Business Council of Australia

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Submission to the

Senate Environment, Communications, and the Arts Committee

on the

Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill

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INTRODUCTION

The vision of the Business Council of Australia is for Australia to be the best place in the world in which to live, work, learn and do business. We have set an aspiration for Australia to be in the top 5 countries in the OECD by 2012, measured by GDP per capita.

Australia's communications infrastructure will make a key contribution to realising that goal. Investment that raises the speed, quality and coverage of high-speed broadband provision in Australia has the potential to contribute to innovation, productivity and economic growth in the coming decades.

Government policy settings have a significant impact on broadband investment. The federal government has placed itself squarely in the centre of this important market over the coming decades with its announcement to form a public company to oversee an estimated $43 billion in investment in a high-speed national broadband network (NBN).

The NBN company (A.C.N. 136 533 741), which has now been established, will be majority government owned (it will hold at least a 51 per cent stake) with the anticipation of private investment. The government intends to sell down its stake in the NBN company five years after the network is built.

While the government is yet to complete its implementation plan, or a cost–benefit analysis, it sees the NBN company as a key part of its commitment to 'develop Australia's physical capacity to participate in the digital economy'.[1]

The government has proposed amendments to telecommunications legislation that would require telecommunications and other utilities to provide 'protected network information' for purposes related to the planning and roll-out of the national broadband network.

Two options have been identified in the explanatory memorandum for accessing information held by telecommunications carriers and other utilities:

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[1] Commonwealth of Australia, *Australia's Digital Economy: Future Directions*, 2009, p. 9.

- Option A – a voluntary approach whereby carriers and utilities provide information on a cooperative or commercial basis, or

- Option B – the proposed amendment to Part 27A of the Telecommunications Act 1997 to extend a power for mandating network information provision that was established for the aborted NBN request for proposal process.

The explanatory memorandum provides further clarification on the type of information required. It says that 'information that is specified by the Minister and that must be provided must be information about things that could be used for, or in connection with, the creation or development of a broadband telecommunications network, or the supply of carriage services over this type of network, or a matter ancillary or incidental to those topics'. The type of information that might be required is 'information about existing infrastructure that might be used in the NBN, such as ducts, pits and poles' (p. 6).

The Bill also 'provides that the obligation on carriers and utilities to provide specified information to an authorised information officer would apply for a period of 10 years.'

Both the breadth of information that could be required under this Bill and the length of time over which it might apply lead us to conclude that the Bill should be supported by a robust and rigorous demonstration of the public benefits from its introduction.

MARKET AND POLICY CONTEXT

The government's decision to form a public company to oversee an estimated $43 billion in investment in Australia's high-speed broadband network is a departure from past policy approaches in the ICT sector and the approach favoured by the OECD and other countries where regulatory environments have been structured to encourage large-scale private investment in next-generation broadband.

While there may be circumstances specific to the Australian context that underpin the government's approach, they need to be well understood – given that it is not without some risk. As the NBN is claimed to be the largest infrastructure project in Australia's history, it is imperative that the policy process surrounding it be of the highest standard and rigour.

All OECD nations, including Australia, recently signed the Seoul declaration of the Ministerial Meeting on the Future of the Internet Economy, which declared that they would:

- Establish a regulatory environment that assures a level playing field for competition.
- Stimulate investment and competition in the development of high capacity and communication infrastructures.

In its most recent advice, the OECD said that 'policymakers must take great care to design public investments in a way that they promote competition without disrupting private investment'.

Policy settings to support the NBN will need to be carefully designed to avoid potential negative impacts on the telecommunications market.

Public intervention on the scale of the NBN will provide benefits in terms of higher levels of public investment, and it is one way of providing greater bandwidth to businesses and consumers. It will also have a major impact on competition in the communications market. It will be important therefore to carefully design policy to avoid causing unnecessary distortions, for example, unnecessary crowding out of competing private investment in fixed and wireless networks.

The Competition Principles Agreement agreed by all governments at COAG in 1995 states that government businesses should not enjoy any net competitive advantage simply as a result of their public-sector ownership, and that where restrictions on competition occur as a result of legislation it needs to be demonstrated that the public benefits exceed the costs.

While we understand that the government has set a high-level policy objective in relation to broadband provision and the development of Australia's fixed broadband infrastructure, we are concerned that any deviation from well-established policymaking practices may lead to unintended consequences that negatively impact on the market and which, in effect, work against the achievement of those objectives.

We are also mindful that in making significant exceptions with respect to the NBN, the government may be establishing a precedent that will be difficult to quarantine from other

regulated infrastructure sectors and broader policy development. It is therefore important in our view that sound policymaking practice is observed in relation to the NBN – in particular the requirement under competition policy principles for a net benefit assessment to justify any restriction on competition.

This is not simply a matter of holding up a principle of good policy development for the sake of it. Rigorous policy analysis and development is critical to ensure that government regulation and spending in the telecommunications sector supports investment, productivity and economic growth and delivers net benefits. Given the scale of investment being undertaken by the government, we believe that confidence in an efficient outcome is paramount.

A further consideration is the government's stated intention to sell down its stake in the NBN company five years after the completion of its construction. It will be important to ensure that the NBN company is an efficient and commercially viable entity and not dependent on government support when it is ultimately sold to private investors. Maintaining competitive markets for fixed and wireless broadband infrastructure in the period leading up to privatisation and beyond would ensure that the NBN company has a strong commercial imperative to operate as an efficient business.

ISSUES RAISED BY THE BILL

In the explanatory memorandum to the Bill, the government outlines its arguments for supporting Option B as its preferred course. In our view Option B raises a number of issues under the government's own competitive neutrality principles and requires further justification.

Competitive neutrality considerations

Competitive neutrality principles agreed by all governments at COAG state that government businesses should not enjoy any net competitive advantage simply as a result of their public-sector ownership.[2]

[2] Council of Australian Governments, *Competition Principles Agreement*, 11 April 1995 (as amended to 13 April 2007).

The COAG Competition Principles Agreement also states that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and
- the objectives of the legislation can only be achieved by restricting competition.

Government policy is to apply competitive neutrality policy to all Government Business Enterprises (GBEs). The NBN company will be a significant GBE that should be subject to the same laws and taxes as private-sector companies and should not enjoy a competitive benefit from public ownership unless it is demonstrated that the benefits exceed the costs. This includes the application of regulatory neutrality whereby government businesses should not have regulatory advantages as a consequence of government ownership.[3]

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

While the government has not yet consulted externally on the proposed amendment, we note that page 16 of the explanatory memorandum reveals that other government agencies have also raised the necessity to further investigate the competitive neutrality implications of the Bill.

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.

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[3] Commonwealth of Australia, *Competitive Neutrality Guidelines for Managers*, February 2004.

A net benefit assessment of the proposal is warranted

The BCA strongly supports the continued observance of the competitive neutrality guidelines. It would take a strong argument to justify watering down the observance of these principles.

The statement on competitive neutrality in a single paragraph on page 12 of the explanatory memorandum is, in our view, insufficient. There is an assertion that the economic benefits of the proposed amendments outweigh the costs, but a detailed case has not been made.

Without a proper consideration and estimation of costs and benefits, it is difficult to see that the government has provided sufficient justification for the proposed legislation.

The government should undertake a cost–benefit analysis in order to identify the net benefits of the NBN proposal and the effects on competition under the proposed Bill to demonstrate it is the best option for delivering the government's objectives.

Cost–benefit analysis provides a framework for assessing future costs and benefits of large-scale infrastructure projects such as the NBN even where there is a considerable degree of future uncertainty. The government's *Handbook of Cost–Benefit Analysis 2006* states that cost–benefit analysis is useful for a project that imposes 'costs or benefits on third parties' and that is 'so large in scale that it is important to be fully aware of its wider economic effects'. In considering the challenges of estimating the future benefits of the NBN, the handbook outlines techniques for dealing with risk and uncertainty, such as using sensitivity analysis and by using 'plausible optimistic and pessimistic assumptions about key variables that determine costs and benefits'.[4]

The effects on competition under Part 27A should be included in that assessment

The explanatory memorandum argues that the amendment to Part 27A is more or less the extension of a similar law enacted to support the earlier request for proposal (RFP) for the aborted NBN tender process.

The purpose of the information gathered under the first NBN request for proposal was to support a competitive tender process by allowing any private bidder to access critical information that would assist them in making a case to build a broadband network, generally accepted to mean a fibre-to-the-node (FTTN) network. In particular, that information was deemed necessary to build a business case based on interconnection with the customer access network.

Under the government's February announcement, the proposed NBN company will be a ubiquitous fibre-to-the-premise (FTTP) network, bypassing the customer access network. The proposed information requirements under Part 27A would seem therefore to serve a different purpose, that is, to strengthen the viability of the publicly owned NBN company.

In both cases the provision of information might support the government's higher-level objective to build a national high-speed broadband network, but the effect on the market and therefore the outcomes for businesses and consumers is likely to be quite different.

The government claims that the introduction of this law in 2008 was not greeted by strong opposition and that this is an argument for extending it now. Indeed, a significant amount of information has already been provided by telecommunications companies during the aborted RFP process.

Importantly, however, the different use of the information proposed under this Bill could not have been envisaged when the current Part 27A was made law in 2008.

Furthermore, the information that could be required under Part 27A is of a very broad nature and could be requested over a ten-year period compared to the twelve-month period for which Part 27A originally was designed to cover, thereby significantly prolonging the provision and use of the information and the effect.

The explanatory memorandum provides a discussion on this point – whether compulsorily acquired information should only be used to undertake the implementation study or whether it should also be made available to the NBN company over a ten-year period. In effect, either purpose provides a competitive advantage to the NBN company, although

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[4] Commonwealth of Australia, *Handbook of Cost–Benefit Analysis*, January 2006, pp. 69–79.

direct provision to the NBN company over a ten-year period would add to the competition impacts and the compliance burden on business.

In conclusion, a more detailed assessment of the likely future effects of Part 27A on competition in the market should be included in the cost–benefit analysis recommended earlier in this submission. The government should consult widely in undertaking that assessment.

Best practice regulation making processes

The BCA has consistently argued that regulatory proposals should be targeted and proportionate, and should achieve the aims for which they are intended without imposing unnecessary costs on business and the community.

The BCA notes the lack of consultation with key stakeholders during the development of the legislation despite the broad-ranging economic consequences of this proposal. Given the government's commitments to comply with proper regulation-making processes, the lack of consultation with stakeholders prior to introduction of the Bill in parliament represents a significant departure from those commitments.

CONCLUSION

The BCA supports policy settings in the telecommunications sector that encourage efficient investment and competition to meet the long-term needs of consumers as technology and market conditions evolve in the years ahead.

The government's proposed amendments to telecommunications legislation need to be considered within the broader frameworks of competition policy and telecommunications policy in Australia, and the significant market impacts that will occur as a result of the NBN proposal.

The BCA's views on the proposed legislation to amend the Telecommunications Act 1997 are that:

- 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.

- The proposal falls short of the government's own best-practice regulation-making processes as it fails to take into account appropriate consideration of the impacts of the legislation and is not based on sufficient consultation with stakeholders.