

Chapter 1

Introduction

Referral of the inquiry

1.1 On 25 June 2008, the Senate established the Select Committee on the National Broadband Network (the committee) to inquire into and report by 30 March 2009 on:

- (a) the Government's proposal to partner with the private sector to upgrade parts of the existing network to fibre to provide minimum broadband speeds of 12 megabits per second to 98 per cent of Australians on an open access basis; and
- (b) the implications of the proposed National Broadband Network (NBN) for consumers in terms of:
 - (i) service availability, choice and costs;
 - (ii) competition in telecommunications and broadband services, and
 - (iii) likely consequences for national productivity, investment, economic growth, cost of living and social capital
- (c) and other related matters.

Conduct of the inquiry to date

1.2 The committee advertised the inquiry in *The Australian* and invited written submission by 15 August 2008; details of the inquiry were placed on the committee's website.

1.3 The full terms of reference for this inquiry are quite extensive and can be found at appendix 1. The Senate placed specific requirements on the conduct of the inquiry, including that the committee should 'request formal submissions that respond directly to the terms of reference' from a number of key stakeholder organisations and Commonwealth departments.

1.4 Letters were written to the named departments and organisations; however all responded by declining the invitation to submit.

1.5 As the committee had not received any submissions by the initial closure date, a number of additional letters were written to relevant organisations inviting submissions. The committee agreed to extend the submission closing date until 12 September 2008.

1.6 As a consequence of the additional letters, the committee has now received 32 written submissions from individuals, organisations and government departments; a list of submissions can be found at appendix 3.

1.7 The committee also decided to pose a number of 'Questions on Notice' to those departments and organisations who had previously declined to submit. Questions were varied to ensure they were pertinent to each organisation and that the response was within their field of expertise without impinging on perceived issues of probity in relation to the Request for Proposals (RFP) process.

Public hearings

1.8 An initial private briefing was held to provide committee members with detailed explanations of contextual background leading up to the Request for Proposals, outlining the various technologies and defining terminology involved.

1.9 To date a number of public hearings have been held in Sydney, Canberra, Melbourne, Perth and Brisbane. Details of these hearings, including the list of witnesses who gave evidence, are shown at appendix 4.

Reporting

1.10 The closing date for the Request for Proposals to build the National Broadband Network was 26 November 2008. The Department of Broadband, Communications and the Digital Economy (the department) has stated that it will allow six weeks from that date for the proposals to be assessed by the Panel of Experts (see page 6), followed by two weeks for the Panel to assess the report on proposals prepared by the Australian Competition and Consumer Commission (ACCC).

1.11 Although the reporting date for this inquiry is not until 30 March 2009, the committee is keen to ensure the inquiry findings made to date are made available to the Senate, the department, and the public in general prior to the announcement of a successful proponent.

1.12 Consequently the committee is providing this Interim Report, which includes evidence from all submissions and incorporates evidence from its first seven public hearings. The committee's final report will investigate all terms of reference and make final recommendations for tabling in the Senate on 30 March 2009.

Background to the inquiry

1.13 On 11 April 2008, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon. Stephen Conroy, announced the release of a Request for Proposals to roll out and operate a new, open access, high-speed, fibre-based broadband network. The announcement detailed the provision of up to \$4.7 billion for the network build, and consideration of any regulatory changes necessary to facilitate the development, over five years, of a National Broadband Network (NBN).

1.14 The NBN is to be a critical element of the Australian Government's national infrastructure agenda, providing the primary platform for delivering high-speed

broadband services, but also possibly the platform for basic voice services and future innovative services in the coming decades.

1.15 Just prior to the announcement of the RFP, the minister cancelled the OPEL¹ contract that had been conditionally signed under the previous Coalition Government to deploy a broadband solution for rural and regional Australia.

1.16 This inquiry was subsequently established to investigate the new proposal by the Labor Government, with notable reference to inquiring into whether the new proposal would deliver an improved outcome to that provided for under the OPEL contract, which was targeted for completion by mid-2009. This inquiry was called also in acknowledgement that, even if the NBN was to provide an improved solution, deployment may well not be completed until 2013, or even later.

The Coalition Government's OPEL solution

1.17 In June 2006, the then Department of Communications, Information Technology and the Arts (DCITA) put out an Expression of Interest (EOI) seeking industry views on a proposal for an innovative approach to achieving the Coalition Government's broadband objectives.

1.18 This was in recognition that, despite some success achieved through an incentive-based scheme that enabled extension to broadband service coverage, some areas of underservicing still remained, and that perhaps the approach under the Coalition Government's Broadband Connect Infrastructure Program was not the most efficient and effective way to enable metro-comparable broadband in these areas.

1.19 The EOI stated that the primary objective of any future competitive grants program would be to achieve sustainable, equitable access to broadband in regional areas by supporting the extension of metro-comparable broadband services into currently underserviced areas, without the need for ongoing government subsidies.

1.20 This objective is strikingly similar to that which is proposed under the Labor Government's current Request for Proposals. However, the major area of difference is in the manner funding is to be provided. The Coalition Government's approach was to provide a subsidy that would have been specifically targeted to underserved areas. The very different approach taken by the Labor Government is to provide Commonwealth funding of up to \$4.7 billion, preferably on an equity basis, but with no guarantee that the current areas of disadvantage would be any better off at the end of the five year project.

1.21 By June 2007, the previous Coalition Government had undertaken a program called *Australia Connected*, a comprehensive broadband solution with five major components:

1 Optus and Elders Communication.

- (a) a new national high speed wholesale network, delivering a mix of fibre optic, ADSL2+ and wireless broadband platforms to rural and regional areas;
- (b) a new commercial fibre optic network, facilitating a fibre network build in cities and larger regional centres;
- (c) the Australian Broadband Guarantee, a safety net entitling Australians living in the most remote or difficult locations to a broadband subsidy of \$2750 per household;
- (d) *BroadbandNow*, a one-stop help centre for consumers to determine the technology options that would best suit their needs; and
- (e) preservation of the \$2 billion Communications Fund to ensure those funds are protected in perpetuity by legislation for the benefit of regional and remote Australians and provide an income stream for future upgrades.²

1.22 The previous government conducted a competitive bidding process, and committed to making any legislative changes required to enable the broadband network to be built without the need for additional government funding. Two companies submitted commercial proposals, with OPEL Networks Pty Ltd announced in June 2007 as the successful bidder.

1.23 The OPEL network was a joint venture partnership between Elders and Optus, offering a range of services including end-to-end broadband services for resellers, improved backhaul access across its network with reduced pricing, assistance to regional Internet Service Providers (ISPs) to link into their network, and a regional presence through 400 Elders' shopfronts across Australia.

1.24 OPEL was to deliver access to ADSL2+³ broadband for 1.5 million premises in regional areas by enabling an additional 312 exchanges. Once rolled out, premises without access to OPEL's network would be eligible to receive a subsidised service provided under the Australian Broadband Guarantee (ABG).

1.25 In May 2007 FANOC, (a company created by the G9⁴) lodged with the ACCC a Special Access Undertaking (SAU) to provide third party access to a bitstream access service on a proposed ADSL2+ fibre-to-the-node (FTTN) in the five mainland capital cities.

2 Sourced from: <http://www.broadbandnow.gov.au/government-intiatives.htm> on 29 July 2008.

3 Extended Bandwidth Asymmetrical Digital Subscriber Line Version 2.

4 G9: the Group of 9 was a conglomerate formed by Optus, AAPT, iiNet, Internode, Macquarie Telecom, PowerTel, Primus, Soul & TransAct.

1.26 In a draft decision handed down in December 2007, the ACCC rejected the SAU, noting that FANOC could withdraw and refine their proposal for future consideration, and inviting industry comment on their decision.

1.27 Telstra appears to have been the only industry respondent noted on the department's website. Interestingly, Telstra supported the ACCC's decision. However, Telstra was simultaneously very critical of the assessment guidelines on which the ACCC's decision was based, outlining the planning, deployment and regulation of the Next Generation broadband network for Australia.

1.28 Perhaps not surprisingly, Telstra was particularly critical of the ACCC's preference for the network to be built by a non-vertically integrated investor that had no role whatsoever in downstream markets.

1.29 On 2 April 2008, the Minister for Broadband, Communications and the Digital Economy announced that the OPEL Networks broadband contract had been cancelled. A precondition of the contract was that OPEL undertake testing and mapping to substantiate the service coverage set out in its proposal. In particular, OPEL was required to confirm its proposal would provide coverage reasonably equivalent to 90 per cent of underserviced premises identified by the department. OPEL's testing had been verified by Australian Communications and Media Authority and Enx TestLab. However, when the department conducted its own assessment, they concluded that the required 90 per cent benchmark would not be achieved by the OPEL proposal, a claim that was strongly refuted by the OPEL consortium.

1.30 In a media release on 2 April 2008, the minister said that:

DBCDE performed an analysis of the detailed testing and mapping undertaken by OPEL, and determined that OPEL network would only cover 72 per cent of identified under-serviced premises. ... On the basis of that assessment the Government determined that OPEL's Implementation Plan did not satisfy the condition precedent of the funding arrangement, and as a result the contract has been terminated.⁵

Request for Proposals

1.31 The termination of the OPEL contract was closely followed by the minister's announcement on 11 April 2008 of the Request for Proposals for the National Broadband Network. The announcement specified that the NBN would need to:

- deliver minimum download speeds of 12 megabits per second to 98 per cent of Australian homes and businesses;

5 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'OPEL Networks Funding Agreement not to proceed', Media Release 82658, 2 April 2008, http://www.minister.dbcde.gov.au/media/media_releases/2008/019 (accessed 25 November 2008).

- ensure the network is rolled out and made operational progressively over five years using fibre-to-the-node (FTTN) or fibre-to-the-premises (FTTP) technology;
- support high quality data, voice and video services;
- earn the Commonwealth a return on its investment;
- facilitate competition in the telecommunications sector through open access arrangements that allow all service providers access to the network on equivalent terms; and
- enable uniform and affordable retail prices to consumers, no matter where they live.⁶

1.32 The Commonwealth's objectives for the NBN project also include that it will be consistent with Australia's international obligations and that it facilitates opportunities for Australian and New Zealand small and medium enterprises (SMEs) to provide goods and services to the project.

1.33 In addition, all proposals must be compatible with the government's \$100 million *Fibre Connections to Schools* initiative. The closing date for proposals was initially 25 July 2008, but was extended to midday on 26 November 2008.

Assessment process

1.34 Proposals will be assessed through a process which the government has stated is to be competitive, transparent and accountable. A Panel of Experts (the Panel) will assess the proposals and provide their recommendation to the government so that the successful proponent can be announced and the new network build can commence. The Panel members are:

- Ms Patricia Scott (Chair): Secretary, Department of Broadband, Communications and the Digital Economy (DBCDE);
- Dr Ken Henry AC: Secretary Department of Treasury;
- John Wylie: CEO, Lazard Carnegie Wylie;
- Laureate Professor Rod Tucker: University of Melbourne;
- Professor Emeritus of Communications, Reg Coutts: University of Adelaide;
- Mr Tony Shaw: former Australian Communications Authority Chairman; and
- Tony Mitchell: Allphones Chairman.

6 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Government invites National Broadband Network proposals', Media Release 82947, 11 April 2008, http://www.minister.dbcde.gov.au/media/media_releases/2008/023 (accessed 25 November 2008).

Role of the Australian Competition and Consumer Commission

1.35 The RFP document outlines the role of the Australian Competition and Consumer Commission (ACCC); the ACCC is to provide the Panel with ongoing advice on issues including:

...wholesale access services and prices, access arrangements, proposed legislative or regulatory changes and the likely impact of Proposals on pricing, competition and the long-term interests of end-users in the communications sector.⁷

1.36 The Panel will provide the ACCC with the Proposals 'as soon as is practicable'⁸ to facilitate formulating their advice and the written report. The ACCC's report is to be lodged with the Panel two weeks before the Panel is due to complete its assessment of proposals – i.e. within the eight weeks following the closure date for proposals.

1.37 The Panel will also consider advice provided by a range of Commonwealth agencies and specialist advisers.

Evaluation criteria

1.38 Detail of the evaluation process is provided in the RFP document, with six listed evaluation criteria. The Panel will evaluate each proposal against these criteria, and then make a comparative assessment of all proposals as to which proposal(s) offer the best overall value for money to the Commonwealth.

1.39 The evaluation criteria against which proposals will be assessed are:

- (a) the extent to which the Proposal meets the Commonwealth's objectives for the NBN project;
- (b) the capacity for the Proponent to roll-out, maintain, upgrade and operate the network;
- (c) the nature, scope and impact of any legislative and/or regulatory changes that are necessary to facilitate the Proposal;
- (d) the cost to the Commonwealth of the Proposal;
- (e) the acceptability to the Commonwealth of the contract terms and conditions proposed by the Proponent and the extent to which the Proposal departs from the Commonwealth's notified commercial terms (if any); and

7 Department of Broadband, Communications and the Digital Economy (DBCDE), *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*; 11 April 2008, paragraph 10.4.2, p. 36.

8 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*; 11 April 2008, paragraph 10.4.4, p. 36.

(f) the extent of the Proponent's compliance with the RFP.⁹

1.40 The government has stated that, following the RFP closing date on 26 November 2008, the Panel will have eight weeks in which to assess the proposals and provide a recommendation to the minister.

Separate but parallel submission processes

1.41 As a separate process, but running in parallel with the RFP, the government invited industry and public interest groups to provide submissions on the regulatory issues, including consumer safeguards, relevant to the outcome of the NBN process. Submissions to this process closed on 25 June 2008. Proponents will have access to these submissions, so that they can be taken into consideration when drafting their RFP.

1.42 Proponents, industry, public interest groups and other stakeholders have also been invited by the government, again in a separate process running in parallel with the RFP, to make submissions on policy and funding initiatives to provide affordable access to broadband services to remote areas that may be outside the NBN coverage. This could include strategies to enhance the ABG program, guidelines for which were released on 1 July 2008. The government has also committed \$270.7 million for the ABG for the next four financial years. Submissions to provide broadband services to the areas outside the NBN coverage closed on 30 June 2008, and have also been provided on the department's website for access by intending proponents.

Structure of this report

1.43 The terms of reference for this inquiry are very broad and as such this Interim Report will not attempt to cover the terms in their entirety. However, a number of common themes are emerging in the written submissions and have been supported in the evidence provided at the public hearings held to date. Concerns raised revolve around the following issues:

- The lack of clarity and/or definitions within the Request for Proposals document of terms that carry critical importance for potential proponents;
- The time frame allocated by the government for the evaluation and assessment of proposals, including possible changes to the current regulatory regime that would be a necessary component of their proposal;
- The basis for allocation of the government's funding, including possible impacts from the current global financial crisis on external funding provision;
- The high likelihood that the National Broadband Network will be a monopoly, and the consequential impact that may have on competition and innovation within the industry;

9 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*; 11 April 2008, paragraph 10.3.1, pp 35-36.

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- The basis for pricing access to the network;
 - The consequential preference for some form of separation between the owner/operator of the network and any downstream retail business units;
 - The opportunity to implement major regulatory reforms for the industry, including a strengthening of the powers of enforcement for the Australian Competition and Consumers Commission; and
 - The nature of the roll-out including principles for a transition plan for current services and carriers.

1.44 Chapter 2 provides some contextual background to the RFP, commenting on the framework and on the overall conduct of the RFP process. It will also probe the RFP terminology and how differing interpretations have been the source of confusion and uncertainty for proponents, the industry and the general public alike. Chapter 3 explores the issues surrounding the current regulatory regime, discussing the implications for the NBN should it be a monopolised entity, and regulatory reforms that will promote innovation and competition within the telecommunications industry. Chapter 4 will examine suggestions for the nature of the rollout of the NBN and what should be essential components of any transition or migration schedule.

1.45 In this Interim Report, all references to Hansard transcripts relate to the Proof Hansard.

1.46 Consideration of the full terms of reference will be undertaken within the final report, due to be tabled in the Senate on 30 March 2009.