Unwired Australia Pty Ltd

Submission in response to

Senate Environment, Communications, Information Technology and the Arts Committee

Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009

June 2009

Executive Summary

The Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009 has been introduced to amend the provisions in Part 27A of the Telecommunications Act 1997. The effect is to extend the information that may be sought to include information from utilities as well as carriers. The effect is also to change the use of the information from responding to the NBN request for proposals to informing the NBN Implementation Study and the NBN operating company.

In our opinion, the Bill could be improved, though it does not imperil security or commercial confidentiality. The need for similar Bills in the future should be removed by a standing process. In particular:-

- The Bill is inadequate in that it is unnecessarily restrictive in the purposes for which the Minister may obtain, use and disclose information. This provision should be broader subject to the restraint that acquisition, use or disclosure of information does not infringe private commercial rights or expose assets to unnecessary risk.
- The Bill is primarily seeking access to public information in a more useable form. It does nothing to infringe private commercial rights of confidentiality nor to expose risks to assets.
- The Parliament should establish an inquiry into the ongoing need for a single process for recording and sharing within Government details of utility infrastructure. The NBNCo should be required to provide regular information to Government on its network, service availability and usage.
- The Department should be consulted on whether the definition of 'broadband telecommunications network' is really necessary, whether the changed timeframe is still required and whether there is a better way to refer to the manner in which the instrument is to be made.

However, none of these constitute reasons why the Bill should not be adopted in its current form.

1. Introduction

This submission is made by Unwired Australia Pty Ltd in response to the Senate Environment, Communications, Information Technology and the Arts Committee (the **Committee**) Inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No 1) Bill 2009 (the **Bill).** Unwired notes that the Senate has referred the Bill to the Committee to consider and report on the scope of requirements, powers conferred and whether confidentiality provisions are adequate to ensure privacy protections.[1]

The Bill in itself is not particularly new or novel. It extends provisions in Part 27A of the *Telecommunications Act 1997*(the **TA***)* that were introduced by the *Telecommunications Legislation Amendment (National Broadband Network) Act 2008 (No. 22, 2008)*. That Bill introduced a set of provisions to obtain network information to assist firms developing proposals for the National Broadband Network (NBN). It was considered by the Committee and a limited number of amendments were proposed, including restrictions un use of information as well as its disclosure, that information included in tenders be marked confidential and to revise wording that may have provided protection for a company whose employee had misused or disclosed the information. Coalition Senators criticised that Bill for not fully detailing the information that would be required.

The current Bill amends Part27A in three main ways, by increasing the scope of parties who can be required to provide information, by amending the basis for use and disclosure of information to the NBN Implementation Study and the NBN Company and extending the sunset provisions on the legislation to align with the revised uses. A number of other consequential or minor amendments are made.

Unwired did not make submissions on the earlier Bill as we were neither a potential respondent to the request for proposals, nor owners of network assets likely to be subject to the disclosure provisions. As a consequence there are aspects of the existing Part 27A that we will comment on in this submission.

2. Background

The Australian telecommunications regulatory regime is complex. Despite the relative simplicity notionally afforded by the Federal Parliament having the constitutional power to make laws with respect to "postal, telegraphic, telephonic, and other like services"[2] the application of State and Territory laws have been important, especially planning laws in their relation to telecommunications infrastructure. In areas undoubtedly within Federal control matters are also complex, with two separate regulatory agencies (the Australian Competition and Consumer Commission (**ACCC)** and the Australian Communications and Media Authority (**ACMA**)) both charged with wide ranging regulatory powers, and a Department charged with the development

[1] These terms are an amalgam of the two references in Appendices 12 and 13 to the report of the Selection of Bills Committee on Thursday 25 June, 2009.
[2] *Commonwealth of Australia Constitution Act 1900* s51(v)

of policy and the execution of an array of specific programs, such as the Australian Broadband Guarantee.

Under Part 27 of the *Telecommunications Act 1997* The ACMA has wide ranging powers to obtain information from carriers, service providers or any other person relevant to the conduct of its functions, and powers to require carriers or service providers to retain certain records. Under Division 6 of Part XIB of the *Trade Practices Act 1974*(the **TPA**) the ACCC also has powers to set record keeping rules. Further under s1555 of the TPA the ACCC has the power to provide information relevant to a designated communications matter as defined by subsection 9.

However, there is no matching ability for the relevant Department of State (the Department of Broadband, Communications and the Digital Economy or **DBCDE**) to obtain information on a similar basis from carriers, service providers or other persons to assist it in the discharge of its policy or program functions. The amendments that introduced Part 27A of the TA and the present Bill in part address this. But this is only in part, because both sets of amendments have been highly restricted to the policy purpose at the time.

The Bill is inadequate in that it is unnecessarily restrictive in the purposes for which the Minister may obtain, use and disclose information. This provision should be broader subject to the restraint that acquisition, use or disclosure of information does not infringe private commercial rights or expose assets to unnecessary risk.

3. Privacy, confidentiality and secrecy

The two references to the committee included the separate terms "detailed consideration of…the confidentiality provisions" and "assess that privacy provisions are adequate." These references confuse two distinct concepts.

"Privacy" is generally regarded as an attribute that relates to real people rather than business organisations. The *Privacy Act 1988* specifically relates to the treatment of personal information – that is, information about a person. "Confidentiality" is the more normal term for referring to information in government or commerce that is to be retained within the organisation or restricted to a defined number of people. "Secrecy" can refer to a particularly stringent level of confidentiality. However, it is more commonly the tendency of parties to try to claim "confidentiality" of information that does not justify the claim

The High Court[3] has found that a claim for confidentiality could not be mounted for something that was already in the public domain. The information sought by the Government through the powers in the Bill is all information that is to some degree available in the public domain, indeed much of it is freely visible on street corners.

The concept of commercial confidentiality has also exercised processes before the ACCC where parties have repeatedly claimed confidentiality. In that arena the legal definition has been applied that 'confidential information' (or a trade secret) is a formula, practice, process, design, instrument, pattern, or compilation of information used by a business to obtain an advantage over competitors or customers. The information sought by the Government doesn't fall within this

[3] Maggbury Pty Ltd v Hafele Australia Pty Ltd [2001] HCA 70 (13 December 2001).

definition either, despite the suggestions by the Shadow Minister that the Government is seeking information from firms to "hand to their competitor".

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.

The Bill is primarily seeking access to public information in a more useable form. It does nothing to infringe private commercial rights of confidentiality nor to expose risks to assets.

3. Non carrier information and extension

The information being sought from other utilities has the same characteristics as above. Much of it is public already, and it is no more entitled to claims of confidentiality. It is a positive use of the Federal power to make laws for telecommunications to require this information.

However, Unwired notes that the States of NSW, SA and WA submitted to the enquiry on the previous Bill a view that they should be added to the list of trusted public officials. Consequently it is expected that they will see the benefit of adding this detail to the information request.

The eagerness with which all parties are welcoming the availability of information about utility infrastructure across jurisdictions suggests that there is a need for a wider exercise. The Parliament should consider establishing a wider enquiry into the co-operative management of information relating to the locations of utility infrastructure.

A related issue is information about existing and future broadband services. NBNCo will have a choice about where it builds its networks first. It would obviously be preferable for NBNCo to build first in areas where ADSL provides very slow or no service, rather than in areas where ADSL provides high download speeds. Hopefully detailed information about current available speeds to specific premises will be included in the instrument issued by the Minister.

However, the related question is what information the Government will require from NBNCo. A fact about "red tape" often ignored is that it is not simply providing information to Government that is expensive and time consuming, it is being required to provide information to Government in an *ad hoc* fashion. In establishing NBNCo, and absent a decision to amend Part 27A to be a wider power, the Government must establish a regime for the provision by NBNCo of information about the network, service availability and usage to inform public policy.

The Parliament should establish an inquiry into the ongoing need for a single process for recording and sharing within Government details of utility infrastructure. The NBNCo should be required to provide regular information to Government on its network, service availability and usage.

4. Other matters

There are three minor matters of drafting that should be rectified. These relate to the definition of a "broadband telecommunications network", the notice period for consultation and the publishing of information on the Internet.

The Bill proposes that the following definition be inserted into s7 of the TA;

> ***broadband telecommunications network*** means a telecommunications network that is capable of carrying communications on a broadband basis.

While the definition is actually used a few times in the Bill, it is already used in the title of Part 27A. However there appears to be nothing in the definition of any merit. "Broadband basis" is used a number of times in the existing Part 27A but is undefined. If it is thought there is some legislative advantage in defining the term then it should be done properly by defining "broadband".

However, it is Unwired's preference that the Act be not unnecessarily cluttered with definitions. It would appear that the entire Part could be written so as to apply to a "telecommunications network" and the few references to "broadband" where it precedes "telecommunications network" be deleted.

The Bill also amends sections of the existing Part 27A that require certain draft instruments to be provided to affected parties. The amendments suggest that the document be provided 5 business days instead of 3 business days in advance. Unwired notes that the objection by Optus to the 3 day period in the 2008 Bill was in their consideration of the instrument as to whether it was satisfactory for the information they needed as a proponent, not as a party responding to the information request. Hence the amendment seems to be superfluous.

Finally Unwired notes that in a number of places (s531C(5), s531D(1)) Part 27A requires instruments to be "published on the Internet". Technically this is impossible. The correct reference would be that it be published on a website connected to the Internet. The *Legislative Instruments Act 2003* is the piece of legislation that technically requires instruments to be published, and the instruments under that Act results in the register of legislative instruments being published on www.comlaw.gov.au. The provision is not only incorrect, but were it to be stated correctly it would be redundant.

The Department should be consulted on whether the definition is really necessary, whether the changed timeframe is still required and whether there is a better way to refer to the manner in which the instrument is to be made.

5. Conclusion

It is disappointing that the Bill continues to be restrictive in the purposes for which Government can obtain information, and would ideally be extended in its operation. There are other matters of drafting that could be improved.

However, none of these constitute reasons why the Bill should not be adopted in its current form.