

Dissenting Report by Government Senators

The Importance of Broadband

1.1 Labor Senators note that the Committee heard over and over from witnesses about the importance of Broadband infrastructure for Australia's long-term economic prosperity. It is clear from the evidence of witnesses that broadband is a critical enabling technology. It will underpin and enhance Australia's future prosperity and the living standards of all Australians.

1.2 The Majority Report argues that the Government should have commissioned a theoretical cost-benefit analysis before it embarked on this project to meet our election commitment.

1.3 Among the multitude of reports that seek to calculate the economic impact of broadband, there is a consistent 'bottom line' result – that broadband will deliver significant economic and social benefits to Australia.

1.4 Broadband will be critical for consumers. It will change and improve the way they interact in the Digital Economy, including with the use of IPTV, transferring large amounts of information quickly and enjoying cheap phone calls through Voice over IP. Over time, the need for high speed broadband to satisfy the demands of consumers will become greater and greater.

1.5 Broadband is also of critical importance to businesses, as noted in the Report in Clause 2.12. This sentiment has been echoed by Heather Ridout, CEO of the Australian Industry Group who has made it clear that the time for debate about whether Australia actually needed broadband was over. Ms Ridout has made it clear that:

The idea that it could be deferred, delayed, argued about again is not warranted.

Ms Ridout further noted that any political party that did not understand the need for the NBN should:

...get themselves into the 21st century.

1.6 By improving the efficiency of infrastructure utilisation, service delivery and transportation, it is also generally accepted that broadband can help reduce carbon emissions. In fact, a recent study commissioned by Telstra and undertaken by independent climate change analyst, Climate Risk; *Towards a High-Bandwidth, Low-Carbon Future: Telecommunications-based Opportunities to Reduce Greenhouse Gas Emissions*, found that:

Telecommunications networks can help reduce Australia's greenhouse gas emissions by almost five per cent by 2015 and deliver up to \$6.6 billion a year in financial savings for Australian businesses and households.

1.7 As noted on the Government's Digital Education Revolution website:

Access to reliable, affordable, high speed broadband connections will strengthen the capacity of students, parents, teachers and the wider community to communicate, collaborate and access resources across system, State/Territory and national boundaries.¹

1.8 High speed broadband will also enable e-health applications such as remote monitoring and consultations to become a reality. As noted on the National E-health transition authority:

Electronic health information (or e-health) systems that can securely and efficiently exchange data can significantly improve how important clinical and administrative information is communicated between healthcare professionals. As a result, e-health systems have the potential to unlock substantially greater quality, safety and efficiency benefits.²

1.9 Australia's broadband performance has fallen dramatically over the past few years.

1.10 The latest OECD figures for its 30 member countries rank Australia 16th in broadband take up levels and 10th on most expensive subscription prices.

1.11 Australian Bureau of Statistics figures, released in 2008 showed the percentage of homes with broadband by State as;

- South Australia 30%
- Tasmania 29%
- Northern Territory 32%
- Western Australia 41%
- New South Wales 42%
- Victoria 42%
- Queensland 41%
- ACT 53%

1.12 Further, in an interview with Alan Kohler on 16 July 2008, Kate McKenzie of Telstra Wholesale stated:

I guess one of the important motivators for the building of the FTTN (fibre-to-the-node) network is that at the moment only about 20 per cent of

1 www.digitaleducationrevolution.gov.au

2 <http://www.nehta.gov.au>

customers can actually get 20 megabytes of speed. The other two thirds in metropolitan regions can't even get 12 megabytes and more than 50 per cent of people in the country can't get 12 megabytes.

1.13 Similar evidence was provided by Terria (formerly FANOC) in its 2007 submission in support of its Special Access Undertaking. FANOC stated that a speed of 12 Mbps is achievable using ADSL2+ at about 1.5 km from an exchange. Beyond 1.5 km the customer speeds are expected to drop below 12 Mbps. According to FANOC, approximately 33 per cent of the metropolitan population live within 1.5 km of a Telstra exchange, and are therefore theoretically capable of receiving ADSL2+ services with a speed of around 12 Mbps. The remaining 67 per cent of metropolitan customers require fibre to be extended beyond the current exchange locations to push DSL closer to them.

1.14 Furthermore, Government Senators note the comments by David Quilty (Telstra) to the Senate Select Committee on 11 November 2008 in which he stated:

...in terms of those exchange areas which are ADSL enabled, less than 50 per cent of the customers—the households and businesses—in those exchange areas can get the full speed benefits that ADSL would provide. Primarily, that is due to the distance limitations. To an extent, it is also due to the other matters that you raised. I would hesitate to guess, but in terms of those other matters it would be less than 10 per cent. Again, the fundamental point here is that ADSL is distance limited and it is also a 'best endeavours' broadband solution. If you read the small print in your contract it always says 'up to eight megabits' or 'up to 20 megabits' if you take the full speed, whereas if we move to a network where fibre is pushed to the node there is the ability to provide guaranteed speeds. I think that is a fundamental proposition in terms of delivering the sorts of value added services that everyone is going to take for granted in a decade's time.

Howard Government's Broadband Legacy

1.15 For the 11 ½ years of its duration, the Howard Government had only one telecommunications policy – the privatisation of Telstra. Every other policy issue in the sector was secondary to this obsession and open to sacrifice in service of the then Government's larger aim. In this context, the Howard Government took a short-term, politically motivated approach to broadband infrastructure investment and telecommunications policy more generally. Where telecommunications infrastructure programs were developed under the Howard Government, more often than not they were designed to satisfy a political constituency needed to support privatisation rather than to resolve a policy problem facing the Australian people. Where regulatory reforms were undertaken, the Howard Government was always careful to ensure that these reforms did not impede the larger goal of privatisation.

1.16 As a result, the Howard Government's telecommunications policies were focused on the short-term; broadband bandaids for infrastructure blackspots and uncoordinated pork barrelling for rural and regional Australia. The Australian people

saw 18 failed policies under the Howard Government that may have achieved the Government's political aims, but produced little in the way of substantive outcomes and left Australia trailing our international peers.

1.17 Importantly, the Howard Government proved completely incapable of resolving regulatory impasses to infrastructure investment. In 2005, after discussions broke down with the ACCC, the Howard Government entered into bilateral, 'closed door' negotiations with Telstra to build a fibre to the node (FTTN) network. They were unable to reach an outcome.

1.18 The Howard Government was also unable to provide regulatory certainty to Telstra that would have enabled it to rollout ADSL 2+ broadband in a number of exchanges across Australia.

1.19 In February 2008, following an assurance from the Australian Competition and Consumer Commission (ACCC), the Minister for Broadband, Communications and the Digital Economy was able to conclude that there was a high degree of regulatory certainty in relation to the ACCC's approach to wholesale ADSL2+, and this position was expressed to Telstra. As a result Telstra enabled ADSL 2+ technology in an additional 900 local exchanges serving 2.4 million households across Australia.

The Communications Fund

1.20 Clause 2.79 of the Majority Report notes that the Howard Government established the \$2 billion Communications Fund that made available \$133 million per year to improve telecommunications in rural and regional Australia.

1.21 The Communications Fund is perhaps the best example of the Howard Government's short-term, politically motivated approach to telecommunications. The Communications Fund was established not to address any identified policy need. The Communications Fund was nothing more than a hastily cobbled together slush fund whose sole purpose was to ensure Senate support for the sale of Telstra.

1.22 The absence of policy rationale for the Communications Fund is clear from the public statements of the Government and Senators at the time. On the 7th August 2005 the then Minister for Communications, Senator Coonan questioned the need for the fund noting:

The ... most important thing is you have to identify an area of unmet need. You can't, I would think, spend more than \$100 million a year, no matter how you tried. So the idea of some large fund for some unspecified purposes, I think, has got a very long way to go in debate.

1.23 Yet despite these comments, just ten days later, the Minister announced the establishment of the Communications Fund. In effect, the policy rationale and administrative arrangements for a then unprecedented, \$2 billion perpetual fund were developed by the then Government inside of 10 days.

1.24 As was outlined in the Labor Senators' Dissenting Report in the *Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills*:

Officials from the department made clear that no independent, needs based, modelling was done to determine the appropriate size of the fund. The touted \$2 billion is just a number that the Government persuaded the National Party to accept.

No evidence was presented to the inquiry to suggest that a \$2 billion fund will be sufficient to address the future telecommunications needs of rural and regional Australia.

1.25 Compounding this lack of policy justification, in response to Opposition criticism of this process at the time, Senator Joyce issued a press release in which he stated that he was '*happy*' for the Communications Fund to be described as a '*slush fund*'.

1.26 Yet another ANAO audit into the actions of the previous government in the establishment of this fund recently found that as a result of the compressed timetable for the establishment of the fund, there was no opportunity for the then government to obtain independent, expert advice on the investment strategy for the fund. In fact, the Investment Strategy for the fund was developed on the run on the basis of Ministerial statements made in the Senate during the committee stage of the bill. Further, during this period, the Minister ignored two warnings from Treasury regarding the lack of a clear investment strategy for the fund.

1.27 As a result of this lack of preparatory work, the final Investment Strategy for the Fund was not complete until June 2007. This was more than 15 months after the initial six month term deposit in which the \$2 billion principle was parked after the passage of the legislation had expired. Even at this stage, the Department spent only \$10,000 on external investment advice for a perpetual fund worth \$2 billion.

1.28 The Communications Fund is a prime example of the politically motivated, short term nature of telecommunications policy making under the Howard Government. This approach failed to deliver for Australians, particularly those in rural and regional Australia. As is noted elsewhere in the report, the National Broadband Network (NBN) provides an opportunity to take a new approach to telecommunications infrastructure in Australia; one focused on long-term outcomes rather than on short term political fixes.

1.29 In light of this, Government Senators note the establishment of the Building Australia Fund (BAF). \$4.7 billion will be drawn from the BAF to fund the NBN. In addition, the BAF will be able to be drawn up for future telecommunications infrastructure projects.

Howard Government's OPEL solution

1.30 Clauses 1.17 – 1.30 of the Majority Report of the Senate Select Committee outlines the establishment of the OPEL project by the Howard Government and the Rudd Government's decision to cancel this project.

1.31 The reality of the OPEL project differs substantially from the account provided by the Majority Report. The origins of the OPEL project lie in the Howard Government's efforts to ram through the privatisation of Telstra in August 2005. At the time of the introduction of legislation to facilitate the full sale of Telstra, the government also introduced the Connect Australia package of spending programs with the objective of ensuring Senate support for the sale. The \$600 million Broadband Connect policy was one of a number of policies introduced as part of this package. It was a program designed to fix a political problem rather than a policy problem.

1.32 When a year later, in September 2006, the then Minister for Communications, Helen Coonan announced the release of the Broadband Connect Program guidelines, she stated that under the program the Government:

...will invest up to \$600 million in rural, regional and remote Australia to encourage private sector rollouts of broadband infrastructure.

1.33 However, soon after the Australian Labor Party announced its policy to facilitate the roll out of a National Broadband Network, public speculation emerged that the Howard Government intended to increase the amount of funding allocated to this project.

1.34 This speculation was subsequently confirmed when the Howard Government executed a \$958 million Funding Agreement with OPEL Networks Pty Ltd, a joint venture between Optus Networks Pty Ltd and Elders Telecommunications Infrastructure Pty Ltd, for the provision of a broadband network covering identified under-served areas and premises across regional Australia.

1.35 At this time, the then Shadow Minister for Communications, Senator Stephen Conroy contacted the Australian National Audit Office regarding the circumstances of the \$358 million increase in funding under the Broadband Connect Process.

1.36 In response to this correspondence, the Australian National Audit Office (ANAO) undertook a 'preliminary review' into the selection of the preferred applicant under the Broadband Connect Program and found that:

DCITA issued two clarifications to the Guidelines dated 3 November and 24 November 2006. Neither clarification mentioned the potential availability of additional funds beyond \$600 million.

Departmental records and advice indicate that one potential applicant sought information from DCITA on whether there could be more funding made available to BCIP. Minutes of a briefing with this potential applicant in November 2006 noted that DCITA:

‘could not comment on whether more than \$600 million could be made available, however, the Government may commit further funds if it believes additional funding is justified and will bring significant benefits.’

1.37 The ANAO went on to state that:

In our view, it would have been prudent for DCITA to inform all potential applicants of its advice on whether additional funding could be made available under the program. This would be consistent with sound practice that recognises the need to provide consistent information to all applicants, and the approach DCITA had adopted for other matters of clarification in relation to this program.

The possibility that the Government may commit additional funds to the program if it believed that additional funding was justified and would bring significant benefits, may have influenced some potential applicants and applications.

1.38 While the ANAO ultimately found that the Broadband Connect guidelines were broad enough to allow the Government to act in this way, the flaws in the Broadband Connect process were obvious.

1.39 In response to these flaws, in August 2007, Telstra, an unsuccessful proponent in the Broadband Connect process commenced legal action in the Federal Court against the then Minister, Senator Helen Coonan, seeking disclosure of the documents upon which the former Minister based her decision to award the Broadband Connect contract to OPEL.

1.40 Prior to the 2007 Federal Election, the ALP publicly committed to honouring the contract between the Commonwealth and OPEL according to its terms.

1.41 A precondition of the funding agreement was that OPEL undertake testing and mapping to substantiate the service coverage set out in its proposal. In particular, OPEL was required to confirm its proposal would provide coverage reasonably equivalent to 90% of under-served premises identified by the then Department of Communications, Information Technology and the Arts. OPEL's testing was verified by the Australian Communications and Media Authority and Enex TestLab.

1.42 OPEL Networks' Implementation Plan, submitted to the Department of Broadband, Communications and the Digital Economy (DBCDE) on January 9, failed to meet the terms of a contract made with the previous Government. The assessment found that OPEL did not achieve the required service coverage. The OPEL network would cover only 72% of identified under-served premises.

1.43 On the basis of DBCDE's assessment, the Government determined that OPEL's Implementation Plan did not satisfy the condition precedent of the funding agreement, and as a result the contract was been terminated.

1.44 Government Senators note that this was not a political decision. OPEL networks would cover only 72% of under-served premises identified by the Department of Broadband, Communications and the Digital Economy. It would have been fiscally irresponsible for the Government to sign off on a \$958 million contract that did not meet its terms.

The Australian Broadband Guarantee

1.45 Clause 1.21 (c) of the Majority Report notes that a further element of the Howard Government's Australia Connected package, of which the OPEL project was the most prominent aspect was support for:

...the Australian Broadband Guarantee, a safety net entitling Australians living in the most remote or difficult locations to a broadband subsidy of \$2750 per household.

1.46 Unfortunately for Australians in rural and regional areas, this commitment was the shortest of the Howard Government's short term broadband policies. In fact, in the lead up to the 2007 Federal Election the former Howard Government made no commitment to continue supporting the Australian Broadband Guarantee beyond June 2009.

1.47 As is noted in the Majority Report it was up to the Rudd Government to commit \$270.7 million to the Australian Broadband Guarantee over the next four years to fund the program until 2012.

1.48 Moreover, in July 2008, the Rudd Government further revised the program guidelines for the ABG to improve the level of service consumers receive under this program. For example, the minimum download cap was increased from 1G to 3G per month, and registered proponents were required to introduce measures to ensure that consumers did not inadvertently receive 'bill shock' if they exceeded this download cap in any one month.

The Howard Government's fibre to the node solution

1.49 Clause 1.21 (b) of the Majority Report notes another aspect of the Howard Government's 'Australia Connected' policy, namely:

...a new commercial fibre optic network, facilitating a fibre network build in **cities and larger regional centres** [bold added]

1.50 As with the other elements of the Australia Connected policy, there was less to this promise than meets the eye.

1.51 The former Government's broadband policy for a new commercial fibre optic network was outlined in a press release on 18 June 2007 which stated:

The Government will also conduct an open and competitive bids process and legislate to enable a new high speed broadband network for built-up areas, without the need for taxpayer funding...

...the Government's decision to proceed with a competitive bids process reflected the enhanced interest of commercial players that had recently become evident...

To facilitate this process, the Government will establish an Expert Taskforce to ensure an open and transparent process for assessment of bids to build a fibre-to-the-node network. Following an open and transparent examination, the Government will legislate to ensure the nation is getting a top class service...

1.52 In certain ways the approach the former Government took to deploy a high speed fibre optic network was similar to the approach taken by the Australian Labor Party in opposition and now in Government.

1.53 The former Government appointed an arms length independent 'Expert Taskforce' to assess proposals from the private sector.

1.54 The Expert Taskforce was to assess proposals and provide a recommendation to the relevant Minister.

1.55 In September 2007, the Expert Taskforce released Guidelines which invited proponents to submit proposals, including the regulatory or legislative changes that would be necessary for them to build the FTTN. The proposed legislative changes were left completely open to proponents to suggest, and there was no forward-looking regulatory framework set out by the Government, or the Expert Taskforce. In its report to the former Minister, the Expert Taskforce revealed its thinking on this issue:³

Consistent with the general comments above about not being prescriptive, the Expert Taskforce has taken the view that proponents should have the flexibility to develop proposals as they see fit, knowing they will be assessed competitively against the stated objectives and assessment criteria. The proposed final Guidelines do not therefore express a preference for a vertically-integrated model or one that structurally-separates wholesale and retail operations. That said, a key element of the Expert Taskforce's assessment will be the extent to which a proposal provides for open and non discriminatory access to new network infrastructure and services, in order to promote efficiency and competition. The Expert Taskforce is interested in how this will be achieved. While the proposed final Guidelines do not preclude proponents from putting forward proposals within the parameters of the current legislative framework the Expert Taskforce expects that the investment in new broadband infrastructure and services will be facilitated by the introduction of new legislative and regulatory arrangements.

1.56 However, in other key ways, the approach by the former Government under this process was significantly different to the Rudd Government's approach.

3 Report By The Expert Taskforce On Its Final Guidelines And Public Consultation On Its Draft Guidelines For High Speed Broadband Network Infrastructure Proposals, paragraph 28, September 2007.

1.57 The former Government's Expert Taskforce Guidelines only called for an FTTN build in '*capital cities and major regional centres*', although what constituted a 'major regional centre' or where the boundaries of 'capital cities' ended or was never defined. In effect, the Howard government had decided to entrench two tiers of telecommunications services throughout Australia; a fibre based service for the capital cities and a wireless based service for everyone else.

1.58 In contrast and as noted in the Majority Report, the Rudd Government has made a commitment to rollout a high speed fibre optic network to 98% of Australian homes and businesses. This commitment is reflected in the Request for Proposals (RFP) for the National Broadband Network (NBN).

1.59 The former Government's Expert Taskforce Guidelines did not set explicit objectives for a benchmark minimum speed that the new fibre network should offer. Instead, their Guidelines said in this context that (paragraph 3.13) '*proposals should produce better outcomes than are currently generally available*', *although the speeds that were 'currently generally available' were never precisely defined to provide a benchmark.*

1.60 In contrast, the Rudd Government has set a clear objective of minimum 12 Mbps downlink speeds for the NBN, which proponents have been invited to meet or exceed within the framework of a competitive assessment process. The Rudd Government has also recognised the importance of 'uplink' speeds in the RFP as a key objective is that the NBN will support symmetric applications like video-conferencing.

1.61 The former Government's Expert Taskforce Guidelines did not include any mechanism for ensuring that potential proponents had access to the necessary 'network information' required to prepare a credible and robust proposal. Despite most of this information residing with one potential proponent (Telstra), their Expert Taskforce was satisfied that proponents would be able to prepare proposals '*on the basis of clearly articulated assumptions and/or information that is public, commercially available, or otherwise available to them...*'.⁴ In other words, proponents were expected to guess, and proponents with more information had an inherent advantage before the process even started

1.62 In contrast, the Rudd Government's commitment to a genuinely competitive, open, fair process was demonstrated by its decision to pass legislation to ensure that all proponents would have access to necessary network information required to prepare and cost a robust proposal. In determining the necessary information set, the Rudd Government consulted the industry as well as relying on the advice of its Expert Panel as well as its other specialist advisers. This information was handed over the

4 Report By The Expert Taskforce On Its Final Guidelines And Public Consultation On Its Draft Guidelines For High Speed Broadband Network Infrastructure Proposals, paragraph 19, September 2007.

pre-qualified proponents on 3 September 2008, and from this date proponents were given 12 weeks to finalise their proposals.

1.63 The former Government's Expert Taskforce Guidelines did not provide any explicit guidance on the role that the ACCC would play in the assessment of proposals. Indeed, the only point at which the ACCC was mentioned in the Guidelines was to state (paragraph 5.7) that the Expert Taskforce:

...may assess proposals with the assistance of relevant Australian Government departments and agencies, including the Australian Communications and Media Authority and the Australian Competition and Consumer Commission.

There was no commitment that the ACCC would have received proposals for their assessment.

1.64 In contrast, the Rudd Government's RFP sets out a clear role for the ACCC. The RFP states that the ACCC will receive proposals; conduct an individual and comparative assessment of them within the areas of its expertise; and provide a report to the Expert Panel for their consideration. The RFP also states that the ACCC has an ongoing advisory role throughout the process to assist the Expert Panel.

The National Broadband Network Process

1.65 As noted in the Majority Report, as part of its election commitment, the Rudd Government has a stated goal to improve broadband opportunities for all Australians. It has committed to invest up to \$4.7 billion and consider regulatory changes for a National Broadband Network providing a minimum 12 Mbps to 98 per cent of homes and businesses.

1.66 The National Broadband Network will set the foundation for Australia's future economic productivity and prosperity. The National Broadband Network is one of the largest infrastructure investments undertaken by any Australian Government. It is a vital building block for our participation in the future digital economy.

1.67 As noted in Clause 1.31 of the Majority Report, on April 11, the Government released the formal Request for Proposals for the NBN. While Clause 1.31 canvases some of the objectives of the NBN, in fact, the RFP contains 18 clear objectives for the NBN determined by the Government. These objectives are set out in Attachment A.

1.68 The RFP process was specifically designed by the Government to maximise competitive tension between potential proponents in order to achieve the best outcome for Australians and the best use of \$4.7 billion in taxpayer funds. In light of this, the RFP does not mandate the forward looking regulatory settings that will apply. In this way, the NBN process is focused on outcomes, rather than prescribing specific mechanisms for achieving these outcomes. The RFP retains flexibility to allow

proponents to put forward innovative proposals for meeting the government's objectives. As the Chairman of Terria, Michael Egan has noted:

Despite some initial scepticism on my own part, I now think that Senator Conroy got it right. There is nothing like competition to make bidders sharpen their pencils.

Likewise, by setting objectives rather than hard and fast requirements, Conroy has forced proponents to put their thinking caps on to come up with the best overall solutions.

1.69 The strong response from industry proponents to the RFP process is a vindication of the Government's fair and open process that has produced substantial competitive tension.

1.70 Six proponents have made public statements confirming they have submitted proposals to the RFP process. Acacia, Axia, Optus and Telstra have confirmed they have submitted a proposal to build a national broadband network. The Tasmanian Government and TransACT have submitted builds to build high speed broadband networks in Tasmania and the ACT respectively.

1.71 As a result of this competitive tension, the Government is now better placed to ensure that the NBN process results in the best possible outcome for Australians.

1.72 The Government's independent Panel of Experts, its specialist advisers and the Australian Competition and Consumer Commission are assessing the proposals. The ACCC is expected to provide a report to the Expert Panel in January. The Expert Panel will provide a report to the Minister by late January.

1.73 Clause 2.126 questions the time the ACCC to view bids. Government Senators note that the ACCC confirmed to the committee that it would be able to perform its role in the process within that time frame.

1.74 In contrast, we can compare the previous Government's Expert Taskforce Guidelines where the ACCC itself was not even assured of having a role in the assessment process.

Public Consultation

1.75 Through the public submission process on regulatory issues relating to the NBN, the Government actively encouraged public debate.

1.76 Clause 1.41 of the Majority Report notes that the Government invited industry and public interest groups to provide submissions on regulatory issues associated with the National Broadband Network, including appropriate regulatory arrangements and consumer safeguards. Over 80 submissions were received and made available to inform proponents when formulating proposals to build and operate the National Broadband Network. The submissions are also being considered by the Department, its Specialist Advisers as well as the Expert Panel. Copies of the submissions are publicly available online at: www.dbcde.gov.au/regulatorysubmissions.

1.77 As noted in Clause 1.42 of the Majority Report the Government also called for submissions on policy and funding initiatives to provide enhanced broadband to rural and remote areas. The submissions were considered by the Regional Telecommunications Independent Review Committee, led by Dr Bill Glasson AO, who provided a comprehensive report to Government in September. The report was tabled in Parliament on October 15, and is publicly available online at: www.rtirc.gov.au. The submissions on policy and funding initiatives to provide enhanced broadband to rural and remote areas are also being considered by the Government in determining appropriate options to improve telecommunications in rural and remote areas of Australia. Copies of the submissions are available online at: www.dbcde.gov.au/remotebroadband.

1.78 Clause 2.115 incorrectly implies that the ACCC or Panel of Experts report will not be published. Government Senators note that the Minister has made it clear that, subject to legal advice, both reports will be made publicly available.

1.79 Clauses 2.115 and 2.118 of the Report incorrectly implies that there will be no public scrutiny of the regulatory changes resulting from the NBN process. As the Minister has made clear, changes to the telecommunications regulatory regime will undergo Parliamentary scrutiny in the same way as any other bill.

1.80 In this context, Government Senators further note that the former Government provided absolutely no opportunity for public scrutiny of regulatory issues including wholesale terms and conditions during its negotiations for the \$958 million Broadband Connect program.

Coverage of the NBN

1.81 The RFP clearly states an objective that the NBN project should establish a national broadband network that *'covers 98 per cent of Australian homes and businesses'* and that *'this figure is to be taken as the national aggregate of homes and businesses at the end of the roll-out period.'*

1.82 The former Government made no commitment as to how far fibre would extend under their policies. In fact, they were happy to entrench a two tier system by publicly stating that fibre would reach only to *'capital cities and major regional centres'*.

1.83 The previous Government, and the current Opposition frequently claim that the OPEL project would cover 99 per cent Australians. In fact, as recently as 26 November, Senator Minchin claimed in a media release that OPEL:

...would have resulted in 99 per cent of Australians having access to affordable high speed broadband services by the middle of 2009.

1.84 Not to be outdone, the Leader of the National Party, Warren Truss claimed in Parliament as recently as the 25th November that the Howard government would have delivered broadband of ‘*up to 50 mbps*’ to ‘*100% of the population*’!

1.85 Government Senators note that the 99 per cent coverage to which Senator Minchin refers to the **combination** of packages put forward in the Australia Connected Package that is outlined in Clause 1.21 of the Majority Report. This was confirmed in a June 18 2007 press statement by the former Minister for Communications that stated:

The centrepiece of **Australia Connected** is the immediate rollout of a new, independent, competitive and state of the art national broadband network that will extend high speed services out to 99 per cent of the population and provide speeds of 12 megabits per second by mid 2009.” (underline added)

1.86 Government Senators note, given that the former Government made no commitment as to how far their FTTN would extend, it is quite possible that there would have been a shortfall between the coverage of the FTTN and the OPEL Network.

1.87 It has always been open for proponents to exceed the objectives set out in the RFP. To this end, Government Senators note that the public statements of a range of proponents indicate that the Government has received proposals offering broadband speeds of up to 90 Mbps. Government Senators also note that a public statement of one proponent exceeds the Government objective of 98 per cent coverage. Government Senators finally note that all proposals will be assessed by the Expert Panel against the RFP.

1.88 The Australian Broadband Guarantee currently enables Australians who do not currently have access to metro-comparable broadband services or who will live outside the 98% NBN footprint to have access to a subsidized broadband service. Information about the ABG is available at www.dbcde.gov.au.

1.89 Clause 2.90 notes that:

...the committee heard calls for the \$4.7 billion to be targeted to areas that are currently under serviced, rather than fund a fibre upgrade to urban and other areas that are already able to access broadband

1.90 The RFP clearly states an objective for the NBN to reach 98 per cent of Australian homes and businesses. As at 30 June 2006, 63.2 per cent of Australia's population lived in the state and territory capital cities, thus the NBN will cover a significant portion of people living rural and regional Australia.

Regulatory Issues

1.91 Government Senators agree with the sentiment expressed in the Majority Report that the NBN provides an opportunity to address the failings of the current regulatory regime implemented by the former Government.

1.92 In particular, Government Senators agree that Clause 3.38 notes that the RFP addresses common principles including:

...facilitating competition through open access arrangements, and ensuring equivalence of price and non-price terms and conditions.

1.93 Government Senators note that the RFP contains a clear objective that the NBN will be a network that:

...facilitates competition through open access arrangements that ensure equivalence of price and non-price terms and conditions, and provide scope for access seekers to differentiate their product offerings.

1.94 Furthermore the RFP states:

The Government is therefore determined to ensure that appropriate open access arrangements are in place to promote competition and ensure efficient investment. In this context it will be important to ensure that access is provided on equivalent price and non-price terms and conditions.

Proponents should submit their proposed arrangements for ensuring open access to the NBN, including measures or models to ensure that access is provided on equivalent price and non-price terms and conditions. If a Proponent proposes to supply both wholesale and retail services it should demonstrate what structural measures or models it proposes be put in place and maintained to prevent inappropriate self-preferential treatment and ensure that effective open access is achieved on the terms required by the Commonwealth.

1.95 Clause 2.60 of the Majority Report incorrectly notes that potential NBN proponents should '*keep in mind*' the objective relating to open access. This ignores the fact that the RFP makes it clear that proposals will be assessed against the 18 objectives and the 6 criterion within the framework of a competitive assessment process. In this regard, the RFP provides that:

The evaluation process is outlined at section 10 of this RFP. Within the framework of an overarching value-for-money assessment, the evaluation criteria against which Proposals will be assessed are:

1. the extent to which the Proposal meets the Commonwealth's objectives for the NBN project (as set out in clause 1.3);
2. the capacity of the Proponent to roll-out, maintain, upgrade and operate the network;
3. the nature, scope and impact of any legislative and/or regulatory changes that are necessary to facilitate the Proposal;
4. the cost to the Commonwealth of the Proposal;
5. the acceptability to the Commonwealth of the contract terms and conditions proposed by the Proponent and the extent to which the Proposal departs from the Commonwealth's notified commercial terms (if any); and
6. the extent of the Proponent's compliance with the RFP.

1.96 Government Senators note that the former Government took effectively the same approach as the Rudd Government on the issue of ‘*open access*’ and on being non-prescriptive on the set of regulatory arrangements that will eventually achieve it.

1.97 Paragraph 3.23 of the previous Government’s Expert Task force Guidelines stated that:

Open access is typically linked with non-discriminatory access. Open and non-discriminatory access could involve the network operator providing access seekers with ease of interconnection to its network at convenient sites on a timely basis (including access to necessary network information and operational support systems) and provision of access and other wholesale services.

1.98 Government Senators note, as discussed in the section of the report entitled *The Howard Government’s fibre to the node solution* that the former Government remained non-prescriptive on regulatory issues, including the definition of open access.

Rollout of the NBN

1.99 The Rudd Government took the initiative in the RFP of raising the issue of whether proponents were able to focus the early phases of the progressive NBN rollout on areas that cannot currently access high speed broadband.

1.100 Paragraph 1.5.5 of the RFP for the NBN states:

Proponents should indicate the extent to which Proposals are able to prioritise areas that cannot currently access minimum speeds of 12 Mbps.

1.101 Government Senators note that from the evidence considered in this inquiry, it is not just people in regional Australia that are having trouble accessing high speed broadband. The Committee also heard that many people in metropolitan Australia are currently prevented from accessing high speed broadband for many varied reasons, including the existence of broadband blocking technologies such as Pair Gain, the degradation of the copper connection to their house or the fact that they simply live too far away from the exchange building.

1.102 Government Senators further note that it is ironic that members of the former Government would now be such strong supporters of a roll-in strategy, whereas the deployment of the NBN is mandated from the under-served areas as a first priority. In many areas, the issue of ‘roll-out’ versus ‘roll-in’ was not a problem faced by the previous Government because their fibre based network was never anticipated to extend beyond the capital cities and major regional centres.

1.103 Government Senators welcome the sentiment in clause 4.26 that states:

the Government should not rely on ad hoc funding programs to prop up the provision of what is now seen as an essential service...

1.104 The Report fails to note that the Government's RFP addresses migration to the NBN. Clause 1.5.13 of the RFP states that

The Government will need to be assured that existing retail customers will experience no or minimal disruption to their services, and also that the migration of wholesale customers will not be subject to anti-competitive delays or processing timetables. Proponents should ensure that equivalent (or superior) services to those that are currently available can be offered to all existing customers.

1.105 Clause 1.4.6 of Schedule 2 of the RFP requests proponents to describe in detail arrangements to migrate existing wholesale services and customers to the NBN, and the RFP also includes risk of migration for wholesale customers within its risk assessment framework (see p. 39 of Schedule 2) .

Technology

1.106 The Government's RFP includes a clear objective that the NBN is rolled out using fibre to the node or fibre to the premise infrastructure.

1.107 Government Senators note that the claimed maximum download speeds for wireless broadband technologies, e.g. 14.4 Mbps are in fact shared between multiple users. In other words, the more users on the system the slower the user experience.

1.108 Government Senators acknowledge that wireless technologies depend on fibre backhaul, which has far superior capacity to support large amounts of data.

1.109 Government Senators note that Clause 4.49 of the Majority Report is incorrect. Clause 9.3.1 of the RFP allows potential NBN proponents to propose a state-based solution:

The Commonwealth may consider stand-alone State or Territory-based Proposals where any such Proposal is assessed as assisting the Commonwealth to achieve an outcome which best satisfies the Commonwealth's stated evaluation criteria including its overall NBN Project objectives. Such Proposals:

1. should provide sufficient information to satisfy the Schedule of Required Information;
2. must meet the conditions for participation specified in clause 10.9; and
3. should identify how a stand-alone State or Territory-based solution will contribute to meeting the Commonwealth's objective of achieving coverage for 98 per cent of Australian homes and businesses."

Contradictions in Recommendations of Majority Report

1.110 Government Senators also note a series of internal inconsistencies between the recommendations of the Majority Report. These contradictions are characteristic of the desire for Opposition Senators to ‘walk both sides of the street’ throughout this inquiry.

1.111 On the one hand, Opposition Senators claim to support the need for broadband infrastructure investment in Australia, while on the other hand they have done everything possible to obstruct and undermine the Government’s NBN process.

1.112 Opposition Senators claim to want broadband infrastructure to be speedily delivered to the Australian public, then insist that the NBN process ought to be delayed by yet another round of public consultation.

1.113 On the one hand, clause 2.127 of the Report notes:

The committee questions the appropriateness of the timeline for the evaluation of the RFP, believing it will not permit the necessary level of scrutiny by either the Expert Panel or the ACCC to select the successful proponent for the NBN.

1.114 Similarly, clause 3.99 notes:

Firstly there is the criticism that the timeframe not only for the assessment of proposals, but for the legislative and parliamentary processes required to make the changes to the regulations and legislation, is inadequate.

1.115 Yet, clause 3.123 notes:

The committee believes that it is in the interest of the government, the industry and the Australian people to ensure that delays to the timeframe for the implementation of the NBN are kept to a minimum.

Absence of Consumer issues in Majority Report

1.116 Government Senators also note with disappointment the fact that the Majority report fails to address the importance of consumer concerns to the NBN.

1.117 In this regard, Government Senators note the establishment of ACCAN which will be funded under section 593 of the *Telecommunications Act 1997*. It will commence operations as the peak communications consumer body representing the interests of communications consumers from 1 July 2009.

1.118 Government Senators also note that several consumer organisations responded to the Government’s public invitation for submissions on the NBN, including the Australian Telecommunications Users’ Group and Telecommunications Disability Consumer Representation (TEDICORE, a project of the Australian Federation of Disability Organisations), and a number of organisations which have representation on

the founding board of ACCAN such as the Internet Society of Australia and the Consumers' Telecommunications Network. As detailed in the NBN RFP (clause 10.6.2), the Panel of Experts will be able to have regard to the regulatory submissions in its evaluation of proposals.

1.119 Government Senators further note that the NBN RFP contains a number of clauses that affect consumers. In particular, Clause 1.3 of the RFP clearly sets out the Commonwealth's 18 objectives to establish a national broadband network that, amongst other things:

- enables uniform retail prices on a national basis;
- continues to promote the long-term interests of end-users;
- facilitates competition through open access arrangements that ensure equivalence of price and non-price terms and conditions, and provide scope for access seekers to differentiate their product offerings;
- enables low access prices that reflect underlying costs while allowing Proponents to earn a rate of return on their investment commensurate with the risk of the project; and
- provides benefits to consumers by providing choice to run applications, use services and connect devices at affordable prices;

1.120 Clauses 1.5.10 - 1.5.23 of the RFP provide guidance in relation services, competition and open access, including the long-term interests of end-users and pricing. In particular, clause 1.5.12 states:

Proponents should outline how consumers will be able to run applications, use services and connect devices at affordable prices. Proponents should outline the type of retail services that could be offered, for both business and residential consumers. The Commonwealth expects that consumers will enjoy affordable retail prices for NBN services, but also notes that services need to be priced so they are economically viable.

1.121 As indicated in clause 10.3.2, Proposals will be assessed by the Panel of Experts against the evaluation criteria specified in the RFP to identify the Proposal or Proposals that represent the best value for money. The evaluation against criterion 1 will involve an assessment of the extent to which a Proposal meets the Commonwealth's objectives for the NBN process as set out in clause 1.3.

1.122 As indicated in clause 10.1.3 of the RFP, the value for money assessment of Proposals includes the overall costs and benefits of the Proposal (including long-term costs and benefits) to the Australian community as a whole.

1.123 Section 10.4 of the RFP outlines the role of the ACCC in the NBN process. Clause 10.4.2 states:

The ACCC will provide the Panel with ongoing advice on Proposals, including 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.

1.124 Clause 10.4.2 of the RFP further states that the ACCC will provide a written report to the Panel. Clause 10.4.3 states that the Panel will consider the advice provided by the ACCC as part of its assessment process.

1.125 Schedule 2 of the RFP describes the information that Proponents should provide in their Proposals. The information provided by Proponents will be used in the evaluation of their Proposals. Clause 1.5(a) of Schedule 2 of the RFP states:

Proponents should describe the extent to which the Proposal will benefit consumers (residential, business and others) over the short and long-term through the availability of communications services and applications at affordable prices.

1.126 Clause 1.5.4 of Schedule 2 of the RFP further states:

For wholesale-only Proposals:

- (a) Proponents should provide estimated price and non price terms and conditions for key entry-level and basic retail services that a wholesale customer could offer consumers. Proponents should also set out the rationale for this estimate.
- (b) Proponents can if they wish also provide anticipated price and non price terms and conditions for any other retail services and applications that a wholesale customer could offer consumers. Proponents should also set out the rationale for this estimate.

For Proposals that offer retail services:

- (c) Proponents should describe the arrangements for the supply of retail services and applications and the range and nature of the proposed retail services and applications (i.e. the levels of functionality and performance).
- (d) Proponents should describe the proposed price and non-price terms and conditions for key entry-level and basic services to be supplied, including:
 - (i) price and non-price terms and conditions for the key entry-level and basic retail services over the investment term of the infrastructure;
 - (ii) any geographical variation in pricing, noting the Government's objective of uniform national pricing, or non-price terms and conditions – for example, connection or fault repair times; and
 - (iii) any proposed approach to the re-adjustment of price terms and conditions over the investment term of the infrastructure.
- (e) In describing price and non-price terms and conditions for the retail services and applications, the Proponent should provide, on a per service basis, to the extent relevant, information including: downlink

and uplink speeds, connection and disconnection fees, service activation and deactivation fees, any periodic charges, billing arrangements, data usage allowances, any excess data fees, shaping policies and service level assurances.

- (f) In providing pricing information for key entry-level retail services, the Proponent should identify any differences in proposed prices and non-price terms and conditions for residential and business customers.

All Proponents:

- (g) Proponents should provide a comparison between the price and non-price terms and conditions of the proposed services and applications with those currently available.
- (h) Proponents should explain the basis and rationale for the proposed price and non-price terms and conditions described above for retail services and applications, including costs and costing methodology, expected take-up rates and price adjustment mechanisms.
- (i) Proponents should describe what will happen to retail prices over time if network traffic differs significantly from forecasts”

1.127 Clause 3.1 of Schedule 2 of the RFP requests, amongst other things, that Proponents indicate how any requested legislative or regulatory changes may impact on consumers.

1.128 Clause 3.2 of Schedule 2 of the RFP goes to compliance with legislative and other regulatory requirements and states

Particular regard should be given to compliance with law enforcement, national security, emergency service and consumer safeguard requirements.

These and other relevant sections from the RFP are provided at Attachment B.

Senator Kate Lundy

Senator Glenn Sterle

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Date: December 2008

Date: December 2008

Attachment A

The Commonwealth's objectives for the NBN project, as stated in Clause 1.3.1 of the RFP, are to establish a national broadband network that:

1. covers 98 per cent of Australian homes and businesses;
2. is able to offer broadband services with a minimum 12 Mbps dedicated downlink transmission speed over each connection provided to a premises;
3. supports symmetric applications such as high-definition video-conferencing;
4. is able to support high quality voice, data and video services;
5. uses fibre-to-the-node or fibre-to-the-premises network architecture;
6. enables uniform retail prices on a national basis;
7. is rolled out and made operational progressively over five years from the date of execution of a contract between the Commonwealth and successful Proponent;
8. continues to promote the long-term interests of end-users;
9. has sufficient capacity to meet current and foreseeable demand and has a specified upgrade path within clear timeframes, consistent with international trends;
10. facilitates competition through open access arrangements that ensure equivalence of price and non-price terms and conditions, and provide scope for access seekers to differentiate their product offerings;
11. enables low access prices that reflect underlying costs while allowing Proponents to earn a rate of return on their investment commensurate with the risk of the project;
12. provides benefits to consumers by providing choice to run applications, use services and connect devices at affordable prices;
13. provides the Commonwealth with a return on its investment of up to \$4.7 billion;
14. is compatible with the Government's related Fibre Connections to Schools initiative;
15. meets Government requirements for the protection of Australia's critical infrastructure;

16. is consistent with national security, e-security and e-safety policy objectives including compliance with laws relating to law enforcement assistance and emergency call services;
17. is consistent with Australia's international obligations; and
18. facilitates opportunities for Australian and New Zealand small and medium enterprises (SMEs) to provide goods and services to the project.

Attachment B

Select clauses from the NBN RFP relating to consumer interests and protection:

Services

- 1.5.10 Proponents should specify the services they intend to offer. Consistent with the network covering homes, businesses and other users, the Government is interested in both residential and business services. The network should be able to support a full range of services and applications that can be facilitated by greater access to high-speed broadband, including multicast, virtual private networks, high-definition video-conferencing, peer to peer content delivery and IPTV, as well as basic services such as telephony and other services such as smart meters.
- 1.5.11 The Government considers that consumers and businesses should be able to purchase key entry level voice and broadband services for the same price, irrespective of where they live or work. The NBN should enable uniform prices for basic entry level services. Proponents should provide the relevant pricing details for these services in their responses to Schedule 2.
- 1.5.12 Proponents should outline how consumers will be able to run applications, use services and connect devices at affordable prices. Proponents should outline the type of retail services that could be offered, for both business and residential consumers. The Commonwealth expects that consumers will enjoy affordable retail prices for NBN services, but also notes that services need to be priced so they are economically viable.
- 1.5.13 The Government will need to be assured that existing retail customers will experience no or minimal disruption to their services, and also that the migration of wholesale customers will not be subject to anti-competitive delays or processing timetables. Proponents should ensure that equivalent (or superior) services to those that are currently available can be offered to all existing customers.

Competition and open access

- 1.5.14 As noted above, the NBN will be a central platform for the Australian communications sector. The Government considers that the long-term interests of end-users should continue to be promoted. The Government is therefore determined to ensure that appropriate open access arrangements are in place to promote competition and ensure efficient investment. In this context it will be important to ensure that access is provided on equivalent price and non-price terms and conditions.

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- 1.5.15. Proponents should clearly specify the wholesale access services they are proposing to offer in accordance with the details requested in Schedule 2. For example, Proponents should include details such as the proposed locations of Points of Interconnection, technical arrangements for service providers that acquire wholesale services and (where relevant) the availability of backhaul capacity to and from Points of Interconnection. In setting out these details, Proponents should keep in mind the Government's objective of providing scope for access seekers to differentiate their product offerings.
- 1.5.16 Open access arrangements should apply to wholesale services to be provided over the NBN, including upgrades of services, as specified in the contract for the NBN. In accordance with section 1.4 of Schedule 2, Proponents should submit their proposed arrangements for ensuring open access to the NBN, including measures or models to ensure that access is provided on equivalent price and non-price terms and conditions. If a Proponent proposes to supply both wholesale and retail services it should demonstrate what structural measures or models it proposes be put in place and maintained to prevent inappropriate self-preferential treatment and ensure that effective open access is achieved on the terms required by the Commonwealth.
- 1.5.17 Proponents should outline how their proposed access prices have been determined with reference to the underlying costs of providing services and demonstrate that the underlying costs are incurred on an efficient basis. Access prices should be set as low as possible, to ensure the best outcome for consumers, while allowing Proponents to earn a rate of return on their investment commensurate with the risk of the project. Proponents should explain the basis on which they have derived the cost of capital, including how investment risks have been calculated.
- 1.5.18 As requested in Schedule 2, Proponents should describe how arrangements will provide scope for access seekers to differentiate their services by allowing the customisation of technical parameters (including but not limited to speeds, quality of service, latency, jitter, contention ratios and interleaving).
- 1.5.19 Proponents should also describe how access services will allow access seekers to offer enhanced applications such as multicast, virtual private networks, high definition video-conferencing, peer to peer content delivery and IPTV if desired.
- 1.5.20 If Proponents are proposing to roll-out new network infrastructure in regions where competing networks already exist, including in some cases existing FTTN and FTTP networks, they should indicate this as requested in Schedule 2. The Commonwealth expects that there will not be economically inefficient duplication of existing FTTN or FTTP

infrastructure. Proponents are also encouraged to consider interconnecting with existing FTTN or FTTP roll-outs.

- 1.5.21 Where Proponents intend to use infrastructure owned by third parties they should indicate the type of access they will require and what arrangements have been reached, or would need to be reached, to ensure it is granted on terms and conditions that are satisfactory to it. Proponents should indicate their pricing assumptions for access to third party infrastructure, as requested in Schedule 2.
- 1.5.22 Proponents should identify the parts of the network that are commercially viable in their own right and those parts that would not otherwise be commercially viable without financial support.
- 1.5.23 If a Proponent considers that mechanisms are required to facilitate the Government's objective of enabling uniform retail prices and the delivery of services to premises within the NBN footprint, it should clearly set out the nature of this mechanism. For example, if Proponents are proposing cross-subsidy arrangements within access prices to enable uniform retail prices, they should clearly identify the extent of any cross-subsidization, as well as other relevant details (see Schedule 2). If a Proponent proposes another type of mechanism to enable uniform retail prices, it should set out details about the nature of its proposed mechanism and other relevant details (see Schedule 2).