

Chapter Three

Progress since the FTTP announcement

3.1 Included in the joint ministerial announcement of the proposed FTTP project was a plan of action, which was immediately launched, as was noted in chapter two. In addition, the government released a number of discussion papers that directly related to the deployment and operation of the NBN. A chronology of events has been included in this report at page ix. This chapter provides details of the progress made on the plan of action, on issues covered within the discussion papers and on other NBN related processes.

April – June 2009

National Broadband Network: Regulatory Reform for 21st Century Broadband discussion paper

3.2 On the same day that the government announced the FTTP initiative, Minister Conroy also released the first of several discussion papers. The *National Broadband Network: Regulatory Reform for 21st Century Broadband* discussion paper provided options for reforming the current telecommunications regulatory regime to increase its effectiveness, particularly during the eight years that the government anticipates it will take to the build and transition to the NBN. The government invited comment from interested parties on a number of reform options, with submissions closing on 3 June 2009.

3.3 The discussion paper was based on the government's extensive submission process on regulatory reform of the telecommunications industry, which was undertaken during 2008 in parallel with the terminated RFP process. Although the government received over 100 submissions during that process, no analysis of those submissions was provided to the industry or the public to indicate which reform options the government favoured.

3.4 Throughout the RFP process, the lack of a regulatory framework, or even an indication of the government's preferences, lead to increasing criticism that prospective bidders would be prevented from building a sound business case for the NBN RFP. This criticism was detailed in the committee's first interim report and is illustrated by the following quote:

I totally agree with the sentiment that the cart has been put before the horse; the regulatory arrangement of the framework should have been done first.¹

3.5 The *National Broadband Network: Regulatory Reform for 21st Century Broadband* discussion paper was based on the general consensus that the current

1 Dr Ross Kelso, *Committee Hansard*, Brisbane, 21 November 2008, p. 18.

regime was ineffective in meeting the basic legislative objectives of supporting competition and protecting the long term interests of end-users. In fact, throughout the discussion paper quotes from key telecommunications stakeholders from the 2008 submission process, including Telstra, were featured, in support of each option.

3.6 The discussion paper cited its two main purposes as:

- to outline the proposed regulatory reforms that the Government will progress to facilitate the roll-out of the National Broadband Network; and
- in light of the announcement of the enhanced National Broadband Network, to consult on the options for broader reforms to make the existing regulatory regime more effective in the transition period before the network is fully rolled out.²

3.7 The paper also stated that, in reviewing the existing regulatory regime, the government will have regard to its ongoing policy commitment to: improve productivity across the economy; competition; consumer protection; rural, regional and remote Australia; and reducing unnecessary regulation.³

3.8 The focus of the consultation process was on the options for reform of the telecommunications competition framework and the existing consumer safeguards in the telecommunications sector.⁴ In the minister's foreword to the discussion paper, he stated that:

The Government does not have a pre-determined view on these [options for reform] and we have an open mind about the reforms that should be pursued.⁵

3.9 By the closing date, the Department of Broadband, Communications and the Digital Economy (DBCDE) had received 82 written submissions. The majority of authors had also provided submissions to the previous RFP discussion process, with many reiterating, if not strengthening, their views regarding the inadequacies and inefficiencies of the current regime.

3.10 The end result of the submission process was the tabling of the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the Bill). This Bill seeks to introduce a series of reforms that

2 Discussion paper, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, p. 1.

3 Discussion paper, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, p. 3.

4 Discussion paper, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, p. 2.

5 Discussion paper, *National Broadband Network: Regulatory Reform for 21st Century Broadband*, p. iv.

would address competition issues within telecommunications while also strengthening consumer safeguards. The Bill is discussed further in chapter eight of this report.

Backhaul Blackspots Initiative Stakeholder Consultation Paper

3.11 On 23 April 2009 the government released a second discussion paper, this one addressing the lack of affordable and accessible backhaul in regional communities. The consultation timeframe was limited, with submissions closing on 12 May 2009. This discussion paper again rehashed many of the previous submissions from the 2008 process on how to improve the accessibility and affordability to broadband services in regional and remote Australia. The lack of competitive backhaul is argued to be a major cause of higher access prices for the access seeker and ultimately the consumer.

3.12 The discussion paper was consequential to the government's commitment to invest 'up to \$250 million to immediately address backbone blackspots throughout regional Australia.'⁶ The purpose of the discussion paper was to facilitate the expedient implementation of the backhaul blackspot project by canvassing opinions on the:

- identification and prioritisation of regional centres to be addressed through the initiative;
- appropriate technical parameters associated with roll-out of backhaul links; and
- arrangements for funding the construction of the links, the delivery of services and the ownership of the infrastructure.⁷

3.13 The government had previously received extensive comment in relation to these issues through the *Regional Telecommunications Independent Committee Report*, which became known as the Glasson Review, named after the Chair of that committee, Dr Bill Glasson. In December 2008, the *State of the Regions Report 2008-09*, produced by National Economics for the Local Government Association of Australia, dedicated an entire chapter to the progress of achieving nationally equitable high speed broadband.

3.14 On 1 July 2009, after examination of the submissions received on the *Backhaul Blackspots Initiative Stakeholder Consultation Paper*, the government 'issued Request for Tender (RFT) to build, operate and maintain backbone transmission links to the following priority locations: Darwin; Geraldton; Broken Hill; South West Gippsland; to Emerald and on to Longreach; and Victor Harbour.'⁸ The RFT closed in early August; however at the time of reporting there seems to have

6 http://www.dbcde.gov.au/broadband/national_broadband_network/national_broadband_network_Regional_Backbone_Blackspots_Program, accessed 29 October 2009.

7 DBCDE, *Backhaul Blackspots Initiative Stakeholder Consultation Paper*, 23 April 2009, p. 2.

8http://www.dbcde.gov.au/all_funding_programs_and_support/national_broadband_network/national_broadband_network_Regional_Backbone_Blackspots_Program, accessed 30 October 2009.

been little acknowledgement of the commencement of work in any of these priority regions.

Request for Expression of Interest – Lead Advisory Services for the Implementation Study

3.15 One of the key action items the government announced on 7 April 2009 was the commencement of an Implementation Study to be completed by February 2010. The Implementation Study will:

...determine the operating arrangements, detailed network design, and ways to attract private sector investment and ways to provide procurement opportunities for local businesses.⁹

3.16 On 24 April the government released the *Request for Expression of Interest for Provision of Lead Advisory Services relating to the Implementation Study for the National Broadband Network* (REOI). This document outlined the two-stage process by which the Lead Advisor would be selected, the approximate timeframe for the REOI and the conduct of the study, and the issues to be analysed within the study. The REOI closed on 19 May with the subsequent RFT sent to short-listed respondents.

3.17 The Lead Advisor is required to conduct a comprehensive and multi-disciplinary study, as was indicated by the list of requirements provided in the REOI, which were:

- Advice as required in support of proposed legislation relating to the operation and governance of the network company, the regulatory regime, and ownership restrictions for retail telecommunications providers and other investors as required;
- Advice on the overall funding requirements for the network rollout (quantum and profile) beyond the \$4.7 billion initial funding injection;
- Development of strategies to maximise the scope for private sector investment in the network company, subject to appropriate ownership restrictions and appropriate terms and conditions for participation;
- Advice on the optimal capital structure for the network company over time;
- Development of detailed commercial/financial and engineering analysis of the network roll-out and the implications for the network company;
- Advice on how best to structure NBN Company arrangement[s] from the outset so that the Government's long term objective of privatisation can be accommodated;

9 REOI, p. 7.

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- Development of plans for the integration of the Tasmanian operation and backhaul network into the overall national broadband network;
 - Network design consistent with the Government's objectives;
 - Development of strategies to provide procurement opportunities for local businesses;
 - Develop a detailed implementation plan for the roll-out of the National Broadband Network;
 - Development of recommendations as to the appropriateness of any foreign ownership restrictions for the network company;
 - Development of a risk management strategy for the national broadband roll-out; and
 - Stakeholder consultation.¹⁰

3.18 The successful Lead Adviser was announced on 6 August 2009 as being McKinsey-KPMG. The committee notes that this appointment was made a full month later than the government had anticipated, which in turn places doubt on the ability of the Implementation Study to be completed on time before the end of February 2010.

Critical decisions delayed until final report

3.19 The committee notes with concern that information critical to the successful build and operation of the NBN remain unavailable pending the release of the Implementation Study. The committee is particularly concerned that until the final report is published, many critical issues remain unresolved for potential investors, potential infrastructure providers, the telecommunications industry and the Australian consumers.

3.20 The committee heard evidence of this uncertainty from numerous witnesses, who stated that the particular detail being sought by the committee would not be available until the completion of the Implementation Study. By way of example, in evidence given by Mr Richard Murray from the Department of the Treasury, the Implementation Study was mentioned on at least seven occasions in just over 30 minutes.¹¹ And these were just Treasury-related issues.

Interim reports?

3.21 Given the extensive scope and analysis required in the Implementation Study, and the reliance of so many stakeholders on its content, it would seem logical for the Lead Adviser to provide at least one interim report prior to the final report in February

10 REOI, p. 27.

11 See for example, Mr Richard Murray, Department of the Treasury, *Committee Hansard*, Canberra, 1 October 2009, pp 4, 5, 6 (for three separate issues), 11, and 14.

2010. Further more, the REOI stated that there would be at least one interim report provided by the Lead Adviser 'during the second half of 2009.'¹²

3.22 The committee raised this issue with the Department of Finance and Deregulation (DoFD) at the Canberra hearing. Mr Simon Lewis made the comment that:

The implementation study is unlikely to have a landing all at one point at the very end; there are obviously going to be issues that need to be addressed through the course of the implementation study.¹³

3.23 When further questioned on whether interim reports would be produced, Mr Lewis clarified that:

I just think it would make sense for the broadband department to bring forward at least that one interim report, if not more than one, prior to the delivery of the final report.¹⁴

3.24 Remarkably, the Department does not seem to agree with the sentiments of the Treasury. When the committee sought confirmation in relation to the interim reports, the Department's response was:

The first Interim Report was provided to the Department on 14 August 2009. The Lead Advisor contract and the terms of reference provide for further interim reports to be provided at the Department's request. However, the Department has not sought further interim reports.¹⁵

3.25 The Department stated that the interim report 'provided an early view of the key issues to be considered over the course of the implementation study.'¹⁶

3.26 The committee notes that this interim report was provided only eight days after the announcement of the Lead Adviser.

3.27 It is the view of the committee that the government has made a severe error in judgement by not requiring further interim reports that would remove the clouds of uncertainty that are obscuring overall confidence in the outcome of the NBN.

Establishment of the NBN Co Limited

3.28 On 9 April 2009, a company was registered by the Department with the Australian Securities and Investments Commission (ASIC). Initially registered under

12 REOI, p. 8.

13 Mr Simon Lewis, General Manager DoFD, *Committee Hansard*, Canberra, 1 October 2009, p. 96.

14 Mr Lewis, DoFD, *Committee Hansard*, Canberra, 1 October 2009, p. 97.

15 Answers to Written Questions on Notice, DBCDE, 9 November 2009, Question 1 a), p. 1.

16 Answers to Written Questions on Notice, DBCDE, 9 November 2009, Question 1 b), p. 1

just the company number issued, ACN 136 533 741 Ltd, the company was subsequently named NBN Co Limited, now generally referred to as the NBN Co.

3.29 On 3 July 2009 the government called for submissions on the governance arrangements for the NBN Co. This had also been a component of the discussion paper *National Broadband Network: Regulatory Reform for 21st Century Broadband*. However, although legislation seeking to reform the regulation of the telecommunications industry has been introduced, no legislation detailing governance arrangements for NBN Co has been introduced into parliament. The NBN Co has begun operating despite its lack of a legislative framework.

3.30 Chapter five of this report details the establishment, operation and funding of NBN Co, and its Tasmanian subsidiary, or rather, as much detail as is publicly known in the absence of the legislation necessary to provide its governance and operational framework.

Fibre-to-the-premises in greenfield estates

3.31 In its 7 April announcement, the government indicated that it would legislate the mandatory deployment of FTTP in greenfield estates that received planning approval after 1 July 2010. Legislation relating to this was expected to be tabled prior to July 2009, but has not yet been introduced at the time of reporting.

3.32 As an interim measure, the government released another consultation paper in May, with feedback required by 12 June 2009. The *Fibre-to-the-premises in greenfields estates* consultation paper put forward options for a national implementation model for requiring the deployment of FTTP infrastructure in greenfield estates.

3.33 The paper offered two options for consideration. The first option suggested legislation requiring developers to ensure FTTP infrastructure and services are available to consumers. The second option was for the Australian Government to work with state, territory and local governments to require installation of FTTP, with the possibility of providing legislative support that would prohibit the installation of non-fibre networks in greenfield estates.¹⁷

3.34 The paper stated the government's preference for the second option, noting that the first legislative requirement may become 'too cumbersome'¹⁸. Other related issues for consideration are outlined in the paper, including the role and responsibility of governments at all levels, possible exemptions, regulatory framework, competition, open access arrangements, equivalence, and retail pricing. Tellingly, the paper also noted that:

17 *Fibre-to-the-premises in greenfields estates*, p. 6.

18 *Fibre-to-the-premises in greenfields estates*, p 7.

The Implementation Study is also relevant to the implementation of the greenfields policy.¹⁹

3.35 The committee notes that issues dependent on the outcome of the Implementation Study were mentioned no less than five times throughout this paper.²⁰

3.36 According to the discussion paper, the Australian Government has consulted with stakeholders in the process of finalising its preferred approach, and suggested the formation of a stakeholder representative group to coordinate subsequent activities.²¹

3.37 The government noted that the establishment of a stakeholder representative group was strongly supported in submissions on the discussion paper. Accordingly, on 14 August 2009, the government announced the establishment of the Fibre in Greenfields Stakeholder Reference Group. Invitations to participate were sent to peak bodies within consumer groups, property developers and telecommunication carriers, as well as to all levels of governments.²²

3.38 The committee also notes that the changes to the telecommunications regulatory regime that are currently before the Senate will impact on the greenfields implementation policy.

Order of the Senate

3.39 On 13 May 2009, the Senate agreed to a motion put forward by Senator Minchin, as the Leader of the Opposition in the Senate, that consideration of any NBN-related bill be postponed until the day after the government tabled the final report of the NBN Panel of Experts, (relating to the now-terminated RFP process) and the formal report by the ACCC to the Panel of Experts.

3.40 At the time of writing, the Order of the Senate remains in place. However, on 29 October 2009, the Senate agreed to exempt the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 from the order.

First NBN related legislation

3.41 On 25 June 2009, the government introduced the Telecommunications Legislation Amendment (NBN Measures No 1) Bill 2009, which was immediately referred to the Standing Committee on the Environment, Communications and the Arts Legislative Committee. This bill sought to amend the *Telecommunications Act 1997* by giving the Minister the power to require that telecommunication carriers provide network information.

19 *Fibre-to-the-premises in greenfields estates*, p 2.

20 See *Fibre-to-the-premises in greenfields estates*, pp 2, 10, 11, 12, and 13.

21 *Fibre-to-the-premises in greenfields estates*, p 19.

22 Address to MAV Local Government Technology Solutions Conference, delivered on behalf of the Minister by the Hon. Richard Marles MP.

3.42 The inquiry reported to the Senate on 17 August 2009, with the majority report recommending that the Bill should be passed without amendments. Due to the aforementioned Order of the Senate, however, further consideration of this Bill did not occur in the Senate.

3.43 The government subsequently introduced an almost identical piece of legislation into the House of Representatives, where it was passed and sent to the Senate on 21 October 2009.

July – September 2009

3.44 The focus of activity during the month of July was the supposed commencement of the roll-out in Tasmania and the establishment of NBN Tasmania for that purpose. Mr Michael Quigley was appointed as Executive Chairman and Chief Executive Officer of NBN Co Ltd. On 6 August 2009, five board members, all to be Directors for the NBN Co, were announced by the government; these were:

- Mr Doug Campbell;
- Mr Peter Hay;
- Ms Siobhan McKenna;
- Ms Diane Smith-Gander; and
- Mr Gene Tilbrook.²³

3.45 The following week, directors were appointed to NBN Tasmania. One of the NBN Co Directors, Mr Doug Campbell, was announced as the Executive Chair of NBN Tasmania, with other directors named as Ms Alison Terry; Ms Jody Fassina; and Mr Greg McCann.

3.46 By early September there were 12 full time staff working within the NBN Co; this had grown to 40 at the time of the Senate Estimates hearings in mid October.

Second NBN related legislation

3.47 On 15 September 2009, the government introduced the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the Bill), a consequence of the extensive submission process on regulatory reforms. The package of reforms in the Bill attempts to address anti-competitive behaviour in the telecommunications industry, and has been long awaited by the industry. The Bill was sent to the Environment, Communications and the Arts Standing Legislative Committee (ECA Committee) for inquiry and report.

3.48 Although only given four weeks to investigate what can be described as the most extensive regulatory reform in the industry for many years, 119 written submissions were received, in addition to 224 form letters. The government-led

23 *NBN Co Limited Annual Report 2008-09*, p. 3.

committee reported on 26 October 2009, with the majority recommending that the Bill be passed. However, Coalition Senators were concerned by many aspects of the Bill, particularly those relating to the proposed separation of Telstra. The Coalition Dissenting Report recommended that:

...further consideration of the bill not proceed until after the NBN Implementation Study has been completed, the Government has tabled its response to the Implementation Study and the Senate has certainty about the network structure of the NBN Co and the regularity framework which will surround it.²⁴

3.49 This recommendation once again highlights the critical dependence of the future fate of the telecommunications industry on the findings of the government's Implementation Study.

3.50 The Bill was passed in the House of Representatives on 21 October. Although further consideration of the Bill was temporarily delayed by the existing Order of the Senate, cross-bench negotiations by the government overcame this obstacle on 29 October 2009, with debate scheduled to proceed in final sitting weeks of November 2009.

Tasmanian roll-out commences

3.51 On 15 September 2009, Aurora Energy announced that work had begun on the Tasmanian deployment of the NBN. Workmen commenced the roll-out at Midway Point, near Hobart, with work on the section between Scottsdale and George Town anticipated before Christmas 2009.

October – November 2009

3.52 On 8 October came the announcement of the first successful supply contract for over 300 kilometres of backhaul fibre for the Tasmanian NBN deployment.

3.53 Other events of note include the release on 22 October 2009 by Communications Alliance of a discussion paper on the *High Level Architecture Options for the NBN*. The objective of the paper is to:

...represent a range of scenarios and options that the Communications Alliance working groups have identified with the purpose of facilitating broader discussion and decision making on the NBN.²⁵

3.54 It is anticipated that this will in turn inform the establishment of 'an industry agreed set of NBN reference architecture options.'²⁶

24 ECA Committee Report, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009*, pp 44-45.

25 *Draft NBN Reference Architecture – High Level Architecture Options of the NBN*, Communications Alliance, October 2009, p. 1.

3.55 In the final week of October, the Business Council of Australia (BCA) released a report examining the Rudd Government's selection and prioritisation of Australian infrastructure projects of national significance. The NBN was highlighted in this report, with BCA condemning the government for embarking on this project without conducting a rigorous cost-benefit analysis.

3.56 This issue has, quite justifiably, plagued the government since the 7 April announcement. However, the government continues to refuse to conduct a robust analysis of costs and benefits of the NBN, despite the government estimating the project will cost up to \$43 billion. The issue of cost-benefit analysis is further discussed in chapter six.

3.57 In late October the Productivity Commission tabled its Annual Report 2008-09; this report also contained strong criticism of the government for not undertaking a rigorous cost-benefit analysis on the NBN and is featured further in chapter six of this report.

3.58 On 29 October 2009 there was a joint ministerial announcement that the bidding process for the 'Smart Grid Smart City' initiative had commenced; further details of smart grid and other broadband applications can be found in chapter seven of this report.

3.59 On 4 November 2009, the government announced that on 10 and 11 December 2009 it will host a 'major forum to explore Australia's potential in the digital economy.'²⁷

3.60 With reference to the role that the NBN will take in shaping the digital future of Australia, the media release stated:

The National Broadband Network will turbo-charge our digital economy and enable Australia to become a global leader, harnessing new applications to support economic growth and service delivery. ...

This forum will highlight the opportunities and help our research community and commercial sectors plan for the digital applications, services and business models of the future.

3.61 Leading keynote speakers will include Mr Mike Quigley, CEO of the NBN Co.

3.62 At the time of reporting, the Senate had not yet considered the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009.

26 *Draft NBN Reference Architecture – High Level Architecture Options of the NBN*, Communications Alliance, October 2009, p. 2.

27 http://www.minister.dbcde.gov.au/media/media_releases/2009/101, accessed 10 November 2009.

