



## Dissenting Report

This Dissenting Report sets out the views of Coalition Members of the Committee on the Telecommunications Legislation Amendment (Fibre Deployment) Bill 2011 (the Bill). The Coalition recommends that the amendments referred to herein are made to the Bill.

The Bill forms part of the package of legislation concerning the establishment of the National Broadband Network (NBN).

The Bill deals with the provision of fibre to all types of new developments (including broadacre estates, urban infill and urban renewal projects.) These are generally referred to as 'greenfields sites' in the NBN context. By contrast, a 'brownfields site' is an existing premise, already connected to the existing telecommunications network, which is now to receive a new fibre connection to the NBN.

The Coalition agrees that it is highly desirable to encourage the rollout of fibre infrastructure in new developments. While it costs more to install fibre than copper in a new development, the incremental cost is much less than the cost of installing fibre in brownfields sites. The Government's stated policy is that in developments of 100 homes or less Telstra will install copper. The Coalition members believe this approach risks wasteful duplication with copper presumably being overbuilt within a few years if it is within the fibre footprint. On any view connecting greenfields developments to fibre must be a key priority given the cost advantage over brownbuild fibre overbuilds referred to above.

Coalition Members believe that, in designing the policy rules for greenfields sites, Labor has committed the same policy errors as in the rest of its NBN policy. Labor's approach to the objective of improving Australia's broadband infrastructure is to establish a government owned company to build a network; expend enormous amounts of taxpayers' money in funding the operations of that company; give that company monopoly powers; and have that company carry out every possible aspect of this enormous task.

The Coalition is opposed to this policy approach. We believe it is far too expensive; it is very bad for competition in broadband and telecommunications; and in a large part of the market it is unnecessary as the private sector can do the job faster, more efficiently and more cheaply once appropriate ground rules are established. (We have however consistently acknowledged that in rural and remote areas there is likely to be market failure and there is a strong case for public expenditure to improve broadband services.)

The policy scheme of this Bill is that:

- The Minister can declare, in respect of a new development, that any fixed line installed must be optical fibre;
- In all new developments, unless exempted, developers must install fibre-ready infrastructure (such as underground ducting or 'pit and pipe' and poles to string overhead cables) meeting specifications set by the NBN;
- NBN must (as the provider of last resort) install fibre cable in developments where developers have installed compliant fibre-ready infrastructure.

Coalition Members believe that this policy scheme unnecessarily assigns the central role to NBN Co - when the evidence the inquiry received demonstrates that there is a vigorous private market for the construction of fibre infrastructure in new developments. There are a number of competitive greenfields operators (CGOs) active in this market, and Coalition Members believe that this market should be encouraged not stifled.

Coalition Members believe this Bill should be amended for three main reasons.

- The regime established by the Bill is unnecessarily slow and bureaucratic for property developers.
- The Bill as presently drafted represents a missed opportunity to take advantage of the existence of the CGOs to impose effective competitive and cost discipline on NBN Co.
- The regime established by the Bill is damaging to competition in the market for the provision of new fibre infrastructure.

We expand further on our views below, and describe two amendments which we believe would address these issues.

## **Arrangements unnecessarily slow and bureaucratic for Property Developers**

The regime established by the Bill is unnecessarily cumbersome, slow and bureaucratic for property developers. At a time when Australia is facing a growing housing shortage, the arrangements mandated by this Bill add expense and delay for those wishing to build new housing estates. Despite the government's rhetoric, in practical terms the Bill gives developers a very strong disincentive to deal with operators other than NBN Co.

In turn, this leaves developers at the mercy of NBN Co's responsiveness and timeliness. The NBN Co will become a bottleneck through which all property developments must pass before they can be completed and brought to market. The downstream consequences for Australians wishing to purchase new housing are likely to include increased delay and expense.

The HIA highlighted the requirement of developers for certainty about what is required, who will undertake the work and how much the work will cost and what time frame the work will be delivered. In addition, these planning decisions should be able to be made in a short period of time with ease. Otherwise there will be delay in the delivery of projects. The HIA stated:

... the legislation needs to make it very clear who is responsible for the delivery and that there are certain obligations on the provider to do that in a very timely way, otherwise it will delay development. I appreciate that there are negotiations in the feasibility and planning arrangements, but there needs to be that level of certainty for developers so they know who is going to do it, who is going to pay for it and when it can be done. It should not take more than a couple of phone calls and a meeting to sort out it being put into the critical path of the development, otherwise those projects will be delayed whilst certain things are waiting for a provider to provide that infrastructure.<sup>1</sup>

## **Missed opportunity to impose competitive and cost discipline on NBN Co**

The Bill as presently drafted represents a missed opportunity to take advantage of the existence of the CGOs to impose effective competitive and cost discipline on NBN Co. If there were a regime in which developers had a viable option to use a

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<sup>1</sup> Mr Graham Wolfe, HIA, Transcript of Evidence, 17 June 2011, p. 21.

CGO to build out fibre networks in their developments, then developers would be likely to do this if the CGO could build the network more cheaply, quickly and conveniently. This would produce a more efficient outcome if it meant that infrastructure in new developments were built at lower cost than if it were done by NBN Co under a monopoly.

Evidence provided to the inquiry demonstrated that there is a nascent but increasingly active market in which a number of CGOs compete to secure contracts from developers to build out fibre networks in their developments. As the Greenfields Fibre Operators Association (GFOA) told the Committee:

We are an alliance of leading fibre to the home operators and carriers in the greenfields across Australia. Our members are OPENetworks, Service Elements, TransACT, Converge, Broadcast Engineering Services Australia and Pivit.<sup>2</sup>

The GFOA explained the achievements of its members in deploying fibre optic infrastructure to homes across Australia, in the course of the ordinary business of those members.

Since 2000, the GFOA members have been designing, building and operating advanced broadband networks in greenfields. Some have even designed optical fibre equipment that is still used throughout the world in optical fibre networks today. GFOA members connect or pass over 400,000 homes. We have a further 350,000 homes, potentially, either under development contracts or within the footprint of our existing networks capable of being connected. The members deliver high-speed data, internet, voice, free to air, pay TV and many other digital services, including CCTV, security services, building services, building management, utility management and community management services as well as a raft of other wi-fi and other forms of services. ..

It is interesting that, without having to tap into the USO funds, we have been able to spread our networks throughout the greenfields, whilst there has been no encouragement by government to address the fact that Telstra was running around using the USO funds to provide a copper network, a very antiquated network, throughout that same decade.<sup>3</sup>

Even Telstra has conceded the existence of this competitive market in the installation of fibre networks in new developments. Telstra stated:

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<sup>2</sup> Mr Sparksman, GFOA, Transcript of Evidence, 16 May 2011, p 57.

<sup>3</sup> Mr Sparksman, GFOA, Transcript of Evidence, 16 May 2011, p 58.

Traditionally as the USO provider we have been deploying copper based infrastructure at the request of developers. More recently a competitive fibre deployment industry had arisen and a number of providers, including Telstra, deployed fibre in many new developments under contract to the developer.<sup>4</sup>

The government's stated policy is that developers should be free to use either NBN Co, or a competing provider, to build out fibre networks in their developments. On 9 December 2010, the Minister for Broadband, Communications and the Digital Economy announced:

It has been a consistent feature of the Government's policy in new developments that there should be room for competing providers. This continues to be the case. Developers will be able to source fibre from competing fibre providers if they wish. Providers can compete to provide infrastructure in new developments, for example, by offering more tailored solutions to developers or more expeditious delivery.<sup>5</sup>

There is a similar statement in the Government's Statement of Expectations with NBN Co. in relation to fibre in new developments. The Statement of Expectations stipulates that NBN Co's role as a wholesaler of last resort within its fibre footprint enables it to:

... use whatever operational arrangements it chooses to service new developments, including sub-contracting and build-operate-transfer arrangements.<sup>6</sup>

Evidence from the GFOA highlighted the potential benefit to taxpayers of the cost efficiencies which could be achieved if NBN Co were subject to cost discipline from CGOs who may well be able to connect new premises to a fibre network more cheaply. GFOA put the view that CGOs can install fibre networks which are NBN Co fibre network equivalent or better for approximately \$1500 per lot in comparison to NBN Co's which cost approximately double that amount at \$3000 to install. GFOA stated:

NBN Co Agreements with Developers, who have already applied for 133,000 new lot connections in Greenfield developments since 1 January 2011, evidences that the cost of each connection is currently averaging over \$3000 per lot (excluding any back haul construction costs). Current prices for GFOA networks that equal or exceed the current functional performance of NBN Co networks

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<sup>4</sup> Telstra, Submission 1, p. 2.

<sup>5</sup> Policy Statement, 9 December 2010.

<sup>6</sup> Statement of Expectations, p. 6.

are up to \$1500 per lot (excluding any back haul construction costs). FTA TV and Pay TV may add \$300 per lot.<sup>7</sup>

TransACT stated that the approximate cost depending on choice of provider and specification used, of installation of a fibre network per premise is up to \$3500.

TransACT stated:

The ballpark type numbers indicate that pit and pipe is somewhere in the order of \$500 to \$1,000 a premise and a turnkey solution is anywhere up to \$3,500 a premise depending on who deploys it and what the specification is.<sup>8</sup>

The Housing Industry Association (HIA) advised that developers reported a cost of installing Fibre-to-the Premises (FTTP) is in the range of \$2500 to \$3500 per premise and with additional installation costs, taxes, charges and developer margins, the cost will be up to the order of \$5000. The HIA stated:

Based on the numbers provided to HIA, the average cost to the developer per block for FTTP is in the range of \$2500 - \$3500. When combined with costs associated with the additional installation requirements within the home, and including taxes and charges and developer/builder margins, the retail cost to the consumer will be up to the order of \$5000.<sup>9</sup>

Under the policy framework as presently established in the Bill, developers have a very strong disincentive to choose any operator other than NBN Co. The developer faces a requirement to install fibre ready infrastructure, which will cost around \$800 per lot according to the Explanatory Memorandum. Beyond that, however, the developer has two options. The first option is to do nothing more, in the knowledge that in a few years' time NBN Co will come along and install fibre at its own expense in the development.

The second option is to contract with a CGO to install fibre in the development. Based upon the \$1500 per premises figure provided in evidence by the GFOA, this will expose the developer to an incremental \$700 per premises. It is very unlikely that developers will incur this expense if they are not required to do so. Given this economic reality, it is highly misleading for the government to claim that its policy leaves open the option for developers to engage a competitor to NBN Co.

The Department of Broadband, Communications and the Digital Economy (DBCDE) argued that it is unclear whether the costs outlined by the GFOA are based on a like with like comparison. The DBCDE stated:

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<sup>7</sup> Greenfield Fibre Operators of Australia, Submission 1, p. 6 and 7.

<sup>8</sup> Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 41.

<sup>9</sup> HIA, Submission 7.1, p. 1.

The department is not aware of the basis for the GFOA's claim in relation to NBN Co's average costs in new developments, and it is unclear whether the GFOA's claims about the costs of its networks and NBN Co's are based on a like with like comparison.<sup>10</sup>

Coalition Members believe that DBCDE's comment misses the point. The evidence suggests that there is at least the potential to realise cost savings. The way to find out whether such savings can in fact be realised is to establish a market structure in which genuine competition can operate. If developers are able to choose a provider other than NBN Co to build the network in their development, and such a provider can build the network more cheaply than NBN Co, then the market will operate accordingly and savings will be realised. The matter should be tested by the market – and the legislative framework should facilitate the operation of a market – rather than being dismissed by stroke of a bureaucrat's pen.

## **Damaging to competition in the market for the provision of new fibre infrastructure**

The regime established by the Bill is damaging to competition in the market for the provision of new fibre infrastructure. Today, as is clear from evidence provided by GFOA there is a nascent but increasingly active market in which CGOs compete to secure contracts from developers to build out fibre networks in their developments. In some cases, the CGO builds the network and then also operates as a retail service provider, providing services over the network to residents in the development.

The regime established by the Bill damages competition for several reasons. First, by exposing CGOs to competition from a government funded operator which is prepared to install fibre at zero cost to a developer (once the developer has incurred the expense of building trenches and other 'fibre ready facilities'), the regime will effectively make it impossible for such CGOs to compete.

CGOs will be at a fundamental cost disadvantage because NBN Co is prepared to install fibre at zero cost, incurring a loss on the installation which it presumably hopes to recoup over time from service revenues.

The second reason that the regime in the Bill damages competition is because the standards for a 'fibre ready facility' (such as a pit) required to be built in greenfields developments will in practical terms be set by NBN Co. Under proposed section 372W, a fibre ready facility (which a developer has an obligation

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<sup>10</sup> DBCDE, Submission 8, p. 4.

to install) is defined as one which amongst other things satisfies such conditions as are specified by the Minister. In practical terms, this will mean that standards will be set by NBN Co, as the Minister is likely to simply set the standards which the NBN Co wants.

The Statement of Expectations makes it clear that the technical standards for fibre infrastructure will be specified by NBN Co. The statement provides that:

The Government expects NBN Co to provide guidance on technical specifications as early as possible. In doing so, NBN Co should consult with the Communications Alliance and the [Australian Communications and Media Association] ACMA, and should use the well established processes to deliver a national standard.<sup>11</sup>

Despite the reference to existing industry standards setting processes (particularly the Communications Alliance which has the responsibility for determining industry wide standards under the present industry arrangements), it is clear from this that NBN Co's wishes will prevail.

The risks to competition of such an approach are profound. It is well established that a dominant operator with the power to set technical standards will use that power as a tool to maintain its dominance. It is for this very reason that the power to set technical standards, which had previously been held by the government owned monopolist Telecom Australia, was in 1989 transferred to an independent body.

A number of contributors to the inquiry put the view that the NBN fibre infrastructure requirements are not industry endorsed and provisions in the Bill further empower the Minister to impose standards according to NBN Co requirements. This will have the effect of imposing greater costs on developers to install fibre infrastructure and also change industry specification requirements without industry endorsement.

TransACT commented that anyone who has a carrier licence and is suitably accredited should be in a position to set a specification. TransACT stated that it wanted to avoid a situation where there is an 'over-engineered specification.'<sup>12</sup>

DBCDE's response to this concern is unpersuasive. DBCDE claims that the Bill does not impose NBN Co specifications on the industry. Rather the Bill provides 'a reserve power (to the Minister) to fast-track' the standardisation (which may be required for the NBN to operate an appropriate level or speed) process if

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<sup>11</sup> Statement of Expectations, p. 7.

<sup>12</sup> Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 41.



required.<sup>13</sup> In effect, DBCDE is conceding the point: the Minister has the final call on the standards and given the policy priority of rolling out the NBN, the Minister will set the standards that NBN Co wants.

DBCDE stated that NBN Co 'specifications will also be provided to the Communications Alliance (CA) with a view to having these specifications endorsed for general use by industry as soon as possible.'<sup>14</sup> This is a fundamental change from the present arrangements under which the CA sets industry wide specifications; now its role is to be reduced to rubber-stamping specifications determined by NBN Co.

The third reason the Bill damages competition is because it forms part of a regime which renders unviable a business model typically used by CGOs today. Typically a developer will contract with a CGO for that CGO to build a fibre access network in a new development, and then to operate as a retail service provider, providing services over that network. The CGO is able to contract with the developer at a lower per premises cost than would otherwise be required, because it also expects to earn revenues from the delivery of services over the network.

This business model is now rendered unviable because of the provisions recently added as Parts 7 and 8 of the Telecommunications Act, as part of the package of legislative measures dealing with the NBN. These provisions impose require that the operator of a telecommunications network used, or capable of being used, to supply a superfast carriage service (over 25 Mbps) to consumers or small business:

- must offer a layer 2 bitstream service (that is, a wholesale service)
- must not offer services over that network to retail customers and may only offer wholesale services.

These two requirements are designed to suit the business model of NBN Co: an extremely large scale business, operating on a wholesale only basis, with the benefit of near limitless funding from government. But under Parts 7 and 8 they must also be met by CGOs – which in the main are relatively small scale private sector businesses.

The policy intent is, quite deliberately, to make it very hard for competitors to NBN Co to sustain their business model. Coalition Members believe this policy intent is wholly misjudged and precisely the opposite of a sensible policy approach to encouraging competition.

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<sup>13</sup> DBCDE, *Submission 8*, p. 2.

<sup>14</sup> DBCDE, *Submission 8*, p. 2.

The consequence has been to weaken the market for the competitive provision of fibre networks in new developments.

## First Proposed Coalition Amendment

To address the difficulties caused for the property development industry by the Bill, and to impose additional cost discipline on NBN Co, the Bill should include measures which remove the disincentive for developers to use CGOs to install fibre infrastructure.

The proposed amendment to the Bill would insert a new section **372CA Purchase of installed optical networks by NBN co.** which would be contained in Division 2 – Deployment of optical fibre lines.

**Proposed new section 372CA** is intended to enable developers whose development project has an installed fibre network (which is in compliance with specifications as determined by the Minister) to have the option to require NBN Co to purchase that network at a reasonable price (as determined by the Minister in consideration of certain market prices and costs).

The rationale for this amendment is:

- Give developers an incentive to use CGOs in the knowledge that if they pay a CGO a per connection basis, they will be able to recoup that cost (up to a limit specified by the Minister) by selling the connection to NBN Co
- Ensure that developers have additional choices beyond the government's default option in which when they build a new development they will install fibre ready facilities, but there will be no live network installed (meaning that residents in the development may need to wait several years - until such time as NBN Co is ready to come along and roll out fibre in the development – before they receive an active broadband service delivered over a fibre connection)
- Benefit end users – incoming residents of new developments – by maximising the likelihood that when residents move in, they will be provided immediately with an active broadband service delivered over a fibre connection
- Impose a cost discipline upon NBN Co by requiring it to purchase connections at a reasonable price which will be set at a price no greater than the NBN Co's own average cost of installing a connection. This means that if NBN Co's competitors can build connections at a lower charge than NBN Co, there will be a cost saving to NBN Co and ultimately the taxpayer.

Coalition Members of the Committee sought the views of witnesses at hearings regarding the proposed amendment. Mr Turnbull described the amendment as follows:

It has been put to us that a more efficient approach would be as follows: a developer could, if he or she chose, get an appropriately qualified firm to connect all of the premises in their new development, be it large or small, with fibre in accordance with specifications that were laid down by ACMA, in consultation with the NBN and that, if the developer did that, he or she could then require NBN to acquire that fibre from the developer at an agreed price. When I say 'an agreed price,' I mean a price that would be a rate set out either in the legislation or in regulations. The argument is that this would mean a developer could take the matter into his own hands, get on with the job, cable the development in a way that meets all the other construction timetables they have got and would not be disadvantaged financially by doing that. That has been put to us by some organisations that are no doubt members or affiliates or fellow travellers of yours. I want to see what you think about it.<sup>15</sup>

The Urban Development Institute of Australia (UDIA) stated that the amendment is a pragmatic suggestion and would provide greater certainty for developers. The UDIA stated:

... that is a pragmatic suggestion. In relation to the certainty question you asked me before, that is what is confronted by developers – how and when are things actually going to be done? Whatever brings around greater certainty for purchasers of those properties that all the utilities are actually there and are available and can be handed over to them and the greater that certainty is, the better it will be.<sup>16</sup>

OptiComm commented that the amendment would provide advantages in terms of maintaining diversity within the fibre provider market. OptiComm stated:

... there would be some advantages in what you are saying to what is currently proposed. That allows diversity in the greenfield. As I have said, we have been successful. Not only do we offer broadband and voice but we offer a number of other services that some developers find attractive. It would still allow them to do

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<sup>15</sup> Mr Turnbull MP, Transcript of Evidence, 17 June, pp 25-26

<sup>16</sup> Mr Bruce Duyshart, Urban Development Institute of Australia, Transcript of Evidence, 17 June 2011, p. 26.

that and allow them to keep that network operating through companies like ourselves or allows them the offer to transfer that ownership to NBN Co. I think that is what you are suggesting. We would never love to build a network and see it go to someone else, but I think the concept is better than where we stand today.<sup>17</sup>

TransACT was supportive of the amendment and commented that a situation where different parties are responsible for installing a fibre network is tripartite and does not offer the best overall outcome. TransACT stated:

Essentially, we believe that having a situation where the developer puts pit and pipe into the development creates a situation where we have a tripartite type arrangement. You have the developer putting in pit and pipe and you have a fibre operator coming in subsequent to that. What we typically provide to developments is a turnkey solution. We deploy the fibre and the pit and pipe altogether to the developer. We believe that having a situation where it is pit and pipe only is not necessarily the best outcome overall

We would support that type of amendment to the legislation.<sup>18</sup>

The Minister's authority to determine a scale of payments would provide an equitable and efficient market outcome. The principal factor the Minister would take into account would be NBN Co's own average cost of installing a fibre connection. The Minister would also be empowered to have regard to:

- The typical costs of installing fibre networks (including significant regional variations in costs);
- A reasonable return to developers for undertaking installations.

This approach would also allow for fibre infrastructure specifications to be made according to agreed standards whether they are NBN Co or industry standards endorsed by the Communications Alliance, without any resulting cost pressure on developers, providing positive competition outcomes.

## **Second Proposed Coalition Amendment**

To further address the damaging effects on competition in the market for the provision of new fibre infrastructure, another amendment to this Bill is required.

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<sup>17</sup> Mr Paul Cross, OptiComm, Transcript of Evidence, 17 June 2011, p. 31.

<sup>18</sup> Mr Ivan Slavich, TransACT, Transcript of Evidence, 17 June 2011, p. 40.

This amendment would add additional provisions to Parts 7 and 8 of the Telecommunications Act, to exempt from the operations of those Parts any fibre network which met the following conditions:

- The network is not owned or operated by NBN Co or Telstra
- The network was installed in a new development (defined as one in which persons had first taken up residence after the commencement date of the Bill) under a contract between the network's owner and the developer
- The network was owned and operated by the same entity which built it
- The network delivered retail services only to persons who resided in (or operated businesses in) the development.

This amendment would have the effect of preserving competition in the market for the provision of new fibre infrastructure. It would be open to CGOs to install and operate new fibre networks in new developments, without needing to meet the requirements of Parts 7 and 8 of the Telecommunications Act, which are tailored to be appropriate to the very different and much larger scale business to be operated by NBN Co.

The CGOs would continue to be subject to the other access requirements which apply under the telecommunications specific provisions of the Competition and Consumer Act. That is, other retail service providers wishing to serve residents of a development would have the legal right to obtain access over the CGO's network.

The effect of this amendment, together with the first Coalition amendment, would be to maximise the options available to developers and CGOs. They could contract on the basis that the CGO would build the network, and operate it until such time as it was sold to NBN Co; or they could contract on the basis that the CGO would continue to operate it and there would be no sale to NBN Co.

Coalition Members believe that providing maximum flexibility would best facilitate the working of the market, and in turn would produce the best outcomes for developers, CGOs – and most importantly, end users, both of the housing provided by the developer and the broadband services to be delivered over the network.

We note the statement made by the Minister for Broadband, Communications and the Digital Economy on 9 December 2010:

It has been a consistent feature of the Government's policy in new developments that there should be room for competing providers. This continues to be the case. Developers will be able to source fibre from competing fibre providers if they wish. Providers can

compete to provide infrastructure in new developments, for example, by offering more tailored solutions to developers or more expeditious delivery.<sup>19</sup>

In the Coalition Members' view, if the Minister is serious about this statement, he should readily agree to the amendment we propose.

## **Conclusion**

Coalition Members will be moving the amendments referred to above when the bill is debated in the Parliament.

**Hon Malcolm Turnbull MP**  
**Member for Wentworth**

on behalf of the Coalition Members of the Joint Committee on the National  
Broadband Network

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<sup>19</sup> Policy Statement, 9 December 2010.