



Telecommunications Legislation Amendment (National Broadband Network Measures—Network Information) Bill 2009

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Contents

Note about the nearly identical Bill introduced in the other house	2
Purpose and short summary of Bill	2
Background	3
National Broadband Network #1: Fibre to the node – ALP election promise 2007	3
National Broadband Network #2: fibre to the home	5
The need for this Bill – why the Commonwealth’s information needs have changed.	8
Committee consideration.	9
Position of significant interest groups/press commentary	9
Significant technical flaws.	15
Financial implications	16
Main provisions	16
Concluding comments.	18

Telecommunications Legislation Amendment (National Broadband Network Measures—Network Information) Bill 2009

Date introduced: 19 August 2009

House: House of Representatives

Portfolio: Broadband, Communications and the Digital Economy

Commencement: Day of Royal Assent

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Note about the nearly identical Bill introduced in the other house

A Bill that is materially the same as this Bill was introduced into the Senate on 25 June 2009 (the *Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009*). Prior to that, on 13 May 2009, the Senate had voted in favour of a motion to refuse consideration of any bill relating to the Government's new national broadband network unless the Government made public two reports concerning its original national broadband network proposal. Those reports have not been made public and that motion stands at the time of writing. On 19 August 2009, the Government introduced into the House of Representatives this Bill that is, as noted, in all material respects the same. According to the second reading speech, the Government took this action to progress the Bill and the rollout of the National Broadband Network. The digest for the other Bill is materially identical to this one.

Purpose and short summary of Bill

The Bill amends Part 27A of the *Telecommunications Act 1997*. Part 27A enables the Minister to require telecommunications carriers to give information to the Commonwealth about their telecommunications networks. In 2008, when Part 27A was enacted, the Commonwealth required this information so that it could provide it to those firms that intended to submit a proposal for the Government's first, now-terminated, fibre-to-the-node National Broadband Network (NBN #1).

This Bill does three things. It removes a sunset clause which made most of Part 27A inoperative after 26 May 2009. It expands the class of firms from which information can be compulsorily obtained to include utilities. It also changes the purpose to which the information can be put. Information is to be received for the purpose of the

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implementation study that the Commonwealth is to conduct and by the company (NBN Co) that the Commonwealth has established to own and operate a new fibre-to-the-home national broadband network (NBN #2).

As suggested by the comprehensive and helpful explanatory memorandum to Bill, which exceeds, in length, the Bill it describes by a factor of almost three, this Bill is not particularly controversial (as distinct from the national broadband network proposal itself which is not without controversy).

Background

National Broadband Network #1: Fibre to the node – ALP election promise 2007

Part 27A was inserted into the Act in 2008 by the [Telecommunications Legislation Amendment \(National Broadband Network\) Act 2008](#). The [Explanatory Memoranda](#) and [digest](#) of that Bill provide an explanation of Part 27A.

Part 27A was enacted to facilitate the building of a national broadband network, this being an element of the election platform of the Australian Labor Party in 2007. A history of that proposal up to June 2008 is set out in the digest for the earlier Bill but is summarised here.

The salient facts are that the original proposal to create a fibre-to-the-node (FTTN) network involved a significant modification of Telstra's network rather than the building of an entirely new one. The main changes were to be in that part of the network known as the customer access network. This is the part linking residential and business premises with the local Telstra exchange. The original proposal would have seen the replacement, with optic fibre, of the segment of bundled copper wire running from the exchange to a point of aggregation near premises (called a node). With the installation of electronic equipment at the node, faster network access speeds would have been available than with the current common technology which places such equipment in Telstra exchanges.

Under the original proposal these network modifications were to be developed under a request for proposals (RFP) process. In order for proponents to submit informed, properly costed proposals, they required information about existing telecommunications infrastructure.

The Commonwealth initially asked some carriers to provide information voluntarily. However, this evidently did not yield a satisfactory outcome and, on 19 March 2008, the [Telecommunications Legislation Amendment \(National Broadband Network\) Bill 2008](#) was introduced.

On 11 April 2008—well before the legislation had passed through Parliament—the Minister [announced](#) the issue of a [request for proposals](#) for the modification of the network.

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Proposals were due by 25 July 2008. Because the passage of the Bill was taking some time (it did not pass through Parliament until 15 May 2008), the Government extended this time until 26 November 2008 so that there was sufficient time for the carriers to provide information of the requisite kind and for prospective proponents to assess that information and formulate their proposals.

By the RFP deadline, six proposals had been received including one from Telstra.

On 15 December 2008, Telstra [announced](#) to the Australian Stock Exchange that it had been excluded from the national broadband network RFP process.¹ In its proposal, Telstra had failed to address one of the mandatory elements in the RFP by not providing a plan explaining how it would involve small-to-medium enterprises (SMEs) in the building of the NBN. Consequently its proposal was non-compliant. The Commonwealth would have been exposed to the ongoing risk of legal action by another bidder or bidders were it to have allowed Telstra's proposal to remain under consideration.

On 22 January 2009, the Minister [announced](#) that he had received the report of the Expert Panel on the compliant proposals.² The Expert Panel had been [appointed](#) in March 2008 to assess the responses to the RFP.³

In an [published extract of the Expert Panel's report](#)—the Government having declined to publish the full report—the panel said that all of the proposals were to some extent underdeveloped and that none provided value for money, one of the dominant principles of Commonwealth Government procurement.⁴

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- 1 Telstra, *Commonwealth excludes Telstra from National Broadband Network RFP process*, media release, 15 December 2008, <http://www.asx.com.au/asxpdf/20081215/pdf/31f5s2sd5t98tp.pdf>, viewed 14 August 2008
 - 2 S Conroy (Minister for Broadband, Communications and the Digital Economy), *Expert Panel Submits Report on National Broadband Network Submissions*, media release, 22 January 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/001 viewed 14 August 2009
 - 3 S Conroy (Minister for Broadband, Communications and the Digital Economy), *Government announces Panel of Experts to assess National Broadband Network proposals*, media release, 11 March 2008 http://www.minister.dbcde.gov.au/media/media_releases/2008/government_announces_panel_of_experts_to_assess_national_broadband_network_proposals, viewed 14 August 2009
 - 4 Department of Broadband, Communications and the Digital Economy, *Extract From The Evaluation Report For The Request For Proposals To Roll-Out And Operate A National Broadband Network For Australia*, 20 January 2009,

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National Broadband Network #2: fibre to the home

Consequently, on 7 April 2009, the Government terminated the RFP process. It [announced](#) that instead it would establish a company to build, own and operate a wholesale fibre to the home network.⁵ Ninety percent of homes, schools and workplaces will be connected to the network with optic fibre cable. The remaining ten percent of homes, schools and workplaces will be connected with terrestrial and satellite wireless services.

The initial announcement stated that company will build and operate the network, but the Minister later explained that the Government contemplated the possibility that the company would secure the use of existing facilities in a range of ways including purchase, exchange for equity in NBN Co or one or more of a variety of other legal arrangements.

The Commonwealth will make an initial investment in the company but might issue retail bonds for the rest of its contribution, the extent of which is unknown. NBN Co itself will be able also borrow in its own right.

The Commonwealth will be a majority shareholder of the company but it will sell down its interest in the company within five years after the network is built and fully operational.

The Minister's media announcement of 7 April 2009 sets out a plan of action to be given immediate effect. The elements of the plan and the developments to date are;

- A company will be established to own and operate the national broadband network. On 9 April 2009, the company (ACN 136533741) was established. At the time of writing it is called NBN Co Ltd. On 25 July 2009, the Minister [announced](#) the

http://www.dbcde.gov.au/_data/assets/pdf_file/0007/110014/Summary_observations_for_website.pdf, viewed 14 August 2009,
http://www.dbcde.gov.au/_data/assets/pdf_file/0007/110014/Summary_observations_for_website.pdf, viewed 14 August 2009.

- 5 K Rudd (Prime Minister), W Swan (Treasurer), L Tanner (Minister for Finance), S Conroy (Minister for Broadband, Communications and the Digital Economy), *New Broadband Network*, media release, 7 April 2009,
http://www.minister.dbcde.gov.au/media/media_releases/2009/022, viewed 14 August 2009

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appointment of Mike Quigley as executive chairman of the NBN Co.⁶ On 6 August 2009, the Minister [announced appointments](#) to the board of NBN Co.⁷

- A [discussion paper](#) on proposals for regulatory reform—including possible forced separation of Telstra’s network and retail arms and changes to the access regime—was issued in April 2009⁸ with well over 100 submissions received by 3 June 2009. On 3 July 2009, the Minister [sought](#) more views on a number of matters including the regulatory arrangements for the new network.⁹ Submissions were required by 30 July 2009 but have not been published at the time of writing.
- Arrangements are to be made for the conduct of an implementation study to inform the Commonwealth on matters such as network design and operating arrangements which will involve, in some capacity, a lead advisor. A request for expressions of interest for the provision of lead advisory services was issued in April 2009 with responses due by 19 May 2009. Following that, a request for tenders was issued the outcome of which was the [announcement](#), on 6 August 2009, of the appointment of McKinseys and KPMG as lead advisors.¹⁰ Neither the request for tenders nor the tenders are publicly available.

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- 6 K Rudd (Prime Minister), S Conroy (Minister for Broadband, Communications and the Digital Economy), *Mike Quigley appointed Executive Chairman of NBN Co*, media release, 25 July 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/067 viewed 14 August 2009
- 7 L Tanner (Minister for Finance and Deregulation), S Conroy (Minister for Broadband, Communications and the Digital Economy), *Board appointments for National Broadband Network*, media release, 6 August 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/072 viewed 14 August 2009
- 8 Department of Broadband, Communications and the Digital Economy, *National Broadband Network: Regulatory Reform for 21st Century Broadband; Discussion Paper*, April 2009, http://www.dbcde.gov.au/communications/national_broadband_network/regulatory_reform_for_21st_century_broadband, viewed 14 August 2009
- 9 Department of Broadband, Communications and the Digital Economy, *Views sought on legislative framework for National Broadband Network*, 3 July 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/061, viewed 14 August 2009
- 10 S Conroy (Minister for Broadband, Communications and the Digital Economy), *McKinsey-KPMG appointed Lead Advisor for National Broadband Network*, media release, 6 August 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/073

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- Measures are to be taken to deal immediately with some regional backbone blackspots. A [consultation paper](#) was issued in April 2009.¹¹ [Submissions](#) were received until 12 May 2009. A request for tender was issued on 1 July 2009 with responses due by 5 August 2009.
- Negotiations with the Tasmanian Government are to be expedited, to build upon its proposal in response to the Government's 2008 RFP process. The Tasmanian Government's proposal found favour with the Expert panel which recommended that the proposal be used as the basis of a plan for an immediate rollout of the network in Tasmania. On 16 July 2009, Aurora Energy, which is central to the Tasmanian Government's project, issued a [request for tender](#) for the provision and management of optic fibre cables. Tenders are due by 16 August 2009. On 25 July 2009, the Minister [announced](#) the appointment of Mr Doug Campbell as executive chairman of the Tasmanian NBN company (TNBN Co), which is a subsidiary of NBN Co.¹² TNBN Co was established on 13 August 2009.¹³
- Legislative changes are to be progressed to deal with matters concerning NBN Co and to facilitate the rollout of fibre networks, including requiring greenfields developments to use fibre-to-the-premises (FTTP) technology from 1 July 2010. No legislative changes other than those proposed in this Bill have been introduced at the time of writing. On 3 July 2009, the Minister sought views on the regulation of the company including governance arrangements and ownership matters. Submissions were due on 30 July 2009. On 13 August 2009, the Minister [announced](#) that he was establishing a stakeholder group to advise on the development of a policy on the rollout of fibre-to-the-home in greenfields estates.¹⁴

11 Department of Broadband, Communications and the Digital Economy, *National Broadband Network: Regional Backbone Blackspots Program*, consultation paper, April 2009, not available online

12 S Conroy (Minister for Broadband, Communications and the Digital Economy), *Doug Campbell appointed chair of Tasmania NBNCO*, media release, 25 July 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/068, viewed 14 August 2009

13 S Conroy (Minister for Broadband, Communications and the Digital Economy), *Tasmanian NBN Co Limited established*, media release, 13 August 2009, http://www.minister.dbcde.gov.au/media/media_releases/2009/075, viewed 13 August 2009

14 S Conroy (Minister for Broadband, Communications and the Digital Economy), *Stakeholder group to advise on greenfields broadband deployment*, media release, 13 August 2009, viewed 14 August 2009 http://www.minister.dbcde.gov.au/media/media_releases/2009/077

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The need for this Bill – why the Commonwealth’s information needs have changed.

In broad terms, the main changes effected by this Bill are to expand the class of firms that can be required to give network information to the Commonwealth to include utilities and to change the purpose for which the information can be used.

Both of these changes can be explained by the differences in the nature—and proposed manner of implementation—of the first and second national broadband network proposals.

A further minor, but important, change is made to amend a sunset clause in the original legislation which caused most of the provisions to cease operation on 26 May 2009.

How has the change in the kind of proposed network changed the information required?

The NBN #1 proposal mainly concerned modifications to the Telstra access network (the replacement of a segment of the copper wire that links premises to the local Telstra exchange). As such, most of the information required by the Commonwealth was information about Telstra’s customer access network (in particular, the location of the nodes at which the copper wires connecting a cluster of premises is aggregated before running as a bundle or bundles to the Telstra exchange).

In its new NBN #2 proposal, the Government’s policy speaks of creating an entirely new network and not just of modifying the access network. This will certainly involve significant modifications to the access network (the replacement or duplication of the copper wire from premises to some point deeper into the network, like a Telstra exchange). However, under this proposal, the Government also envisages that the NBN Co will also build, buy, or acquire some rights of use in, elements of the network on the other side of the exchanges (the core network) including, perhaps, other non-communications assets.

As such, the Commonwealth may now require information about an additional range of existing infrastructure. This will include information about existing carrier-owned telecommunications infrastructure like fibre transmission links, points of interconnection, ducts, pits and poles. However, it could also include infrastructure held by utilities. This latter category could include both communications facilities and other assets that could be used for new communications facilities like land corridors (where rail lines, electricity lines or pipelines run), poles, towers, water, sewage or gas pipelines and conduits. Information about the infrastructure of utilities is not currently dealt with in Part 27A of the Act.

How has the change in the implementation of proposed network changed the information required?

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Proposals for NBN # 1 were provided by the private sector and State Governments. It was those parties to which the Commonwealth was empowered to make available the network information given under Part 27A of the Act.

With three qualifications, the NBN #2 plan will be developed through an implementation study, the lead advisors of which, McKinseys and KPMG, were [announced](#) on 6 August 2009 and will be implemented by NBN Co.¹⁵ The existing terms of the Act authorise the receipt of information by McKinseys and KPMG. However, minor amendments are required to authorise the receipt of information by those in the Department who are engaged on the implementation study and by the NBN Co and its suppliers.

Committee consideration

The Bill was referred to the Senate Environment, Communications and the Arts Committee for inquiry. The Committee's report was tabled on 17 August 2009. Details of the inquiry are at

http://www.aph.gov.au/senate/committee/eca_ctte/nat_broadband_bill_2009/index.htm.

Position of significant interest groups/press commentary

The technical and incremental nature of changes being made to Part 27A by this Bill militate against mainstream media interest. The Bill has, however, attracted some attention in the industry media. For instance, on 29 June 2009, an [opinion piece](#) by influential communications analyst, Richard Chirgwin, the industry publication Commsday, observed that the Bill 'is...for the most part, entirely unnecessary' because 'most of the information about these utilities is already available to the public in the form of maps'. Further, he notes that much of the information about the infrastructure of utilities is mapped by State governments which would likely provide this to the Commonwealth without much hesitation.¹⁶ In his blog, David Havyatt, manager of Regulatory and Corporate Affairs at wireless internet access provider, Unwired, correctly observes that the clauses in the Bill requiring that instruments to be "published on the internet" are meaningless, and should refer to a website. He also addresses some of the

15 The three exceptions mentioned in the previous paragraph are a) that in Tasmania, construction of the network will commence while the implementation study is being conducted; b) the Minister has foreshadowed that legislation will be introduced in the middle of this year to mandate fibre to the home in greenfields estates which, if it occurs, will mean that the legislation will not incorporate the outcome of the implementation study and c) the Commonwealth has already received tenders to build some transmission capacity as part of the backbone blackspots measure that it announced on 7 April 2009.

16 Richard Chirgwin, *Secret, What secret?* Communications Day, Comment by Richard Chirgwin, "Secret, what secret", <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22library%2Fjrnart%2FRTDU6%22>

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objections that have been raised to the original legislation by, for instance, Telstra and Pipe Networks.¹⁷

Nine submissions were received by the Senate committee that is conducting an inquiry into the Bill. The following observations were made in those submissions:

Optus

Optus said that it 'has already been required to provide information under the original legislation' and that it 'has no concerns with the current amendments which seek to change the focus of the legislation to the Government's current proposals for a fibre to the premise NBN'. Further, it says;

'we anticipate that this is a necessary piece of legislation to assist with the efficient and cost effective roll-out of the NBN. It is likely that information obtained under this legislation, including that from utility companies, will enable more informed decisions to be made about the optimal deployment of new infrastructure to support the roll-out of the NBN'.¹⁸

Telstra

Under Part 27A as it is now, Telstra was the principal focus of the Commonwealth's information requests last year. In its submission, Telstra agrees with the observation in the explanatory memorandum that 'due to its existing networks [it] is likely to be the major discloser of information under the Bill'.

Telstra's comments on the Bill are supportive. It says that it 'agrees that the builder and operator of the NBN, NBN Co, will need access to information from a range of telecommunications and utility infrastructure providers in order to deliver the Commonwealth's vision for the NBN'. However, it expresses a concern about the principle of competitive neutrality being breached given that carriers' information will be disclosed to the NBN Co, a publicly held company, that may compete in some markets with the carriers.¹⁹

17 <http://davidhavyatt.blogspot.com/2009/06/high-point-of-legislative-drafting.html>, viewed 14 August 2009

18 Optus, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=b4945a33-df8e-47a0-acfa-b97ed76d032e>, viewed 13 August 2009

19 Telstra, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009*, July 2009, p. 1. <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=8664f3d6-2805-4dce-999f-0797e40f69e6>

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Telstra raises two considerations that, it says, ought to be kept in mind in finalising the Bill. The first is that ‘effective security arrangements are put in place to protect the information provided by carriers and utilities under the regime. The second is that ‘carriers and utilities providing information should have certainty about their rights obligations and exposure in relation to the subsequent use and disclosure of the information provided under the regime’.²⁰

Telstra rightly notes that the Act currently contemplates that an instrument will be made dealing with security issues (see subsection 531H(4)). However, the Act does not set out any matters that must be taken into account in the consideration of the content of such an instrument. Telstra suggests that the Act be amended to set out the matters that must be addressed in the instrument. It says that the rules in the instrument should cover at least the following topics;

- ‘(a) Physical security measures (such as secured areas and access logs);
- (b) Software and network security measures (including email security, ant-virus measure, firewalls and cryptography);
- (c) Access control and active security measures (including user identification and authentication, intrusion detection and access logging)
- (d) Hardware and media destruction sanitisation procedures (and destruction should be mandatory upon occurrence of specified triggers, including a material breach of any provision of Part 27A or of the Rules);
- (e) Security compliance review and incident detection and management; and
- (f) Personnel security measures (such as training programs and security clearances).’²¹

Telstra says that the Bill is not sufficiently clear about the nature of the information that might be requested in an instrument made by the Minister. While it says that it understands that the kind of information likely to be required is information about physical components of the networks of telecommunications carriers and utilities, the drafting in proposed clause 531(1A) is not obviously limited to that kind of information. It could include, for instance, ‘business plans and other information concerning the way in which a carrier intends to use its physical network infrastructure commercially’.²² This would, it says, would ‘raise serious issues of fairness and competitive neutrality, particularly given

20 Telstra p. 1.

21 Telstra p. 2.

22 Telstra p. 2, paragraph 3

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the majority stake of the Commonwealth in NBN Co and its position as a market participant for years to come'.²³

Telstra seeks protection from liability for parties providing information that is 'unintentionally inaccurate' in any way when that information is disclosed to the NBN Co or its contractors. It notes that it is not the carrier or utility that selects the information that is to be disclosed and therefore considers 'it would be reasonable for the Bill to include an immunity from claims against any carrier or utility who provides information under the regime'.²⁴

Last, Telstra points to a drafting oversight which would leave those parties that received information in 2008, under the existing provisions of the Act, in a position that they could use the information for their own benefit if they still possessed it.²⁵ Telstra does not identify the drafting oversight. However, the Department did address this issue in evidence before the Senate inquiry into the Bill. It says that all information that was provided to proponents has been handed back or destroyed and that statutory declarations to that effect have been made.²⁶

Water Services Association of Australia

Upon being invited to make a submission, the Water Services Association of Australia (WSAA) made several criticisms, many of which were beyond the scope of the Bill and concerned the suitability of water infrastructure for use in a telecommunications network. To the extent that it commented on the Bill itself, it is concerned that there are national security implications associated with the release of this information. It notes that the legislation contemplates that the Minister may make an instrument for 'the handling, storage and disposal of network information in order to protect the security and confidentiality of such information. Until such an instrument is drafted, it is not possible

23 Telstra, p 2, Paragraph 3

24 Telstra p. 2, paragraph 4

25 Telstra p. 3, paragraph 5

26 Mr P Mason, Senate Environment, Communications and the Arts Committee, Inquiry into Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Committee Hansard, p. 38

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to provide any further comment regarding this matter'.²⁷ In fact, such an instrument has been made under the existing legislation.²⁸

Australasian Railway Association

The Australasian Railway Association, in a ten page submission, addressed the possible consequences of the use of rail infrastructure for telecommunications purposes but did not address the Bill itself except to note that it was not consulted on it.²⁹

Unwired³⁰

Unwired suggested that the Bill 'is primarily seeking access to public information in a more useable form' and, as such 'it does nothing to infringe private commercial rights of confidentiality nor to expose risks to assets.'³¹ Further, the Bill does not go far enough in that it is 'unnecessarily restrictive in the purposes for which the Minister may obtain, use and disclose information'.³² Unwired points out that there are already several legislative regimes under which network information can be required to be given by carriers to the two regulators, the Australian Communications and Media Authority (ACMA) and the Australian Competition and Consumer Commission (ACCC) as well as to other carriers but that none of these regimes give the Department a right to ask for such information. It

27 Water Services Association of Australia, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=19c1cdd9-223f-442a-a8a1-a6c081e6886a>

28 Telecommunications (National Broadband Network—Restricted Recipients and Storage, Handling and Destruction of Protected Carrier Information) Rules 2008 (No. 1), [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A7FE3A70056CDADCCA25749E00086419/\\$file/TelNBN_Recipientsandstoragehandlinganddestructionofinforma.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/0/A7FE3A70056CDADCCA25749E00086419/$file/TelNBN_Recipientsandstoragehandlinganddestructionofinforma.pdf)

29 Australasian Railways Association, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=0f4f4431-aa66-4419-869e-c58c5b0a51b8>

30 Unwired, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=b1e2eb48-3e19-4876-97a9-d1ea9fc536af>

31 Unwired, p. 2.

32 Unwired, p. 4.

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suggests that there is a case for ‘a single process for recording and sharing within Government details of utility infrastructure’.³³ Unwired also makes some accurate observations about some arguments made by others around privacy and confidentiality. Privacy, at least in the way that word is used in the Privacy Act, concerns personal information about people and not corporations and so need not be a concern in relation to this Bill. It says, however, that the Bill may raise issues of confidentiality of network information but only to the extent that that information is not already in the public domain which is the position in relation to almost all infrastructure.³⁴

As to the arguments that have been made in relation to Part 27A generally (and not this Bill in particular), that issues of national security arise from the release of network information, Unwired says, in dismissing such concerns;

The other claim mounted has been that release of some of this information could create a risk to national security. A fact of networks is that if you want to attack them the best point for the attack is a node rather than a link. All the nodes are very visible. In fact most of the links are visible, including routes with labelled manhole covers and even topographic maps showing the course of power lines.³⁵

Energy Networks Association

While being supportive of the Government’s plan to develop the national broadband network and of the efficient use of existing infrastructure, the Energy Networks Association has four concerns about the Bill. The first is that it considers that more time should be given to utilities to consider and comment on the draft instrument that the Minister makes to require that information be given to the Commonwealth (the Bill proposes a consultation period of 5 days). Secondly, it is concerned with the cost of providing information, particularly where IT system changes are required to capture the information in the required form. Thirdly, it is concerned about the security of the information that utilities are required to provide and that appropriate controls are in place when that information is disclosed. Lastly, it is concerned about the burden of information requests on companies that do not have systems in place to extract the required information in the form required by the Commonwealth. (It should be noted that this last criticism does not concern the Bill directly but rather instruments made under the Act as it is now and that these concerns can therefore be addressed under the consultation process that is already in the Act).

Integral Energy

Integral Energy generally supports the Government’s latest NBN proposal and acknowledged the benefits of the use of existing infrastructure. It does not raise concerns about the Bill itself but rather about aspects of the instruments that the Minister may make

33 Unwired, p. 5.

34 Unwired p. 3–4

35 Unwired p. 5.

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under the Bill. These concerns are that information requests should reflect an understanding of the electricity sector and that the Department should engage with the sector before any draft instruments are issued; that a reasonable amount of time be given for information to be supplied; that there be sufficient controls over the disclosure and use of information; and that compensation is paid on a cost basis for information provided to the Commonwealth.³⁶

Business Council of Australia (BCA)

The Business Council of Australia (BCA) asserted that the disclosure of some network information to the publicly owned NBN Co could confer a competitive advantage on it and that this would be contrary to principles of competitive neutrality.³⁷

With regard to the application of Part 27A to utilities, the BCA says;

In the case of utility and other network companies, it is not clear that there is a need to compulsorily require information. If the purpose of acquiring information is to explore options for accessing the infrastructure of utility companies on commercial terms, then those companies would be likely to provide the requested information on a voluntary basis where it is in their interest to do so.³⁸

Most of the BCA's concerns, however, are best characterised as concerning the latest NBN proposal itself—notably its use of a publicly held company to effect the rollout and the failure of the Government to assess the benefits of the proposal—and not the Bill itself.

Significant technical flaws

In its submission, Unwired criticises the Bill's requirement that subordinate instruments be 'published on the internet' and notes, correctly, that this is meaningless. The point being made is that the internet is not the web. Presumably, it is intended that such instruments be published on the Department's website. The legislation ought to say that and to state that it remain on the website for a specified time.

36 That is, companies should not be left with 'out-of-pocket' expenses in providing this information to the Commonwealth. Integral Energy, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=02a7f02e-9622-4169-9f39-eeb3e681a9b0>

37 Business Council of Australia, Submission to Senate Environment, Communications and the Arts Committee, *Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009*, July 2009, <https://senate.aph.gov.au/submissions/committees/viewdocument.aspx?id=59afa254-9668-43e7-b032-2ff69f04a77a>

38 BCA, p. 7.

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Financial implications

The Explanatory Memorandum records that the cost in the first year is expected to be no more than \$100 000.³⁹

Main provisions

Items 1 to 8 either insert new defined terms, point to new defined terms in Part 27A, or repeal redundant ones.

Item 9 replaces the simplified outline of Part 27A with a new one.

Items 10 to 13 make changes to definitions to reflect the new purpose for which information is to be requested. That is, that information will be requested for the purposes of an implementation study or to be given to the NBN Co or some of its contractors and not for the purposes of the now-terminated RFP process.

Item 14 repeals the definition, in section 531B, of ‘protected carrier information’ this being the information that was given by telecommunication carriers under the existing provision of Part 27A.

Item 15 inserts into section 531B a definition of ‘protected network information’ which is in substantially the same terms as the definition of ‘protected carrier information’ but includes information received from utilities and some minor technical differences relating to the time at which information is received. As before, protected network information can be information given voluntarily or compulsorily under the proposed changes.

Item 16 inserts new definition of utility into section 531B. A utility broadly includes suppliers of electricity, gas, water, sewerage or drainage and suppliers of carriage and transport services. It also includes anyone who owns a structure or thing used for the provision of those services.

Item 17 inserts **proposed section 531BA** which allows the Minister to determine via (a disallowable) legislative instrument that another company is a ‘designated broadband company’. Such a company can receive information like NBN Co does. The Tasmanian NBN Co. will be an example of a designated broadband company.

Item 18 makes minor amendments to include utilities within the ambit of Part 27A.

Item 19 inserts **proposed subsections 531C(1A) and 531C(1B)**. Existing section 531C allows the Minister to make a ‘written instrument’ requesting information from carriers

39 Explanatory Memorandum, Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, p. 5.

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and utilities. Whilst this is not a legislative instrument, it is nonetheless disallowable under existing subsection 531C(7). The proposed amendment puts limits on the kinds of information that the Minister may request. In general terms, the information must concern existing or proposed things that could be used in connection with the national broadband network.

Items 22 and 23 amend section 531C to extend, from 3 to 5 days, the period of consultation that the Minister must allow when he makes a draft information request.

Item 24 repeals sections 531D and 531E which deal with concepts unique to the first national broadband network proposal that are not longer relevant.

Item 25 repeals Division 2 (which consists of only one section (section 531F)) and replaces it with a **new Division 2**. Existing section 531F obliged a person to comply with a notice requesting information. However, the provision was expressed to cease operation 12 months after its commencement. That time has passed and the provision needs to be amended accordingly. The obligation to comply with an information request is proposed to continue for 10 years after commencement of the section (**proposed subsection 531F(5)**). In addition, new Division 2 prohibits a person from being involved in a breach of the main obligation by, for instance, aiding and abetting or inducing a breach of the obligation (proposed subsection 531F(3)). New Division 2 also makes this a civil penalty provision (proposed subsection 531F(4)). In the case of a corporation, such a provision carries a maximum penalty imposed by a court of \$250,000 per relevant contravention.

Item 27 amends 531G by making changes to the way in which an ‘entrusted public official’ may *disclose* protected network information. The changes simply relate to the different ways in which NBN #1 and NBN #2 are being implemented (that is, an RFP in the former case and an implementation study in the latter).

Item 30 inserts **proposed subsections 531G(2A), (2B) and (2C)** which allow the Minister to make a new kind of (disallowable) legislative instrument setting out the conditions on which an ‘entrusted public official’ may disclose information to another public official.

Items 32 and 35 amend section 531G in an identical manner to items 27 and 30 above but in relation to the *use* of information rather than *disclosure*.

Item 39 repeals section 531H which sets out the rules for disclosure of information to those involved in the now-terminated RFP process and replaces it with **proposed section 531H** which sets out rules for disclosure to officers of NBN Co or a ‘designated NBN Co’. The new section retains the Minister’s power to make legislative instruments limiting the way in which information may be used (existing section 531N, which is retained under this Bill, allows the Minister to make ‘restricted recipient rules’ limiting the people to whom information can be given. Subsection 531H(3)—also retained—allows the Minister to make a legislative instrument setting out the purposes for which information can be given.)

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Item 41 amends section 531K to make changes to the circumstances in which an ‘entrusted company officer’ may disclose information to another ‘entrusted company officer’. The changes simply relate to the different ways in which NBN #1 and NBN #2 are being implemented (that is, an RFP in the former case and an implementation study in the latter).

Item 44 inserts proposed **subsection 531K(2AA)** to allow the Minister to make a legislative instrument setting out other conditions on the disclosure of information by an ‘entrusted company officer’.

Item 45 substitutes paragraph 531K(2A)(a) to reflect the different ways in which NBN #1 and NBN #2 are being implemented (that is, an RFP in the former case and an implementation study in the latter).

Items 46, 47, 49 – 55 make changes consequential upon the inclusion of utilities in the class of person who may be asked to provide information and minor related changes.

Concluding comments

The legislation in Part 27A sets up a framework under which the Minister can make a range of instruments. It is these instruments that will include the detail of the legislation. This is common drafting practice. It is not practical to include within the Act itself the matters that will be addressed in the Ministerial instruments. Most of concerns raised in submissions to the Senate inquiry relate to matters that are to be dealt with in subordinate instruments. They are, therefore, not criticisms of the Bill *per se* and can really only inform the drafting of those instruments when the time comes. However, there is merit in Telstra’s suggestion that, in relation to at least one of the Minister’s powers, the legislation should set some parameters about what the Minister may determine in an instrument. Telstra made this suggestion in relation only to the rules surrounding the security of information. However, were there concerns about the scope of the Minister’s other instrument-making powers, the Act could be drafted to circumscribe that power.

This Bill makes relatively minor changes to a legislative regime that, judging from evidence before the Senate inquiry into the Bill, appears to have operated without significant detriment to those affected by it. Whether it provided any positive benefit cannot be judged as the project for which Part 27A was originally intended was terminated before any evidence of its virtue was publicly demonstrated.

A reasonable concern has been raised by, for instance, Telstra and the Business Council of Australia that the provision of information to the publicly held NBN Co is counter to the obligations of competitive neutrality that Australian governments have assumed under the National Competition Policy Agreements. This has merit but only to the extent that the information is not otherwise publicly available. However, the use of this publicly held company is a central feature of the Government’s broadband plans and so this criticism

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really goes to the policy and not to this Bill itself. The Bill does not implement the policy but merely facilitates aspects of it.

Concerns were raised in a submission to the Senate inquiry that the legislation should provide immunity for providers of information in the event that another party suffers damage as a result of relying on inadvertently inaccurate information. This is a reasonable concern but it needs to be weighed against the need to create an incentive for providers to disclose accurate information. In any case, such risks can likely be mitigated by appropriately worded disclaimers.

On the whole, this Bill makes small changes to an existing legislative regime that represents only a small piece of the national broadband network puzzle.

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