

Additional Remarks – Coalition Senators

1.1 The Coalition believes there are a number of flaws in the government's proposed National Broadband Network (NBN) proposal. This notwithstanding, the Coalition will consider this bill on its merits and in conjunction with the government's latest policy on the NBN.

1.2 Primarily, Coalition Senators are concerned about the potential cost of this project and the fact the government arrogantly refuses to conduct any cost benefit analysis.

Senate order for the production of documents

1.3 Coalition Senators note that upon the introduction of this bill in the Senate on 25 June 2009, debate was adjourned 'to the next day of sitting after the presentation of documents relating to the National Broadband Network tender process pursuant to an order of the Senate of 13 May 2009.'¹

1.4 This order of the Senate requires that before further consideration of this NBN bill and any other NBN legislation that the government provide to the Senate, copies of the Australian Competition and Consumer Commission's (ACCC) report to the Expert Panel and the Expert Panel's report to the government. These reports relate to the Government's initial NBN proposal and Request for Proposal (RFP) process and the decision not to proceed with the proposal the ALP took to the last election and instead propose a \$43billion fibre-to-the-premises option predominantly to be funded by government debt.

1.5 Coalition Senators still believe that this order of the Senate should be complied with and call on the government to provide these reports to the Senate to facilitate further consideration of this current bill.

Consultation

1.6 The Coalition is concerned by the overwhelming weight of evidence that indicated the government did not consult stakeholders about the content of this bill prior to its introduction.

1.7 Coalition Senators are disappointed that utilities only became privy to potential obligations proposed by this bill after the bill was introduced. In evidence to the committee, Mr Claude Piccinin, Deputy Executive Director, Water Services Association indicated that he was made aware of the bill through the media.

1 See Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, Second Reading Speech, *Senate Hansard*, 25 June 2009, p. 4274.

Senator MINCHIN - From the perspective of your industry, I would like to know when and how you learnt of the existence of this bill?

Mr Piccinin—The way I learnt about it is that I was sitting at my desk on a Friday afternoon, minding my own business, winding down and looking forward to the weekend, when a journalist asked, ‘Would you care to comment on this?’ and I said, ‘What?’ It was a total surprise, shall we say.

Senator MINCHIN — You found out from the media —

Mr Piccinin — Indeed.

Senator MINCHIN — presumably after the bill had already been introduced?

Mr Piccinin—Indeed - yes.²

1.8 Mr Brett Hughes, Director, Policy, Australasian Railway Association, stated in evidence to the committee that ‘the rail industry is concerned about the lack of dialogue with government on this issue, which potentially has very significant impacts to the industry directly and Australia as a whole.’³

1.9 Further, it is surprising that in the time since the introduction of the bill those utilities that may be compelled to provide information have not been formally approached about their willingness or otherwise to cooperate.

1.10 Coalition Senators note that the Department of Broadband, Communications and the Digital Economy (the Department) has now met with some stakeholders to discuss their concerns, but remains opposed to any improvements to the bill to address stakeholder concerns.

1.11 Coalition Senators highlight our concerns about the Department’s lack of consultation on this legislation – particularly given that the government argues it is pivotal to the NBN implementation study.

1.12 The legislation was introduced almost three months after the announcement of the NBN Mark II proposal and the government should have been consulting with stakeholders over this period and as the bill was drafted. It is disappointing that the first stage of a project that will involve such a massive expenditure of taxpayer funds was not conducted in a cooperative and proactive way.

Compulsion

1.13 The Coalition notes that there was no evidence presented to the committee that carriers and utilities would not be prepared to cooperate with the government in providing information for the implementation study on a voluntary, commercial basis.

2 Mr Claude Piccinin, *Committee Hansard*, Canberra, 4 August 2009, p. 7.

3 Mr Brett Hughes, *Committee Hansard*, Canberra, 4 August 2009, p. 18.

Consultation timelines

1.14 The Coalition believes that the concerns expressed to the committee about the timelines for consultation have merit and should be further considered.

1.15 Submissions and/or evidence from Integral Energy, Energy Networks Association and the Water Services Association of Australia raised concerns with the timelines in the bill, both in relation to the consultation on the draft instrument and the timeline for the provision of required information.⁴

1.16 Given that the project is already experiencing delays and that it took four months to even appoint the lead advisers for the implementation study, the Coalition does not believe the arguments presented by the Department about their restrictive timelines have merit when they are being imposed at the expense of stakeholders.

1.17 Firstly, in relation to the period for consultation on any instrument to require the provision of information, the Coalition supports the recognition by the government that the existing consultation period is too short and that this bill amends section 531C(4) to extend the consultation period from three to five business days. However, given this bill will affect both carriers and utilities the Coalition is sympathetic to the arguments presented to the committee that further consultation should be required.

1.18 We are inclined to support an increase in the consultation period to 10 business days. The government has not proven in this first step on the NBN Mark II proposal that they will be proactive in their engagement with stakeholders. Therefore to ensure that all stakeholders are given adequate time to consider any proposed instrument, we support calls for a further amendment to 531C(4).

1.19 The approved period for the provision of information remains unchanged by this bill at not less than 10 days. However, there was also evidence presented to the committee that this period should be extended.

1.20 Further, Coalition Senators also believe that the requirement that the minimum 10 day requirement for the provision of information should be extended to take account of the concerns raised by utilities about providing required information.

1.21 Integral Energy highlighted their concerns during the committee's hearing into the bill.

Senator MINCHIN — Again, the bill provides for 10 working days for providing the information, the consultation having occurred. I think you recommend 20—working days, I assume. Would you like to expand on that?

4 See for example, Integral Energy, *Submission 8*; Water Services Association of Australia, *Submission 2*; and Energy Networks Association, *Submission 5*.

Mr Englund — Depending on the scope of the information required it may be relatively easy to deliver what the department wants. However, as I averted to in my last response, most of our asset information is contained within our GIS systems and is relatively easy to deliver, but about 30 per cent of our asset information, which largely relates to ducts underneath our larger metropolitan areas—we service the Parramatta, Liverpool areas and Western Sydney, into the Blue Mountains and down to the South of New South Wales—a lot of the assets were acquired pre-1990. We only have those in a scanned document format. They are not 100 per cent accurate and if, for example, the department is looking to acquire that information in a particular format or, perhaps more pertinently, they are looking to understand what level of capacity a particular electricity duct has, that would take us some time to acquire because we do not necessarily keep all of that information up to date. If they wanted cost information in addition to that, that would be another order of magnitude, because we would probably have to custom build something to deliver that.

Senator MINCHIN — It sounds as if even 20 working days might be —

Mr Englund — It would be pushing it but we are trying to be helpful.⁵

1.22 Similar concerns were expressed by the Water Services Association of Australia in relation to the difficulties in providing information about easements in the 10 day period.⁶

1.23 Officials from the Department confirmed at the hearing that the penalties for not complying with the timeframes could be onerous for carriers and utilities.

Senator MINCHIN — But if it is 10 days then I can imagine a minister being inclined to sign-off on 10 days. If you supply the information on the 11th day you are prima facie guilty of an offence under this bill, is that correct?

Mr Mason — It is a breach.

Senator MINCHIN — You have contravened the act. And the maximum penalty for contravening this act, as I understand, is \$250,000?

Mr Mason — Yes. It depends on the nature of the party in some ways because for a carrier it is a carrier licence condition.⁷

1.24 The Coalition believes that the views of stakeholders should be considered and the time to provide information should be extended to accommodate the difficulties utilities may have in obtaining and preparing the information required.

5 Mr Anthony Englund, *Committee Hansard*, Canberra, 4 August 2009, p. 4.

6 Mr Piccinin, *Committee Hansard*, Canberra, 4 August 2009, p. 9.

7 Mr Philip Mason, *Committee Hansard*, Canberra, 4 August 2009, p. 41.

Immunities

1.25 During the inquiry, Coalition Senators questioned the Department about whether they had considered providing some level of immunity from civil penalties for carriers and utilities who inadvertently do not provide accurate information.

Senator MINCHIN — Thank you. The other issue that attracts my interest is a request made by some for the bill to provide a mechanism by which suppliers of information are granted an immunity from civil action based on any inaccuracy in the information provided that may incur damages to a third party. Has that been considered and rejected? Has it not been considered at all? Are there difficulties from your point of view in such an immunity?

Mr Mason — It is an issue that we are very aware of. It was something that was actually considered last year in the context of Part 27A generally. We understand the sensitivity from the perspective of information providers but the other side of it is that there does need to be an incentive, we think, for information providers to provide the best quality information that they can. We would be concerned if there was too much immunity or too great an immunity that they may be perhaps a little lax in checking the details or the accuracy of it, which could have consequences for network planning and so forth.

Having said that, we recognise that there are sometimes limitations to carrying databases. For example, some of the utilities have indicated a lot of their infrastructure is quite old and it may not be that well recorded. So that is the countervailing one. In terms of how that can be dealt with in practice, it needs a degree of understanding, I suppose, on the part of the Commonwealth in seeking information from the implementation study and potentially, if it gets that far, from the national broadband network company in relation to the quality of the information. It is potentially open to the information providers to state limitations to the information when they provide it, as well.

Senator MINCHIN — Yes, that is true. I know Senator Lundy expressed some surprise, but it is clear from evidence, particularly from utilities, that there is quite a bit of legacy network information that is stored on papyrus or something and not exactly well documented. Even with the best of endeavours, some of these utilities may have considerable difficulty supplying information which they could vouchsafe to be absolutely accurate. It would be unfortunate if they then paid a penalty for that. I understand you are sensitive to that, and that is something we may be able to pursue.⁸

1.26 Coalition Senators note that the Department has considered this issue and they think it unnecessary to include any immunity from civil liability in relation to the

8 Mr Philip Mason, *Committee Hansard*, Canberra, 4 August 2009, p. 42.

provision of this information. However, we see strong merit in giving further consideration to including immunity for unintended inaccuracies in the information provided in the legislation to allay some of the concerns of utilities who have indicated they are willing to cooperate.

Costs

1.27 Utilities raised with the committee the issue of the costs associated with the provision of information that may be required by the government and the actual ongoing costs associated with the potential use of their infrastructure.

1.28 The Explanatory Memorandum states:

Any potential detriment to carriers and utilities if required to provide the information is outweighed by the national importance of the NBN to be planned and rolled out as efficiently as possible so that the economic and social outcomes that the NBN will facilitate are maximised. As identified above, the cost of making this information available is not considered onerous.⁹

1.29 We believe that the Explanatory Memorandum is potentially misleading as there is no evidence to support these assumptions regarding the costs to utilities or carriers of providing the information it may require.

1.30 As noted in the Majority Committee Report, four submissions to the inquiry raised concerns about the costs to utilities in providing information and that they would anticipate compensation to cover reasonable costs.

1.31 To highlight the validity of these concerns, Mr Hughes of the Australasian Railway Association told the committee that:

According to the legislation, railways will be required to provide information on land infrastructure and other facilities under their control. I am sure that you will appreciate that there are millions of pieces of information which may be requested varying from digital location information to the size of ducts. There are over 44,000 kilometres of rail track in Australia and countless stations, terminals, offices, yards, sidings, depots and other facilities. A simple question such as the boundaries of land under railway control represents an enormous amount of work to answer with any degree of accuracy. Yet this is exactly what the rail industry fears could be required under the legislation. If such information is required without due regard to reasonableness or compensation, it will impose an unacceptable burden on the Industry.¹⁰

9 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 16.

10 Mr Hughes, *Committee Hansard*, Canberra, 4 August 2009, p. 18.

1.32 While the Coalition notes that it is the government's intention to seek information on a cooperative and commercial basis there is currently no mechanism that requires consideration of compensation under a mandatory requirement to provide information.

1.33 Further consideration should be given to whether this 'intention' of the government should be formalised in the legislation. If the government is confident that it can undertake commercial arrangements to obtain the information it requires, there can be limited concern about inserting a provision in the bill that will require reasonable costs being recompensed under a compulsory demand for information.

Security of information

1.34 One of the key concerns of Coalition Senators is the protection of sensitive information about assets and infrastructure provided to an authorised information officer. This is of particular concern given that the information of these utilities and carriers is of national security interest and the definition of who can potentially access any information is being broadened.

1.35 Protection of the integrity of information should be the paramount focus of the government throughout this process. While we support the government having flexibility in relation to the procedures for the protection of the information, we do believe that the stakeholders should be consulted about these protection and control regulations as suggested by Integral Energy.¹¹

1.36 In its submission to the inquiry, Energy Networks Association noted that the broadening of the definition of entrusted company officer in the bill 'carries with it infrastructure security and commercial implications, as well as possible risks, for businesses providing this type of information to a range of entities.'¹²

1.37 We are concerned about the broad scope of people who could have access to the information over the life of the NBN Co. and that this bill gives the government the ability to impose obligations on carriers and utilities for a decade.

1.38 Integral Energy also raised their concerns in the committee hearing about the potential for the Australian Competition and Consumer Commission or the Australian Energy Regulator gaining access to information provided to the Commonwealth for the purposes of the NBN.¹³ Upon questioning of the Department about this issue, they advised that though they understood the concerns the intention was not to broaden the scope of the information to be provided broader than for the 'purposes of designing a network.'¹⁴

11 Integral Energy, *Submission 8*, p. 3.

12 Energy Networks Association, *Submission 5*, p. 2.

13 Mr Englund, *Committee Hansard*, Canberra, 4 August 2009, p. 4.

14 Mr Mason, *Committee Hansard*, Canberra, 4 August 2009, p. 42.

1.39 However, and as mentioned in the majority report, Telstra pointed out in evidence to the committee that the scope for which information is to be provided is much broader than in the existing Act, and 'the language needs to be tightened up quite significantly in terms of the current legislation to make sure that information provided is strictly for the building of the NBN and that it is much more specific than it currently is.'¹⁵

1.40 The Coalition believes that the ten year sunset clause serves only to compound the level of concern about the procedures in place for the protection of any information that could be sought by the government.

Competitive neutrality

1.41 Coalition Senators are concerned that the government is blindly consumed by the anticipated social and economic benefits of the NBN upon delivery which assumes that the project will actually commence, let alone be completed.

1.42 This is evident throughout the Explanatory Memorandum, particularly in relation to competitive neutrality.

1.43 The Explanatory Memorandum states:

In relation to competitive neutrality it is recognised that any framework that compels the provision of information from one commercial entity to another, particularly where they may compete in some way, raises issues of competitive neutrality. However, where such considerations arise, they must be balanced against the larger public policy objectives of the Government's NBN policy, which, in the longer term, delivers benefits to consumers and the economy generally that will outweigh any competition concerns arising from accessing the information.¹⁶

1.44 The Coalition believes that this explanation ignores the potential costs that will be imposed on utilities, carriers and taxpayers and is a statement that is based on broad generalisations rather than a detailed or rigorous analysis of the costs involved. As highlighted in the majority report, the Business Council of Australia's submission to the inquiry states:

Information compulsorily acquired from a private business in support of the NBN company under Part 27A will almost certainly be of commercial value. The proposed Bill therefore confers a competitive advantage on the NBN company and is likely to have an impact on competition in the wholesale market for telecommunication services. As such we would

15 Mr Geoff Booth, *Committee Hansard*, Canberra, 4 August 2009, p. 27.

16 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 12.

expect to see a rigorous cost-benefit analysis in support of the Bill in accordance with the COAG agreement.¹⁷

1.45 The Coalition agrees with the concerns of the Business Council of Australia and we have serious concerns about the apparent lack of certainty surrounding the issue of competitive neutrality in the context of this bill and the NBN Co. going forward.

1.46 The Explanatory Memorandum further states that "The provision of network information to the NBN Company would be subject to a further decision by the minister, thereby allowing any competitive neutrality issues to be considered further."¹⁸

1.47 We have considerable concerns about leaving these considerations in the hands of the minister. We therefore believe that further consideration should be given to limiting this bill to the provision of information for the implementation study only.

1.48 Should it be determined after the implementation study that the NBN Co. requires this information, the government should come back to the Parliament to get approval.

1.49 Given there are so many details still to be finalised in regards to this project, we do not support giving the minister carte blanche powers with a ten year sunset clause.

1.50 In this we concur with the Business Council of Australia, who concluded in their submission:

The proposal raises a number of issues in relation to competitive neutrality principles agreed by all governments at COAG and therefore warrants a net benefit assessment.

The assessment should take into account the likely impacts on competition resulting from the provision and use of information under Part 27A, in particular the possible consequences resulting from the broad definition of information that can be required and the time period of up to 10 years.¹⁹

1.51 We believe this bill should be for the purposes of the implementation study only and support the sunset of this requirement in June 2010.

17 Business Council of Australia, *Submission 9*, p. 7.

18 Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009, *Explanatory Memorandum*, p. 16.

19 Business Council of Australia, *Submission 9*, pp 10-11.

Recommendation

That the government further consider the concerns of stakeholders and refine the bill to accommodate these concerns, including through the reconsideration of the ten year sunset clause.

Senator Simon Birmingham Senator Judith Troeth Senator Nick Minchin

August 2009