

Chapter 2

Framework for the Request for Proposals

Introduction

2.1 Throughout this inquiry, the committee has heard concerns expressed by stakeholders and prospective bidders alike relating to potential differences in the interpretation of a number of key concepts and terms of phrase within the National Broadband Network (NBN) Request for Proposals (RFP) document. There have also been issues raised about the perceived transparency of the process due to the lack of face-to-face discussion opportunities with the sector and the tight timeframes specified for the assessment of proposals after the closing date.

2.2 This chapter explores the varying definitions of broadband technology, examines a number of key terms and concepts within the Request for Proposals and also provides comment on the overall tender process.

What is broadband?

2.3 Broadband is rapidly becoming a critical element of Australia's national infrastructure, being an enabling technology that fulfils a key role in connecting consumers and businesses to the online economy. It allows organisations and government departments alike to adopt more flexible service delivery and more productive ways of operating.

2.4 The term broadband is a contraction of the term 'broadband width', generally used to describe fast, 'always-on' internet access. The intrinsic value of broadband is not just the technology, but in what it enables people and businesses to do. Most people are not concerned about what type of technology might deliver their broadband access, but rather their ability to access services and perform tasks where, when and how they want. Different users will have different needs; the diversity of consumer demand underscores the fact that there is unlikely to be a 'one-size-fits-all' broadband solution for Australia.

High speed broadband

2.5 A definition of 'high speed' broadband provided in the government's RFP is 'a minimum dedicated downlink speed of 12 Mbps (Megabits per second)¹ that is capable of supporting 'symmetric applications such as high-definition video-

1 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 1.5.2, p. 7.

conferencing.² However the government also recognises that this speed will most likely be quickly outdated, requesting that proponents should outline how their solution would support future upgrades 'in line with international trends'³, while demonstrating a 'clear upgrade path ... to at least 2020 and preferably beyond.'⁴

2.6 In relation to what is 'high speed', the committee received evidence at the public hearing in Sydney that many Australian households and businesses are already able to access broadband speeds much higher than 12 Mbps. Mr Gregory Hicks, Chairman of Adam Internet Pty Ltd, made the following remarks in his opening statement:

We have our own networks in South Australia that currently are providing more than 50 per cent of our customers with speeds greater than what the national broadband network is proposing anyway.⁵

2.7 Mr Hicks later reinforced this point by saying, 'In fact, I do not class the 12 megs as the next step.'⁶

2.8 The Organisation for Economic Cooperation and Development (OECD) Broadband Statistics report published in June 2008 clearly shows that available broadband speeds in Australia in October 2007 were well below other OECD countries, including New Zealand; they also illustrate that our incumbent telecommunications operator does not provide the fastest connection rate within Australia.⁷ Although Australia rated in the top ten OECD countries when rating the fastest advertised connection speeds, the top five countries were at least three times faster, with the highest rating country, Japan, rating thirty times faster than Australia's fastest connection speed.

2.9 At the Canberra public hearing, Mr Lyon from Infrastructure Partnerships Australia, noted that:

2 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.5.3, p. 7.

3 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.5.9, p. 8.

4 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.1.11, p. 2.

5 *Committee Hansard*, Sydney, 7 October 2008, p. 39.

6 *Committee Hansard*, Sydney, 7 October 2008, p. 48.

7 *OECD Broadband Statistics: Fastest broadband speeds advertised by the incumbent telecommunications operator, all technologies*, October 2007, <http://www.oecd.org/dataoecd/10/55/39575114.xls> (accessed 2 November 2008); *OECD Broadband Statistics: Fastest advertised connection available among all surveyed operators, by country*, October 2007, <http://www.oecd.org/dataoecd/11/36/39575235.xls> (accessed 2 November 2008).

The speeds in both Japan and South Korea are around 100 megabits per second. We are talking about a minimum speed in Australia of around 12 [Mbps], so we still have some way to go if we are to reach them.⁸

2.10 Conversely, the committee has heard that many Australian homes and businesses will not require speeds much higher than 12 Mbps to access online services, contending that the majority of benefit gained from speeds higher than that is purely social in nature, being utilised by consumers wanting to download movies or participate in interactive online games. Mr Paul Budde commented that:

There are still a million people in Australia for whom the only thing they do is to occasionally check emails.⁹

2.11 In his submission, Professor Joshua Gans made a similar observation, noting that:

Indeed, evidence from Japan and South Korea where even fast internet connections are available suggests that where there is demand it is mainly for video downloads and gaming.¹⁰

2.12 However, the committee received evidence that businesses will definitely benefit, as was noted by Dr Walter Green from the Communications Expert Group (CEG), whose submission included a summary of case studies looking at the impact of broadband on small and medium enterprises (SMEs) in the United Kingdom.

2.13 This summary highlighted the productivity gains that could be achieved by SMEs, the lack of which could lead to 'loss of opportunity and reduced efficiencies.'¹¹ It is well acknowledged that for any business, 'time is money'; this was reflected in a comment made in Dr Green's submission that, in general:

...SMEs were dependent on multi megabit ... [and] the main driver for bandwidth was response times ... They all reported improved profits and efficiencies because they could spend more time delivering the services they were good at ...¹²

2.14 The committee acknowledges that broadband benefits will facilitate the government's social inclusion agenda, particularly for those Australians living in isolation. However, the committee also acknowledges that the extent to which these benefits are felt will be highly dependent on the extent to which the NBN will be accessible by those in regional and remote Australia.

8 Mr Brendan Lyon, Executive Director, Infrastructure Partnerships Australia, *Committee Hansard*, Canberra, 8 October 2008, p. 25.

9 Mr Paul Budde, Managing Director, Paul Budde Communication, *Committee Hansard*, Sydney, 7 October 2008, p. 83.

10 Professor Joshua Gans, *Submission 15*, p. 4.

11 Communications Expert Group, *Submission 31*, p. 6.

12 *Submission 31*, p. 7.

Specified coverage of the NBN

2.15 The RFP follows the government's election commitment by requiring that 98 per cent of Australian homes and businesses will be covered by the successful NBN fibre-based solution, with the remaining two per cent to have 'an improved broadband service'¹³ through funding under the Australian Broadband Guarantee (ABG) program.

2.16 The Australian Government has injected \$270.7 million to continue the ABG over the next four years. Answering questions at Senate Estimates in relation to how this funding will be utilised, the Secretary of the Department of Broadband, Communications and the Digital Economy, Ms Patricia Scott, said:

The Australian Broadband Guarantee will provide access to metro comparable broadband services to underserved areas while the network is being rolled out and for the remaining two per cent of Australians in rural and regional areas.¹⁴

2.17 Ms Scott explained that the demand for the broadband guarantee is expected to decline as a consequence of 'the continuing provision of commercial metro-comparable services'¹⁵ via the NBN rollout.

Qualifying the 98 per cent coverage

2.18 The committee repeatedly drew attention to the objective stated within the RFP that 98 per cent of Australian homes and businesses would be covered by the NBN, attempting to clarify on what basis this percentage was decided upon, and how the Department of Broadband, Communications and the Digital Economy (the department) would assess whether prospective proponents would achieve that level of coverage. At the Senate Estimates hearing on 20 October 2008, the Minister for Broadband, Communications and the Digital Economy, Senator the Hon. Stephen Conroy explained that:

After extensive consultation with the sector, we believed that 98 per cent was achievable and so we decided to set that as our benchmark ... it is our stated policy and election commitment to reach 98 per cent.¹⁶

13 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 35.

14 *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 9.

15 *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 9.

16 *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, pp 31-32.

2.19 The minister also suggested that the specified coverage rate was very achievable when he continued that:

... I have not heard one single potential bidder suggest that they cannot reach 98 per cent ...¹⁷

2.20 It was further explained that the RFP was specifically not prescriptive in what geographic areas the 98 per cent of covered homes and businesses existed. This was to ensure that the RFP:

... maintains as much flexibility as it can for the Commonwealth. ... We have left it up to the bidders as part of the competitive process to suggest what the best architecture is.¹⁸

2.21 As an alternative view, Mr Paul Budde suggested to the committee that the requirement for fibre to reach 98 per cent of Australian homes and businesses was unnecessary. At the public hearing in Sydney, Mr Budde stated his view that:

I am totally in favour of looking at fibre to the node to approximately 91 to 93 per cent of the population. It is silly to go for 97 [sic] per cent. For that last two, three or four per cent [coverage], you are spending all your \$4 billion, and it does not make sense. It is not necessary.¹⁹

2.22 Most other witnesses and submissions did not agree with Mr Budde on this point. For example, in his submission Dr Green from CEG stated that, in order to achieve the government's broadband objectives, it was essential for all Australians to have access to broadband services. Dr Green then recommended that the 98 per cent needs to be further clarified or defined by the government:

The Commonwealth Objective of achieving 98% coverage is critical to the future wellbeing of all Australians, however the definition needs to be clarified or strengthened by including a definition such [that] "all communities of more than 100 persons should have access to the NBN Broadband network."²⁰

2.23 Discussion at the Canberra public hearing turned to how the government would measure whether each proponent would actually reach 98 per cent coverage, in particular what modelling the department would be using to make their assessment. The department explained that proponents have been asked to provide a wide range of detailed information within their proposal, much of which relates to coverage:

17 *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 33.

18 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 33.

19 Mr Budde, Paul Budde Communication, *Committee Hansard*, Sydney, 7 October 2008, p. 84.

20 Communications Expert Group, *Submission 31*, p. 3.

...proponents are asked not only to indicate what extent their coverage will be but also the methodology by which they have come to that number themselves.²¹

2.24 When the department was subsequently questioned whether the modelling that the department was using to evaluate the ability to achieve the required 98 per cent coverage would be provided to bidders, the department responded by saying that:

... there are a number of approaches to modelling and in the interests of a very comprehensive and thorough assessment of proposals we envisage using all those ... there is no single set that we could give to proponents.²²

2.25 This response does not provide the level of confidence that proponents are seeking and seems to imply that there may be several models used, or the department is as yet undecided as to the model they might use. This raises doubts in relation to the transparency of the process, given that proponents do not have access to this critical piece of information that would assist their solution design. This is borne out by the fact that the previous OPEL contract was cancelled subsequent to the department applying its own modelling to measure the coverage promised by OPEL, which provided different results to OPEL's assessment.

2.26 The committee is of the opinion that, in order to prevent a difference of measurement modelling, similar to that which occurred with the assessment of the OPEL bid, possibly resulting in a consequential delay to the NBN implementation, it would be beneficial for all stakeholders to know which modelling the department will use to assess the coverage footprint. The committee heard from Terria, (one of the bidders) at the Canberra public hearing, that they had sought clarification of how the 98 per cent would be calculated by the department. Dr Wagg from Terria told the committee that:

...we have written at least twice to the department specifying what we believe 98 per cent to be, what the basis is of what we are going to submit and the logic behind why we believe that will achieve 98 per cent. ... As far as I am aware, we have yet to receive any response from the department formally identifying that our position is incorrect.²³

2.27 Dr Wagg's consortium colleague, Mr Michael Simmons, later stipulated that bidders needed to be confident on what the modelling would be and also that the department would apply that model consistently across all proposals:

21 Mr Philip Mason, Assistant Secretary, Regulatory and Technical Branch, National Broadband Network, DBCDE, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 36.

22 Mr Mason, DBCDE, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 36.

23 Dr Michael Wagg, General Manager, Networks Strategy, Terria, *Committee Hansard*, Canberra, 8 October 2008, p. 42.

... I must also stress that there is no dispute ... on coverage measurement. It is just seeking clarity and agreement between both parties on how it would be measured and that that methodology would apply to all bidders.²⁴

The remaining two per cent

2.28 A substantial number of stakeholders and members of the general public have expressed their concern to the committee that the two per cent of Australian homes and businesses that will not be covered by the NBN would be those in remote and rural Australia, or other 'black spot' areas, which are already underserved or unserved.²⁵

2.29 This concern was predictably expressed quite clearly in submissions from state governments responsible for a large number of remote communities, which have the potential of being bypassed by the NBN due to their location and low population densities.

2.30 The submission provided by the Queensland Government incorporated their previous submissions provided to the department in response to a call for suggestions on recommendations for regulatory change and on how to supply broadband services to the two per cent. In the latter submission, it was highlighted that defining the NBN broadband footprint for their state was a key issue for Queensland. Of particular concern was that to date no detail has been provided by the Australian Government:

... on how [the 2 per cent] will be determined or where the 2 per cent will be located.²⁶

2.31 The Queensland Government submission illustrated its concerns with a map created using population densities of Census Districts obtained from the 2004 Census. This clearly highlighted that, by using populations densities, the 98 per cent footprint would include all highly populated areas along the coast of Queensland, with the vast majority of inland regional, rural and remote Queensland comprising the remaining two per cent. The Queensland Government submission strongly states that:

The Queensland Government does not wish the NBN 98 per cent threshold to be allocated in Queensland purely on a population density basis.²⁷

24 Mr Michael Simmons, Managing Director, Terria, *Committee Hansard*, Canberra, 8 October 2008, p. 43.

25 See for example: Queensland Government, *Submission 5*, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas', p. 4.

26 *Submission 5*, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas', p. 4.

27 *Submission 5*, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas', p. 6.

2.32 A subsequent map illustrated a comparative 98 per cent footprint that would be created if the Australian Government was to ensure that the NBN provided services to:

- Population centres in Western Queensland (not just those within a few hundred kilometres of the coast);
- All bounded localities and hub towns;²⁸
- Every school and tertiary campus in Queensland;
- Every health and public safety facility (i.e. police, ambulance, SES and fire service); and
- All state and local government libraries.²⁹

2.33 This footprint covered a far greater geographical area of Queensland, with the submission consequently calling on the Australian Government to:

...collaborate with the states to agree on the location of homes and businesses that will benefit from the NBN.³⁰

2.34 The Queensland Government has demonstrated that it will continue to strive to meet the broadband needs of its citizens, stating that it will:

...consider using its telecommunications expenditure to support the extension of the NBN bidder proposals should they not meet all the Queensland Government's requirements [described above in 2.32].³¹

2.35 The South Australian Government expressed similar concerns in their submission to the Regional Telecommunications Independent Review Committee (RTIRC) in June 2008. The submission states that almost three-quarters of South Australia's population reside in metropolitan Adelaide. However, South Australia (SA) differs from other states in that it has only two regional centres with more than 20,000 people. The submission highlights this, stating that:

The sparseness of the population is indicated by the fact that only 30 towns have a population greater than 2,000 and 50 per cent of the state's regional population reside in towns of less than 200 people or in rural areas. Over

28 A hub township is a small rural township offering both residences and businesses of the township and outlying areas access to core services. Their function is convenience, social amenity and service level.

29 Queensland Government, *Submission 5, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas'*, p. 6.

30 *Submission 5, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas'*, p. 4.

31 *Submission 5, 'Policy and Funding Initiatives to provide Enhanced Broadband to Rural and Remote Areas'*, p. 8.

30 per cent of the regional population is in towns with less than 200 people or in rural areas outside of towns.³²

2.36 In the attachment to their RTIRC submission, the existing level of broadband access in regional, rural and remote South Australia is described, noting that:

... a significant proportion (estimated at 27 per cent) of South Australia's regional, rural and remote population remains unserved.³³ [emphasis added]

In some regional areas the proportion of population that cannot access broadband at all is as high as 33 per cent.³⁴

2.37 Like the Queensland submission, the situation is clearly illustrated with a map indicating the 98 per cent NBN footprint that would be covered if it was based on population densities. This footprint would represent only four per cent of the state's land mass. The state acknowledges however that the actual NBN coverage may in fact be significantly less than 98 per cent, 'due to the economics and practicalities of an FTTN architecture solution'.³⁵ If the footprint was dropped even by a small percentage, to 95 per cent of the population, coverage would reach only 0.7 per cent of the state's land mass.

2.38 It is the committee's view that it would be an extremely unsatisfactory result for the NBN, such a significant government investment, which has been contributed to by all Australian taxpayers, to reach only a small percentage of a state's geographical area while leaving a very high proportion of rural and remote citizens without access to the NBN.

2.39 South Australia recommends against allowing the NBN operator to adopt a 'cherry-picking' market-driven approach to select the larger towns 'with the most easily deployed broadband solutions.' It closes with the following statement:

... the submission urges the adoption of region-wide projects as the most effective means to reduce the effect of being outside the NBN coverage and recognises a collaborative model as the best approach to achieve widespread, sustainable outcomes.³⁶

32 South Australian Government, *Submission to the Regional Telecommunications Independent Review Committee (RTIRC)*, December 2008, p. 3.

33 South Australian Government, *Submission to the Regional Telecommunications Independent Review Committee (RTIRC)*, December 2008, 2.

34 South Australian Government, *Submission to the Regional Telecommunications Independent Review Committee (RTIRC)*, December 2008, Attachment 1, p. 2.

35 South Australian Government, *Submission to the Regional Telecommunications Independent Review Committee (RTIRC)*, December 2008, p. 7.

36 South Australian Government, *Submission to the Regional Telecommunications Independent Review Committee (RTIRC)*, December 2008, p. 18.

2.40 The Western Australia Department of Industry and Resources (WA DOIR) also noted concerns with where that state would fit into the 98 per cent footprint. When asked whether they have been able to determine with any certainty where the 98 per cent may be, WA DOIR answered in the negative.

We tried to ask that question of people in Canberra and no-one could give an exact answer. ... WA as a whole could become the two per cent. ... I think we risk becoming the two per cent casualty of NBN.³⁷

2.41 Mr Anson Cheng from WA DOIR drew attention to the fact that the majority of Western Australia's (WA) population of approximately 1.8 million lives in Perth, with around 400,000 living in rural and remote areas. Of this number, around 200,000 to 300,000 live in the state's far north-west region. Mr Cheng highlighted the importance of this small section of Australia's population, noting that:

... the bulk of the wealth of this nation is generated by these 200,000 to 300,000 people in the north-west, and they are not getting the infrastructure.³⁸

Conclusion

2.42 At the time of this report going to print, neither the department nor the Australian Government had provided any guidance or further clarification of the composition of the 98 per cent NBN coverage footprint. The committee believes that the government needs to provide this clarification to proponents and stakeholders alike to ensure a level of confidence that the significant \$4.7 billion funding will benefit in particular those Australians that are already underserved or unserved. Particular attention is required to address the needs of those remote areas that are currently generating a large percentage of Australia's wealth yet are in the most underserved areas.

2.43 Chapter 4 will highlight this issue again to examine suggestions for the rollout schedule for the NBN.

Definition of open access

2.44 One of the critical Commonwealth objectives within the RFP is that the National Broadband Network:

...facilitates competition [in the telecommunications sector] through open access arrangements that ensure equivalence of price and non-price terms and conditions, and provide scope for access seekers to differentiate their product offerings.³⁹

37 Mr Anson Cheng, Manager, Broadband Infrastructure, Western Australia Department of Industry and Resources (WA DOIR), *Committee Hansard*, Perth, 6 November 2008, p. 14.

38 Mr Cheng, WA DOIR, *Committee Hansard*, Perth, 6 November 2008, p. 12.

39 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*; 11 April 2008, paragraph 1.3.1.10, p. 5.

2.45 Given that this objective is central to ensuring that the current level of anti-competitive behaviour is addressed, there has been strong criticism that the government did not clearly define the term 'open access' within the RFP. 'Open access arrangements' is a term used within the RFP, which does leave room for interpretation. However, the government has repeatedly stated that it has deliberately avoided being prescriptive to allow proponents the greatest degree of flexibility.

The approach taken in the request for proposals is an approach that tries not to be prescriptive. It is outcomes focused with 98 per cent coverage and open access competition ... and it wants to have the most competitive process possible to achieve those outcomes.⁴⁰

2.46 In the RFP the government expands on open access by stating that:

...the long-term interests of end-users should continue to be promoted. The Government is therefore determined to ensure that appropriate open access arrangements are in place to promote competition and ensure efficient investment. In this context it will be important to ensure that access is provided on equivalent price and non-price terms and conditions. ... Proponents should keep in mind the Government's objective of providing scope for access seekers to differentiate their product offerings.⁴¹

2.47 Although the government's intentions may have been to encourage innovation by proponents, the capacity for individual interpretation of the open access terminology has led to uncertainty within the industry.

2.48 Many submissions have consequently sought to provide the government with what they believe should be considered as 'open access' to the network, with some calling for this to be defined within legislation. The submission provided by Google was a prime example, stating that:

Google submits that the Government should consider regulatory conditions that will preserve the fundamental open architecture of the Internet in designing the regulations to apply to the NBN. ...

...the Government should also consider crafting narrowly tailored non-discrimination rules that appropriately limit potential access provider misconduct, as competition may not be a panacea.⁴²

2.49 Comments relating to open access are often interwoven with requests for regulatory change that would engender sustainable competition in the telecommunications market; however, this relationship will be more fully explored in chapter 3.

40 Mr Colin Lyons, Deputy Secretary, National Broadband Network Taskforce, DBCDE, *Committee Hansard*, Canberra, 8 October 2008, p. 54.

41 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraphs 1.5.14-15, p. 9.

42 Google, *Submission 29*, p. 17.

Why is open access so critical?

2.50 The requirement for open access stems from the commonly held assumption that, due to Australia's high infrastructure costs, large land masses and relative low population densities (compared with other developed countries such as the United Kingdom), it is most likely that the NBN will be characterised as a natural monopoly. Clearly there are issues with the current incumbent having a strong monopoly position in most local markets, but particularly in non-commercially viable remote and regional areas, which has subsequently lead to lack of choice and higher costs in those areas. There is a need to avoid re-creating similar issues when designing the NBN.

2.51 In order to achieve open access, it can be deduced that the new owner/operator of the NBN, which will most likely be a monopoly provider, must share with other access seekers, without discrimination, the infrastructure they build, in order to enable competition. The Western Australian Government states that:

... it is in the national interest to encourage (if not compel) the local monopoly bottleneck facilities' owner to share its facilities with its competitors.⁴³

2.52 iiNet attributes the existing lack of customer access to fixed line broadband to not only the lack of infrastructure, but also to a 'lack of genuine open access to existing infrastructure'.⁴⁴

2.53 In their submission, iiNet offers their own definition of open access requirements as being:

...the broad requirements for improvements in the relationships between the rights and obligations of the network owner/operator (Access provider) and those organisations purchasing access (Access Seekers) ... to services and facilities for the creation and eventual sale of retail products and services to end users.⁴⁵

2.54 Of particular importance is their qualification that open access requirements:

...do not relate to the sale of retail products and services to end users.⁴⁶
[emphasis added]

This strong comment captures the concern that the capacity for individual interpretation may allow a prospective proponent to claim they enable open access, when what they actually will allow is open access to their own pre-packaged services.

43 Western Australia Department of Industry and Resources, *Submission 2*, p. 1.

44 iiNet, *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 3.

45 *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 7.

46 *Submission 3*, 'Access Seeker Requirements', 30 March 2008, p. 7.

2.55 Google draws attention to the exponential growth of the internet in the last decade, highlighting that this has been due to the open access on which the internet was founded:

This open, non-discriminatory architecture [of the Internet] has given rise to fierce competition, constant innovation and unparalleled social benefits ... [and] was deliberately designed to empower end-users...⁴⁷

Telstra's differing definition

2.56 It is a fact that although urban areas can support competition in the provision of backhaul, once the metropolitan or major regional areas are exited, Telstra is the frequently the monopoly provider of backhaul between major centres. Due to the immense distances and subsequent extremely high infrastructure costs involved, it is unlikely that facilities-based competition would ever be sustainable in rural and remote areas of Australia.

2.57 In their submission Vodafone notes that once the NBN is operational, the use of Telstra's backhaul will significantly increase. However, for the reasons mentioned, there is unlikely to be a competing infrastructure provider:

Accordingly, the vast majority of transmission routes display strong natural monopoly characteristics, meaning entry [as a competitor] is neither desirable from a social welfare perspective nor commercially viable...⁴⁸

2.58 Vodafone draws the conclusion that because of the strong likelihood that there will be a monopoly owner/operator of backhaul in rural and remote areas, open access requirements for the NBN become even more critical:

The importance of open and non-discriminatory access to backhaul transmission is therefore likely to significantly increase with the roll out of the NBN ... The regulatory regime for the NBN must recognise the importance of backhaul infrastructure, and maintain the status of such transmission as a declared service under the existing regime.⁴⁹

2.59 Vodafone believes that it will be essential that large-scale wholesale customers like themselves:

...are able to purchase unbundled wholesale access services which allow them to develop a suite of tailored products for their customers.⁵⁰

2.60 This comment concurs with that made earlier by iiNet that open access must allow access seekers to differentiate their products. The current RFP only asks that prospective bidders 'should keep in mind' this objective; however the committee

47 Google, *Submission 29*, p. 14.

48 Vodafone, *Submission 9*, p. 16.

49 *Submission 9*, p. 17.

50 *Submission 9*, p. 17.

suggests that there is a strong requirement for the government to ensure that proponents achieve this objective.

2.61 A number of submissions have stated that they believe that the only feasible service provider that could fulfil the government objectives for the delivery of the NBN is Telstra. Electronic Frontiers Australia is of this opinion, noting that, for a number of reasons:

...as a matter of commercial and legal practicality, nobody other than Telstra would be able to build the FTTN network.⁵¹

2.62 Telstra has publicly stated that it supports open access, but the cause for concern within the industry is the fact that the current incumbent has a very different understanding of the term open access.

2.63 In their submission, Optus went to great lengths to draw similarities between the current 'open access' practices of Telstra and what Telstra has proposed in their response to the suggestions for regulatory changes required for the NBN. The submission quotes a number of pre-conditions that Telstra has stated that it would require to roll-out the NBN, which include:

- (a) A specific guarantee that services on the NBN will be excluded from the current regulations;
- (b) That it would only be obligated to provide access to a limited set of "anchor products". These are the legacy services it provides today – it would have no obligation to provide new services;
- (c) That it should have freedom to set wholesale prices based on "value" not "cost"; and
- (d) There would be no restrictions on Telstra discriminating between the prices and delivery of both wholesale and retail services.⁵²

2.64 Optus states that although Telstra is claiming that this equates to open access, in reality this is far from the case:

[Telstra's] regulatory model is actually a form of discretionary access not open access – that is Telstra will provide access on its discretion and on its terms.⁵³

2.65 The Optus submission supports their claim with a quote from the General Manager of Telstra's wholesale division, which indicates that Telstra does not intend to treat its retail and wholesale customers on equal terms:

Whether we would sell exactly the same products in the wholesale division as the sorts of things that retail would be seeking for their end customers,

51 Electronic Frontiers Australia, *Submission 23*, p. 2.

52 Optus, *Submission 19*, pp 13-14.

53 *Submission 19*, p. 14.

not necessarily. Just like it is now, we sell a lot of things in wholesale that retail don't directly buy an equivalent of and I expect that would continue to be the case.⁵⁴

2.66 In the submission from the Competitive Carriers Coalition, Telstra's definition of open access was strongly criticised. The submission quoted a media statement by Telstra that seems to confirm the concerns of many that Telstra indeed has a completely different concept of open access. Mr Donald McGauchie from Telstra is quoted from a media briefing held on 23 June 2008, where Mr McGauchie stated his belief that Australia should move:

...away from "open access" type requirements, in which competitors can free ride or cheap ride on incumbent's networks...to one based on competition between fully vertically and horizontally integrated rivals...⁵⁵

2.67 Mr Maha Krishnapillai from Optus criticised the stance taken by Telstra that they would define the meaning of open access, warning that Telstra's definition would not facilitate a level playing field for competitors. Telstra responded to the criticism by stating that:

It's a purely open access proposal ... you will be able to take the [wholesale] service from the network that we build and do with it whatever you like. And copy what we do if you are prepared to invest...⁵⁶

2.68 Digital Tasmania provided a submission to the committee that called for access regulation that would protect and encourage competition, so that:

...access seekers are free to seek commercial arrangements with both NBN and other non-NBN operators ... [so that] a level playing field can be created for all access seekers [which] offers ISPs the ability to differentiate themselves ... through competitive commercial arrangements.⁵⁷

Open access as defined in the RFP

2.69 Returning then to the definition provided within the Request for Proposals, a key objective for the NBN is to establish a national broadband network that:

...facilitates competition through open access arrangements *that ensure equivalence of price and non-price terms and conditions, and provide scope*

54 Optus, *Submission 19*, p. 14, quoting Kate McKenzie interview with Alan Kohler, 17 July 2008.

55 Competitive Carriers Coalition, *Submission 8(c)*, 'A Critique of Telstra's Regulatory Model for Broadband Networks Since 2005', p. 14.

56 Luke Coleman, 'Optus charge: Telstra NBN "open access" akin to North Korea, Zimbabwe!', *Communications Day*, Issue 3351, 29 August 2008, p. 1, quoting Dr Tony Warren, Telstra.

57 Digital Tasmania, *Submission 18*, p. 7.

*for access seekers to differentiate their product offerings;*⁵⁸ [italicisation added]

2.70 Despite Telstra's assurance that it will meet that objective, it is clear that the majority of stakeholders' lack confidence in this undertaking, most likely due to Telstra's prior record of anti-competitive behaviour. Indeed, in their evidence at the Canberra public hearing, Mr David Quilty from Telstra provided their definition of open access, which seems to confirm the concerns of many.

What we mean by an open access network is that Telstra ... would make available to wholesale customers a range of wholesale *products* on an equivalent basis. ... I cannot go into detail of what those *products* might be.⁵⁹ [italicisation added]

2.71 As previously mentioned, stakeholders have highlighted that open access must be supported by appropriate changes to regulation, with many also advocating structural changes to the industry itself to prevent anti-competitive behaviour by a powerful monopoly provider. Although the definition of open access may appear to be reasonably clear within the RFP, a cause for concern is the fact that the advocated restructure of the industry is not assured as a component of the NBN, especially when Telstra has openly stated that it will not be a part of the NBN process if structural separation is a prerequisite:

Telstra's position is that if further separation is part of the NBN then we are not in a position either to build or to bid for the NBN. We have sought clarity from the government that further separation will not be required of Telstra as part of the NBN ... and that clarity is very important in terms of Telstra being able to do this project.⁶⁰

2.72 The relationship between open access, structural separation and regulatory changes will be more fully examined in chapter 3.

Conclusion

2.73 The committee believes that submissions received and evidence taken to date strongly support the need for the term 'open access arrangements' to be more clearly defined. The committee calls on the government to provide a clarification of this term, which is critical to encouraging ongoing competition in the industry. This would ensure that there is no potential for a successful bidder to interpret the term to its own competitive advantage.

58 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.3.1.10, p. 5.

59 Mr David Quilty, Group Managing Director, Public Policy, Telstra, *Committee Hansard*, Canberra, 11 November 2008, p. 18.

60 Mr Quilty, Telstra, *Committee Hansard*, Canberra, 11 November 2008, p. 5.

Funding estimates and allocation

2.74 In the government's announcement of the National Broadband Network, it committed up to \$4.7 billion to facilitate the roll-out. One of the terms of reference for this inquiry requests the committee to investigate:

(k) the cost estimates on which the Government has based its policy settings for a NBN, how those cost estimates were derived and whether they are robust and comprehensive.⁶¹

2.75 Through the course of this inquiry, there have been comments relating to the adequacy of this funding, how it relates to predicted costs of implementing the NBN, and whether the funding should have been targeted to ensure benefits to those Australians that are already underserved or unserved by broadband.

2.76 The Department of Broadband, Communications and the Digital Economy was questioned extensively by the committee on the funding, in acknowledgement of the significant proportion of the budget that the \$4.7 billion represented. The requirement for clarity from the department was heightened following the global financial crisis that evoked a strong monetary response from the government, which included the spending, if necessary, of the entire surplus to ensure Australia survived the crisis.

2.77 At the Canberra public hearing, the department was asked whether it had made any calculation or estimation of the overall cost of rolling out a National Broadband Network, with Senator Nash commenting that:

We seem to be at bit of loss of even a close to ball park figure of what the total figure might end up being?⁶²

2.78 Responding to this, Mr Colin Lyons, from the department answered:

I would not wish to speculate on the cost. The government has indicated it will offer up to \$4.7 billion ... [and] expects proponents to make a significant contribution ... it is a matter for the competitive process to bring forward the best possible proposals ... within the cap of the contribution that the Commonwealth has said it will provide.⁶³

2.79 The Coalition Government had established a \$2 billion Communications Fund that was to ensure that funding is available 'in perpetuity' to enable the telecommunications industry to provide metro-comparable services in regional and remote Australia. Questions were asked of several departments by the committee as to the fate of the \$2 billion and whether it had been rolled into the \$4.7 billion made available for the NBN. Several departments provided similar responses to this

61 Committee terms of reference, available at: http://www.aph.gov.au/Senate/committee/broadband_ctte/tor.htm (accessed 4 November 2008).

62 Mr Lyons, DBCDE, *Committee Hansard*, Canberra, 8 October 2008, p. 50.

63 Mr Lyons, DBCDE, *Committee Hansard*, Canberra, 8 October 2008, p. 50.

question. The response from the Department of the Treasury perhaps captures the essence of these answers:

In the 2008-09 Budget, the Australian Government announced that it will close the Communications Fund and transfer the balance to the Building Australia Fund (BAF), with up to \$4.7 billion from the BAF to be made available for the NBN initiative. This reflects the Government's election commitment to use the \$2 billion from the Communications Fund to finance, in part, its contribution to the roll-out of the NBN.⁶⁴

2.80 This answer confirmed Senator Nash's concerns that where there had previously been \$2 billion set aside purely for the provision of metro-comparable services for those in regional and remote areas,⁶⁵ this funding would now be used to provide broadband for the majority of Australians who already had access to broadband services.

2.81 In their response to this same question, the department also explained the purpose of the newly created BAF:

The BAF will provide a financing source for future investment in critical economic infrastructure in transport and communications such as broadband.⁶⁶

2.82 At the Senate Estimates hearing on 20 October 2008, members from the Select Committee also questioned the minister as to whether the recently announced criteria for prioritising the projects that could access funds from BAF would be applied retrospectively when allocating the NBN funding. In response, the minister stated quite categorically that:

This [expenditure for the NBN] will not be subject to Building Australia Fund processes. This is a separate election commitment.⁶⁷

2.83 The minister eventually provided details of where the \$4.7 billion would be sourced, as follows:

...a provision for the national broadband network is to be included in the contingency reserve, pending the determination of the successful proponent. ... Budget Paper No. 1 identifies where the funds will be sourced. I refer you to page 7-6 ... which states that government will close the Communications Fund and transfer its assets to the BAF, the Building

64 Department of the Treasury, answer to question on notice, Question Two (b), 10 September 2008 (received 24 September 2008).

65 See *Committee Hansard*, Canberra, 8 October 2008, p. 53.

66 DBCDE, answer to question on notice, Question Thirteen (a), 10 September 2008 (received 25 September 2008).

67 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 28.

Australia Fund. The BAF will also receive \$2.7 billion from the Telstra 3 sale process.⁶⁸

2.84 Since this inquiry was established in June 2008, the global financial situation has worsened considerably to the point where it is commonly termed the 'global financial crisis'. The Australian Government has put in place a number of financial measures designed to steel the nation's economy from the full impact of this crisis. Despite this, the value of the Australian dollar has fallen by a third since the May Budget was brought down. This will have the obvious consequence of making it more difficult for prospective proponents to source financial backing for their NBN costs, while also increasing their costs to build.

2.85 This fact was conceded even by Telstra, which, having now placed a bid, will undoubtedly be positioned as one of the strongest contenders financially. At the public hearing in Canberra, Telstra stated that:

...obviously times have changed ... [T]he cost of capital has increased. Of late we have seen a significant devaluation or reduction in the value of the Australian dollar, and virtually all of the equipment for this would be sourced from overseas. The economics of building this are not getting easier.⁶⁹

2.86 At the Senate Estimates hearings in October 2008, discussion ensued around the recent government announcement of its intention to spend half of this financial year's surplus to minimise any impact from the current global financial crisis. It was proposed by Senator Minchin that, due to the surplus being halved, the \$4.7 billion committed by the government for the NBN would now represent close to half the BAF, with potentially less funding being available for other essential services such as education and health.⁷⁰

2.87 Despite repeated questioning, the minister would not speculate on the size of the BAF, noting that:

Because a whole range of factors could impact on the final size of the BAF ... I am just not in a position to give you any commentary on it. ... That will depend on the final size of the surplus. It will depend on a whole range of factors to do with growth, tax receipts and [other financial] issues.⁷¹

68 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 46.

69 Mr Quilty, Telstra, *Committee Hansard*, Canberra, 11 November 2008, p. 24.

70 See discussion, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 47.

71 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 47.

2.88 At both the Senate Estimates hearing and also the Select Committee's Canberra public hearing, questions were asked of the department as to how the figure of \$4.7 billion was determined to be an appropriate figure for government funding of the NBN. The minister was able to explain that this was based on a range of discussions that his department had held with the industry:

There have been a range of estimates and I have drawn on ... such expert policy analysis as the Page research centre. ... We took some soundings, and no-one in the sector at the time believed that the proposition that we were putting forward was unreasonable.⁷²

2.89 Mr Lyons from the department also reiterated that the \$4.7 billion is the maximum commitment from the government, and that the RFP document made it clear to proponents that they would be required to make a significant contribution to the cost of implementation.⁷³

2.90 The manner in which the \$4.7 billion will be allocated was also a concern for the industry and stakeholders alike. Throughout the inquiry the committee heard calls for the \$4.7 billion to be targeted to areas that are currently underserved, rather than fund a fibre upgrade to urban and other areas that are already able to access broadband. This issue will be examined in detail in chapter 4 of this report.

2.91 The WA Department of Industry and Resources touched on targeted approaches to funding when describing an initiative they have placed before the government for future funding:

...instead of putting a blanket broadband coverage throughout the state, or this whole country, we should apply a targeted approach where it is required, not duplicating the infrastructure. It is just a waste of money.⁷⁴

2.92 The committee attempted to determine whether the \$4.7 billion would be targeted to specific areas or groups of homes and businesses. At the Canberra public hearing, Mr Lyons from the department explained that:

It is not targeted to any specific areas. ... [The government] has asked proponents to indicate in their proposals what would be the uneconomic areas that would be part of its coverage rollout ... to determine the extent to which there is any subsidy component in their bid.⁷⁵

72 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 47.

73 Mr Lyons, DBCDE, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 48.

74 Mr Cheng, *Committee Hansard*, Perth, 6 November 2008, p. 7.

75 Mr Lyons, DBCDE, *Committee Hansard*, Canberra, 8 October 2008, pp 50-51.

2.93 The minister verified this during Senate Estimates, commenting that this would ensure that the successful solution would not create a second class of broadband receivers in rural and remote areas:

We have explicitly stated that we support the cross-subsidy [from the successful proponent to the underserved areas]. So there will be one uniform price reaching 98 per cent of Australians – not a two-tier system ... It is a national build ...⁷⁶

2.94 When further questioned as to whether the government could assure those in regional and remote Australia that this cross-subsidy would be ongoing, beyond the five year scheduled roll-out, the department could only verify that this was, once again, just one of the factors that proponents would have to provide, which would be considered together with the stated objectives and evaluation criteria.⁷⁷ To confirm otherwise would be speculating on the outcome of the RFP.

2.95 Also questioned was the requirement within the RFP that the proponents demonstrate the capacity to provide the government with a return on investment. The RFP document states that:

The Government has indicated it will make a funding contribution of up to \$4.7 billion to establish the NBN. This contribution may take the form of debt or equity which would be required to earn a return. While the Government has previously indicated its preference for an equity investment, other forms of funding will also be considered.⁷⁸

2.96 Telstra again pointed to the economics of fulfilling the government's objectives in the current financial climate:

...commercially we could not, even with regulatory certainty, roll out a fibre-to-the-node network to 98 per cent. The economics would not stack up ... without government money, it is simply not feasible to roll out to that footprint, but that is not what the government is asking in the RFP.⁷⁹

2.97 In their evidence at the public hearing, the government's preference for an equity-based investment was also raised with Telstra, who verified that if this was required by the government, Telstra would not participate in the NBN.⁸⁰

76 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 49.

77 See discussion, *Committee Hansard*, Canberra, 8 October 2008, pp 49-52.

78 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 1.1.12, p. 2.

79 Mr Quilty, Telstra, *Committee Hansard*, Canberra, 11 November 2008, p. 27.

80 See discussion, *Committee Hansard*, Canberra, 11 November 2008, p. 27.

Other financial considerations within the RFP

2.98 During Senate Estimates in October 2008 and also during the committee's public hearings, there was much discussion on whether a cost-benefit analysis had been, or would be, undertaken by the government on the investment of \$4.7 billion of taxpayers money, and whether that study would be made available to the public. When asked by the committee whether he was conducting a cost-benefit analysis, the minister answered:

This is an election commitment and we will deliver on our election commitment. ... No ifs, no buts: it will be delivered.⁸¹

2.99 The committee considered that this was an 'amazing' admission by the government adding the comment that:

I am just fascinated that you propose to do it without any cost-benefit analysis of how you will spend \$4.7 billion of tax payers' money.⁸²

2.100 The same question was raised quite independently by Professor Joshua Gans in his submission during his discussion of how Telstra had 'dramatically revised' its own estimates of the value of broadband to the economy. Professor Gans states that:

...as an economist, I am concerned as to whether a proper cost-benefit study as been conducted (either within government or industry). Those benefits ... have not been appropriately quantified in a rigorous manner.⁸³

2.101 If there has not been a government cost-benefit analysis, this runs contradictory to the government's policy in relation to the \$20 billion Building Australia Fund, under which all initiatives and projects seeking funding under undergo the scrutiny of what the government has stated will be a rigorous cost-benefit analysis.

2.102 Another concern raised regarding how the fund might be spent was in relation to whether there would be any allocation towards researching the types of online services that would drive take-up levels of the NBN once it was implemented.

2.103 This issue can be likened to the 'chicken and the egg' debate, as it could be said that, without the infrastructure being present, services cannot be provided, so infrastructure needs to be established prior to services being developed and delivered. Conversely, it could be said that appropriate services must be made available as soon as the NBN is available; otherwise there will be no incentive for people to adopt the new broadband, which would make it less commercially viable for an owner/operator, who might in turn limit their future investment. This issue was highlighted in two

81 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 28.

82 Senator the Hon. Nick Minchin, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 28.

83 Professor Joshua Gans, *Submission 15*, p. 2.

separate submissions; both advocated for research into the provision of services, but from a slightly different perspective.

2.104 Professor Joshua Gans acknowledges the importance of providing the infrastructure for high speed broadband, but continues that infrastructure itself does not create demand for such connections. Professor Gans suggests that the government should be investing 'on two fronts':

First, it needs to encourage applications that leverage the network ... e health, e-education or video-conferencing. ... Second, the government needs to investigate the price of computing equipment that households need to access the new network.⁸⁴

2.105 Professor Gans highlights that for many households the purchase of appropriate computer equipment would be a constraint on their ability to utilise the network, with the consequence that they would be paying for a network through their taxes but unable to gain any benefit from it.⁸⁵

2.106 In Professor Trevor Barr's submission, he strongly recommended that the government should utilise a proportion of the \$4.7 billion to research the types of services that consumers would utilise once they had access to the NBN:

The present ongoing National Broadband Network (NBN) tender process gives almost no attention to the complexities of services on the demand side of the broadband equation. ... It is surely incongruous for a government to offer such huge capital expenditure to ensure that the new fibre network passes 98% of Australian homes but to ignore the issues of what services will be offered to whom and how?⁸⁶

2.107 The affordability issue was also taken up by Ms Teresa Corbin from the Consumers Telecommunication Network. Ms Corbin stated the need to ensure that broadband is affordable for all Australians, and suggested that this could be achieved by the government also using the \$4.7 billion to assist people of lower income levels:

It is in our submission that there has to be some kind of communications allowance, particularly for people who are recipients of a government benefit and require higher downloads. For instance, if they are a user of any health service ... they are going to require some assistance to ensure that they are not running up ridiculous bills, and we end up with a two-tiered health system. We will have to be very cognisant of how, in reality, its affordability plays out on customers.⁸⁷

84 Professor Joshua Gans, *Submission 15*, p. 4.

85 *Submission 15*, p. 4.

86 Professor Trevor Barr, *Submission 13*, pp 2-3.

87 Ms Teresa Corbin, Chief Executive Officer, Consumer Telecommunications Network, *Committee Hansard*, Sydney, 7 October 2008, p. 71.

2.108 Evidence taken at the Perth public hearing also raised the issue of affordability when discussing the ability of remote Indigenous communities to access broadband services. Commenting on the impact that the Australian Broadband Guarantee has had in remote communities, Mr Anson Cheng stated that:

There is a bit of impact, but ... [t]hese are people who are very poor and cannot even afford to pay for their basic living. How can they afford broadband in this case?⁸⁸

2.109 The committee acknowledges concerns of affordability and service provision, which have the potential to impact on the long-term sustainability of the NBN operator in providing a viable return of investment.

The RFP process itself

2.110 On 11 April 2008 the government released the Request for Proposals document outlining the objectives of the government's broadband initiative and a number of criteria against which each bid will be evaluated.

2.111 In addition to the issues already raised regarding the lack of clarity provided in relation to critical terminology used in the RFP, the committee has had a number of other concerns highlighted in evidence and written submissions.

Transparency

2.112 A common criticism has been that, despite the government's claims, the RFP process is not as 'open and transparent' as the government has stated it would be, particularly when considering the significant government funding outlay of \$4.7 billion of taxpayers' money.

2.113 This criticism was heard repeatedly by the committee when prospective bidders were unable to elaborate on critical issues due to what has effectively become a gag order within the RFP. A clause within the RFP states that:

Proponents should not communicate with or solicit information in relation to the RFP process from any government employee (or contractor), Minister or Minister's adviser other than the Contact Officer.

The Commonwealth may preclude a Proposal from further consideration if the Proponent does not comply with any requirement of this clause 10.7, or based on any investigation carried out under this clause 10.7.⁸⁹

2.114 Additionally, the document states in a later clause that an additional right of the Commonwealth is that it may:

88 Mr Cheng, *Committee Hansard*, Perth, 6 November 2008, p. 4.

89 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraphs 10.7.5-6, p. 38.

...at any time, in its absolute discretion and without providing reasons ... decline to answer queries from any Proponent;⁹⁰

This goes some way towards explaining why some proponents have mentioned to the committee that they have sought clarification on issues, such as footprint of the 98 per cent and the modelling of how this might be measured, as already highlighted in this chapter, but that these clarifications have not been forthcoming.

2.115 Although the government clearly provided several opportunities for the industry and the general public to provide comment in the form of written submissions, it was noted that this did not allow for two-way dialogue. Dr Ross Kelso noted this in his submission:

It is difficult to appreciate how this process can be transparent and accountable ... Neither the Panel of Experts nor the specialist advisors are required or are likely to publish their deliberations. ... Whilst the tabling of submissions from industry and public interest groups does constitute a public process of consultation, such consultation is only one way communication. There is no process for official feedback nor further public scrutiny.⁹¹

2.116 When outlining his suggestions for public policy goals for the NBN, Dr Kelso again highlighted the lack of accountability, stating that:

A prime goal in selecting the NBN provider and managing ongoing deliverables should be to ensure full transparency of process and public accountability for outcomes.

It is totally unacceptable for agreements with the NBN provider to hide behind the cloak of 'commercial-in-confidence' secrecy. ... [t]ransparency and accountability are crucial factors.⁹²

2.117 Dr Kelso also criticised the government's launch of the RFP without establishing the desired regulatory framework and went on to highlight the subsequent importance of this Select Committee inquiry process:

This Senate Committee offers the only opportunity for the consideration of public submissions by a body independent of the Department or its Minister.⁹³

2.118 The lack of opportunity for either industry or public scrutiny was particularly a concern in relation to the regulatory regime. The government has invited suggestions for regulatory change, but has not provided an opportunity for industry

90 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraph 11.2.1.7, p. 40.

91 Dr Ross Kelso, *Submission 24*, pp 2-3.

92 *Submission 24*, p. 8.

93 *Submission 24*, p. 3.

comment on the regulations under which they will be required to operate their businesses.

2.119 When questioned in Senate Estimates in October 2008, the minister would neither confirm nor deny that this opportunity would be provided. Rather, he indicated that he did not want the legislative process to be impeded by any additional consultation with either the industry or the customers who will be accessing broadband services under this new regime. The minister claimed that:

We will go through the process of the NBN, we will then put forward a package of legislation, and if [the] opposition choose to block it, slow it or frustrate it, then it will be on your head.⁹⁴

2.120 The minister was non-committal when asked at the same Senate Estimates hearing whether there would be an announcement of the successful proponent at the end of the eight week assessment period, which according to the government's revised timeline, should be towards the end of January 2009. In response to the committee's questioning, the minister responded:

We are not intending to announce a winner and then try to negotiate an outcome.⁹⁵

2.121 This sparked a lively discussion on whether it would be feasible for a contract to be signed with the successful bidder prior to the passing of legislation that would create the regulatory framework necessary to implement and administer the operation of the NBN. The minister continued to evade the issue, but did state that:

...we will reach an agreement [with the successful bidder] and we will put forward – depending on the outcome of that [agreement] – any regulatory changes. ...

We are not going to be negotiating with your good selves about this issue once we have reached an agreement with the successful bidder.⁹⁶

How the proposals will be assessed

2.122 The RFP states that the proposals will be assessed on:

...the extent to which the Proposal meets the Commonwealth's [18] objectives for the NBN project. ...

94 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 26.

95 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 16.

96 Senator the Hon. Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, pp 18-19.

Within the framework of an overarching value-for-money assessment [against] the [six] evaluation criteria...⁹⁷

There are eighteen Commonwealth objectives for the NBN initiative and six evaluation criteria, which are listed at appendix 2.

2.123 Criticism has been levelled at the timeframe for evaluating the bids that are submitted by proponents. The RFP states that the assessment process will be undertaken during an eight week period immediately following the closure of the RFP. The committee notes that, given the closure date is 26 November 2008, the assessment period will occur over the Christmas / New Year break, when most of the industry and government bodies will have closed down.

2.124 When the department was asked to clarify the timeframe for assessment, it became apparent that the Australian Competition and Consumer Commission (ACCC) would actually only have six weeks to examine all proposals and write its critical report on each for the government to consider during the last two weeks of the eight week process. Their assessment and report would be conducted in parallel with the assessment process conducted by the Expert Panel, who will have an additional two weeks to consider the ACCC's report. Ms Patricia Scott, the Secretary of the department, explained the timeline:

We are expecting the ACCC to provide written advice to the panel at the end of the six weeks of them examining the proposals. ...

It is expectation that the panel will commence its work on the receipt of the proposals on 26 November and that it will conclude its work at the end of eight weeks.⁹⁸

2.125 At the Canberra hearing, the ACCC seemed very much aware that they would have a very limited time to provide a report that would be critical to the government's final decision. Although their responses were constrained by their role in this process, the comment was made that:

I can assure you that Christmas has been cancelled for the relevant officers that will be working on this...our staff are expecting some long hours over this period...⁹⁹

2.126 Through this discussion, the committee noted that the RFP states merely that the ACCC will have access to the final proposals 'as soon as is practicable'.¹⁰⁰ This

97 DBCDE, *Request for Proposals to Roll-out and Operate a National Broadband Network for Australia*, 11 April 2008, paragraphs 1.3.1 and 1.4.1, pp 5-6.

98 Ms Scott, DBCDE, *Estimates Hansard*, Senate Standing Committee on Environment, Communications and the Arts, Canberra, 20 October 2008, p. 20.

99 Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division, Australian Competition and Consumers Commission, *Committee Hansard*, Canberra, 8 October 2008, pp 76-77.

may well lead to the ACCC having less than the six weeks already mentioned. The committee believes that a more appropriate time for the thorough assessment of proposals and the subsequent report should be allowed by the government.

Conclusion

2.127 The committee questions the appropriateness of the timeline for the evaluation of the RFP, believing it will not permit the necessary level of scrutiny by either the Expert Panel or the ACCC to select the successful proponent for the NBN.

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