any such sale should not be conditional on the sort of criteria required to be satisfied in clause 47 of the bill - for example, the NBN being considered “complete and operational” by the Communications Minister, and the Finance Minister declaring “market conditions are suitable”.

Privatisation will not necessarily result in a market monopoly scenario nor lead to a reduction in the quality of services. Rather, privatisation will add to increased infrastructure-based competition.

Timeframe to dispose of any acquired retail operations

Coalition senators are concerned about the lack of any compelling case for NBN Co to hold a controlling interest in retail operations. We believe it should be possible, as frequently occurs in commercial negotiations, for NBN Co to separate out any retail interests as part of any acquisition activities.

We will consider potential amendments to address this issue, which could again undermine the 'wholesale only' intent of the NBN.

Scrutiny [Status of NBN Co]

The Coalition has previously proposed to amend the bill so that NBN Co is taken to be a prescribed authority for the purposes of the Freedom of Information Act 1982.

This would bring NBN Co under the ambit of section 9 of the Freedom of Information Act, so it would then be an agency within the meaning of, and therefore subject to, that Act. This does not mean that every document of the NBN could be required to be produced.

Like other prescribed authorities, NBN Co could claim exemption under part IV of the Freedom of Information Act, including section 42, 'Documents subject to legal professional privilege'; section 46, 'Documents disclosure of which would be contempt of parliament or contempt of court'; section 45, 'Documents containing material obtained in confidence'; and section 47, 'Documents disclosing trade secrets or commercially valuable information'.

It is critical that NBN Co and the NBN is thoroughly accountable in this regard.

Unfortunately, the recommendation in the Chair's Report (and the amendment proposed by the Greens) has the effect of making the NBN completely immune in practical terms from the Freedom of Information Act. The Greens amendment, which we understand the government has persuaded them to put up, has the effect of exempting all documents of the NBN which can be described as being 'in relation to its commercial activities'.

Given that the NBN is a business, it has few if any activities which are other than commercial. The words 'in relation to' have been construed very broadly by courts on many occasions. If 'commercial activities' has a broad practical effect in relation to NBN Co, adding the words 'in relation to' only broadens that already broad practical effect.

The amendment that the Coalition proposes, and which the Greens did in fact support some time ago, is much more appropriate. It would result in the NBN Co being accountable, without being obliged to produce commercially confidential, trade secret, legal documents.

Recommendations

1. Ensure NBN Co remains legally defined as a prescribed authority under the Freedom of Information Act - **Scrutiny [Status of NBN Co]**
2. Strike out exemptions to wholesale-only rules for utilities and other 'essential services' in sections 10 to 16. **Wholesale Only [supply to the public] and [exemptions to wholesale only rule]**

3. Amend section 9 to ensure that a carrier or a carriage service provider (CSP) should only be able to buy services directly from NBN Co for the sole purpose of on-supply and not for its own internal use. **Wholesale Only [supply to the public] and [exemptions to wholesale only rule]**
4. Specify in explicit language that NBN's supply of wholesale communications services be restricted to Layer 2 products sold to retail service providers for the purpose of providing services to end customers. **Cherry Picking [layer 2 bitstream services] and [restriction to layer 2 products]**
5. Remove language requiring competitors wishing to build super-fast broadband networks to provide an open access network subject to ACMA technical standards and limiting them to offering only layer 2 operations. **Cherry Picking [layer 2 bitstream services] and [restriction to layer 2 products]**
6. Delete requirements for the Communications Minister to declare that the NBN is 'complete' and 'fully operational' and the Finance Minister to declare market conditions are suitable. **Privatisation [Commonwealth Ownership Provisions]**

Senator Mary Jo Fisher (Deputy Chair)

Senator the Hon Judith Troeth

Senator Simon Birmingham

Senator the Hon Ian Macdonald