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SENATE

SELECT COMMITTEE ON THE NATIONAL BROADBAND
NETWORK

Reference: Implications of the proposed National Broadband Network

WEDNESDAY, 8 OCTOBER 2008

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**SENATE SELECT COMMITTEE ON
THE NATIONAL BROADBAND NETWORK**

Wednesday, 8 October 2008

Members: Senator Fisher (*Chair*), Senator Birmingham (*Deputy Chair*), Senators Lundy, Ian Macdonald, Nash and Sterle

Senators in attendance: Senators Birmingham, Mark Bishop, Fisher, Ludlam, Lundy, Ian Macdonald, Minchin, Nash, Sterle,

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Mark Bishop, Boswell, Boyce, Brandis, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Ellison, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, McEwen, McGauran, McLucas, Marshall, Mason, Minchin, Moore, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Stephens, Troeth, Trood, Williams, Wortley and Xenophon

Terms of reference for the inquiry:

1. To inquire into and report 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.
2. The committee's investigation should include, but not be limited to:
 - a. the availability, price, level of innovation and service characteristics of broadband products presently available, the extent to which those services are delivered by established and emerging providers, the likely future improvements in broadband services (including the prospects of private investment in fibre, wireless or other access networks) and the need for this government intervention in the market;
 - b. the effects on the availability, price, choice, level of innovation and service characteristics of broadband products if the NBN proceeds;
 - c. the extent of demand for currently available broadband services, what factors influence consumer choice for broadband products and the effect on demand if the Government's fibre-to-the-node (FTTN) proposal proceeds;
 - d. what technical, economic, commercial, regulatory and social barriers may impede the attainment of the Government's stated goal for broadband availability and performance;
 - e. the appropriate public policy goals for communications in Australia and the nature of regulatory settings that are needed, if FTTN or fibre-to-the-premise (FTTP), to continue to develop competitive market conditions, improved services, lower prices and innovation given the likely natural monopoly characteristics and longevity of the proposed network architecture;
 - f. the possible implications for competition, consumer choice, prices, the need for public funding, private investment, national productivity, if the Government does not create appropriate regulatory settings for the NBN;
 - g. the role of government and its relationship with the private sector and existing private investment in the telecommunications sector;
 - h. the effect of the NBN proposal on existing property or contractual rights of competitors, suppliers and other industry participants and the exposure to claims for compensation;
 - i. the effect of the proposed NBN on the delivery of Universal Service Obligations services;
 - j. whether, and if so to what extent, the former Government's OPEL initiative would have assisted making higher speed and more affordable broadband services to areas under-served by the private sector; and
 - 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.

3. In carrying out this inquiry, the committee will:
 - a. expressly seek the input of the telecommunications industry, industry analysts, consumer advocates, broadband users and service providers;
 - b. request formal submissions that directly respond to the terms of reference from the Australian Competition and Consumer Commission, the Productivity Commission, Infrastructure Australia, the Department of the Treasury, the Department of Finance and Deregulation, and the Department of Infrastructure, Transport, Regional Development and Local Government;
 - c. invite contributions from organisations and individuals with expertise in:
 - i. public policy formulation and evaluation,
 - ii. technical considerations including network architecture, interconnection and emerging technology,
 - iii. regulatory framework, open access, competition and pricing practice,
 - iv. private sector telecommunications retail and wholesale business including business case analysis and price and demand sensitivities,
 - v. contemporary broadband investment, law and finance,
 - vi. network operation, technical options and functionality of the 'last mile' link to premises, and
 - vii. relevant and comparative international experiences and insights applicable to the Australian context;
 - d. advertise for submissions from members of the public and to the fullest extent possible, conduct hearings and receive evidence in a manner that is open and transparent to the public; and
 - e. recognise the Government's NBN proposal represents a significant public sector intervention into an increasingly important area of private sector activity and that the market is seeking openness, certainty and transparency in the public policy deliberations.

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Committee met at 9.10 am**FORMAN, Mr David, Executive Director, Competitive Carriers Coalition****HEALY, Mr Matthew, Chair, Competitive Carriers Coalition**

CHAIR (Senator Fisher)—I declare open this public hearing of the Senate Select Committee on the National Broadband Network. This is now our second day of public hearings into the national broadband network and we are about to kick off with the Competitive Carriers Coalition.

Senator LUNDY—I would like to formally place on the record of this committee, as I did at the beginning of the inquiry, that I am married to Mr Forman, who represents the Competitive Carriers Coalition. It is important for everyone involved in the committee to understand that.

CHAIR—Thank you, Senator Lundy. These proceedings are public, but the committee can decide to hear evidence in camera. If you decide at any point to provide evidence in that manner, the committee can consider your request according to the grounds upon which you might seek that ability. Providing evidence to the committee is protected by parliamentary privilege, and it is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a Senate committee and it may be treated as a contempt of the Senate. It is also a contempt to give false or misleading information and evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is to be taken. The committee will then determine whether it will insist on an answer having regard again to the ground upon which the objection is based. If the committee determines to insist on an answer, a witness may request that an answer be given in camera. Again, you can make a request of that nature at any time. The committee has received your submissions. Do you wish at this stage to amend or vary your submission?

Mr Forman—No.

CHAIR—In that case, I invite you to make a brief opening statement to the committee, after which we will ask you questions.

Mr Forman—I thank you for the opportunity to participate in this public hearing. In my opening I wish to talk to how the Competitive Carriers Coalition sees the NBN process. We believe it is important to understand the role that it plays in the context of the broader history of communications in the last 20-odd years. In particular, we think it is important to see it in the context of the decision going back to 1991 to actually create Telstra as the integrated network wholesale/retail company that it is today. The decision by the then government was highly contentious. At that time the then Treasurer warned that a decision to create that kind of a company would be anticompetitive and harmful to consumers over the longer term. At that time, Mr Keating, as the Treasurer, promoted a structurally separated entity. When the decision to create Telstra as an integrated entity was agreed to he famously described it as a second-rate decision by a second-rate government. Nineteen years later the CCC would contend that the outcomes that he warned of are what we observe in the industry and the marketplace today. We have the highest prices, or among the highest prices, across the suite of communication services of anywhere in the developed world. We are slow to see many of the new technologies adopted

in this country. We have an industry that continues to be dominated by one company to an extent that is unparalleled in the rest of the developed world. We would suggest that the NBN process and the decision about how to proceed with the construction of a new access network provide an opportunity to correct that mistake of 1991. Indeed, we would suggest that the No.1 imperative for policy makers is to correct that error. To do that, the new network needs to be independently owned, independently operated and not integrated into the business of any retailer, and not just Telstra.

We would argue that a decision that falls short of that would be a second-rate decision, just as the decision in 1991 was a second-rate decision. I think that, while there has been an enormous amount of discussion about broadband as an issue in itself, we must not lose sight of the fact that the end game is around delivering services at internationally competitive prices to as many consumers as we can reach.

Senator NASH—Going to the issue of competition and having open access under the new NBN environment, whoever the successful tenderer is, as things stand currently—and I think I know what you will say to this—how do you view the ability to get open access at the moment? Under the currently regulatory environment is there going to be open access for other carriers?

Mr Healy—It is fair to say that it is the structure of the industry rather than simply the regulatory settings that we have at the moment that makes it difficult, if not impossible, to have open access. Regulatory settings are important. I will come to those perhaps secondly. But primarily the reason we do not have open access at the moment is because of the way in which the incentives of the incumbent, the dominant retail operator and the dominant network owner, act to afford benefits to their own retail arm as against benefits and open opportunities to its wholesale competitors. If we look to the NBN, if the NBN structure replicates the structure that we have at the moment, we will have the main monopoly network owner also being the main retail operator. The incentives that flow under that model are no different from the incentives that we have at the moment, which gives us cause for real concern that you cannot have open access in that model, because there is simply the incentive and the opportunity to afford your retail arm, if you are Telstra and you are the winning bidder, with benefits and opportunities that you will not necessarily want to afford to your retail competitors. It is not so much the regulatory settings as it is the structure of the industry that militates against an open access arrangement.

Senator NASH—We have had a number of submissions that have advocated for a structural separation. I gather from your submission that you are also of that view. It is becoming quite clear that the integration of having the wholesale and the retail and then expecting competition may well prove to be extremely difficult. How would you see the structural separation working? If this is going to be a PPP model or something like that, surely it would be a good opportunity to look at some sort of structural separation? It might be an opportunity we will never get again. How would you see the process of structural separation taking place if—and this is of course ‘if’—Telstra were the successful tenderer?

Mr Forman—I will answer that, but I want also to go back to the notion of open access for a moment. To answer your second question, in my view, given that we are talking about some kind of PPP model, it would almost be a more difficult financial/engineering fit to make that work in an integrated environment than it would to have it as a structurally separated environment or an independently owned entity. It seems to us to be a quite natural structure for an enterprise that is

owned under a public private partnership model to be independently owned with an independent shareholder and management structure.

If one of the private partners were Telstra or in fact any other retailer the constraints would have to be placed around the influence that it could exercise as a shareholder over the decisions of the board and the management of that other entity. How you would structure a PPP such that it was integrated into the existing ownership structure of Telstra is something that, as I say, I find more perplexing. I am not sure how you could have a government ownership element. I suspect you would have to have a grant or some kind of a loan to facilitate that kind of integration.

Going back to your question about open access, one of the things that have been troubling me in the last few months is the way the accepted definition of what open access is has been changed by virtue of a different definition that has been put into the market by Telstra. Open access has never been understood to be a set of products to which everybody gets equal access but then there is a network to which one person has privileged access more generally. Perhaps the best example of how this is understood more broadly would be the decision last week or the week before in Singapore to award the right to build their national broadband network to an independent, structurally separated entity that included SingTel as a 30 per cent owner. The statement from the chief executive of SingTel at the time was that in an open access environment there 'is nothing to be gained by us owning the basic infrastructure and so we are going to transfer that basic infrastructure into this new company because we can realise immediate value from it that way'. And there 'is no point us owning it because we cannot leverage any advantage from it'. That is the working definition of open access being put into effect, in our view. What Telstra seems to be saying is, 'We can provide open access. Of course we will provide open access, because we will have this product that we will call wholesale bit stream or something and we will provide that to everybody, but there will be other stuff that we get but you would not expect other people to get that.' I am sorry, but we do think that open access means that the network owner has no incentive but to give everybody access to anything that they can make available.

Senator NASH—Given that there is \$5 billion of taxpayers' money going into this and given that it is going to be, just by the nature of it, a natural monopoly, surely there has to be some structure around allowing a level playing field?

Mr Forman—Absolutely. We think so. It would be abhorrent for the public to be subsidising a network that one company or one set of shareholders of one company benefit from to the disadvantage of other shareholders in other companies or other citizens.

Senator NASH—There has been a bit of a focus on Telstra in a number of submissions and some of them have been quite critical, which is understandable given that they are the owners of the infrastructure. If they were to be successful in the bid, I guess that carries greater weight with it than for those who are not necessarily the current infrastructure owners. What are your thoughts around stranded assets and what should happen there in terms of any sort of compensation? Do you believe there is a need for compensation? It was raised with us yesterday that there should be a period of grace, if you like, a bit of a transition period, if Telstra were to be the successful bidder, whereby those other companies who are currently using other platforms to deliver would have a period of time to cross over and not potentially be chopped off at the knees, if you like? Do you have a view on that?

CHAIR—‘Migration’ was another term that we heard yesterday in this context.

Mr Healy—The Competitive Carriers Coalition primarily, as the name suggests, wants to advocate a pro-competitive market. For a pro-competitive market to exist we still need to have competitive operators. Under one scenario of the new network being rolled out in the hands of Telstra, if it were unchecked in the way it could roll out in terms of not having any boundaries around the transition and migration arrangements, it could in one fell swoop strand all of the assets of competitors. To the extent that we as competitors have those assets that connect our customers and to provide those services, we would literally be cut off and we would not have any access to our customers and therefore there would be no competition. In that worst case scenario, we can see that Telstra, if it were unconstrained, would have the ability to be able to strand assets and therefore strand competitors’ accessing customers. We see that there really do need to be arrangements put in place around the transition to the new network so that we can ensure that we move from what we would say is a suboptimal competitive market at the moment towards one that could be more competitive, and we need to take steps that take the industry with it and therefore consumers and customers with it on to the new network.

Senator NASH—Are you satisfied that the government is giving enough consideration currently to that particular issue?

Mr Healy—I think it has been made clear that the central role that the ACCC will have in vetting bids and making recommendations and advising on the outcome of the bids is very important here. It has a history of understanding where competitors have put their infrastructure, how they are using it and how that might be affected under certain implementation plans of some of the bidders. We are concerned that those issues do not get lost, but we are also heartened that there are some indicators that say that those issues will be taken into account, and indeed with people such as the ACCC having a role there.

Mr Forman—One thing the government could have done to disarm this issue more effectively would have been to be clearer about the structural arrangements that were required. If they believe that it should be structurally separated and had stated that up front, the issues of the stranding of assets would have been less contentious. With an entity that has the incentives that a structurally separated network has, I think you have an alignment with their interests and those of retailers in not trying to put those guys out of business. They actually want those people to be able to make a transition as seamlessly as possible on to the new network. We saw a really interesting example of that when we invited a fellow from KPN, the Dutch incumbent who was out here a couple of months ago. They are going through the process of building a similar network. They call it a fibre to the cabinet network in Europe, but it is the same kind of architecture as fibre to the node. They have a number of companies, such as Macquarie Telecom, Primus, iiNet and Internode who are taking an unbundled copper line from the exchange today in the Netherlands just as these companies are in Australia. What they are saying to those companies is, ‘We are going to build this new access network, but we are going to do it in such a way as to give you the most comfort that we can that we are not trying to put you out of business, and so we will give you incentives to a new unbundled-like service that runs through the new network. If you think you can make a go of it, we will give you the opportunity to put your equipment down at the cabinets. But, frankly, we don’t think that’s feasible. But if that’s what you want to do, then we will help you do it. And we won’t cut you off from the copper for an extended period.’ They are doing everything that they can to keep those retailers in business

and to bring those retailers along at their own pace into the new network. What people are concerned about with the proposal that Telstra has put forward previously around fibre to the node is that no such conversations have occurred. In fact, Telstra has quietly changed a number of its wholesale contracts to say to people, ‘You get 15 weeks notice, and then we can cut you off.’ The level of suspicion obviously went through the ceiling. Again, we think that is a consequence of the incentives that Telstra has as an integrated entity.

Senator NASH—Hypothetically, if we did have a courageous government that was going to move towards legislating structural separation, how do you think Telstra would react in that circumstance?

Mr Forman—I guess that is a matter for them. But we can look at the examples in other places. Typically what has happened is wherever you have a strong pro-competitive regulatory change incumbents have resisted for some time. There reaches a tipping point where the incumbent realises it is going to happen and then they try to find a way to engage with the government or the regulator to make it happen with as little disruption as possible. Once it is going to happen the greatest damage to the share value of those incumbents comes when they are seen to be standing against the tide.

Mr Healy—Whilst a number of incumbents in other jurisdictions have reacted against regulatory settings that put in place arrangements such as structural separation, I am not aware of any that have packed up shop and decided that they will not provide retail services to customers. When one looks at other jurisdictions, there is more to be lost from resisting those structural changes and resisting government reforms than there is by saying, ‘Well, we are going to have to adopt and play to the new rules.’ The clearest example of that is British Telecom. The other one at the moment that is going through a similar arrangement is New Zealand. We have heard in the past that Telstra would somehow or other change businesses and go into the airline industry or something. I do not know, but we suspect that it would continue and it would wish to service customers on that new network.

Senator MINCHIN—Telstra has said it will not be part of this process if at some point the government said that there is a precondition that structural separation is a requirement; they will simply absent themselves from the process. Are you saying that is not likely to occur and that they would not withdraw? But if we take Telstra at its word and it simply withdraws from the process, then what? Could you explore that scenario with us, that Telstra simply does withdraw on the back of some government decision that structural separation would be required?

Mr Forman—Again, predicting what Telstra might do is fraught, but I think it would be unlikely that they would withdraw because, frankly, they have too much to lose by not taking a pitch. If they did, what would be the outcome? There are other bidders. Telstra might seek to continue to disrupt the process and to disrupt other people from delivering on their plans, but ultimately no incumbent anywhere in the world has succeeded in doing that. Singapore is a great example. Ultimately, they had to accept the process, engage in the process and now they are leveraging best value for their own enterprise out of the process. As to Telstra withdrawing, I look to the comments from your predecessor Mr Billson, when he was asked exactly that question at an event I was at recently in Sydney. Frankly, I think we concur with his view. He put the point forward that, if they choose to do that, they have to answer to their shareholders and the government needs to continue to do what it thinks is the right thing. It is a dangerous road to go

down to allow public policy to be held hostage to saying, ‘What are you going to do if we don’t play?’ just because Telstra is there at the moment.

Senator IAN MACDONALD—Have they said that? Have you heard them say that?

Mr Forman—They have said that they will not participate if there is a precondition for structural separation—

Senator IAN MACDONALD—You do not believe them?

Mr Forman—I do not think it is a rational position for them to take. Again, the history and examples in other countries suggest that, at the most extreme, what happens in those circumstances is that the entire management is removed from the company and a more compliant one arrives.

Senator IAN MACDONALD—Someone else mentioned that yesterday.

Mr Forman—I noted an article in the newspaper today. A group of shareholders have written to Telstra and, under the ASX rules, Telstra has been required to send the letter around. A group of shareholders have written to the management questioning whether they are acting in the interests of shareholders by taking the approach that they are taking.

Mr Healy—If Telstra does withdraw from the bidding process, there are other bidders. The government’s plans seem to be able to support—and we would think that they would support—another bid being provided and being successful. However, if you go down a path that then says that, if someone other than Telstra wins it, the ability for Telstra to frustrate that bid might be such that this NBN process may not be a success, I think that merely points to the fact that the structure of the industry allows Telstra at the moment to exercise such extraordinary market power over government policy, and it is further evidence and another indicator of the reasons why this is an opportunity to change that underlying structure so that we are not left in a position whereby a single operator is able to hold not just the rest of the industry but also good government policy to ransom.

Senator NASH—As to the actual provision of the network, our understanding is that there was no requirement that the bidders indicate where they are going to begin a rollout. It would seem that, with nearly \$5 billion of taxpayers’ money, that money going to the underserved areas where they do not have broadband access would be the most appropriate deployment. A rolling in, if you like, rather than a rolling out—

Mr Forman—That is exactly the term that the CCC has used. We have always advocated a roll in. We think it also makes business sense. If you are building a network for anything other than anticompetitive reasons, that would be where you would want to start. You would want to expand the addressable market by going into areas where people cannot get broadband, and work your way in. You should have an alignment of good public policy with a business incentive as well.

Senator NASH—Do you think that the ACCC currently has the resources it needs to properly do its job in terms of the industry? If under the NBN scenario we have a provider that is not

structurally separated and there is no change to the regulatory environment, what will be the outcome?

Mr Healy—We are currently trapped in a quagmire of regulatory gaming and activities that slow down the processes of investment by competitors and the ability to bring innovation to the market. Telstra resists that at every turn and it has a number of avenues and opportunities within the existing regulatory arrangements in the Trade Practices Act and the processes that the ACCC oversees. It has the incentive and the opportunity to frustrate competitive investment and competitive innovation. If we move to an NBN world where the same sorts of processes are available to Telstra, we would think they would do exactly what they are doing here. I think at last count there were about 35 to 40 disputes between Telstra and the rest of the industry. There are a number of cases in the Federal Court in the Competition Tribunal. We have already had High Court cases. We would think we would just see a replay of that. The answer is not merely to give more powers to the ACCC. Again, let us get to the source of the problem and deal with the structure and the incentives that make business sense for Telstra to engage in this game and conduct. Let us go to that heart rather than being seen to put more bandaids around the problem by perhaps giving the commission more power. I would be interested in giving the commission more power. I think it needs it, because it could slice through some of these clear gaming opportunities. But that said, I think the opportunity presented under the NBN process is to get to the heart of the issue and deal with it that way.

Senator LUDLAM—Have you any opinions on the way the tender process has been conducted? To paraphrase, some of the witnesses yesterday were talking about the tender process being overly prescriptive in terms of technology and sketchy in terms of regulation or what the eventual market structure was going to look like. Perhaps I should break that up into two. Do you think too much information is being landed on the tenderers in terms of the technology that they are expected to deliver?

Mr Forman—My interpretation of the tender, as a commercially disinterested observer, that is, someone who is not responding to it, is that it set a minimum standard of performance at the end and on where fibre needed to run to. It seems to be interpreted by all of the bidders as being prescriptive to the extent that everybody that I am aware of has proposed the same network architecture, that is, fibre to the node. The experience around the world suggests that that was where it was going to go, anyway. But I do not think that the idea of fibre to the home is closed off in the description of what was required in a technological sense. As far as we are aware, we are seeing a lot of bids that look the same in terms of the technology, and that may have been an inevitable outcome, other than in regional areas where others may have gone for a wireless solution. A public policy decision was made. The government's description of it is that it was an equity issue; they wanted everyone to have the same architecture to 98 per cent. That obviously comes at a cost. It is up to the bidders to do the cost-benefit analysis on that.

On the prescription of technology front, I think it was probably going to go there, anyway. With the regulatory prescriptions, we have been of the view that they should have been clearer about structural separation and that they should not have been covered by Telstra saying, 'We won't play if you force us to play to rules that we do not like.' We think they should have been explicit about structural elements and not just used the term 'open access' and hope that everybody would stick to the definition we understood.

Senator LUDLAM—From a technology perspective, if Telstra's bid is unsuccessful, are we essentially creating a duplicate network given that Telstra has complete ownership of large parts of the network that we have at the moment? A few folks yesterday were talking about overbuild. Does that sort of leave us in a very difficult position of virtually starting a network from scratch?

Mr Healy—The monopoly element is that last connection. It is easiest to use a residential home as your example. If you go from the front door of your home, the monopoly element is really just from the copper connection from the home back into the network. At this stage under the proposal, as far as I am aware, and with other jurisdictions that are going through this process, there is no economic or technical reason why we need to duplicate that last wire. It is no different from a gas pipe, water pipe or electricity pipe into the home. You do not need two of them. The ability to provide broadband over that last part remains unaffected by what you do in the rest of the network. Where the new build, the new network, is going is not that last monopoly element, it is another build further back into the network away from the home. In that regard, again, we think that this network is going to use fibre and use the existing duct network that has been around from the PMG days, from two centuries ago, and you will use that duct network to put your fibre through. That is the new part of the network. That will connect with the very old part of the network but which still has much utility, which is that last couple hundred of metres of copper. Will there be an overbuild? Will there be a duplication of that last part of the copper network? No, there would be no economic reason why you would want to do that. You might have an anticompetitive reason why you might want to do that. But we would think that any of the arrangements for the bidders will make it clear that it would be both uneconomic and anticompetitive to attempt to overbuild even that last part of the network.

Senator LUDLAM—I am still not clear then how the network would operate. If the other consortium ended up being the successful bidder, but leaving ownership of that last kilometre or last 100 metres in the hands of Telstra with somebody else owning the new build, how would that work?

Mr Healy—We already rent that last part of the network, anyway. That last part of the copper network is already available to be able to be rented. We would simply think that that arrangement should continue. The renting of that last part of the network, the last copper connection, is not a novel concept. In fact, that is something my company has been doing, Macquarie Telecom, for a number of years. That is not a new or novel issue.

Mr Forman—The right to do that was one of the issues at the heart of the High Court challenge that Telstra took and so spectacularly failed at. They were attempting to challenge the ability of the ACCC, and by extension the government, to make that piece of copper available for others to use. The High Court found that the history of regulation of telecommunications—again going back to the PMG—suggested that Telstra did not have the property right that was at the basis of their claim. It had always been built with a view to being constrained by public policy requirements.

Senator LUDLAM—You mentioned briefly in your submission, as have a few others, the rate of return that Telstra has publicly expressed it anticipates. Can you elaborate on your comments?

Mr Forman—Those comments were based on the CIE report that we commissioned. I should preface this by saying that it is not precisely clear what Telstra means when they talk about ‘north of 18 per cent rate of return’. Some people interpret that as being a rate of return that is far greater than that that the CIE interpreted. We asked the CIE to take that proposition from Telstra and look at whether that 18 per cent seemed reasonable to them by creating a benchmark looking at other similar assets and, if it were not reasonable, then to look at the implications of that rate of return being allowed. The CIE, as I say, tells us it took a conservative approach to all of its assumptions. It found that there was a substantial delta and it felt that the rate of return that Telstra was claiming indicated exploitation of market power conduct, and then modelled that using the ORANI model, which is the general equilibrium model used by Monash University that is widely used, to look at the implications of that across the economy. I think it is fair to say that they found that it was an extortionate rate of return.

Senator LUDLAM—I am thinking perhaps of the United Kingdom where there is a privatised carrier that was structurally separated away from the retail end. Do we know what the rates of return are in other parts of the world? Do we have any valid basis for comparison?

Mr Forman—There is a global regulatory discussion or debate at the moment when you talk about these fibre to the node or deep fibre access networks about what is the basis for a so-called premium on regulated rates of return and how big that premium should be. It is an ongoing debate and it is one that is being conducted in a somewhat hypothetical state at the moment. One of the things that we are saying in relation to this country is that the process that the government is engaged in should make that an irrelevant issue anyway for us. It is not for me to have to make a call on what the rate of return should be now if we have competing bids that will make their own judgments about the appropriate rate of return. Our only concern is that there will be enough competing bids and that they will reflect a view of the bidders that they cannot afford to claim monopoly rents and think they will get away with it.

Mr Healy—Perhaps another way to answer the question is to not so much look at the specific rates of return that may or may not be justified but to look at the way that Telstra currently operates its business. As our submission sets out, at the retail level Australians pay relatively higher prices. We have relatively fewer capped limits on downloads. We have less availability of broadband and we pay high prices. That ultimately supports Telstra’s extraordinary profits as a company. Telstra has made it clear that it wants to be able to maintain those sorts of profits on to the new network. We say that that would be a significant public policy error and this is an opportunity to say, ‘Let’s again strip out the monopoly profits that are being earned by Telstra at the moment and establish the framework for an industry whereby we have a more competitive market built upon prices being closer to cost for consumers.’ We think that when that occurs consumers use the networks more, drive up demand, and have lower prices and increased quality.

Mr Forman—There is one OECD graph. We had someone from the Netherlands out here. We invited a guy from OECD’s telecommunications group to give a presentation. There is one graph that he provided. It is on page 14 of the submission that we made on structural separation. He said that when he constructed this graph it left him stunned. He took those countries where there were download caps on broadband services and mapped the levels of those caps. Against that he then mapped the premium or penalty price that people pay when they go over those caps. What you see is that we have among the lowest caps in the world but the penalty price that people pay

when they go over those caps is just stunning. It is so far above any other country that one can only interpret it as being an exercise of market power. It is a crucial graph because not only does it demonstrate existing market power; it demonstrates what we face if we build an NBN that has that kind of unconstrained market power. Speeds will go up and therefore the ability to download a lot of data will increase. I am sure all of you have heard from constituents horror stories of getting \$5,000 monthly bills on broadband services from Telstra when they have gone over their cap. Can you imagine how many of those stories you will hear if you have that kind of pricing model imposed on a network that is capable of delivering tens times as fast. I suspect you will be kept busy with constituent complaints.

Senator BIRMINGHAM—Can we turn to table 4.2 in your submission, which contains the modelling. You have listed a number of potential annual revenues required to provide a return to capital for Telstra's fibre to the node network and others, including a 'competitive Telstra'. Can you tell me on what basis a 'competitive Telstra' is assessed there? The table is on page 21 and gives the 'Telstra return on a national fibre to the node network'?

Mr Forman—That is the CIE report itself, is it?

Senator BIRMINGHAM—Yes.

Mr Forman—I actually do not have that one here.

Senator BIRMINGHAM—You can take that on notice.

Mr Forman—I think I know what you are referring to there. In the latter part of that they did an appendix looking at some other models using a different weighted average cost of capital. In different places different regulatory processes offer different weighted average cost of capital requirements. I think what they did there was to take the weighted average cost of capital calculated against the rest of the industry. If Telstra was getting what the rest of the industry would get on the WACC, it said that that would be the outcome.

Senator MINCHIN—It gives the overall return Telstra would earn on the network if it was not able to extract monopoly prices.

Mr Forman—They just did a calculation based on the different WACCs that Telstra have used in different places and then they took a premium off that based on their analysis of the legitimacy of the WACC that Telstra had claimed, and did a calculation based on that. This was part of the report that was in a sense giving an analysis around testing the propositions and testing the outcomes of their primary modelling.

Senator BIRMINGHAM—Moving back to broader issues—and Senator Ludlam picked up a little bit on this—how does the Competitive Carriers Coalition feel about the approach the government has run with the tandem processes, as such, of the regulatory review overlapping as it is with the request for proposals? Are you confident this will give the best outcome and potential for bidders under the RFP to lodge informed bids?

Mr Forman—I have some views about the process of the bidding itself, but separate to that the process of the regulatory review that ask people for their views and in effect invited the

potential bidders to take those into account was perhaps optimistic in that it took the view that all the bidders would be interested. Clearly, Telstra have indicated that they were not particularly interested in those submissions to the extent that they have simply rejected the idea of a structurally separated new network. I think it is always a worthwhile exercise to ventilate discussion in the community around regulatory process. What was absent in that was a conclusion that said, 'This is the view that the government has formed out of this.' What we assume is supposed to happen is that the bidders look at it and take it into account but also that the expert panel or task force take it into account and use that to build the framework on which they assess the bids. That goes to some of the concerns I have about the bidding process separately. When the bidding process was announced there were three or four issues that we raised as concerns. The first was the timing. We thought it was too short. We now think the timing is appropriate. It is a pity that it was not always going to run through to November.

The second issue was the level playing field and the availability of information about those ducts and copper runs that Mr Healy spoke about earlier. The bidders appear to have been satisfied by what the government has required from Telstra, and so we have no issue around that. The third issue was transparency, and we still have concerns about that. It is not clear to us what the task force will take from the regulatory submissions. The government has not been required to respond on its own behalf so it is not clear to us what the government will take from the regulatory submissions. There have been comments by the minister about the need for structure to be got right that do give us more comfort than we had when the thing was first announced. That has gone some way to giving us some comfort. But the important next stage for us will be to understand the level of transparency in the ACCC process once they become involved after 26 November. When bids are submitted you then have parallel processes. You have the ACCC looking at each bid on the basis of the price and competition issues that are raised by it, and you have the expert task force informed by the ACCC process making a decision about which is the superior bid.

Our view is that it is really important that the ACCC process is open. We can understand why some commercial elements in the expert task force process may be held confidentially, because you want to be able to have that competition between rates of return as we discussed earlier. But it is crucial to us that the process by which the commission reaches its conclusions about the competitive outcomes and the appropriate price and methodologies presented by each of the bidders has a level of transparency so that we can participate. We have no concern about the competence of the ACCC, but everybody can make mistakes or overlook things. That is why the commission has the processes that it has today when it tries to determine the pricing principles underlying any other regulated service in the market today. This is so much more crucial because we are going to be locked in presumably by a contracting arrangement at the end of this bidding process. We need to understand the commission's thinking and we need to be able to put our views to the commission where we think their thinking may be incomplete or defective simply to have comfort.

Senator BIRMINGHAM—Your concerns sound very similar to concerns made by a witness appearing before us yesterday who in their submission said that implicit in the process being undertaken is 'an interplay between the regulatory environment in investment decisions and a negotiated outcome with financial sponsors of the successful bid'. It seems concerning if we are going to have a negotiated outcome around the ideal regulatory framework with a successful sponsor of the bid, if that ends up being the case, and I take it that is a fundamental concern you

share from a lack of transparency evident in the process. I think these witnesses and others yesterday made an appeal for the government to outline some type of framework for involvement and feedback on the regulatory environment that would be applied before it is finalised. Would the coalition welcome some type of opportunity for further involvement as a government position is developed?

CHAIR—If I may interject there—and without further delaying a process that needs to happen?

Mr Forman—Absolutely. I think it is consistent and I think it can be done through the process that the ACCC has to undertake. It has not been clearly explained how the commission will undertake its duties, but the opportunity is there for the commission to perform its functions in such a way that allows that transparency to occur. For example, you may be aware of the so-called FANOC proposal from last year, where the companies that later became the Terria consortium proposed a network across the capital cities and a number of regional cities. They put that proposal to the commission as what is called a special access undertaking, and the public process was engaged in up to the point where a draft decision was released by the commission that did expose its thinking. We can take some comfort, looking back at that, in what the commission said. It was very firm about the need for clear control over the ability of a retailer to influence the decisions of the wholesale network and said that that has to be precluded from the governance structures of the FANOC proposal. We think the same kind of process should be engaged in in this instance. Even though the time frame is shorter, I think the opportunity is there because so much work has been done by the commission in the past. But we would be concerned if from this point we now had some kind of radio silence out to February or March next year when an announcement is made. When you talk about a negotiated outcome, we are talking about the interests not just of potential investors but of every citizen in Australia. Some 98 per cent of us are going to have to use this network for the most basic form of communication right up to broadband.

CHAIR—Do you have any suggestions as to how we would avoid getting to that pincer point?

Senator BIRMINGHAM—Yes. It would be good if when the deadline for proposals is passed the commission at that point—if not earlier but at least at that point—outlined how it intended to perform its duties and how it intended to have a public examination of its thinking and, if the time allows, to publish draft positions and, if not, at least discussion papers that ventilates what it thinks are the issues that have to be resolved or are the points of contention, and allow people to respond to that and publish those responses. When it does reach its final recommendations, to the maximum extent possible within the constraints of commercial confidentiality, we would like to see those recommendations published as well.

Mr Healy—We are not reinventing the wheel here. We have processes that the commission ordinarily undertakes when it is deciding to recommend a certain decision either to government or if it is making a decision off its own bat. It involves being able to make public inquiry as well as to have commercial in-confidence issues dealt with by only those who need those issues dealt with. We have an opportunity here to look at the very clear issues around legislative reform, for instance, and the impact that that reform might have on other operators as well as consumers. That is at one end of the spectrum, and that really does need to have a very clear and open

transparent process built around it versus perhaps the minutiae around how the funding arrangements might work for a particular bid. Maybe that is better done with a degree of commercial in-confidence arrangements built around it. We think there is ample opportunity to have public and open transparent debate around the real core issues around the new network and the legislative reforms that need to be put in place, the sorts of services that need to be on it and where it is going to go. Those are issues that need to be ventilated, with the ACCC being able to ultimately perform the task for which it has been asked, which is to comment upon the competitive nature of the bids.

Senator BIRMINGHAM—In your submissions you make it clear that, of course, even if structural separation is achieved, because the owner of the network will exist as an effective and a natural monopoly that does not fix issues that are required particularly around pricing arrangements. What processes do you think should be ideally in place? Are there clear models that you think exist that could be applied to provide a pricing and access regime?

Mr Forman—Imagining that we would move to a world where one of the bidders has built a structurally separated or independent access network, and do not retail from it, you would have a situation that is very much like the power markets, the gas and electricity markets, at the moment. The processes that are in place in the ACCC and in other agencies managing those environments seem to be working as intended. There is still contention. There is always going to be contention about the price that is charged for access to a monopoly element, but it becomes a much clearer debate. You will have retailers saying, ‘We think that they are getting too much margin and we are not getting enough.’ You will have a regulator saying, ‘Public interest is to get that price to the lowest level possible’, and the owners of the assets saying, ‘We need a fair return on our investment and we need the incentive to continue to invest.’ Those issues have been dealt with for a decade now in electricity and gas. While the level of comfort between the various participants waxes and wanes, there is nothing like the contention that we have in telecommunications, where there is not the same transparency and there is a whole different incentive set on the participants in the marketplace.

Senator IAN MACDONALD—I will roll my three questions into one. Your constituents seem to me to be all city-centric telcos. Can you assure me that you are interested in the roll-in rather than the rollout? Along that line, if the only other bid on the table is the Terria bid, from what you know about that—and I appreciate it is a secret bid—and from what you have read in the papers and know, is it likely to provide an as good as you can get open access? Finally, could you comment upon the OPEL bid, which I understand from evidence was never perfect. But for those of us who live in the country as I do, had that gone ahead we would have been having access to some form of broadband now, which on current estimates, as I understand it, we may not now get until 2014-15 at the latest? Can we roll those into one for a relatively quick answer?

Mr Forman—As to issue of the regions, it is true that most of the investment by my members has been in the cities, although there have been a number of notable exceptions. I think if you look to South Australia, you will see that Internode is one of my members. In Western Australia iiNet is one of my members. Both of those have sought quite aggressively to go into more outlying areas. If you think of the way that a market entrant would naturally expand their business, they go firstly to where the market is most concentrated. That is why since 1991, 1993 or 1994, when AAPT entered the market at a time when there was in fact no competitive regime,

they entered with the big corporate, and after 1997 most of the entry came in the cities. Gradually they expanded out.

Senator IAN MACDONALD—From a commercial point of view, we are talking about a \$5 billion government subsidy here. I am sorry, keep going.

Mr Forman—What we have seen, though, over the last 10 years is an increasing reliance on government subsidy to try and drag competition out of the cities into the regions, and yet it has not seemed to work. We have had experiences with, for example, the HiBIS program, where a number of smaller micro-carriers arrived in communities where Telstra had chosen not to invest in ADSL technologies and had said they are simply not on the roadmap for investment. These wireless micro-carriers used government funds to give them a leg up to enter those markets. I am sure you have heard many stories of Telstra arriving literally the week before those guys switched on, and rolling into town with a road-show truck. Suddenly ADSL has been installed in the exchange and is available and those businesses overnight become unviable. My members have had that experience, too, but they have done it from a more robust capital base out of the cities. It has drawn very distinct lines on the map. You cannot go beyond that point because you know that you are not going to make a dollar. The truth of the matter is—and I will not ask my colleague to comment on this because he obviously represents another company as well—they are not making any money anywhere. You have Telstra and Optus making some profit, and the rest of the industry is sharing nothing. In that circumstance, they cannot expand. Do they want to expand or will they expand or will they roll in? As I said, if an independent networker starts building in outer metropolitan or regional areas what they would be doing is breaking virgin ground. At that point there would be an enormous incentive. My view is that there would be a bit of a land rush by retailers, if they felt they could get in on a level playing field, to get in and grab those customers who would be available for the first time. I have that confidence. I tend to view things simply from a commercial incentive point of view, but it seems to me that, if there is a customer out there to be got, retailers tend to try and get them. Your question about the Terria bid was whether I am confident that they—

Senator IAN MACDONALD—Is it open enough access?

Mr Forman—I can only form a judgement on the basis of the public utterances. The public rhetoric seems to me to tick all the right boxes. But, again, that is why I think the ability to deeply scrutinise what they are saying through the ACCC process is crucial. If they do what they say they are going to do, it should deliver. But—

Senator IAN MACDONALD—Can I just go on to the OPEL bid.

Mr Forman—With regard to our view on OPEL, we have not engaged in the public debate because after OPEL was announced a number of my members had unhappy experiences when they approached the company and asked about the wholesale access arrangements, and they seemed not to be there. It seems to be that people were referred to Optus wholesale and not to an independent OPEL entity. There was always a somewhat jaundiced view about what was really going to happen when OPEL went ahead. That is putting aside all the technical issues, which I am not qualified to comment on. I am simply coming from the perspective that my members had directly in trying to engage with OPEL, which was not confidence inspiring.

Senator IAN MACDONALD—It had the benefit of immediacy for the country, which appealed to me. I would like to explore this further with you, but I do not have time. Perhaps some other time.

Senator MINCHIN—In relation to money, does the coalition have a view about what it is likely to cost in total to achieve the government's objective of a 98 per cent coverage of fibre to the node at 12 megabits per second? Is it \$10 billion? Is it \$15 billion? Then touching on the issue you raised, also in the context of Telstra, of the government's contribution, which they are indicating is an equity investment with an undisclosed desired rate of return on that investment, I would like your views on the issue of the conflict that potentially raises, given that one of the many reasons obviously for getting the government off the share register of Telstra was to end the conflict of the part owner of the business being the regulator of the business, which it seems to me is also raised by this proposition. I think Telstra has said not only will they not have a bar of this for the reasons we have previously discussed; they will not have a bar of it if it involves government equity. I think you indicated that you thought that having government equity in a structurally separated or in Telstra bid would be difficult, anyway. Could you comment on those propositions.

Mr Forman—The issue of—

Senator MINCHIN—The total cost issue first and then the equity issue second.

Mr Forman—It has been almost funny to watch how total cost leapt about all over the shop. The original \$9.6 billion came, as I am sure most senators are aware, from Telstra in August 2005 and the so-called digital compact had a couple of options. There was the \$2 billion for the bush or the \$4.6 billion for the bush, to a total of \$9.6 billion. There was \$2 billion for a wireless version, and \$9.6 billion to take fibre to 98.6 per cent. Telstra reiterated that number as late as August or September last year. Suddenly inflation took off obviously because it went to \$15 billion. It virtually went in two weeks from \$15 billion to \$20 billion to \$25 billion and they have not said anything since. At one point we were afraid that it was going to reach the total GDP of the country. Again, the competitive process we would hope will elicit the truth around that and take into account what is going on in the world with equity markets today. That obviously has an impact as well. I do not form a view on what the cost will be. I am informed also, though, by the so-called Homestead proposal from 2004, which Senator Nash would be aware of, from Boulderstone Hornibrook and Ericsson to build fibre to the home for all of Australia outside of what we would regard as the CBD and inner metropolitan areas. They put a price tag on that of about \$20 billion. Telstra was saying I think at that point that it was \$20 billion for fibre to the home. Senator Nash might remember this more accurately than I do.

Senator NASH—They were indeed.

Mr Forman—The Homestead proposal was saying that it was about \$10 billion for fibre to the home. Somewhere in that spectrum of numbers that moved according to the interests of the person is speaking at any particular time is the truth. If I had to guess, based on the history of the way those numbers have moved around, I would say it would be closer to \$10 billion than \$25 billion, but we will see.

Senator MINCHIN—At least \$10 billion. And on the equity issue?

Mr Forman—Yes. Our view on the ownership conflict issue is that we think there is a conflict where the government is a vendor of shares, not where they are necessarily an owner. It gets complicated. It requires the government to be very clear. If they are sitting on the shares and holding them with no intention of selling them, they have to structure the ownership such that there is no confusion that one year the Treasurer might be sitting doing the budget and thinking, ‘It would be nice to prop up—

Senator MINCHIN—Yes.

Mr Forman—Again, I think that comes down to the form of the shareholder agreement that is structured. I do not know, but the public statements from Terria are suggesting that at some point they would think that that entity would be offered to the public markets. At that point, you would have not the kind of privatisation that we have had in the last two tranches of Telstra but you would have this kind of blended ownership in some form where you could have a privatisation that was to some degree at arm’s length from the government depending on whether they got the ownership structure right at the beginning. Did you have a question about the rate of return?

Senator MINCHIN—No. Telstra also said that they would not be party to this if it is an equity investment. I think you indicated early on that you thought that it would be difficult if Telstra were the successful bidder to integrate an equity model into this. Is that your view? Do you think the government should be flexible about this; that it should not lock itself into only providing the funds via equity?

Mr Forman—No. I guess my view is that, again, government should be minded to make the right public policy decisions not influenced by being blackmailed by Telstra saying, ‘We won’t do that. What are you going to do about it?’ I think what they should say is, ‘This is the right way to structure this thing and if you don’t like that then you either need to change your mind or someone else will win.’

Senator MINCHIN—But your view is that equity is the way to go, is it; that is how the government should provide its funds?

Mr Forman—Because equity is a neater fit with a structurally separated model, we think that equity is the preferable way to go. But I am open to the idea of preference shares or some kind of convertible note arrangement. As long as it is something that is consistent with an independently owned entity and it is not such a financial construct as to be beyond anyone’s understanding.

Mr Healy—What we want to avoid are arrangements that undermine a competitive retail market and government ownership in whatever shape or form in a way that, to be blunt, meddles with that retail market because there is both a retailer and a wholesaler. Under the current arrangements that we have with Telstra, a dominant retailer and a dominant wholesaler and government involvement in between, we think that history shows that messes with the retail market and undermines competition. It is a very different arrangement that we have an opportunity for here, which is where the wholesaler is a monopoly and it is regulated and it can have some degree of government ownership without the knock-on effect of manipulation and undermining of a vibrant retail market.

CHAIR—I want to ask one more question coming on the tail end of Senator Macdonald's concerns, particularly in terms of getting to the 'hard to gets'. Many of the witnesses have suggested, as Senator Macdonald indicated, the rolling in rather than the rolling out to get to the 'hard to gets'. I heard you express some reservations about how the 'hard to gets' have not had delivery thus far. I heard you essentially questioning, therefore, how will spending of the \$5 billion more concentrated in the 'hard to gets' change that outcome? From our perspective, we need to change that outcome. What would be your thoughts as to how we do get to the 'hard to gets'?

Mr Forman—Perhaps because I am a simple person, my view is that the incentives have not been right in the past and the incentives can be got right this time. For me, again, if I were looking at this as a person building up a business case for an entirely new network the place I would start is the market where there is the lowest percentage of people who are buying the service today who are going to clamour to get it. If I were a network builder who had no interest in protecting any existing retail activity that is where I would want to go. To me, an independent network requirement creates that incentive in a way that the absence of that requirement does not and maybe would force you to take other actions that were more complicated. Firstly, clarifying that structural issue would be the question for me. Then it would come down to perhaps a point of negotiation around the conditions that attached to the government's contribution when you are getting to that level of the negotiation with the preferred tenderer. If you wanted particular areas that you thought were going to be got to too late to be advanced in the roll-out program then you could do it there.

Senator NASH—On the issue of rolling out to the 98 per cent, through previous questioning of the minister we have certainly had no indication geographically where that two per cent might be. With all the talk of rolling it out to 98 per cent of people, we still have no idea of where that two per cent geographically is going to be. Does the CCC have any indication where that land mass might be?

Senator IAN MACDONALD—I can give you a good guess.

Senator NASH—Given the minister could not inform me I thought I might check and see whether somebody else could.

Mr Forman—I cannot give you any precise answer—

Senator NASH—That is actually my point; that there is not a precise answer. To date, even though we are talking around all these percentages, we cannot actually talk yet about those people who are going to fall outside this 98 per cent, how this is going to affect them and what is going to be in place for them. There is a lot of numbers talk and not a lot about the communities on the ground. I was just interested to know whether you have had any greater information, but obviously not.

Mr Forman—I think the people who would be best informed to tell you precisely on an exchange by exchange basis, frankly, are Telstra. They were the ones who created the 98 per cent number back in 2005 when they first put forward the Digital Compact. I can only assume they did that on the basis of understanding the exchange locations and who hangs off them and who

does not hang off them, because I think it is the people who do not hang off them that are the two per cent we are probably talking about.

Mr Healy—I think it partly points to why it was so important to get network information out of Telstra as part of this bidding process, so that those who want to bid start to get some transparency around where the people are at the outer limits of the current network. I am confident that we will probably find out where those people are and, more importantly, put forward competitive ways in which they can be delivered services of a kind that they are not currently getting.

CHAIR—Thank you very much, gentlemen. This committee is scheduled to report by the end of March next year. This is part of a rolling series of inquiries. Your evidence today has been very informative and valuable. We look forward perhaps to seeing you before us again.

Mr Forman—We would be very happy to provide more material or to appear again if the committee thought it was useful.

CHAIR—Thank you. Thanks for being flexible with the extended time frame.

Proceedings suspended from 10.28 am to 10.47 am

LYON, Mr Brendan Curtis, Executive Director, Infrastructure Partnerships Australia

CHAIR—I welcome our next witness, Mr Lyon, from Infrastructure Partnerships Australia. This is the second day in a series of public hearings by this Senate Select Committee into the National Broadband Network. Thank you very much for attending today and being somewhat flexible with the time frame.

Mr Lyon—It is my pleasure.

CHAIR—My colleagues will materialise because we are all interested in what you are going to be saying to us. The committee's proceedings are public. If at any stage you wish to request evidence to be provided in camera, we can consider that request. In giving evidence to the committee you are also protected by parliamentary privilege, which provides certain restraints on others in respect of the evidence that you give, but if you wish for any more details in those respects, please ask.

CHAIR—Do you wish to make a brief opening statement?

Mr Lyon—I will, with your dispensation. It is my great pleasure to appear before the Senate Select Committee on the National Broadband Network today. The body that I represent, Infrastructure Partnerships Australia, is the nation's peak infrastructure body. We represent around 160 of the nation's top financiers, designers, constructors and operators of infrastructure, as well as a large section of the public sector in terms of departments of infrastructure and central agencies around the country.

Our mission is to advocate the best policy frameworks and the priority projects that will build the assets we need to sustain economic growth and development in Australia. We recognise that infrastructure is about much more than a particular asset. It is not about a road or a bridge, or in this case, a fibre optic cable, but rather it is about the services that are delivered to the economy and to the taxpayers.

I particularly welcome the opportunity to appear to discuss the regulation of the national broadband network. Infrastructure Partnerships Australia endorses the commitment of the federal government and the parliament to deliver a fast, affordable and truly national broadband network. In a major paper we brought out in 2007, *Australia's infrastructure priorities: securing our prosperity*, we identified the development of a national broadband network as one of the most pressing sectoral reforms in the nation. In spite of the need for a new network being on the COAG agenda since 1993, until now little has come of it. In the twenty-first century access to high bandwidth IT infrastructure is critical if we are going to drive economic growth. We support the use of a fibre-based network which will allow businesses, academia, consumers and taxpayers to better engage with the full capabilities of the digital economy. By global standards, the penetration and speed of broadband in Australia is relatively poor and the price is relatively high. As the Prime Minister said at a major conference in Brisbane yesterday, Australia is lagging behind 26 other nations in terms of the development and penetration of broadband infrastructure, including the Slovak Republic, Korea and much of the OECD.

A national broadband rollout will address both the physical availability and the speed of broadband, and it will also address the price at which it is offered, provided that the right

regulatory regime, one that promotes competition, is ultimately settled upon and enacted by this parliament. The development of this network is clearly a national infrastructure priority and it is through this lens that my organisation appears before you today. To progress the plans for the national broadband network the government must, of course, tender the delivery of the network, but it must also determine with certainty the regulatory regime that will dictate the shape and operation of the wholesale and retail markets that will be created by the national broadband network.

Our submission to the select committee addressed two key issues: the failure of the current regulatory framework to foster effective competition in telecommunications and we suggested a range of changes to the regulatory framework which would achieve competition in the national broadband environment, safeguarding consumers and deliver on the vision for a new, hard-wired Australia.

Since the introduction of competition to Australia's telecommunications market participants in the sector have been subject to regulatory frameworks designed to promote competition and to limit anticompetitive behaviours. The incumbent network operator, Telstra, is required to maintain operational separation between its divisions for retail, wholesale and network services. This framework was designed to allow Telstra to seek legitimate and fair benefit from its vertical integration and at the same time ensure that it did not discriminate in favour of its own retail businesses over other wholesale customers. It is clear that the current regulatory framework has comprehensively failed to promote a desirable level of competition in the telecommunications marketplace. It is equally clear that with such a significant public investment in the proposed national broadband network of \$4.7 billion and the clear national significance of the development of this network that it demands that Australia's policymakers move to a much stronger, more clearly articulated and sound market structure that will deliver the competitive outcomes.

The case to reform the telecommunications sector has been widely recognised for some time. Former opposition and telecommunications spokesman, now the minister for finance, is on the record supporting the need for fundamental reform of the telecommunications marketplace. The current minister for broadband, Senator Conroy, is also on the record expressing the now-government's approach and support for a robust, competitive market structure. By its nature, the national broadband network will be a natural monopoly asset. A fibre to the node network cannot be economically unbundled or easily duplicated. To unbundle an FTTN network competitors would have to put new equipment into every node. Given the very limited reach of each node it is unviable, impractical and uneconomic to undertake this process. Obviously duplication of the entire network, with or without a government contribution, is equally unviable and inefficient.

Faced with the reality of a monopoly asset, policymakers, this committee and this parliament need to look carefully at how to regulate the network to deliver the stated aims of the project, that is, a new world-class broadband network with competitive prices delivering minimum speeds of 12 megabits per second reaching 98 per cent of Australians within five years. Achieving these aims clearly requires a robust, competitive market that promotes contestability of supply and this regulatory regime must be backed by significant regulatory power.

The current system of vertical integration with operational separation has allowed Telstra to undermine real competition and these past policy failings cannot be repeated as we move to

deliver this new network. The current regulatory framework has been unable to promote competition in the way that it was envisaged by the parliament. The current regime could, for instance, allow Telstra to refuse to sell services to retail competitors or it can provide better services and higher service standards to its own retail customers over wholesale customers. That means that this committee and the government should be looking at meaningful and real structural separation between the NBN owner and retail providers, whoever they may be. Real and actual separation will mean that the national broadband network owner has a commercial incentive to grow its wholesale activities, not a perverse incentive to sell to one retailer over another, or for favourable terms to one over another. It removes the potential or actual conflict that will arise from having the wholesaler as an active participant in an otherwise competitive market with the attendant and natural temptation to commercially advantage one's own retail arm.

Structural separation will ultimately mean cheaper prices for end consumers, be they business, government, educational or domestic consumers. In the very likely event that the owner of the NBN also holds retail interests, then a strong regulatory regime is required, backed by significant powers to impose competitive outcomes and fair access. We would contend that the Australian Competition and Consumer Commission is best placed to provide the function of an unbiased arbiter. We submit that the ACCC should be required to oversee access conditions for the NBN and, if the ACCC deems conditions to be anticompetitive or not to meet the public interest test, then the commission must be given the necessary powers to impose reasonable access provisions and prices, not simply reject them and seek new undertakings, as is the case with the current negotiate-arbitrate provisions of the Trade Practices Act.

Infrastructure Partnerships Australia hopes that this committee and the parliament will move with certainty and speed to deliver the kind of competitive and robust regime that will give the NBN the greatest chance of success in its aims. I say 'speed' and 'certainty' deliberately in that the move to an NBN has been necessarily slow, but further unwarranted delay would be unwelcome. Australia's businesses and consumers are keen to see the network procured and delivered within the five-year time frame that has been spelt out in government policy and the economy will clearly benefit from the development of this network.

We would ask that the Senate select committee also consider the need for the successful tenderer and proponent of this network to be granted a licence to facilitate the rollout. We would ask that the ACCC or an equivalent authority be given the power to enforce the conditions of such licence in terms of access to existing network infrastructure. We would ask that the ACCC be given the power to set prices, not just reject them as is currently the case, allowing for swift and certain determinations of market conditions and removing the current concerns raised by some of the proponents of this project about gaming of the regulatory regime to delay or frustrate competitive outcomes.

CHAIR—Mr Lyon, if I may, this is very good, but much of it is in your submission. I think we would like the opportunity ask questions.

Mr Lyon—Yes, absolutely.

CHAIR—Do you have much further by way of an opening statement?

Mr Lyon—I was just going to thank you for your time.

CHAIR—My apologies. I will lead off if I may. You noted in your submission the dire situation in which we find ourselves in terms of ranking seventeenth or so out of the 30 OECD countries with respect to the penetration of broadband internet to our homes and businesses, and you state that the bandwidth that is currently available is relatively low yet the price is rather high. That is today. We have heard from some witnesses who are of the view that the government's current proposals—and you will talk further about the shortcomings that you see in that—could in fact deliver an outcome that has speeds no better than are already available and at an even higher cost, so essentially we might get stuff that is slower and cost more. Do you have some views on that?

Mr Lyon—Obviously we are not technical experts when it comes to telecommunications, but overwhelmingly the telecommunications industry seems to support the notion of a rollout of a high bandwidth, fibre optic based national broadband network. The government and this parliament will need to be very clearly minded about the outcomes they seek, because it is a very significant investment of taxpayers' money and it is the kind of asset that you need to get right from the start. That does need to be very carefully scoped, both through the procurement process and through the enabling legislation that will come through this parliament. But there is no doubt that we do need to access high speed, competitive, low cost broadband infrastructure in this country. It needs to bring us up to par with peer countries in the OECD and elsewhere.

That is a matter for the parliament. It is a matter for the department and the minister. But certainly there needs to be a clear-minded focus on delivering the right sort of network to meet those aims.

CHAIR—Thank you. Senator Minchin.

Senator MINCHIN—I would like your understanding, because there seems to be some public confusion, about the \$4.7 billion the federal government has indicated it is prepared to make available and the \$20 billion that is talked about as being the BAF. I saw one report this morning separating those two amounts but, as I understand it—and I would like your understanding—the \$4.7 billion is part of the \$20 billion. Is that your understanding?

Mr Lyon—As I understand it the \$4.7 billion is contained within the Building Australia Fund.

Senator MINCHIN—Yes, so there is only \$15.3 billion for other things?

Mr Lyon—That is for other economic infrastructure, yes.

Senator MINCHIN—Is your body, which represents anybody interested in infrastructure of all kinds, of the view that a quarter of this fund should be devoted to this particular exercise?

Mr Lyon—That is a policy decision that the government has made and has made from the outset. Clearly, we support the rollout of a national broadband network. Clearly we saw it as being a national infrastructure priority long before this matter came up before the parliament. It is something we identified in our national reform paper as being one of the key drivers of economic growth, so we do support the allocation of public money to seed this infrastructure.

Senator MINCHIN—Out of the \$20 billion?

Mr Lyon—It is out of the \$20 billion. We would very strongly hope that the \$20 billion is only an initial endowment and that future surpluses will be added to the Building Australia Fund and used to develop nation building infrastructure.

Senator NASH—Can I just ask a question?

Senator MINCHIN—Yes.

Senator NASH—You are saying that the \$4.7 billion should come out of the \$20 billion. Does that mean that you do not agree that the \$2 billion should come out of the Communications Fund?

Mr Lyon—I must admit I did not look at this clearly before coming down here today, but as I understand it that money is contained within the initial endowment of \$20 billion in the Building Australia Fund.

Senator NASH—Of course, yes.

Senator MINCHIN—That has not happened yet. That is the government's policy.

Mr Lyon—The Building Australia Fund does not yet exist. It is a matter for you and the Senate.

Senator MINCHIN—Their policy is to take the \$2 billion and put it in.

Senator NASH—Yes. Thank you.

Senator MINCHIN—No one can say exactly how much this NBN is going to cost, but it is generally accepted that it is going to be at least \$10 billion, so there is at least \$5.3 billion to raise. Do you have a view on what the current 'global financial crisis' is going to do to the prospects of raising this sort of money over the next 12 to 18 months?

Mr Lyon—There is absolutely no doubt that the current turmoil in the global financial markets is having an impact on the delivery of infrastructure and the ability to raise funds, as it is across all sectors of the economy. That is simply a reality. At the same time, an asset like the national broadband network will be of significant interest. It is a globally sized project. It will be of significant interest, particularly to institutional investors and superannuation funds. It provides the kind of long-term stable returns that they are looking for in the superannuation sector, particularly, and as we understand it there continues to be strong interest in the rollout of this network so we expect that it will attract funding, provided it is a properly structured and properly considered project.

Senator MINCHIN—Your plea and that of many others is, of course, about this whole regulatory environment that surrounds the NBN and the investment and you want this thing to happen as quickly as possible, but I would just draw your attention to a catch 22. Presumably, the investors and financiers that you represent will want to know exactly the regulatory

environment that they will face before they spend a dollar, so you are advocating what is a pretty radical change to the regulatory environment which of itself is going to be a major impediment to (a) the certainty of investment, but (b) the time line for this thing. I do not know how familiar you are with this place and what happens here, but nothing happens quickly. You are saying to us that we have to rewrite the whole regulatory environment before we do anything, but presumably your investors will want to know exactly what the environment is before a dollar rolls out the door. I can see that taking virtually all of next year at least to design, write, introduce, debate and pass a new regulatory regime for telecommunications. Correct me if I am wrong, but I suspect not a dollar will be spent by any private investor until that is certain. Do you want to give your perspective on that scenario?

Mr Lyon—Of course. I referred to unnecessary delay. We would view getting the regulatory frameworks as being fundamental and necessary. As you rightly point out, you need to provide a level of regulatory certainty around the future shape of the market if you are going to run a truly competitive tender that is going to deliver best cost outcomes for the taxpayers. We would ask that both processes occur with some rapidity. I am not sure about the timing of the Senate, the house and the government in getting policy reforms through, but I would submit that a clear-minded focus on a robust regulatory regime followed by a swift but appropriate procurement of the national broadband network would be the way forward.

Senator MINCHIN—Presumably your investors will not invest a dollar until they know what legislation comes out of the end of the sausage machine. Government policy announcement is not going to be sufficient, is it?

Mr Lyon—No.

Senator MINCHIN—It is like the luxury car tax. We had a diabolical mess come out of the Senate.

Mr Lyon—Press releases do not generally provide a sound basis for investment decisions. We would say that legislation would need to be in place and that certainty will need to be around the future shape of the market and a regulatory regime that exists, but again we would ask that these matters be approached with some focus and diligence.

Senator MINCHIN—Presumably contract negotiations would be a very lengthy and detailed process, too, particularly if you have an equity investor represented by the government.

Mr Lyon—Procuring this project will be extremely complex, both in terms of physical length of the rollout to reach 98 per cent of people, scoping that level of project, and the detailed designed phases will take some time, but it is right that it be considered. This is a major national investment. This network will be with us for some time and it is right that it be properly scoped. It is also right that it should be set within the proper regulatory framework, but at the same time I would say that it needs to happen with some focus.

Senator MINCHIN—Thank you.

CHAIR—Senator Ludlam?

Senator LUDLAM—I would like to draw your attention to page 3 of your submission. There is a very interesting graph on there with broadband speeds for the OECD countries, with Japan and South Korea right off the chart and then the rest of the world arrayed out. Then we find ourselves somewhere seventeenth or fourteenth in terms of speed, but the costs are still quite high. What did Japan and South Korea know that the rest of the world did not?

Mr Lyon—I am not exactly sure what the basis is, but I assume—and it is just an assumption—that there has been a significant government investment in a major network rollout and then a competitive market delivered at the end. I would suggest that probably the taxpayers have undertaken the capital expenditure, with the competitive market in the retail of the services. I am happy to come back to the committee on that if you wish.

Senator LUDLAM—I would not object. I think that would be useful, particularly just for those two, because they are so far in excess of the rest of the countries.

Mr Lyon—Yes. Certainly their price is on par with Australia's price and, as you can see, their speed is many multiples of what we have available here.

Senator LUDLAM—Yes, and it is noted here that the national broadband network would deliver download speeds up to 40 times faster than those currently available, which would probably still leave us somewhere short of what exists today.

Mr Lyon—Yes. 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, so we still have some way to go if we are to reach them.

Senator LUDLAM—This might seem a little bit lateral, but do you have a position on how much easier this would be if the network were in public hands and we were not trying to design that section of the market around the needs of a large corporation?

Mr Lyon—We would almost need a time machine to get back there to do what you are suggesting. It is not something that we have given any consideration to. At the same time reform of the regulatory structure should be considered as purely in terms of the national interest, not the commercial interest of shareholders of particular corporations. There are ways that these reforms can be undertaken. They have been undertaken, as I understand it, in both the United Kingdom and New Zealand. As we have seen recently with the restructure of PBL where it was split into two companies, shareholders can be adequately compensated; they ended up with a stockholding in both of the separated entities. A similar model could be pursued without commercial disadvantage to the investors.

The other point is that the strategic interests of Telstra's management are not the same as the interests of Telstra's shareholders necessarily, nor do the interests of the shareholders align with the national interest.

Senator LUDLAM—That is an interesting answer. Lastly, does your group have an opinion on whether the infrastructure should be rolled out from the cities where the services already exist or rolled in, as it were, from the edges of the network?

Mr Lyon—Again, that would be a decision that would come out in the detailed design phase of the tender. I would suggest that should be either a policy decision of the government or left to the structure of the ultimate rollout of the project. At the same time it is clear that the easiest way to reach the greatest number of people is to roll it out in the cities, but the greatest need is clearly in rural areas who were expecting the OPEL wireless rollout to occur, which has now been put back. I would suggest that might be something that the committee might look at, and certainly it is something that the government should be looking at.

Senator LUDLAM—This is a fundamental question. Does Infrastructure Partnerships Australia not have a position on it?

Mr Lyon—We have a position on the overall network. We do not have a position on where it should be rolled out first. We have a strong view that the network should be procured and rolled out, but again that is a policy decision. We are looking at it as a whole-of-nation network. We have not given particular consideration to which towns should get it first, whether it should be Goondiwindi or Sydney. That is a policy decision that the committee might like to make findings on, it is certainly not something that fits within the ambit of our interest or expertise.

CHAIR—Thank you, Senator Ludlam. Mr Lyon, we may be a bit down on Senatorial numbers right at the moment, but you cannot see behind you, as much as you might like to have eyes in the back of your head. You have a cast of some tens very interested in the evidence that you are giving to the national broadband network inquiry of this Senate select committee today.

Mr Lyon—I met them in the airport lounge.

CHAIR—Welcome all. Mr Lyon, I would like to ask you one further question before Senator Nash asks you some questions. Coming off the back of your response to Senator Ludlam you talked about regional areas. Other witnesses have put to us the terminology of rolling in, rather than rolling out, to meet the needs of regional areas. We have heard a lot about that, but from your particular perspective and expertise in respect of infrastructure what are your views as to how that should take place?

Mr Lyon—In terms of the rollout of the network, as far as I am concerned it has no particular impact on the structuring of the package of the network as an infrastructure project. Again, it is a policy decision that would need to be taken by the parliament or by the department about the outcomes they wish to seek.

CHAIR—Does your organisation not have views about where there are more significant deficiencies in respect of infrastructure at the moment?

Mr Lyon—Clearly the economic benefits would be derived from delivering it to not only capital cities but to regional cities as well, to connect businesses particularly to a higher speed, higher capacity network. Again, the greatest need and the paucity of telecommunications in the bush would suggest that a policy decision could be made that it should be rolled in rather than rolled out, but it is beyond the scope of our interest in the project, which is looking at it as a whole-of-nation network development. Whether you start it out and roll it in to the cities or whether you start it in the cities and roll it out progressively does not have a particular impact,

because we are looking at procuring an entire network. Our interest lies in this as an entire network.

CHAIR—Thank you. Senator Nash.

Senator NASH—Thank you. Just on that point, obviously you have no view either way of where it should start, but given that we have had a fair bit of discussion today around the fact that we do not know the amount it is going to cost and there does not seem to be a firm figure of how much this is going to cost, what would your view be on how the government should assure people that if indeed a rollout did start in the city it was going to get completely to that 98 per cent and we are not going to end up in a situation where x years down the track the successful tenderer suddenly says that it is going to cost a bit more than they thought, that they have not got that money and they are not going to get all that way? Given that you have said that there is not a need to start where the greatest paucity is, as you termed it, what mechanisms should the government put in place to ensure that that complete rollout happens?

Mr Lyon—The government has rightly signalled a use of the public-private partnership model for the delivery of this project. What a public-private partnership will do is to give certainty of cost and certainty of service to the government as it procures this project and network. There will be a very stringent contract that lays out the outcomes that are sought by the government in the development of this network and there will be contractual obligations to ensure that it is delivered within the time frames that are specified within that contract and with the network coverage that is specified within that contract.

Senator NASH—While we do not have a clue at the moment, by the time we get to that point you are confident that there will be a figure and contracts?

Mr Lyon—This is a very complex network. A lot of the network information has only recently become available and some of it may still be unclear. What will happen is as they move through the detailed design elements of the partnership project that will become scoped, it will become clear, and that will form part of the final detailed design that is contracted.

Senator NASH—In your opening remarks you said that operational separation had ‘clearly failed’. Can you give us an indication of how you have arrived at that view that it has clearly failed and, specifically for *Hansard*, the operational separation of Telstra?

Mr Lyon—Sure. The ADSL2+ rollout is a good example where Telstra have only rolled out this new technology that provides a much higher speed in exchanges where they have direct retail competition. It is clear and it is natural within the frameworks that exist that companies will commercially advantage themselves. That is what companies do. That is why it is such an imperative for the parliament to make sure that the regulatory regime is robust and fit for purpose to make sure that it does provide a level playing field. Companies operate within markets; governments set the frameworks that the companies operate within. So we would contend that this committee, the Senate and the whole parliament needs to give very careful consideration to the outcomes they want, the level of competition they want, and then structure the regulation around that.

Senator NASH—You mentioned also in your remarks that the ACCC should issue a licence for the rollout and you were talking about some conditions that should be around that.

Mr Lyon—That is right.

Senator NASH—Can you expand on that for the committee?

Mr Lyon—Depending on who and where this is rolled out there will be a requirement to access cabinets, nodes, boxes or whatever you want to call them. As a condition of this rollout I think a licence should be granted that will give certainty of access and timely access to the exchanges that need to be accessed to the existing network infrastructure that needs to be accessed. Once the rollout begins there needs to be great certainty around how they can get into these assets and how they can get them loaded up and ready to go.

Senator NASH—You also mentioned about the ACCC having the ability to set prices rather than just reject them. How would you see a change in regulation affecting that?

Mr Lyon—The current arbitrate-negotiate provisions in the Trade Practices Act allow the process to be potentially unnecessarily dragged out with repeated actions, resubmissions and so on. We would argue that there needs to be a much more cogent and clear ability to set the kinds of network access arrangements and price arrangements that are needed so that we do not have situations like we have had. One particular case I was looking at the other day has dragged on since 1999 and new undertakings kept being bowled up and rejected, and it goes on and on.

Senator NASH—Would there need to be some amendments to the Trade Practices Act?

Mr Lyon—Indeed.

Senator NASH—Thank you.

CHAIR—Thank you, Mr Lyon, and thank you for being flexible in terms of the timing of your appearance here today.

Mr Lyon—I thank the committee very much for their time.

CHAIR—Mr Lyon, we have one more quick question from Senator Macdonald.

Senator IAN MACDONALD—I was just curious about the name, Infrastructure Partnerships Australia. Some might get confused with Infrastructure Australia.

Mr Lyon—If only we had \$20 billion.

Senator IAN MACDONALD—I understand Senator Minchin has raised some issues with you about \$4.7 billion being part of the \$20 billion.

Mr Lyon—That is right.

Senator IAN MACDONALD—Is your organisation involved in Infrastructure Australia at all? Will you be consulted by the government? Are you part of the advisory group?

Mr Lyon—Infrastructure Partnerships Australia is not; however, our chairman does sit on the Infrastructure Australia advisory council. The Hon. Mark Birrell, who some of you might know, was appointed to serve on that, but he serves on that in a personal capacity and not as the chairman of our organisation. Obviously, as the national peak infrastructure body we have a strong interest in the current federal reform process that is going on that affects our industry. We have very strong views, again, around the kinds of frameworks that should be considered. We were very pleased to see what Infrastructure Australia released the other day in terms of their assessment criteria.

We strongly support the Building Australia Fund. We strongly support the aims with which that fund is being created. But in terms of a direct influence on what it does, we have none.

Senator IAN MACDONALD—Obviously I will not encourage you to answer if it is outside the areas you would want to go to, but there have been suggestions made in the media and in some of the submissions to us that \$4.7 billion is going to be only a drop in the ocean compared to the cost of building a proper broadband network. As someone who comes from the country I fear that if it is not enough the people who will drop off will be those who are less commercially relevant, which is those in the more remote parts of Australia. Do you or your organisation have a view on whether perhaps even more of the Building Australia Fund might be relevantly appropriated towards this?

Mr Lyon—As you rightly point out the total cost of the network is not known. Any of us could make a guess about what it might be, but certainly from my point of view it would be just that. At the same time, the government in a policy sense has made a very firm commitment that this network will reach 98 per cent of Australians. I would be very surprised if it departed from that. It also has a very strong interest, particularly from two consortia, who think that they can make a go of this project with the government contribution of \$4.7 billion and with private finance to deliver the rest.

Senator IAN MACDONALD—Does your organisation have a view?

Mr Lyon—In terms of whether more should be taken from the Building Australia Fund?

Senator IAN MACDONALD—If it were necessary to do that. I hear you saying that the two consortia think they can do 98 per cent with \$4.7 billion, but we are yet to see, naturally enough, what each consortium is actually saying, apart from that being the government's preference.

Mr Lyon—There is a lot of competing projects that require funding. The estimates of Australia's infrastructure backlog range between around \$455 billion up to almost \$1 trillion. The question is where do you get the greatest good from significant investments of taxpayer money? That is a decision that would need to be made. We are very hopeful that no more will be taken from the Building Australia Fund for the national broadband network. If more capital is required then that decision needs to be made, but I suspect that it is not within the government's contemplation at this point that further money will be taken. There is a strong interest from a

range of private consortia based on the conditions that are there and we would expect that the project will proceed within the scope that has been discussed thus far.

Senator IAN MACDONALD—Thank you for that.

CHAIR—Thank you again, Mr Lyon.

Mr Lyon—Thanks again to the committee.

[11.22 am]

EGAN, Hon. Michael Rueben, Chairman, Terria Pty Ltd

SIMMONS, Mr Michael John, Managing Director, Terria Pty Ltd

WAGG, Dr Michael Wallace, General Manager, Networks Strategy, SingTel Optus Pty Ltd

CHAIR—I welcome Terria to the table. Whilst those from Terria are making themselves comfortable we might reflect on the relative youth of the public audience and speculate that they may know as much about matters of national broadband as we do, despite us having sat through quite some days of very informative evidence.

Senator NASH—I would say they probably know more.

CHAIR—My colleague, Senator Nash, has suggested indeed they probably know more. Gentlemen, welcome. Thank you for your time and for your flexibility. This is the second day of a series of days of public hearings of the Senate Select Committee into the National Broadband Network. Your evidence here today is protected by parliamentary privilege. You also have the ability to request that some or all of your evidence be given in camera. The committee is able to consider requests of that nature noting that otherwise the proceeding is clearly public and enjoyed by many. At this stage I would ask you if you have any questions about that or whether you have any requests? Would you like to make a brief opening statement to the committee, noting that we will be very keen to explore your submission thus made with questions?

Mr Egan—Thank you. I have a few brief comments. First of all, thank you for the opportunity to appear before the committee. As you are all aware, Terria is a bidder for the licence to roll out the one and only national broadband network to every nook and cranny of the nation. I might say that we are very optimistic about the NBN's potential, provided that it has the right set of rules around it. It is well understood that there is no absolute guarantee that this national broadband network will be a success. That is acknowledged by both the government and the Senate and that is why there is a competitive tender process under way, that is why the government has called for regulatory submissions and also why, no doubt, the Senate is holding this inquiry.

The success or failure of the national broadband network will depend not so much on technology, as important as that will be, but mainly on the rules that will govern it. Done well, the national broadband network will be worth its weight in gold. Done badly, it will be a dead weight. If Australia gets it right, the national broadband network will be the platform for robust, vigorous competition among a very large number of rival retailers. It will help drive down prices and it will help encourage innovation by both upstream and downstream users. If Australia gets it wrong, the national broadband network has the potential to wipe out competition in telecommunications. Frankly, I think that has been Telstra's game plan all along. That is why they have been so keen to roll out a new network but only if their demands to be freed of regulation are met.

In other words, Telstra has offered to build it only if it is also given the means to wipe out its retail rivals and remonopolise fixed line, voice and internet services. I think Telstra's blackmail

has been open and brazen: ‘Give us what we want or Australia does not get any broadband roll out.’ I think Australia has been very fortunate that successive governments and the ACCC have always been prepared to call its bluff. No regulator and no government with the public interest in mind could ever cave in to Telstra’s outrageous demands to use its public licence as a right to do whatever serves its own commercial interests, whatever the consequences to Australia’s economy and consumers.

If the national broadband network is to fulfil its potential, it must be an assured open access network. It must treat all comers equally, and we believe that will happen only if the NBN is properly regulated; it will not happen if it is essentially unregulated. The NBN will be an assured open access network only if it is an independent network not controlled by any retailer or group of retailers, and not providing its own retail services. Genuine independence requires that it be a separate company with separate ownership, board and management. The interests of the network owner must be aligned with the national interest and not with the interests of any retailer or upstream user such as a media company or content provider. The network owner should have an unconflicted incentive to treat all comers equally and maximise traffic on the network. On the other hand any retailer which also operates the NBN will always have both the ability and the commercial incentive to discriminate against its rivals and attempt to stifle competition.

One final point, as you would all be aware, is that the fundamental objective of the national broadband network is to treat all Australians equally. I am sure you will agree, for far too long regional and country areas have been disadvantaged by poor telecommunications and internet services. It is our view that the NBN offers the chance to level the playing field and for that reason we believe that there should be a requirement that areas that are currently underserved relative to other parts of Australia should be the first focus of the national broadband network. That includes country and regional Australia and a number of black spots in metropolitan areas. In other words, we believe there should be a requirement that the network be rolled in from underserved areas rather than rolled out from already better serviced areas.

That concludes the remarks I wanted to open with and I am happy to take your questions.

CHAIR—Thank you. I would like to start where you finished, which is that all Australians should be treated equally. We have heard evidence that one size will not fit all in terms of delivery of service, so to that extent there is suggestion from other witnesses that in getting to treat all Australians equally one size does not fit all. What is your view of that? Secondly, is it achievable to treat all Australians equally in respect of the outcome.

Mr Egan—Yes. My understanding is that there is no technological reason why all Australians cannot have access to high quality, high speed and affordable broadband. Mr Wagg is the technical expert and he might be able to provide some more information for you.

CHAIR—I would like to put a little more flesh around the bones of the question. Maybe it depends on what you mean by high speed and cheap, because other witnesses have talked about us currently having several classes of users and non-users and have expressed the view that the rollout of the national broadband network must not create a new second class of citizen.

Dr Wagg—The technology that is available to roll out in both regional and city areas can be configured to provide equality of services across the country. The technology is available today to do that, so then it comes down to an economic equation to provide equality of service.

CHAIR—Thank you. Senator Nash.

Senator NASH—I would like to take you to the issue of open access where you have a bid in. You have said publicly that as part of your bid you would be providing open access to competitors. Can you define for the committee what you mean by ‘open access’? There seem to be some varying views from different quarters around what this means.

Mr Egan—Mr Simmons?

Mr Simmons—Terria’s position on open access is that all access seekers would have equivalent both non-price and price access terms in accessing the network and that would be guaranteed by having a separated and independent network between the network owner-operator and all access seekers.

Senator NASH—Thank you. One thing that has been raised quite a number of times with us is this issue of potential stranded assets. Does Terria have a view on how that should be dealt with and what the framework should be for any kind of transition or migration, or should it be an immediate cut-off? Do you have a view on how that should be managed?

Mr Egan—That is one of the advantages of a roll in rather than a roll out. Those assets would be stranded if you rolled out from the start of the five-year period and will have a longer economic life. Mr Simmons might like to add to that.

Mr Simmons—Our bid does have a model for compensating for asset. Obviously we cannot disclose that, but as the Chairman just mentioned, an outside in rollout means existing assets are preserved for a much longer period of time. You can sweat those assets. A lot of the assets invested today are nearing the end of their useful life and over a five year time period the value of those assets will diminish.

Senator NASH—It is interesting and encouraging that you talk about rolling in. I note you refer to it in your submission. We have had some witnesses say that the business case would stack up better rolling out rather than in; you obviously have a different view. Can you give the committee a bit of detail around how that rolling in would stack up business wise?

Mr Simmons—If you are Telstra it would stack up better rolling out than in, but if you are Terria and the rest of the industry that has invested in the most populated markets of Australia today and are finding it extremely difficult to invest in the less populated markets, it is more economic to roll out into the capital cities than out of the capital cities. It depends on where you sit.

Senator NASH—We can look at the regulation in two parts. You have talked about a structural separation. You at Terria have obviously committed yourselves to it and are expecting it from any other successful proponent. Do you think that is achievable and, if it does not

happen, is there any change to the regulatory environment that you could make that would compensate for not doing that?

Mr Egan—It is difficult to see how you could do it effectively. If you do not have structural separation and if the interests of the network owner are not to maximise traffic on the network and not to encourage all comers to use the network, then you would need an army of regulators with summary and arbitrary powers to ensure that there was genuine open access. We have largely seen that with the history of telecommunications in Australia that the regulator has really always been at a disadvantage. They have always been playing catch up, because it is quite possible to game the system. You can always institute legal actions; we have seen some matters that have gone on for years and years. I think that is the problem with having a retailer, particularly a dominant retailer, being the owner of the national broadband network. They have the incentive. They have the ability to use it for their own interests.

Structural separation aligns the interests of the network owner with the broader national interests. I do not think you can get an outcome anywhere near as good as that simply with regulation. I think you need two things. I think you need a separate independent network, but you also need a regulatory system which can intervene if for some reason the commercial incentives of the network owner go off on a tangent somewhere. You need both.

Senator NASH—In your view is structural separation inherent enough to the success of the NBN network? As my colleague raised earlier, and quite rightly, there would be a length of time if structural separation was going to be pursued to make it eventuate.

Mr Egan—Do you mean legislative?

Senator NASH—Yes, just the sheer time frame of practically getting it in place. My question is: is it important enough to wait that length of time if it was necessary to do so?

Mr Egan—If you were trying to separate an existing corporate entity that might be the case, but if it is, for want of better description, a greenfield company then it is separate right from the start. So you do not have to legislate to make that company separate. There may be other pieces of legislation that are required and that will probably be the case with whoever wins the national broadband tender.

Senator MINCHIN—Can I just come in on that?

Senator NASH—Yes.

Senator MINCHIN—The parliament would need to legislate to sustain an industry structure that was based on separation, would it not, to prevent a successful tenderer subsequently vertically integrating?

Mr Egan—That is right. That would be a very simple legislative change.

Senator MINCHIN—Yes.

Mr Egan—I would just take that opportunity, I would anticipate that a separate network owner would, within a reasonable period of time, be subject to a public float. It would seem to me to be a perfect candidate for that and in that situation I am sure you would need a legislative prohibition on one of the existing retailers coming in and buying it and therefore vertically integrating it. That would be the case if it was Telstra, Optus or anybody else.

Mr Simmons—I would like to answer your question. Another important point that we may have just skipped over is that this is a new network that we are proposing to build in Australia and it is a new network with a significant amount of capital investment, as we all know, with nodes being deployed throughout communities and copper cut over to that network with rent paid for that copper. There are the regulatory mechanisms in place today to achieve rental of existing infrastructure to enable the most efficient rollout of a new network. So, there are the mechanisms in place to regulate access to that network.

Mr Egan—I would like to emphasise that point. The Terria proposal is not dependent on us taking any of Telstra's infrastructure off them.

Senator NASH—You just need access to it.

Mr Egan—Obviously there will be Telstra infrastructure and indeed infrastructure owned by other companies that whoever owns the national broadband network will want to access, but that should be at a regulated price. Certainly, we are not saying you should carve Telstra as it stands today.

Senator NASH—Thank you.

CHAIR—I have one further question before I invite Senator Ludlam to ask questions. Coming out of your answers to Senator Nash and Senator Minchin's questions, Mr Egan talked about legislated structural separation and a time frame for that. If it were the case that an existing provider were to decide to structurally separate, do you have any basis upon which you might be able to suggest what would be an appropriate time frame within which to allow that to happen, bearing in mind the infrastructure and service needs as well as corporate criteria?

Mr Egan—We are structurally separated from the start and I would think that it would be an easy requirement on any other company that won a tender for the national broadband network, whether it was Telstra or somebody else, to require that the new network have a separate ownership from Telstra or whatever the retail company happens to be. I would not think that would be a terribly difficult thing to do.

CHAIR—Do you mean not requiring much time other than the decision to do it?

Mr Egan—And whatever legislation needed to go through to ensure that it stayed a structurally separate company. Again, I come from a different legislative background.

CHAIR—New South Wales?

Mr Egan—Yes, the mother parliament.

Senator NASH—You are not trying to tell us that is more efficient?

Mr Egan—When there was a need to get legislation through quickly, we could do it very quickly.

Senator IAN MACDONALD—That was in your days.

Mr Egan—That was in my day, but that was when we had 13 cross-benchers in the upper house. They went from one extreme to the other, but we still managed to get legislation that was needed.

CHAIR—Some may take the view that in federal parliament it might indeed happen quickly, but just not quickly enough for some.

Mr Egan—I see.

CHAIR—Thank you. Senator Ludlam?

Senator LUDLAM—This might seem like I am asking you to give an expression of the bleeding obvious.

Mr Egan—I am sorry, I did not hear you?

Senator LUDLAM—Given that the bid that you are putting together is still under wraps, how much can you tell us about the kind of entity that you are proposing to set up? I understand you are a large consortium.

Mr Egan—Yes.

Senator LUDLAM—Are you proposing to constitute a completely separate entity, separate from any of the parties that make up the consortium?

Mr Egan—The best person to explain the corporate structure is Mr Simmons.

Mr Simmons—Today we have a company with eight shareholders representing the majority of the industry that has invested in fixed line services, whether it be voice or broadband. Each shareholder owns one share each and we are bidding to win the right to build the NBN. Assuming we win that bid, which we expect to do, debt and equity would then be invested in that entity which would dilute our eight shareholders. Our basic principle, which the rest of the industry has argued from the outset for four-odd years, is that no access seeker or any access seeker in aggregate can control the company that builds the network to service the whole of the nation, and when that money is invested, the debt and equity investors will ensure that separation. It occurs without legislative requirement initially and then you need to provide regulation to ensure that independence continues into the future. Independence and separation are achieved immediately on awarding the network to Terria.

Senator LUDLAM—Can you spell that out for me? One of the things I picked up on in your consortium is that there are no mobile carriers there, that you are all fixed line.

Mr Simmons—There is one.

Senator LUDLAM—I beg your pardon. Would there not still be a perceived disadvantage for a company provider that was outside the shareholding of that new entity?

Mr Simmons—No. All access seekers are treated equally. We would be submitting certain ring fencing arrangements that protect the operation of that network.

Senator LUDLAM—Isn't it ring fencing that has caused so much trouble with Telstra?

Mr Simmons—What we are proposing is that the ACCC would continue to have a regulatory role to oversee the operation of the network to ensure that there would be open access on both price and non-price terms, and that independence would be preserved.

Mr Egan—I would like to make the point that as soon as you introduce any other owners into a company then the fiduciary duty of the managers and board of that company is to that company. For example, if in the long-term some of the retailers were to retain an equity ownership of the network company, the management and directors of that network company, under the law, owe a fiduciary duty to that company and not to any other company that might have an equity ownership.

Senator LUDLAM—For example, Telstra could buy up a big chunk.

Mr Egan—That is why Telstra will not go into partnerships. That is why Telstra says that it will not have the government as an equity partner or have anybody else as a partner, because the very moment it does, under the Corporations Law the directors and managers of that company owe a fiduciary duty to that company and not to Telstra. What we are talking about here is that companies are sponsoring bids. There is no particular reason why any telecommunications company should remain a long-term owner of a network company and I would anticipate that they would not.

Senator LUDLAM—I would like to change tack briefly. One of the witnesses this morning talked about some different interpretations of what is meant by open access. Can you spell out how you see that term being used or how it should be used?

Mr Simmons—It is transparent access and open access on both price and non-price terms, so that all access seekers would be offered the same terms of access, the same time period to deploy services and the same pricing. That does not obligate the network owner to not apply normal commercial practices in pricing. For example, if someone pays up front rather than over time, or gives a volume commitment, there may be normal commercial practices in pricing, but if you have the independence between network owner-operator and all access seekers you are taking away the incentive to discriminate between all access seekers.

Senator MINCHIN—I would like you to clarify this for me. Are you proceeding on the basis of the government's investment being an equity investment?

Mr Egan—Yes. We would like to see either all of the government's contribution or a considerable part of it as an equity investment. One of the advantages of that is that right from

the start the government's involvement should give confidence to all of the access seekers and community generally that the new network company is going to be run for the benefit of everyone and not just for a particular retail player or group of retail players. As I said earlier, I do not necessarily see a government or any of the early equity owners as being necessarily long-term equity owners.

Senator MINCHIN—Is it part of your bottom line that the government be a minority owner of this new entity via its equity investment?

Mr Egan—Not necessarily, no.

Senator MINCHIN—Is it possible the government could be a majority shareholder?

Mr Egan—Depending on what the network costs. The \$4.7 billion is a sizeable slab of the total capital that will be required to build this network, so they could be the majority owner initially.

Senator MINCHIN—We asked an earlier witness what they thought the total cost of providing 98 per cent of Australian households with 12 megabits per second by fibre to the node would be and it appears to be the case that everybody accepts that it will be at least \$10 billion. Your answer suggested that may not be the case.

Mr Egan—I am somewhat constrained.

Senator MINCHIN—You can take a stab at it.

Mr Egan—We have a very good idea what it will cost, but we would not want to flag that to any of our rivals. We know we have two rivals at least and there might be more that we do not know about. What I can say is that what we know it will cost is much closer to the original estimates than some of the inflated estimates we have heard in recent months. It is certainly not \$25 billion and it is not as low as \$10 billion.

Senator IAN MACDONALD—The \$4.7 billion could have the majority, from pretty simple arithmetic.

Mr Egan—No, because some of it will be debt.

Senator IAN MACDONALD—Yes. I see.

Mr Egan—Hopefully we will have an efficient capital structure. Some will be equity and some will be debt. It might well be that not all of that \$4.7 billion has to be in equity.

Senator MINCHIN—I would like to go to this issue of conflict. I do not want to reflect too much on my experience with T3 but certainly that was one of the many arguments we advanced, that there was a conflict in the government being a shareholder in the country's biggest telecommunications provider and the regulator, and indeed every other telecommunications company in the country supported that proposition and supported privatisation on that basis, but what we are contemplating here is the partial renationalisation of part of the nation's

telecommunications infrastructure with the government back in the position of having inherent conflict as the part owner of a national broadband network and the regulator. I put that to you.

Mr Egan—It is quite a different situation from what existed prior to the privatisation of Telstra where the government was the major shareholder of a company that was competing with a number of other retail companies. There was a clear conflict of interest there. In this case where the government is proposing to invest in a natural monopoly network company, they do have a regulatory interest and their investment in the network is aligned with the interests of the role of the government as a regulator. The government's purpose has to be to establish a competitive telecommunications industry where both downstream and upstream users can compete ferociously, if you like. Therefore, the government would not have the conflict of interest that it once had as the owner of a major retailer competing with lots of other retailers. Presumably there will be only one national broadband network. It is not as though there is going to be infrastructure competition where the government is protecting its investment from the rival national broadband network.

Senator MINCHIN—I am not sure about the conflict of interest issue, but we can come back to that. Just to follow up that latter point of yours, I understand it is part of your proposal that if you were the successful bidder you would require legislative protection from anyone seeking to establish a competing network. Is that right?

Mr Egan—I am not sure it would necessarily be legislative protection, but certainly the government has called for requests for proposals for one national broadband network—not two, three or four—and the reason for that is pretty obvious. We are a big country. We have only 20 million people. The idea of having competing infrastructure networks would be as uneconomic and absurd as having two sets of electricity wires running down every street or two sets of sewerage or water pipes. If we are going to deliver to 98 per cent of Australians fast, affordable broadband where the person in Bourke pays the same amount as the person in Bellevue Hill, then we can only have one network. Whether you could ensure that even under the licensing provisions that are in the existing legislation, I do not know, but in my view there can be only one terrestrial broadband network.

Senator MINCHIN—That is not to say that technological developments may enable other forms of broadband being made available at competitive prices, but you accept that as part of the competitive environment that you would be entering into.

Mr Egan—Yes.

Senator MINCHIN—You are not seeking to have any sort of protection from that.

Mr Egan—No. If all of a sudden a wireless network could make the whole thing redundant, that is part of the risk that you take. I am not a telecommunications engineer, but I understand that is not likely to happen.

Senator MINCHIN—But you accept that it is a risk. Thank you.

CHAIR—Senator Macdonald.

Senator IAN MACDONALD—I would like to be clear on that. If you are successful—and you have indicated that you are not taking over Telstra’s network—and then Telstra wants to use its existing semi-national network, are you suggesting that the government should legislate to ban it from doing that?

Mr Egan—Using a terrestrial network, Telstra, like any other company, if we were to win the bid would have to use the Terria infrastructure and we would also be needing to use their infrastructure, particularly their copper wires. Yes, Telstra would be using our network as we would be using part of theirs.

Senator IAN MACDONALD—With what it already has it could still run an almost national system.

Mr Simmons—There is an important point here. If you are cutting over 100 per cent of the copper at the node, then that copper would not be available for another party.

Mr Egan—That might need some more explanation. Would you like to answer that, Mr Wagg?

Dr Wagg—The design we have with the cutting over of the copper at the node is that fibre runs to the node and then you cut over all the copper, so all services that are served off that copper go through that node. Any retail carrier, including Telstra, would need to run services through that node, which is part of the national broadband network.

Mr Egan—The node, of course, is then connected to the premises by Telstra’s copper which would be rented at a regulated price.

Senator IAN MACDONALD—Thank you for that. In your submission you have stated that in the next few weeks you are going to release your model. Is there any timing on that?

Mr Egan—I am not sure that we did say that in our submission. Correct me if I am wrong.

Senator IAN MACDONALD—I think I underlined it. I will get back to you on that.

Mr Egan—We are precluded by the RFP from divulging details of our bid and, needless to say, we would not want to be alerting our rivals anyway.

Senator IAN MACDONALD—Let me come back to that. Again, I am being repetitive here in emphasising what I understood you said. You are indicating that your partners and others already have big investments in capital city networks. I do not want to put words in your mouth, but you do not see that too much of the \$4.7 billion needs to be invested in that area, hence your comment that you agree that you should be starting out and coming in.

Mr Egan—Capital cities are generally reasonably serviced at the current time. They could be better serviced obviously, but the areas that are in greatest need are those that do not have services such as their capital city cousins have. As a matter of equity it would seem to me that is where government and parliament should be insisting the rollout should start. It does happen to also coincide with our commercial interests to start the rollout from underserved areas. We

make no secret that it is in our commercial interest to roll in rather than roll out. The reason for that is that every person who gets these services for the first time as a new customer is providing new revenue.

Senator IAN MACDONALD—I am delighted to hear that.

Mr Egan—As I understand it, in Telstra's case the commercial incentive for them is to roll out from the capital cities because that is where they are currently experiencing most competition from their rivals. So by rolling out they think that they can eliminate that competition that has emerged in capital cities in recent years.

Senator IAN MACDONALD—In the request for proposals was it required that at some time early in the piece this sort of information would be made public by the different proponents?

Mr Egan—About their rollout?

Senator IAN MACDONALD—Yes.

Mr Egan—I do not think it was. My recollection is that the RFP did ask for indications of the rollout, but I do not think there was anything that would make it public information.

Mr Simmons—The RFP does require certain information on coverage and achievement of the objectives under the RFP and how you would measure your coverage in your submission. It was not specific in asking for an outside in or inside out approach.

Senator IAN MACDONALD—You do not need to do that, anyhow, because you have done it here.

Mr Simmons—Yes.

Mr Egan—Yes.

CHAIR—Senator Birmingham.

Senator BIRMINGHAM—Thank you for your time today. I would like to turn to some of the process issues around the NBN tender. Firstly, are you satisfied that all of the network information and data required to successfully lodge your bid has been provided?

Mr Egan—Mr Wagg can answer that.

Dr Wagg—We requested certain amounts of information in order for us to provide a robust bid, I think was the wording. We believe we have sufficient information to do that, but sufficient information was not provided for us to do a detailed design. The protected carrier information was insufficient for us to do a detailed design. It was sufficient for us to do a business case and the estimates on that is that it is within a 95 per cent confidence of our numbers. We are doing our design based on that detail, but there was certain information that was requested that was not provided.

Senator BIRMINGHAM—Do you believe that places you at any disadvantage in the process?

Dr Wagg—Yes, because certainly in Telstra's case they know what they know and we do not know what we do not know.

Senator BIRMINGHAM—Was there a reason provided by the department or government for not providing that extra information?

Dr Wagg—No.

Senator BIRMINGHAM—Have you lodged any protests with the government over what you feel is a disadvantage?

Dr Wagg—A couple of times we requested the same level of information that we originally did.

Mr Simmons—We have written to the department expressing our concern and raising the fact that it is not sufficient to be 100 per cent certain in the bid. We do not believe it will affect us lodging a competitive bid and a bid that can be chosen by the government, but it is not 100 per cent sufficient to be certain of every dollar that will form part of our bid. With the manner in which we are developing our bid, we feel we have enough guarantees to ensure that we can deliver within what we are proposing, so we have had to build in fat, being one way of putting it, and we have taken certain assumptions in developing our bid.

Senator BIRMINGHAM—Obviously in the OPEL arrangement the then consortium ran into some trouble with the now-government over differing definitions of the scope of coverage. Are you confident that enough clarity has been provided upfront as to the scope of coverage needed to be met under this tender, and particularly the 98 per cent, and what that might cover?

Mr Egan—Again, I will ask Mr Wagg to answer that. Keep in mind that we are here as Terria. I am not a spokesman for Optus. Mr Wagg does work for Optus. He is their General Manager of Network Strategy, but he too is here today with his Terria hat on.

Dr Wagg—Within 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. It was only a couple of weeks ago that we reiterated that position. As far as I am aware, we are yet to receive any response from the department formally identifying that our position is incorrect.

Mr Simmons—There are ongoing discussions on the methodology to be applied to measure the 98 per cent reach post winning the bid and post rolling it out. They are ongoing discussions because there are a number of methods that you can apply to measure and we would like certainty in how we measure that. We expect that to unfold. There are regular meetings between Terria and the department, as there is with other bidders, in gaining further information to enable the completion of bids, and this is part of that process.

Senator BIRMINGHAM—It is fairly fundamental. I raise it not because one party at the table works for a company that was part of the OPEL bid, but I cited the OPEL bid because it was the difference over methodologies that the government used as the reason for pulling out of that contract. Obviously, this is fairly fundamental this time around and I would have thought that for the equity of all bidders it would have been beneficial for the government to be very clear and upfront as to what methodology it expects any bidder to apply to guarantee that 98 per cent coverage.

Mr Simmons—We are seeking clarity on that, but I must also stress there is no dispute at this point in time 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. We expect that to be resolved between now and 26 November.

CHAIR—Clearly, you believe it is measurable.

Mr Simmons—We have a methodology that we would prefer to apply.

Dr Wagg—Yes.

Mr Simmons—We have proposed that to the department and they need to agree to that methodology or an alternative that we can both agree on.

Senator BIRMINGHAM—What is your interpretation of the technological mix that can be applied under the RFP? Is it purely a fibre to the node arrangement or fibre based arrangement, or is it possible for bidders to be applying other technologies to meet the requirements of the RFP?

Mr Egan—Fibre to the node is a given for 98 per cent. Obviously, whoever provides the network should have the capability of being upgraded to fibre to the premises. From the node to the premises, most of that will be copper. I suppose there may be situations where it is something other than copper, but it will certainly be fibre to the node.

Mr Simmons—If there is an alternative technology from the node to the premise, it will still meet the objective of the RFP, it just may be an alternative technology. That may include fibre where the economics allow it.

Senator BIRMINGHAM—In terms of the type of protections that you were discussing with Senator Minchin and Senator Macdonald previously, do you see that applying to this network construct? Obviously if other technologies for delivery and particularly wireless type technologies were applicable in the future, would that be a fair competition in the marketplace?

Mr Egan—I think so. The point I would make is that there can only be one terrestrial network. Certainly, if wireless develops in some way that makes a terrestrial network redundant then it is too bad, but everybody says that is not going to happen.

Senator BIRMINGHAM—Should Terria or another non-Telstra bidder be successful in this bid, how do you believe government should approach the regulatory issues surrounding Telstra after that? We have talked a lot about structural separation, open access arrangements and so on

should Telstra win, but should Telstra not win then obviously there are existing concerns about the way regulatory regimes work and I would imagine that not all of those would be resolved by somebody else winning the right to build the NBN. How would you foresee those different tensions in the communications sector being resolved?

Mr Simmons—As we have stated publicly, there are four key elements in our regulatory outcome. They are separation, independence of network owner-operator from access seeker, open access on non-price terms and equivalence in open access on price terms, and a continuing role for the regulator, and our choice is the ACCC because of its current experience. There are mechanisms to achieve that regulation that exist today and there is some modification of that regulation that will be required to complete the network build. That detail is privy to our bid and we would not want to put that on the table too soon to enable the opposition to build a defence, but there are mechanisms available to achieve the majority of those outcomes with a little bit of modification to the existing legislation.

Mr Egan—I am not sure that was your question.

Senator BIRMINGHAM—I am talking about some of the pre-existing tensions in the communications sector with Telstra continuing to own some of the assets and some of the infrastructure. Will simply licence arrangements for the NBN bidder resolve those issues or will there be a need for regulatory reform or structural reform as it applies to access Telstra's infrastructure and the management of Telstra's infrastructure?

Mr Egan—Provided that the new network has access to Telstra's infrastructure at a regulated price, that should be the basis of any ongoing regulation. The new national broadband network, to a very large extent, would overcome many of the issues that have plagued telecommunications now for almost a couple of decades. It really is an opportunity to put right what was mucked up in the late eighties and early nineties when new entrants were allowed to get a licence. I think the reason that it was mucked up back then was that telecommunications reform preceded the national competition reforms rather than followed them. The national competition reforms gave us a model. Before that I do not think anyone conceptually had this model in their head and so, if telecommunications reform had happened in 1998 rather than the early nineties and late eighties, we would have a structurally separate network. You cannot unscramble the egg and I am not suggesting that Telstra should be carved up, but the new network really enables that structural separation. It should have been put in place at the start without taking anything off Telstra.

Senator MINCHIN—Can I follow up on that?

CHAIR—Yes.

Senator MINCHIN—Senator Macdonald was trying to ask about that. Pardon us if we sound dumb, but you have still got a vertically integrated Telstra. Let us say you win this contract, you have still got Telstra as the vertically integrated network, a wholesaler and retailer. What your bid relies on is licensed access to the hardware they currently own. But is it implicit that Telstra would thereby be prevented from being a network provider on the network it owns? In other words, it is going to be required to licence it out to whoever is awarded this contract by then not be able by law, presumably, to provide network services to wholesalers.

Mr Simmons—Telstra would be entitled to be an access seeker, along with any other access seeker, to access the national broadband network on the same terms as any other access seeker. They are not precluded from competing in the marketplace.

Senator MINCHIN—As a wholesaler?

Mr Simmons—As a wholesaler or a retailer.

Senator MINCHIN—What about as a network owner? They own the network.

Mr Egan—They are using their network. The difference would be that they would not be paying somebody else rent for their own network. They would be using that.

Mr Simmons—And they would continue to own the copper and they would earn a rental income on that copper. They would maintain that copper and certain other infrastructure, duct and backhaul, where there is only one piece of infrastructure today, rather than overbuilding that infrastructure.

Senator BIRMINGHAM—Senator Minchin's point is that they are still a vertically integrated company, but they will just be missing a link in the chain, essentially.

Mr Egan—A very significant link in the chain.

Senator BIRMINGHAM—It gives access to the links that they still hold.

Mr Egan—It is a link that all traffic has to follow.

Mr Simmons—They are still vertically integrated by they are accessing the network on the same terms as everybody else.

Senator MINCHIN—They will still be the owner.

Mr Simmons—They will be the owners of the copper.

Mr Egan—Yes, the owner of the copper and the fibre, obviously.

Senator IAN MACDONALD—They have a network up the coast of Queensland, or someone has, but they will still own that.

Mr Simmons—Yes.

Senator IAN MACDONALD—And you will be building one beside it.

Mr Egan—No. It will be connected. There must be only one network.

Senator IAN MACDONALD—Is someone going to compulsorily acquire their existing network?

Mr Egan—No. We will rent their network at regulated prices, just as they will rent the Terria network at regulated prices.

Mr Simmons—There is existing Telstra infrastructure today that is rented under regulated pricing.

Senator IAN MACDONALD—Their existing ‘network’ someone else already has access to on commercial terms or whatever the regulator has said?

Mr Simmons—It exists today. The ACCC regulates what they call the unbundled local loop, which is the copper network, and there is a regulated price of access to that copper and Telstra must provide access at that regulated rent. What we are proposing is that regulated rent will enable the 100 per cent cut-over of that copper to a node, that the rent will continue for access to the copper and Telstra will continue to own the network.

Dr Wagg—The services through that node will be open access to all retail service providers, including Telstra and any other retail services group provider. That is the difference.

Senator MINCHIN—They can rent it to the wholesaler and retailer and they would earn rent from any fibre, let us say, that they currently own and they would then be required to lease to you at a regulated price for you to be the network provider to the extent that you needed their hardware to be part of your network.

Mr Egan—That is right.

Senator IAN MACDONALD—The same would apply for any network fibre that Optus or anyone else may currently have?

Dr Wagg—Or anyone has who has provided it, yes.

Mr Egan—Ideally there should not be any duplication of the network. If there is then someone is paying too much for it.

Mr Simmons—Just to come back to Senator Birmingham’s question about a vertically integrated Telstra. Yes, it will remain a vertically integrated operator, but it will have access to a national broadband network on the same terms as every other party to a network owner-operator who is independent of all those parties and therefore not discriminating in downstream markets, which is the problem we have today. We are not separating Telstra; we are not taking it apart as being a vertically integrated company, we are just taking a mechanism that enables us to rent the copper today and enables us to rent that same copper in the future, cut over to a node to deliver higher speeds and uniform pricing to the whole of the nation.

Senator BIRMINGHAM—I would like to ask a final question. A number of witnesses have argued that there needs to be greater transparency particularly in the tail end of the process, that as the ACCC finalises the type of regulatory framework that should be applied there should be an opportunity for others with interests in this to comment on that ACCC regulatory framework. Does Terria support such an approach?

Mr Egan—I would like to know what the ACCC's position is. That would assist the public debate, although overall I would have to say that I am very happy with the process. This is the first time I have been on this side of the process and if I were to go back to my old career I would do a few things differently, but I am overall quite pleased with the process. I think it is a genuinely competitive process. Yes, we would like to have a better idea of where the ACCC is coming from and what their role will be in the process.

CHAIR—Thank you. Yes, indeed, that is a good lead in for this afternoon's proceedings. Senator Macdonald.

Senator IAN MACDONALD—The document that we have—I have been told by the secretariat that you supplied it—tells us who you are. The last paragraph states that the group says it will release its competitive broadband model over the next few weeks which it says will 'protect the consumer' from 'vested interests'.

Mr Egan—Is that Terria or was it G9 in relation to their statutory access undertaking?

Senator IAN MACDONALD—It was supplied by our secretariat, but I think they indicated that you had supplied it. If it does not ring a bell with you then we will not argue about the minutia. I will just not accept that as your words.

Mr Egan—I am not sure, but it may well have been the G9 when they made their submission to the ACCC some time ago.

CHAIR—We will take it as that, Senator MacDonald.

Mr Egan—Thank you very much.

CHAIR—Thank you for your flexibility in terms of the time frame as well.

[12.21 pm]

COBCROFT, Mr Simon, Acting Assistant Secretary, Broadband Infrastructure Branch, Department of Broadband, Communications and the Digital Economy

KING, Ms Marianne, Assistant Secretary, National Broadband Network Taskforce, Department of Broadband, Communications and the Digital Economy

LYONS, Mr Colin, Deputy Secretary, National Broadband Network Taskforce, Department of Broadband, Communications and the Digital Economy

WINDEYER, Mr Richard, Acting First Assistant Secretary, National Broadband Network Taskforce, Department of Broadband, Communications and the Digital Economy

CHAIR—We now welcome the Department of Broadband, Communications and the Digital Economy to the table. The department's representatives almost number as many as were in the public gallery earlier, but looking somewhat more mature in the most part than the audience previously. Thank you for your time and being prepared to appear before the committee today. I imagine, as expert as you are, you are probably more than informed about the processes of this public hearing and that the department does have the ability to seek that certain evidence be provided in-camera, which request the committee can consider. Other than that, the evidence you provide today is public. Do you need to amend or vary your submission in any way?

Mr Lyons—We did not provide a submission. We did provide some responses to specific questions. I would like to make a very brief opening statement.

CHAIR—Please do so.

Mr Lyons—Thank you for the opportunity to make a brief opening statement. As the committee would be aware, there is a live competitive tender process underway for the national broadband network and all those involved in the process, including officers of the department, are subject to those probity requirements. We certainly appreciated the committee's understanding in its letter to us asking us specific questions of your acknowledgement of the sensitivities associated with our process and the framing of the questions that were put to the department.

I need to say that during the course of answering questions I wanted to be conscious of the integrity and the confidentiality of the process. We will try and answer, to the best we can, all questions that are asked. We have some witnesses that are potentially available depending on the particular questions that might be asked. It may be difficult for me to answer questions relating to the actual process that is currently underway, given that it is a live competitive process, in terms of issues like speculating on what proposals we might receive or how we might respond to particular proposals. I am not really in a position to do that. Subject to that, I am happy to answer your questions and see how the discussion goes.

CHAIR—Thank you. Obviously as we proceed through questioning if you are of the view that you need to decline to answer you will no doubt inform us of the basis upon which you are doing so.

Mr Lyons—I may need to take questions on notice.

CHAIR—We can then assess that response accordingly.

Mr Lyons—Thank you.

CHAIR—Are there any further opening comments?

Mr Lyons—No, that is it.

CHAIR—Thank you very much. Senator Lundy will start off.

Senator LUNDY—I thought it might be useful to get a picture as a committee about those probity related issues. Can you describe to the committee the work done by the government to protect the integrity of the bid process? This seems like a good opportunity to outline that to the committee.

Mr Lyons—The request for proposals has been issued and it has been issued in accordance with the Commonwealth procurement guidelines. The department has appointed a probity adviser as well as legal advisers, technical advisers and economic advisers. The department is conducting the process on the basis that it needs to be conducted ethically and fairly and that all proponents should be treated equally. Are there any other comments you would like to make, Ms King?

Ms King—As you would imagine, we have in place probity plans to govern the behaviour of all the people that are involved in the process. That includes the panel of experts that will be involved in assessing proposals, as well as the departmental staff involved, all of our advisers and officers from other departments and agencies who are involved in our interdepartmental committee process. All Commonwealth officers and advisers who are working on the process have been probity cleared by our probity adviser.

Mr Lyons—There is also an opportunity for proponents if they think that there are probity issues to contact the probity adviser and to raise those issues to have them resolved.

Senator LUNDY—Just for the record, what are the actual remaining specific time frames and key dates for the process?

Mr Lyons—The requests for proposals are due on 26 November. The request for proposals indicated the panel would have eight weeks to report to the government. After that point it is really a matter for government in terms of taking the process forward with its own timing and decision-making.

Senator LUNDY—Is that eight-week period for the panel to recommend to the government the winning tender?

Mr Lyons—I will let Ms King go to the details, but in broad terms the panel will put forward recommendations to the government on the way forward and the request for proposal is necessarily a little bit flexible on that because it depends on the number, quality and complexity

of the proposals received and the considerations of the panel as to what specific recommendations it will make.

Ms King—That covers it. The panel's role is to assess and evaluate proposals in accordance with the evaluation criteria set out in the request for proposals document. They will also assess them as to the best value for money. If there is a proposal that they assess that provides the best value for money they can recommend that. They can also make recommendations as to whether or not further processes, such as the best and final offers process, need to be undertaken in parallel negotiations.

Senator LUNDY—Thank you.

CHAIR—Senator Nash.

Senator NASH—Thank you for coming in today. I am sure this will be most helpful. We have had some discussion with the committee around the potential cost of the rollout of the network. Does the department have a view on the overall cost of what will be incurred as a result of the rolling out of the network? We seem to be at a bit of loss of even a close to ballpark figure of what the total figure might end up being?

Mr Lyons—I would not wish to speculate on the cost. The government has indicated it will offer up to \$4.7 billion. It has indicated that it expects proponents to make a significant contribution and it has made its objectives clear. From this point on it is a matter for the competitive process to bring forward the best possible proposals that meet those objectives within the cap of the contribution that the Commonwealth has said that it will provide.

Senator NASH—This is something that I should know already, but can you tell me exactly where that \$4.7 billion is targeted?

Mr Lyons—It is not targeted to any specific areas. The Commonwealth has indicated it will provide up to \$4.7 billion. It has asked proponents to indicate in their proposals what would be the uneconomic areas that would be part of its coverage rollout.

Senator NASH—So it has indicated that that money should be going towards the uneconomic part of the rollout?

Mr Lyons—The government has indicated that it has up to \$4.7 billion and that its objective would be to get a return on that investment, but it recognises that there may be uneconomic areas. It is leaving it up to the proponents to identify what they can do within the funding parameters provided by the government, but also the fact that the government has said it will consider proposals for regulatory change. So that will also have financial implications for proponents.

Senator NASH—I am sorry, I probably did not make that very clear. When you were talking about uneconomic, I am trying to understand where that fits in. When I said, 'Have they targeted the money?', you then used the word 'uneconomic'. Am I right in assuming that the government would like that taxpayers money to be spent where the ordinary economic business case for rolling this out does not stack up, or have I got the wrong end of the stick?

Ms King—The RFP asks proponents to describe the amount of funding and contribution that would be required and to provide a detailed explanation of how the funds would be deployed and whether that funding is being provided for commercial or non-commercial services. It is really a matter that we have asked proponents to come forward with, indicating that the government is prepared to provide up to \$4.7 billion.

Senator NASH—On what basis has the government asked them to identify economic or uneconomic parts of it in the criteria? What I am trying to get at is if the government has said to the proponents, ‘Come to us and show us which bits are economic and which bits are uneconomic of your proposal,’ then why has it asked that?

Mr Lyons—It is to determine the extent to which there is any subsidy component in their bid.

Senator NASH—This is what I am trying to get to. Does the government believe that the \$4.7 billion should be going to a subsidy component?

Mr Lyons—I do not think the government is being prescriptive about how much of that \$4.7 billion is going to a subsidy component and how much of it is going to get a return on investment.

Senator NASH—If they have asked for that information then it must be something that is being considered.

Mr Lyons—It is something that is being considered, yes.

Senator NASH—I should not ask you this because I am sure you cannot answer it anyway, but that may lead the government to decide whether a roll-in or roll-out type tender is going to be more appropriate if they have asked, in the first place, for that to be a consideration.

Mr Lyons—The government has also asked proponents to identify how they would propose to roll out, which would include that question in terms of the testimony of previous witnesses, whether they are rolling in or out. That is just one of the factors to be considered when the government looks at the proposal against the objectives.

Senator IAN MACDONALD—You mentioned the government wanted a return on its investment and then you said an economic return. Is there a difference between an economic return and a financial return? Are you suggesting that the \$4.7 billion, or part of it, is an investment in a financial return to the government?

Ms King—The government has an objective for the NBN of earning a rate of return on its investment of \$4.7 billion. That is one of the government’s objectives.

Senator IAN MACDONALD—To follow Senator Nash, is part of the \$4.7 billion to be a CSO and part of it to be a financial investment?

Mr Lyons—It ultimately depends on what the proponents put forward. We are looking for the best possible proposals that meet the government’s objective. We are not being prescriptive on what element would be comprised of which.

Senator NASH—They are not being prescriptive. That \$4.7 billion could go towards a bid that had no requirement to deliver to underserved areas.

Mr Lyons—All proposals will be assessed against the objectives, which includes 98 per cent coverage and a minimum of 12 megabits. There is a series of objectives that the government is looking at.

Senator IAN MACDONALD—Part of the \$4.7 billion must be an investment in areas which are clearly not going to give any financial return.

Mr Lyons—I do not want to speculate on what particular proponents might put forward. That is my difficulty. If they do put forward proposals that are seeking a subsidy then they will need to identify it.

Senator NASH—I would like to explore that further. If that \$4.7 billion was going towards part of a bid that was not going towards an underserved area, is the predication then that the said company who wins the tender will then make enough money to cross-subsidise the areas that it is going to have to roll out to get to the 98 per cent which do not have an economic case to stack up?

Mr Lyons—It is the issue of an underserved area that I am not quite sure what you mean.

Senator NASH—I am sorry. We have been talking about this for a couple of days now. Those areas where broadband delivery is not at the speed or service level it should be at comparable to the metropolitan areas.

Mr Lyons—Can you repeat your question now, sorry?

Senator NASH—If you say there is no predication for which it should go as in the economic or uneconomic and if that entire amount of taxpayers' money goes towards a proponent who is planning to put that all in, if you like, the side of the business case that is economic, is it not that there is then an assumption that the successful tenderer will be making enough money out of the economic side to cross-subsidise the underserved areas?

Mr Lyons—Again, I do not want to speculate on if proposals have particular elements then how might the government assess them, because the government is going to assess them against a series of objectives, including 98 per cent coverage and a minimum of 12 megabits.

Senator NASH—That is a fairly straightforward question. If the money is not going to the non-economic areas of the model that is put forward, that it is going to the economic areas, is it then assuming that the company is going to cross-subsidise the areas that do not stack up with an economic case? That is regardless. That is not part of the criteria. That would just be a practically, would it not?

Ms King—There is a range of different ways in which a proponent could respond to the totality of the government's objectives. The government has indicated that it has 18 objectives for the NBN, one of which is to earn a return on its investment and, in order to have a national broadband network that covers 98 per cent, it is prepared to offer up to \$4.7 billion. There are a

number of different ways that a proponent could approach that and it is probably not appropriate for us to speculate on how they might do that.

Senator NASH—Just to continue with the \$4.7 billion at the moment, part of that is the \$2 billion Communications Fund which was set up purely to look after future needs in regional areas. If that \$2 billion is now part of the \$4.7 billion, and you have just said to the committee that it is not predicated to go to any uneconomic area, have we now not got \$2 billion that has disappeared out of future potential needs for the regional areas because it might go into an economic business case for the NBN model proponent?

Mr Lyons—The direct answer is that it is predicated on going towards, as a maximum contribution, the delivery of a high speed broadband network to 98 per cent of Australia's homes and businesses. That is what it is predicated on.

Senator NASH—We might move on from there. Can you talk for a moment about access and open access? Actually, before we go there, I would like to ask you a very broad question in terms of structures. How do we not end up with a monopoly if there is only going to be one NBN and one provider?

Mr Lyons—The government has indicated in its request for proposal that this will clearly be a significant piece of infrastructure. There already are other providers out there using other technologies.

Senator NASH—They will have to use this infrastructure if they want to provide the service.

Mr Lyons—There are existing wireless broadband services out there in the market.

Senator NASH—We are not talking wireless. We are talking fibre.

Mr Lyons—There already is an Optus cable network that delivers broadband.

Senator NASH—In the metropolitan areas.

Mr Lyons—In the metropolitan areas.

Senator NASH—We are all aware that there will be one national fibre network.

Mr Lyons—The government is recognising that this is a significant network which will require open access and equivalence of treatment. One of the objectives is open access and competition. Proponents will put their proposals forward. Part of their proposals they put forward will be proposals for regulatory change and the government has said it is willing to consider those. The extent to which the outcome will be a monopoly is something which you would have to assess in terms of the outcome of the process.

Senator NASH—That is where I was going to head next. Can you give me the definition of 'open access' as the government sees it?

Mr Lyons—In broad terms open access is ensuring that the retail providers on the network are all having access on equivalent terms; effectively, that means non-discriminatory terms. That is in terms of the price of access, but it is also the non-price terms and conditions of access.

Senator NASH—I stand to be corrected, but I understand that one of the proponents, Telstra, may have made some comments that they feel that they should be able to provide some of those retail services that would not necessarily equate with that particular view of open access. Do you have any comments around that?

Mr Lyons—Until I see the particular comments that people may or may not have made I do not think I would like to comment on it.

Ms King—The RFP talks about the fact that the open access arrangement should apply to wholesale services to be provided over the NBN. It is providing wholesale services on an open access basis to retail.

Mr Lyons—To retail providers.

Senator NASH—What if that wholesaler is also the retailer?

Mr Lyons—This is speculative. If the proponent puts forward a proposal which involves being the wholesaler and the retailer, they would still need to demonstrate that they are treating themselves in the same way as they are treating other access providers. The same broad test would apply.

Ms King—Again, the RFP indicates that proponents need to demonstrate what structural measures or models they propose to be put in place and maintained in order to prevent inappropriate self-preferential treatment.

Senator NASH—What is the regulatory requirement to make them do that in practicality?

Mr Lyons—Again, proponents would put forward proposals for regulatory change. The government would consider the acceptability of those proposals and what regulatory framework is appropriate to implement those proposals.

Senator NASH—Given that this is reasonably clear cut, does the government have a view in advance of what regulation it would like to see in place to deal with this particular outcome?

Mr Lyons—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. It is not prescriptive in terms of mechanisms and it wants to have the most competitive process possible to achieve those outcomes.

Senator NASH—Once these changes to the regulatory environment have been considered by government and a decision is made—hypothetically, of course, because we are not there yet—what will the process be? Will there be any consultation with industry at all about the changes to the regulation, given that it is going to affect the whole industry and not just the successful proponent?

Mr Lyons—I would leave it to government to make a specific and detailed answer to that question. It may not make those decisions at that time. In terms of what has already happened and what might be expected to happen, I can say that there has been a process of seeking regulatory submissions from all stakeholders recognising the importance of the national broadband network and that any proposals for legislative change would be subject to parliamentary scrutiny and debate. The other part of your question is ultimately a question for government.

Senator NASH—I would like to ask you about the process. Thank you for the timeline that you provided to the committee. Even more importantly, what happens next and, in the context of finalising a decision, where does that regulatory consideration by parliament fall in that time frame? You can take the first step first and give us an indication of when there is going to be a final decision taken, if you have that knowledge, but then I would like to link that into what we were just saying. If there is going to be a regulatory change, how does that fit in with the timeline with any kind of announcement?

Mr Lyons—Can you just repeat the two parts of your question?

Senator NASH—We will go one at a time. We will go back to the timeline. We have the timeline through to 3 September, with 26 November being the closing date. What then happens from 26 November until we get a final decision and announcement on who has won and what is going to happen next? We will start with that.

Mr Lyons—As we indicated before, the proposals are due on 26 November and the panel is expected to report within eight weeks to government.

Senator NASH—Is that realistic, given the Christmas period? I know departments work very hard, but is that realistic?

Mr Lyons—Yes, it is a realistic time frame. Ultimately these issues will be for the panel. The panel is the one providing the report and we are providing advice to the panel. That will ultimately be a decision for the panel. Again, it could depend on the proposals that are received.

Senator NASH—What date does that take it to?

Mr Lyons—It probably takes you to the end of January. The government has indicated it wants to make timely decisions but I do not think it is being prescriptive about the exact dates.

Ms King—To some extent I think also the timing does depend on the nature of the panel's recommendations.

Senator NASH—I will watch that bit with interest. The second part of the question was: if there needs to be regulatory change and, say, hypothetically we have got a decision at the end of January about who has won the tender, when would you envisage the regulatory change that will quite likely accompany this happening? When will it be considered?

Mr Lyons—After the government sees the panel's report, obviously there will be a process for it to make decisions on where to go to. Again, it is a bit speculative because it depends upon

the outcome of the panel's recommendations. But assuming that you have specific recommendations from the panel, then the government would make its own decisions on whether the proposals deliver value for money. You would expect that, if proponents were putting forward proposals seeking legislative change, their proposals would be conditional on that legislative change occurring. If they are proposing amendments to legislation then final implementation of their proposals would be subject to parliamentary scrutiny.

Senator NASH—It could be announced that this is the winning bidder and then there would be a process to go through to determine that regulatory change—whether or not in effect that did happen—before any commencement of the network would start—

Mr Lyons—Again, I am speculating, but to the extent that any proponent's proposal is saying: this is conditional upon changing an act of parliament then it logically follows that the implementation would not follow until after that change. But that would be based on the proponent's proposal.

Senator NASH—This is another point of interest, actually. If it is the proponent's proposal, surely, this is bigger than just what a proponent wants out of changes in the regulatory environment, because this is going to be an enormous change for the industry. Are you saying that it is only the proponent's requirements in terms of regulatory change that will be considered and that concurrently the government is not preparing changes to the regulatory environment to deal with the new arrangements?

Mr Lyons—I am saying that the government has had a range of submissions from the public on what it sees are the regulatory issues associated with the national broadband network or related to the national broadband network. That will be a resource for government and they have been provided to the panel. The panel will take those into account in framing its recommendations. They will be a resource for government in making its decisions. I cannot speak for government on how it will then take the process forward other than to say the logical statement that if there is a proposal that is subject to legislative change it will have to be subject to parliamentary scrutiny and debate.

Senator NASH—As to the 98 per cent which is the total of the rollout. We have had a number of discussions over past months about the remaining two per cent. Is the department aware geographically of where that two per cent will fall out? My question is: somebody somewhere initially came up with the fact that broadband could be rolled out to 98 per cent of the country. I have been trying to determine for some time now if somebody has initially determined that it would be 98 per cent then somebody must know where the two per cent was that they excluded in the first place in order to come to that 98 per cent. Does the department have any kind of information of geographically where that two per cent will be?

Mr Lyons—No. The department may have done preliminary work on that sort of issue, but at the end of the day proponents have to identify within the parameters of the \$4.7 billion and within the parameters of the regulatory change that is being offered to them how they will get to 98 per cent. The government has decided not to be prescriptive on the location of the 98 per cent, which means that the location of the two per cent is equally not prescribed. The government will consider the best proposal. The best proposal will be intended to serve 98 per cent of the population and that will leave two per cent. The government has invited submissions on how

best to deal with the two per cent. The regional committee of inquiry is looking at issues related to that and there is also an Australian Broadband Guarantee program that we know will be a safety net while the national broadband network is being rolled out and after its completion, but it really is going to depend on the proposals from the proponents on what meets their business case in the light of what the government is offering for this competitive process.

Ms King—I think it is also important to say that there is nothing that precludes a proponent coming forward with a proposal that covers 100 per cent. The government has an objective of 98 per cent coverage but it also talks about the potential for the network to expand its coverage beyond that level. There is absolutely nothing that would prevent a proponent from coming forward with a 100 per cent coverage proposal.

Senator NASH—How did the government arrive at the figure of 98 per cent?

Mr Lyons—I think as you will be aware there is an election commitment—

Senator NASH—I am asking how they arrived at the figure. Election commitments can spring up all sorts of wonderful things but how did they actually arrive at 98 per cent?

Mr Lyons—I would need to take that on notice because we are about implementing the government's election commitment.

Senator NASH—How did they arrive at the figure of \$4.7 billion figure as an appropriate amount of funding?

Mr Lyons—Similarly I will take that on notice because our role in the department is to implement the government's clearly stated election commitment. And remember that the \$4.7 billion is an 'up to' figure.

Senator NASH—If you could take those both on notice and in detail, I think it would be quite important for this committee to understand exactly the rationale behind the government arriving at both of those figures.

Senator LUDLAM—In the context of this inquiry, we had made a commitment to provide an interim report by 25 November directly before the bids close. What process would the department have for incorporating the interim findings of this committee?

Mr Lyons—You are saying an interim report would be available just before on our timetable bids are—

Senator LUDLAM—Correct. The final reporting date is somewhere in March, but we have undertaken to provide something that would be of use before the end of the year.

Mr Lyons—The panel needs to evaluate the proposals against the objectives in the request for proposal. That is its mandate. That is its terms of reference. But the panel has had regard to date to public submissions on regulatory issues relevant to the national broadband network, so if there were an interim report provided by this committee it would be a matter for the panel to consider the relevance of the information in that report to its consideration, but I should say its primary

role is to evaluate proposals in accordance with the objectives and the provisions in the request for proposal.

Senator LUDLAM—A lot of the evidence we have heard has hinged on the issue of the structural separation of the owner of the network and the operator of the network from the wholesalers and retailers. The evidence to date has almost exclusively been that the structural separation is not merely important, but essential. How will the panel be benchmarking the proponents' proposals in that regard?

Mr Lyons—As I said before, the request for proposals is an outcomes focused document, not a mechanism focused document. It does not prescribe that certain structures or mechanisms are essential to achieve particular outcomes. In regard to open access and equivalence of treatment of access seekers on the network, it has indicated that it wants proponents to demonstrate how they will provide truly open access and genuinely equivalent terms and conditions of access. That is the policy benchmark against which proposals will be tested and it is up to proponents to demonstrate that their particular structures, or their particular mechanisms, will best achieve that outcome

Senator LUDLAM—You have got 18 or so criteria—I forget what the number was that you mentioned before—

Mr Lyons—Objectives—

Senator LUDLAM—How are they going to be weighted?

Mr Lyons—There is no weighting in the request for proposals in relation to the objectives.

Senator LUDLAM—I would put to you though that the submissions that we have received to date have been heavily weighted. That to my mind is becoming the central issue around which most of the submissions and evidence have revolved.

Mr Lyons—The view the government took was that it had a series of objectives that were outcomes focused, including the 98 per cent coverage, the minimum speed and the scalability of the network—and I am only mentioning a couple of those—as well as open access and competition. It took a view reflected in the RFP that it should be seeking the best possible outcomes that then to the greatest extent possible meet those objectives.

Senator LUDLAM—COAG was due to consider its best practice guidelines for public-private partnerships at its October meeting. In your response to the committee's questionnaire you have noted that. I am just wondering whether you have received that and what role that will play from here on?

Ms King—We have not received the best practice guidelines. I understand the policy responsibility for them rests with the Department of Finance and Deregulation. At the moment there are public-private partnership guidelines. I think, as Mr Lyons indicated, this process is being run in accordance with the Commonwealth procurement guidelines.

Senator LUDLAM—You are not aware whether anything fell out of the last COAG meeting that could help inform this process?

Mr Lyons—I think it would probably be useful to clarify for the committee that there is a technical meaning behind the concept of a public-private partnership. The request for proposal does envisage the possibility that people could put forward proposals that are in the form of a public-private partnership in the technical meaning of that word, but it also leaves open the possibility of other structures and other ways of putting their proposals forward. If it is a public-private partnership then certain things will flow from it, but not all proposals need be public-private partnerships which is possibly different from the general concept, to the extent that the government is putting up to \$4.7 billion and seeking a contribution from the private sector, that that in broad policy terms could be seen to be some form of partnership between the public sector and the private sector. That is not the exact meaning of a public-private partnership.

Senator LUDLAM—Some time ago the Australian Communications Consumer Action Network was formed. Can you sketch what role that group has played since its inception and how it is constituted?

Mr Lyons—I would probably need to take that on notice because it is not within my direct area of responsibility. Certainly, consumer groups that are part of that overall process of the minister were invited and did make submissions to the department on what they see as the policy and regulatory issues associated with the national broadband network. But the question of the operations of that particular committee is something I would need to take on notice.

Senator LUDLAM—I would really appreciate that, just as to how active a role that group has taken or it is envisaged that it will take—

Mr Lyons—Do you mean in this process, or generally?

Senator LUDLAM—Both. I presumed it was more something for after, but we heard yesterday from one witness that there is a real gap actually in consumer protection particularly as broadband starts to take on the role of virtually an essential service. While we have spoken of most of the \$4.7 billion being in wires, cabinets, nodes and so on, there is a real need for consumer protection to be properly considered as this rolls out. It would be helpful to have that.

CHAIR—I have a couple of questions which both arise out of your answers to Senator Nash. The first is in respect of your indication that it was possible that the successful tenderer may make it a precondition of their bid that there be certain legislative change. You referred to the need to pass legislation through parliament. Is it then possible that a tenderer could be selected on the basis of that legislative precondition and then, because any legislation is at the will of parliament, it is possible that parliament may decline to pass the legislation in the terms upon which the bid is based. Is it not possible that a successful tenderer could be chosen, some time passes and then we are back to the drawing board?

Mr Lyons—I am not saying what they will or will not say but to the extent that a proposal is conditional then clearly parliamentary approval will be required before any roll-out could commence.

CHAIR—The second question relates to the 98 per cent and the two per cent. Tell me if I have got you wrong, but as I understand it you have suggested that it is expected that the tenderers will define or identify the two per cent: who; what; when; where; why; how.

Mr Lyons—By virtue of defining the 98 per cent.

CHAIR—By virtue of defining the 98 per cent. You are in the business of advising the government as to the formulation of its policies. Now that it is government have you provided advice as to how the 98 per cent might be defined or made up?

Mr Lyons—I would take that on notice but I do not believe that we have. One of the things that we do need to do in running this process is to start off on the basis of the government's objectives and the way that the request for proposals has been framed and then not to try to reach predetermined outcomes that are not clearly stated in the request for proposals. We want to look at the proposals that are received and evaluate the extent to which they are achieving 98 per cent.

CHAIR—What I am trying to flesh out though is the extent to which the government was able to inform itself in setting that objective. If the department has not provided the government with advice as to how that 98 per cent might be made up or defined and, therefore, by default the two per cent, then who might have provided that advice to government?

Mr Lyons—I think the position the government has taken, which is consistent with the advice the department provided, is that if we are having a competitive process it is better not to be prescriptive on what proponents have to come forward with but to have clearly stated objectives. Ninety-eight per cent coverage is the clearly stated objective.

CHAIR—Is it achievable?

Mr Lyons—Yes.

CHAIR—On what basis can you say it is achievable? If you are sitting here before us, on what basis can you attest that a target is achievable if or unless you have not formed a view as to how in this case the 98 per cent is defined and made up? If you have a view then I ask again: have you provided it to government?

Mr Lyons—I think our advice to government would be that 98 per cent coverage is achievable.

CHAIR—On what basis will you provide that advice? It is sounding to me thus far like the government has said, 'Yes, 98 per cent is our notional target and near enough will be good enough.'

Mr Lyons—I have said before that we are implementing the government's election commitment—

CHAIR—I understand that.

Mr Lyons—But I would not like you to think that it is not achievable. The government confidently believes that it is a competitive process and wants to see the best outcomes from that process.

Senator NASH—I must say it is a little inconsistent to say on the one hand that you have no understanding of how the government has arrived at a 98 per cent target figure and then on the other hand say—

CHAIR—That it is achievable.

Senator NASH—straight to this committee that it is achievable to reach that.

Senator IAN MACDONALD—I do think the witness has indicated the basis on which the 98 per cent came. In fairness, I do not know—

CHAIR—Perhaps then if it could be repeated, because I am not sure I understood it.

Senator IAN MACDONALD—I mean, anything is achievable. You can fly to the moon if you have got the money. One hundred per cent is achievable—

CHAIR—I want to give you some criteria around it rather than a blank ‘yes’. Do you have anything else to add?

Mr Lyons—Clearly, our understanding is that it is technically achievable. The government is putting the money forward. It is putting the regulatory proposals prospect forward and it is a matter for proponents to deliver on that outcome. I do not want to speculate on how likely they are to achieve that outcome or to what extent they are going to achieve particular aspects of the objectives.

Ms King—I think it is important to say that the government has an objective; proposals will be assessed against the extent to which they achieve those objectives. During the course of this process nothing has come to our attention to indicate that that objective is not achievable.

Senator MINCHIN—With regard to the 98 per cent coverage, we are proceeding on the assumption that the requirement is that there is fibre to the node that enables 98 per cent coverage; is that correct?

Mr Lyons—The objective is to use fibre to the node, or fibre to the home, architecture and to deliver a minimum of 12 megabits and to achieve 98 per cent coverage. There are a number of other objectives but they are probably the three that are related to each other.

Senator MINCHIN—When you say ‘objective’, you do not mean it is a necessary precondition? You mean if all bids say, ‘We can achieve 98 per cent broadband coverage but it does not involve fibre to the node everywhere,’ presumably that is open to be considered? This is not a—

Mr Lyons—The government will consider the best possible proposal to meet the objectives to the greatest extent.

Senator MINCHIN—The objective is fibre to the node ‘but’?

Mr Lyons—Yes.

Senator MINCHIN—I want to clarify the issue of time lines too. I think this regulatory issue is a big one and it could take most of next year, but there is also the obvious issue of contract negotiations. Let us just presume that it is necessary for the government to propose legislation to change the regulatory arrangements to enable the NBN to be rolled out. Presumably, the preferred tenderer will not sign a contract until the day the Senate passes the legislation in a form that meets their preconditions and at that point the contract would be finalised; would that be right?

Mr Lyons—That may be true. The request for proposal does indicate a process by which there would be an assessment and a report by the panel, negotiations and a government decision. What I am saying is that if legislation is proposed and if their proposals were conditional then, as you say, legislation would need to be passed before the final implementation could happen. What contractual negotiations might happen before then I think is a matter for speculation or for the government to determine.

Senator MINCHIN—It is normal that you might publicly announce a preferred bidder but that you then go into a process of detailed contract negotiation, assuming that that will all be resolved but—

Mr Lyons—I suppose I would rather leave it to the government to make those difficult decisions about timing of announcements and negotiations in the light of—

Senator MINCHIN—If I could refer back to the issue Senator Birmingham has been raising, the issue of the OPEL proposal, could you just remind us was that a signed contract?

Mr Lyons—There was a condition precedent in a funding agreement entered into between the Commonwealth and OPEL.

Senator MINCHIN—It was signed conditionally?

Mr Lyons—And the government on advice from the department considered that that condition precedent had not been met.

Senator MINCHIN—Just remind us how you reached that conclusion.

Mr Lyons—I would probably need to take the details on notice but broadly speaking the condition precedent required the proponent, OPEL, to achieve 92 per cent of coverage in accordance with the department’s methodology. There were complex clauses in the deed. But ultimately the government assessed and, more importantly, the department assessed that it was significantly less than what was required under the condition precedent. That was about serving underserved premises. It was not a question of coverage, it was a question of calculating the extent to which people were going to be provided with a metropolitan-comparable service that they were not currently being provided. That involved coverage maps and detailed technical

analysis. Based on the expert advice from the department and its advisers there was a decision taken that OPEL did not meet the condition precedent. It was a legal decision.

Senator MINCHIN—You could have the same situation arise here. There is a condition precedent to this proposal that 98 per cent gets 12 megabits per second.

Mr Lyons—There are clear government objectives of achieving 98 per cent coverage of 12 megabits per second. The OPEL situation was one where there was a contractual or a funding deed negotiation after the evaluation process.

Senator MINCHIN—But assuming that the successful bidder does satisfy the government prima facie that it can achieve this 98 per cent at 12 megabits you have then got, as I think you had with OPEL, an implementation plan. You will have to—

Mr Lyons—There will be contractual—

Senator MINCHIN—Until you test that, you would not sign a contract.

Mr Lyons—You would expect there to be contractual—

Senator MINCHIN—Before you hand over \$4.7 billion you are going to have to be absolutely satisfied that they can achieve that. Maybe this is not your responsibility, but if you could comment on it I would appreciate it. The funding of the \$4.7 billion which presumably you will have responsibility for is to come from closing the Communications Fund. Legislation to do that was introduced and then withdrawn; is that right?

Mr Lyons—I think that is correct.

Senator MINCHIN—Are you responsible for that in the parliament?

Mr Lyons—No.

Senator MINCHIN—Is your department?

Mr Lyons—I think our department might have been responsible for the Communications Fund bill that was introduced in the parliament.

Senator MINCHIN—There is existing legislation in place that establishes this Communications Fund which is in your department?

Mr Lyons—I am sorry. I thought you meant that—

Senator MINCHIN—I am asking about the closure of it. Are you responsible for the legislative process by which the Communications Fund is closed and the money transferred to the Building Australia Fund?

Ms King—We would expect that the legislation to establish the Building Australia Fund will include the arrangements for closing the Communications Fund and transferring that balance to the new Building Australia Fund.

Senator MINCHIN—Who will have responsibility for that?

Ms King—My understanding is that the Building Australia Fund is the responsibility of the Minister for Finance and Deregulation and the Treasurer.

Senator MINCHIN—You will not have that since you lose the Communications Fund—

Ms King—The Communications Fund balance is going to be transferred into the Building Australia Fund and the Building Australia Fund legislation will include provisions for the \$4.7 billion to be made available for the NBN project.

Senator MINCHIN—Can you remind us where the other \$2.7 billion is proposed to come from?

Ms King—I think the rest of the funding for the Building Australia Fund is coming from the budget surplus generally. That is my understanding.

Senator MINCHIN—Will you take that on notice?

Ms King—Yes.

Senator MINCHIN—Given this \$4.7 billion represents effectively a quarter of the Building Australia Fund, are you aware of whether or not whether that contribution will be subject to the Building Australia Fund guidelines which the Prime Minister just announced, or is this to be immunised from those guidelines, do you know?

Ms King—My understanding is that the arrangements are still under development precisely as to how the Building Australia Fund and the NBN money will work. But the government has clearly made a commitment both during the election and the request for proposal process to make that \$4.7 billion available.

Senator MINCHIN—You are not sure whether—

Ms King—I think the arrangements are still under development.

Senator MINCHIN—Is it possible that this 25 per cent of the Building Australia Fund for the NBN can be extracted from the Building Australia Fund in a way that is not at all subject to the requirements so glamorously announced by the Prime Minister just recently?

Ms King—I think it is important to note that the NBN is subject to a whole range of scrutiny. There has been an expert panel appointed to assess proposals in accordance with evaluation criteria that are set out and made public. Clearly then there is a process by which the government will assess the panel's report and then consider whether or not to proceed.

Senator MINCHIN—If it is not subject to the requirements that the Prime Minister announced with respect to the Building Australia Fund, it will not be subject to any comparative testing whatsoever as to where it fits in the national priorities for infrastructure spending. Should we take that as a given?

Mr Lyons—I think we would probably need to take that on notice, given that the government has not made any announcements in relation to that issue.

Ms King—I think it is important to note that the government has made a commitment through the request for proposals process to make up to \$4.7 billion available for this process.

Senator MINCHIN—On this issue of the rate of return, so that we are all clear on it should we interpret that as ‘an objective’ but not one that is necessarily a fixed precondition? In other words, it may be that the bids are such that it becomes clear that in order to roll this thing out the government is not going to be able to get ‘a rate of return’ on the \$4.7 billion and it might proceed on that basis. Should we take that as the case?

Mr Lyons—I would not want to speculate on what the government might or might not consider acceptable in the proposal that might or might not provide a rate of return. But clearly those key things in the request for proposals are objectives.

Ms King—Proposals will be assessed as to the extent to which they meet those objectives. There is also an evaluation criterion about the overall cost to the Commonwealth of a proposal.

CHAIR—Given the emphasis placed by the government on the roll-out of the national broadband network and the recent announcements in respect of Infrastructure Australia, on what basis would the national broadband network essentially not be part of the government’s renewing vision in respect of Infrastructure Australia?

Mr Lyons—I would probably again take it on notice, because the government has not made specific announcements about that issue, other than to say that after the election the government wanted to achieve its election commitments in a timely way. The government triggered a request for proposals process. It already had an election commitment to commit up to \$4.7 billion. The request for proposals implements that election commitment. The government made decisions on the policy objective that would be met through that process, and the process is under way.

CHAIR—I may come back to that.

Mr Lyons—The only other thing I would say is that the government sees the national broadband network as being a critical element of its national infrastructure agenda and it considers the national broadband network is going to provide significant benefits, and therefore it has embarked on a timely process.

CHAIR—How will the evaluation criteria link that in?

Mr Lyons—The RFP sets out a number of clear objectives and then it sets out some criteria which in some ways wrap up those objectives and refer to concepts such as value for money. The panel will need to assess those proposals in accordance with those objectives and those criteria.

The government will equally assess the recommendations of the panel in accordance with those objectives and those criteria.

Senator IAN MACDONALD—I think Senator Minchin asked my questions while I was outside. If this is part of Infrastructure Australia, why is it not within the guidelines that Mr Rudd so prominently announced in recent days? Isn't Infrastructure Australia involved in this process at all? Are they part of the panel?

Mr Lyons—No.

Senator IAN MACDONALD—Is it intended that there will be any sort of connection or coordination between the Infrastructure Australia process and this NBN process?

Mr Lyons—I will take the details of that question on notice, other than to say that the government has embarked on a request for proposals process. It wanted to get a timely outcome from this process and so it sets up a request for proposals set of documentation. They are the rules of the game for the bidders to bid against. They are not something that is going to be changed midstream.

Senator IAN MACDONALD—As I was saying before, I appreciate you do what the government of the day determines. It does seem that we now have a set of guidelines for Infrastructure Australia, but in spite of the great pronouncement on the weekend they will only be followed some of the time, not when it suits us. I do not really want or should not—

Ms King—I think it is important to note that this has already been announced by the government. The BAF is providing it—

Senator IAN MACDONALD—So, one part of Infrastructure Australia has been announced and it has certain rules, but the other part is announced this weekend with great fanfare and it will have different rules but it is all Infrastructure Australia. They are really political points which I should not perhaps be embarrassing you by raising. I simply take the opportunity to raise this in any case.

Senator BIRMINGHAM—What are the rolled gold commitments in the RFP process versus objectives?

Mr Lyons—The government has made a commitment to provide up to \$4.7 billion and to consider regulatory change and to test proposals in the market against a set of clearly stated objectives. But if you are asking what has been nailed down and been totally prescriptive and unable to change, or mandatory, the RFP has a clearly stated set of objectives.

Senator BIRMINGHAM—Is 98 per cent coverage a commitment or an objective?

Mr Lyons—The government has made a commitment which it has implemented to embark on a process to deliver a national broadband network with certain characteristics, and the way the request for proposals has been framed is to ask people: 'To what extent can you achieve these objectives? You will be judged against those objectives and related criteria, such as value for money and cost to the Commonwealth.'

Senator BIRMINGHAM—Unlikely though it may be, but if every bidder were to put it in and say, ‘We can only actually do 97 per cent with 12 megabits and for the extra one per cent we can get only 10 megabits to them’, then you would negotiate in good faith—

Mr Lyons—You are asking me to speculate on what proposals might contain, whereas the objective of the process is to maximise competitive tension.

Senator BIRMINGHAM—I understand that objective, but in the end every aspect is an objective, whether it is the scope of coverage, the speed, the equity arrangements or the return on investment. Just so that we are all clear, they are all objectives and it is up to the bidders to see how far they can go towards meeting those objectives; the only rolled gold guarantee is \$4.7 billion?

Mr Lyons—Up to. Sorry, we have to keep saying that because it is important.

Ms King—Which may of course, as one of the not negotiable variables, compromise whether indeed there is a commitment as opposed to an aim. As to the monetary component, if A plus B plus C equals D, D being 98 per cent, if A plus B plus C is not able to be varied to make sure that you get D then you are necessarily going to get something potentially less than D in terms of 98 per cent.

Senator BIRMINGHAM—Indeed. I want to jump back to the issue of the 98 per cent coverage that Senator Minchin was pursuing. The OPEL arrangement fell apart because of the misunderstanding of methodologies; is that a fair summary?

Mr Lyons—No.

Senator BIRMINGHAM—No?

Mr Lyons—The government reached a view based on advice from this department that OPEL had failed a condition precedent in the funding agreement.

Senator BIRMINGHAM—That condition precedent was its capacity to deliver to more than 90 per cent or 92 per cent of underserved premises?

Mr Lyons—In accordance with the methodology laid out in the funding agreement.

Senator BIRMINGHAM—In accordance with the methodology laid out in the funding agreement? Was it the government’s methodology or the contractor’s methodology?

Mr Lyons—I take on notice the specifics of the question, but fundamentally it was reaching 92 per cent of underserved premises in accordance with the database of methodology of the department that had been provided to proponents.

Senator BIRMINGHAM—Given that fundamental basis, would there not be greater benefit to the surety of this process if the bidders knew what the government’s methodology and interpretation of 98 per cent coverage actually was rather than the government asking bidders to define a methodology for what 98 per cent coverage may be?

Mr Lyons—All I can say at this stage, because we are in the middle of a live process, is that the RFP includes certain provisions in relation to seeking proponents to identify how they will achieve coverage of 98 per cent and the measurement of that, but it is an ongoing process and I would not like to provide any further comments at this stage.

Ms King—The RFP does provide some guidance on this. It talks about the figure of 98 per cent being taken as the national aggregate of homes and businesses at the end of the roll-out period and that in assessing the information proponents provide in their responses the total number of homes and businesses that will be able to receive services over the NBN will be compared against the total number of Australian homes and businesses. I think there is guidance in the RFP as to how that will be.

Senator BIRMINGHAM—The bidders we had at the table prior to yourselves from Terria—and I cannot remember how much of their evidence you were in the room for—indicated that they have been engaged in some correspondence with the government trying to seek surety or comfort around the methodology that they are applying to the 98 per cent. Is it the government's intention to publicly provide some clarification to all bidders if there is that concern that obviously exists with one bidder?

Mr Lyons—There is an ongoing process in relation to that issue and I would not like to comment in the middle of that process about how the RFP will be managed or what clarification will or will not be provided to proponents.

Senator BIRMINGHAM—If clarification were provided. But my understanding is that the process under the probity rules and so on is as soon as an additional statement is released it should be available for all and sundry to see; is that correct?

Mr Lyons—Yes.

Ms King—Clarifications are provided to proponents.

Senator BIRMINGHAM—Clarifications are provided to proponents?

Ms King—Yes.

Mr Lyons—Sorry, I did not quite understand that.

Senator BIRMINGHAM—On an individual basis?

Ms King—If there are any clarifications made under the RFP, they are made available to proponents—

Senator BIRMINGHAM—To all proponents?

Ms King—Yes. Up until 23 May, which was the date that the pre-qualification requirements were made, any clarifications were published on AusTender, but after that date they are made available to pre-qualified proponents.

Senator BIRMINGHAM—Are you able to tell us how many pre-qualified proponents there are?

Mr Lyons—I would prefer not to. That question goes to the integrity of the process and the competitive tension in the process.

Senator MINCHIN—There is no intention to make public the bidders unless the bidders themselves like Terria say they are bidders? We know there is Telstra and Terria, but you are not at liberty—

Mr Lyons—I am aware, as you are aware, of public statements that have been made, but I do not wish to comment on them.

Senator MINCHIN—You are not at liberty to confirm or deny anything?

Mr Lyons—No.

Senator MINCHIN—That is fair enough.

Senator BIRMINGHAM—Finally, a number of submitters to date have argued that the process for negotiating regulatory frameworks to be applied at the end of this should involve some further opportunity for public comment from interested parties or the like. Is it government's expectation or intention that there will be such an opportunity or will the public submissions process that has already been undertaken be the only opportunity for public input into the regulation?

Mr Lyons—In response to a previous similar question, I indicated that, yes, there had been a public submissions process and that, yes, if there were conditional proposals that required a change to an act of parliament, there would need to be parliamentary scrutiny and debate. But it is a matter for government, in the final event, to determine in the light of the proposals received what other processes there might be.

Senator BIRMINGHAM—Is it expected that, as part of the discussions between the expert panel and the preferred bidder, or between the government and the preferred bidder, that there will be discussions about the regulatory framework to be applied?

Mr Lyons—To the extent that proponents put in proposals for legislative change, they will need to be assessed by the panel and considered by the government. To the extent that there are negotiations with one or more preferred bidders or one or more proponents about their proposals, which is contemplated as being a possibility, you would expect that relevant aspects of their proposals would be subject to those negotiations, including those sorts of issues, if that were relevant to the—

Senator BIRMINGHAM—Including legislative or regulatory issues?

Mr Lyons—Yes.

Senator BIRMINGHAM—They could be subject to discussion following the closing of bids and prior to the finalisation of those regulatory or legislative frameworks?

Mr Lyons—Yes.

Senator NASH—Earlier on we were talking about the two per cent of underserved areas. I think you referred to the Australian Broadband Guarantee as being one of the vehicles that is appropriately assisting in that area and will continue to do so. It is my understanding that funding for that runs out though at the end of 2008-09; is that correct?

Mr Lyons—I might need to bring a departmental officer to the table who manages the Australian Broadband Guarantee program.

Mr Cobcroft—The funding was announced in this year's budget to 2012—four years' funding—so the program does not end this financial year.

Senator NASH—Thank you very much.

CHAIR—Thank you very much one and all.

Proceedings suspended from 1.32 pm to 2.37 pm

COSGRAVE, Mr Michael, Group General Manager, Communications Group, Australian Competition and Consumer Commission

DIMASI, Mr Joe, Executive General Manager, Regulatory Affairs Division, Australian Competition and Consumer Commission

CHAIR—Welcome. Thank you for giving up your time to give evidence before this Senate select committee inquiring into the national broadband network today. I am sure you gentlemen are aware of the usual operating strictures of committees such as this. The evidence provided is in public, unless you wish to make a request for it to be in camera. Your evidence is protected by parliamentary privilege and certain consequences flow from that. Would you care to make a brief opening statement to the committee?

Mr Dimasi—I will make a very brief statement. We appreciate the invitation from the committee to appear today. We of course are willing to assist the committee as best we can. But as the committee I am sure is aware, we do have an advisory role in the national broadband network process. As such, the commissioners and the relevant ACCC staff do have obligations to comply with the government's NBN probity plan. We need to ensure that our participation does not undermine the integrity of the NBN process or our involvement in that process. For that reason, we believe that the information that we can provide will necessarily be information that is currently in the public domain. With that proviso, we are more than happy to try to answer whatever questions you have.

CHAIR—As we proceed, if there are any occasions on which you express a wish to decline to answer a question, the committee will consider the basis upon which you suggest that it is appropriate for you to do so and we will proceed accordingly. Is there anything else you wish to add by way of opening?

Mr Dimasi—Nothing at all. We are happy to move straight to questions.

CHAIR—Thank you, gentlemen. Leading off will be Senator Minchin.

Senator MINCHIN—I am curious about your opening statement. How could you undermine the integrity of the process? What evidence could you give to help understand it? Do you mean anything going to the content of the proposals?

Mr Dimasi—Yes, questions going to the content of proposals or perhaps our approach in assessing those proposals.

Senator MINCHIN—There is nothing else, though?

Mr Cosgrave—No. It would be the identity of proponents and things of that nature. That is predominantly what we were about with that opening statement.

Senator MINCHIN—As you will have noticed, this committee is turning into an effective lobby to achieve structural separation of Telstra, I suspect. I am interested in your statement in

your answers to questions to the committee that you have never said that only a structurally separated ownership arrangement would represent a sustainable public policy outcome. Is that, indeed, your position? The ACCC has never said that separation of the ownership of the network is the only way to achieve sustainable public policy outcomes; is that right?

Mr Dimasi—I think that is right. I think we have never said that full structural separation is the only way to achieve that objective.

Senator MINCHIN—You have also commented on what exists in its place—that is, operational separation. The ACCC has been critical of the way that has worked. Have you ever publicly proposed or do you have proposals to enhance the effectiveness of operational separation? If you are saying that we do not to have go to structural separation but the current operation of separation is not working as well as it should, what is in between?

Mr Dimasi—My recollection is that, when operational separation was being considered, we made some recommendations and some comments to the then Senate committee that was looking at that issue and I think we did make some suggestions as to how you could improve that. So, yes, I think there are ways.

Senator MINCHIN—Are you able to briefly remind us of those now?

Mr Cosgrave—We have previously indicated to the Senate some of the differences between Australia's regime and those that are in place in jurisdictions such as the UK and New Zealand. I think the things we highlighted were differences in governance and oversight arrangements, different accounting requirements and processes, different approaches to enforcement of the obligations and differences in relation to the obligations around equivalence. All of those things broadly—quite a bit of detail sits under each of those—would be examples of things that are differences in the regime that exists in Australia compared with those in other jurisdictions.

Senator MINCHIN—But it could still be described in the vernacular as operational separation as distinct from any other form of separation; it is just more rigorous?

Mr Cosgrave—I guess the arrangements we have in place today are largely behavioural undertakings. Despite being described as operational separation, they are largely behavioural undertakings. There is, of course, a continuum of separation arrangements that could be contemplated. Certainly the separation arrangements that exist in the two jurisdictions I have talked about are much more transparent in terms of a separation between wholesale network access and retail businesses.

Senator MINCHIN—But to come back to the point, it is your evidence, isn't it, that a satisfactory public policy outcome in terms of equivalence of treatment, so to speak, is achievable without structural separation?

Mr Dimasi—I think we can get bogged down in semantics about whether it is operational separation or structural separation, and you could have a number of other titles. The issue really is to what extent you have things like separate business units, transparency of pricing, separate staffing arrangements and incentives for staff to behave in particular ways. We would rather focus on those sorts of issues that are important and matter in getting outcomes. You can then

follow it through in terms of what sort of form of separation you might need to achieve that. You ask whether you could achieve it in a form of operational separation. As Mr Cosgrave has said, you could probably think of it as a continuum. The more of these requirements you strip away, the less effective the regime could become. You could still call it operational separation, I suppose, but it might not be a very effective one. But if you achieve more of those outcomes, you could have a more effective operational separation. That is the basic message we have been trying to suggest.

Mr Cosgrave—That said, I will just add to what Mr Dimasi has said. The Senate might be aware that last year the ACCC had cause to consider an undertaking put in by the predecessor to Terria, who appeared before you today, which was then called FANOC. It was more colloquially known as the G9, but FANOC was the formal legal entity. They put before us a structure that we did ultimately have some difficulty with in terms of the governance arrangements. But in the context of considering that undertaking, which only ever went to a draft decision because they did not pursue it, we did consider the separate structure they had put up. Quote directly from our decision:

The ACCC considers that a vertically separated ownership model could reduce incentives for the access provider to discriminate between downstream users of the access service and therefore facilitate strong and effective competition between access seekers in retail markets. Where such an ownership model is in place, the ACCC considers the need for regulatory oversight of non-price terms and conditions of access in particular could be relatively low.

So, obviously, we are setting out the tension you always have between structural arrangements and behavioural regulation. The ACCC is certainly not putting in evidence that it does not realise the benefits of that model. I think we were just not being pinned to a position that said it was the only option available.

Senator NASH—Was that information around the FANOC proposal made public?

Mr Cosgrave—Yes. It is a public decision that I do not have the date of.

Senator NASH—I will come back to that. Thank you.

Senator MINCHIN—Could you just perhaps put on the record, because I am sure we are all interested, the process that you will be following and the extent of your involvement in this whole NBN tender process, just so that we are clear from you exactly what your role is?

Mr Dimasi—We are clear on it. Basically, our role has been set out in the request for proposal documentation. In particular, we have two functions. One is to provide ongoing advice to the panel that is in place. The other is to provide a written report to the panel. We will be examining the proposals and providing a written report to the panel on the issues that are relevant to us.

Senator MINCHIN—Were you fully consulted before this outline of your role was documented?

Mr Dimasi—We were consulted on our role, yes.

Senator MINCHIN—Was it put to you that you should have a bigger role than in fact has emerged?

Mr Dimasi—No. As I recall, the minister stated publicly that the ACCC would have a role. In the consultation that occurred as the documentation was being drafted, we put our views and I think we were satisfied with the role as it has emerged.

Senator MINCHIN—Is it somewhat unusual for the ACCC to be involved in an advisory capacity in a public tender process of this kind? Is there a precedent for that?

Mr Dimasi—I am not sure whether there has been a precedent for a national broadband—

Senator MINCHIN—Other forms of infrastructure or structural investment?

Mr Dimasi—Yes. In a sense, it is not necessarily that unusual. For example, if my recollection is right—and I think it is—in the gas laws, for example, in regulation, there are proposals for tender approaches to regulating networks where the ACCC is involved in the assessment of those tenders. It is not the same as this, I have to say; there are differences. But as to the concept of our involvement in those, tendering for the market, if you like, as economists would describe it, that sort of thing does happen.

Mr Cosgrave—It is also not unusual for us to have a formal advisory role in relation to the communications space. A good example of that would be the retail price controls that pertain to Telstra. I think on the last two or three occasions that the government has considered them they have commissioned a formal public report from the ACCC.

Senator MINCHIN—Is it intended that your report to the panel will be made public at the time of its delivery?

Mr Dimasi—Our report is to the panel. I guess it will be up to the panel then as to what they do with it.

Senator MINCHIN—You did not make it a condition of your involvement that your report should be made public so that you are not involved in some secretive process there?

Mr Dimasi—We are not involved in any secretive process and we certainly would not have any concerns about our work being made public. But it is not unusual for us to provide reports to the government that the government then releases. That is a perfectly normal process in a number of our functions.

Senator MINCHIN—So you had no objection to the panel publishing your report?

Mr Dimasi—I cannot see why we would. Naturally the report will be dealing with highly confidential matters, so there are all those sorts of issues to be resolved. But subject to all of those things, we certainly would generally not object to our views being made public.

Mr Cosgrave—Although there may be issues about timing as well, of course.

Senator MINCHIN—Presumably your advice is simply factual, is it? It is really you providing your knowledge of the current regulatory regime and how it will interact with the proposals that you are being asked to consider?

Mr Dimasi—It could be a little more extensive than that. For example, I draw your attention to clause 10.4.2 of the request for proposals. It states that the ACCC will provide the panel with ongoing advice on proposals, including advice on issues such as 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. That, I think, gives us scope to certainly draw on the information we have and on our expertise, but the implications of some of those proposals on competition and on pricing are a legitimate area for us to address as we see in this clause.

Senator MINCHIN—Do you envisage that, in giving effect to this national broadband network, significant regulatory change is going to be required?

Mr Dimasi—That is hard to anticipate. We have not seen the proposals. It will very much depend on what the proposals come up with and, until we see those, it is hard for us to speculate.

Senator NASH—At what point then are you giving your advice? Are you giving your advice having seen the proposals?

Mr Dimasi—Absolutely.

Senator NASH—But you have not seen them yet.

Mr Dimasi—The proposals have not been submitted yet.

Mr Cosgrave—They have not been submitted yet.

Mr Dimasi—Once the proposals have been submitted, we will see them and we will write our report and provide our advice on that basis. I should add that we are providing ongoing advice to the panel, for example, when they might ask us general questions of the nature you were suggesting, Senator Minchin—questions such as how the current regime works. It would be factual issues such as that. On those sorts of issues we can provide advice on now. But as to advice on the proposals, obviously we will have to wait until they come in before we can do that.

Senator MINCHIN—Sorry to be technical about it, but do you get the proposals as soon as they are lodged with the expert panel or not until 26 November, which is the closing date?

Mr Cosgrave—I think 10.4.4 just says that they will be provided to us as soon as practicable. One would imagine that ‘as soon as practicable’ might well be as soon as they are lodged.

Senator MINCHIN—You do not know that. I think the panel has been given eight weeks to give the government a preferred bidder. If your processes have to be accommodated in that eight weeks, it is going to make it more difficult, is it not?

Mr Cosgrave—We are not expecting a long Christmas holiday.

Senator MINCHIN—Presumably it could take you a number of weeks to go through all of these proposals in detail and to provide written advice on them.

Mr Dimasi—I would imagine so.

Senator BIRMINGHAM—And to provide for consideration in those eight weeks; you might actually need to take a Christmas holiday, if you do not—

Mr Dimasi—No. I can assure you that Christmas has been cancelled for the relevant officers that will be working on this.

Senator MINCHIN—Was your advice sought on whether eight weeks from the date of close of tender to announcement was realistic?

Mr Dimasi—Our advice related mainly to our involvement and the time that we might need rather than the process.

Senator MINCHIN—So, you were asked how long you might take and then—

Mr Dimasi—And obviously our advice is that the longer we have the greater attention we can give to these proposals, but we recognise the need for a timely decision as well. All those things have to be balanced.

Senator MINCHIN—I would have thought you would want to get these proposals the minute they are lodged?

Mr Dimasi—Absolutely. We want to get them as soon as possible and get into the process of assessing them as soon as possible, yes.

Senator MINCHIN—Have you formally asked to be in receipt of these proposals as soon as they are lodged?

Mr Cosgrave—I do not think we need to because—

Senator MINCHIN—You do not know whether you are going to get them before the 26th or not.

Mr Cosgrave—I do not know whether any will be lodged before the 26th.

Senator NASH—I think Senator Minchin is saying that, if they are lodged before then, wouldn't it be suitable and appropriate for you to have them as soon as they are lodged? Would it not be right to formally request that that happen?

Mr Dimasi—As you can imagine, we are in constant discussion with the department, and the issue of how soon we will get the proposals will be an issue that we will continue to discuss with them.

Senator MINCHIN—Doing a proper and detailed assessment of these proposals in order for you to provide written advice over Christmas within this eight-week time frame that the government has allowed seems to me rather ambitious.

Mr Dimasi—As we have said, our staff are expecting some long hours over this period, yes.

Senator NASH—I will just follow on from that. We are probably drilling down into a bit of detail here, but I think this is quite important given the length of time that the process has been extended and allowed now to run. It is not a concurrent eight-week period that you will have. You will have only a portion of that eight-week period in which to determine your views and your advice to the panel and for them to then consider it before any announcement is made. In reality, you might have four weeks at best. One would hope that the panel and resulting government decision will take a few weeks subsequent to getting your advice. Do you really think you can assess those proposals in a few weeks, given the detail and the change in nature of what that is going to bring about?

Mr Dimasi—It very much depends on the proposals that come up. We are not starting this process as cleanskins. We do have a lot of information and a lot of knowledge about the issues, so we anticipate that we will be able to provide a report within the time that has been given to us and we are working to do that.

Senator NASH—Why would Mr Willett, the commissioner responsible for telecommunications, not be here today for the ACCC?

Senator MINCHIN—Is he having an early Christmas holiday?

Mr Dimasi—No. He is getting ready to work over Christmas.

Senator NASH—I am sorry, it is just that I would expect him to be here; he would be the most appropriate person.

Mr Dimasi—Mr Willett is the chairman of the communications committee. Mr Cosgrove and I are the senior staff responsible for communications matters. We hope we can do justice to your questions, but we will see how we go.

Senator NASH—But you did not really answer my question, though. Is there any particular reason why the one who is directly involved in telecommunications would not be here?

Mr Dimasi—When you say ‘directly involved’, all of our commissioners are involved. Mr Willett chairs the communications committee. All of the commissioners are involved.

Senator NASH—I will come back to other questions later.

Senator IAN MACDONALD—We heard a lot of evidence yesterday particularly about there being a lot of difficulties in enforcing and investigating the current regulatory regime. The difficulty of legislation or regulations depends on how much of a fighter the various parties to any issue are. Also, there is a suggestion that some of the regulations you are called upon to enforce or interpret are imprecise at best. Are you conscious of that?

Mr Dimasi—We certainly understand the legislation and the regulations we administer and there are debates from time to time about parts of it. But that is not unusual. In every area of regulation we are involved in there is that sort of debate.

Senator IAN MACDONALD—I do not want to verbal those who gave evidence—and there is a range of people and written submissions—but many of them are saying, ‘Oh, look, it’s not even worth taking on Telstra’, in this case, ‘because it will take years and the ACCC is overworked and snowed under and it is always difficult.’ Has that issue been raised with you before?

Mr Dimasi—That general debate and that general issue have been around for a while. Yes, our officers work very hard, but I do not think we are snowed under; we do not believe that. We do face a lot of litigation at the moment, and from Telstra in particular. That is out in the public arena. When you are involved in litigation and you go through court processes, that can be a lengthy process. That is true whether we are talking about telecommunications, gas, electricity or any other regulatory areas that we are involved in. That is the nature of the beast.

Senator IAN MACDONALD—I am leading into a dorothy-dixer here, so be nice to me. You would anticipate that, under this new arrangement, your work is going to increase exponentially? Is that right?

Mr Dimasi—It very much depends on the outcome. It is a bit hard for us to know whether it will or not. It depends very much on the sort of potential changes that could be made to the regulatory arrangements. It could depend very much on the issues of structural or operational separation that Senator Minchin raised. As Mr Cosgrove has indicated, the greater the effectiveness of the regime of separation perhaps the less need there is for detailed intensive regulation as a trade-off potentially between those two things. It depends on lots of things as to whether our work program might increase or not increase.

Senator IAN MACDONALD—Would you usually and, in this instance, do you expect to be intimately involved in drafting the regulation and in alerting the drafter to the pitfalls and the difficulties with the evidentiary problems that might be around?

Mr Dimasi—We are not normally involved in drafting. That of course is the job of the policy departments. But we are generally consulted extensively, and we would expect to be consulted, on any changes. We would hope to give them our advice on potential pitfalls or problem areas that might arise. We certainly would expect to be consulted and to give advice on those things.

Senator IAN MACDONALD—I appreciate you say that what you will have to do will depend upon what eventuates. Have you prepared a notification to the government for further resources? Is that sitting in a bottom drawer just in case you might need it?

Mr Dimasi—We are very familiar with the NPP process, as Senator Minchin in his former capacity would be well aware. I can assure you that we will not hesitate to activate those processes if we think we need more resources as a result of new or more complex functions that might come about.

Senator IAN MACDONALD—I know this would not happen in Senator Minchin's time, but I can be sure that all finance ministers generally will say, 'Oh, the efficiency dividend and all that. Don't bother about Christmas next year as well as this year and get it done.' This could be a huge influx in your workload.

Mr Dimasi—We just do not know. Quite frankly, we will be making all those judgments as we look at the proposals and make an assessment as to the outcomes. We believe we will be able to make that call once we have that information. If we think there is need for more resources, we will say so.

Senator LUDLAM—You mentioned earlier being involved in quite a degree of litigation with Telstra and other parties. Relative to other sectors that the ACCC has oversight of how large is the burden of litigation for the telecommunications sector?

Mr Dimasi—Putting aside our enforcement activities—I am talking here about only our so-called regulatory activities where we regulate the infrastructure areas, such as energy through the AER or transport, et cetera—telecommunications is our area of greatest litigation, yes.

Senator LUDLAM—More than everything else combined?

Mr Cosgrave—Yes. It is significantly larger.

Senator LUDLAM—Do you have any idea as to why that would be? Is that significantly just Telstra having a go at every single decision that—

Mr Cosgrave—It has been significantly Telstra in relation to decisions over the fixed network and particularly in relation to arbitrations and the arbitral role that we have where each of the decisions in relation to the price of the fixed network have been administratively reviewed. There have also been multiple appeals on the merits of our decisions to the Australian Competition Tribunal, although I should say that they have been by a variety of parties. In terms of pricing they have been largely by Telstra. There have been others by mobile operators, and there have been other appeals launched by access seekers, including one that is before the Australian Competition Tribunal currently.

Senator LUDLAM—Do you see it as part of your role or your mandate in terms of your involvement in this process as it is unfolding now and post 26 November to make recommendations on how you might spend less of your time fighting proponents through the courts?

Mr Dimasi—We will be assessing the proposals as they come. But I guess in looking at any potential changes that the government might consider and that might come about as a result of the proposals, in our advice we would be looking obviously to make it as least litigious as possible but within the bounds of the objectives of the legislation.

Mr Cosgrave—I think those proponents who have outed themselves have already indicated that they are likely to put up legislative or regulatory changes. Our role specifically contemplates advice on proposed legislative or regulatory changes.

Senator LUDLAM—Can I just skip back further? I am still not clear on whether you have a fixed deadline post 26 November or whenever you are given receipt of the tender documents. Do you have a fixed deadline to provide your advice to the minister or is it just as soon as you are able to do so?

Mr Cosgrave—It is not totally fixed, but it is clearly within the period contemplated for the expert panel process. But, of course, in part the reason that it is not fixed is that we will need to look at the number and complexity of the proposals.

Senator LUDLAM—Your work or your interface with the department or the minister's office is ongoing, so you are not sitting around waiting until 26 November, are you?

Mr Dimasi—That is correct.

Senator LUDLAM—Can you give any sort of broad description of what your work involves in the meantime?

Mr Dimasi—Our work is with the department and the panel. Our work is basically to answer their questions and provide briefings to them on issues around the existing framework and how that might operate. A number of requests have been asked of us.

Senator LUDLAM—I suppose most of the discussion in the last few days has focused on the question of access from different corporate players who might be seeking to get on to the network. How much of your time or mandate concerns broader issues of access from consumers generally? Do you have any role, I suppose, in—

Mr Dimasi—The criterion is the long-term interests of end users. Ultimately all of our concern is with having a framework here that provides the best outcome, if I can put it that way, for consumers. On the issue of access, because we are talking about a bottleneck facility with natural monopolistic characteristics it is about ensuring that it is not just one party that has access. There are a number of parties and you need competition in the service consumers. That is how our access arises here.

Senator LUDLAM—But I would not see that as being the only way that you can protect the interests of people who are using broadband services. We heard from deaf advocacy groups yesterday. There also would be people with different language needs and so on.

Mr Cosgrave—But we are talking here largely around access regulation, and access typically is sought by carriage service providers who then provide retail services directly.

Senator LUDLAM—I guess that was what I was trying to get to. You do not see your role directly as looking after the interests of end users rather than intermediaries who might be serving them?

Mr Dimasi—I would not put it that way. We very much see ourselves as looking after the interests of end users. The question is how you do that.

Senator LUDLAM—And obviously looking after access for players is one way of doing that.

Mr Dimasi—Through access seekers, yes.

Senator LUDLAM—That is one way of doing that.

Mr Dimasi—Yes.

Senator LUDLAM—That is one domain of fulfilling that function.

Mr Dimasi—Yes.

Senator LUDLAM—But do you see there being others?

Mr Dimasi—I am not sure that I understand what ‘others’ could be.

Senator LUDLAM—One way of looking after end users, as it has been defined, is through ensuring that there is proper competition and there are not monopolistic practices and so on.

Mr Dimasi—That is correct.

Senator LUDLAM—Another way concerns where somebody is being ripped off directly by a service provider. I suppose I am trying to work out whether, with your role in consumer protection, you are working directly on that end user.

Mr Dimasi—Part V of the Trade Practices Act deals with issues of how businesses interact with consumers, ensuring that they provide the services they say they provide, that they do not mislead, that they do not falsely advertise and a whole range of things, which are all relevant; they will all come into play. The access regulations or the access schemes are one part, part V, of the legislation. Indeed, for that matter, part IV, which deals with the misuse of market power, price fixing and so on, is relevant as well. Those provisions of the act do not go away; they continue to operate as well.

Mr Cosgrave—We have been very active in that sphere over a number of years, we would think, over a variety of issues. Just to pick a few: broadband speed, zero-dollar handsets, mobile premium services most recently, and slamming or unauthorised transfer, when that was rampant in the industry a few years ago. We think we have played a fairly active role in the consumer protection space.

Senator LUDLAM—For example, I note the existence of the Australian Communications’ Consumer Action network, which is something that we do not know a great deal about. Have you had a role in advising or informing that network?

Mr Cosgrave—No, because it is in the process, as I understand it, of being formed. We were involved in some initial deliberations and I think public discussions that led to the formation of that network.

CHAIR—Gentlemen, before I ask Senator Birmingham to proceed with questions, do you think the government’s stated objective of 98 per cent is achievable? If it is not, on what basis do you suggest that?

Mr Dimasi—That is not an issue that we can give any advice on. We are concerned with competition questions and with the reach—

CHAIR—But, Mr Dimasi—

Mr Dimasi—Other agencies I think would be better placed than us to advise you about the technical possibilities. That is an issue for the government to deal with.

CHAIR—Maybe, but you have also said that you focus on consumers.

Mr Dimasi—Yes.

CHAIR—It may well be that competition is the way to deliver a 98 per cent target. Indeed, if a 98 per cent target is achievable, competition may be the passport to achieving it. What is your view on that?

Mr Dimasi—We will wait and see what the proposals say and what their proposed reach is, and I guess we will see then. The people who are going to build these networks will be much better placed than us to know where they can and cannot achieve. Essentially these are commercial and technical questions and not competition questions, and we are not the people best placed to deal with them.

CHAIR—Maybe or maybe not. But part of the difficulty is that we are all waiting to see. We heard before the lunch break that the government has not had the department advise it to the who, what, when, why and how of a 98 per cent target. So, we are struggling to work out whether indeed 98 per cent is a commitment, a guarantee, or something that may well transpire to be ‘near enough is good enough’. Clearly, we hope the latter is not the case. In your role of advising the panel and providing ongoing advice in respect of proposals, can you flesh that out a bit more in this context: before lunch we heard from the department about the prospect of selection of a tenderer who might have a precondition in their bid requiring legislative change? So, it is at least a possibility that, given that legislation requires parliamentary passage, firstly, not only will there be yet another delay, pending Senator Minchin’s questioning then about the signing of contracts, but that presupposes that parliament would pass legislation to fulfil that precondition. What are you able to say about your advice to the panel in that respect, given that in that scenario there is at least a prospect that such a tenderer could be selected? Then, if relevant legislation does not go through, we are back to square one in respect of the tender process.

Mr Dimasi—I guess that is an issue that the panel will have to consider and deal with.

CHAIR—But you are advising the panel?

Mr Dimasi—Yes. It would depend very much on the nature of the proposal that was put up and the nature of the legislative changes proposed. We would be seeking to point out any implications that we thought were appropriate from our perspective and from where we sit of the proposed changes and what they might mean in terms of 10.4, I think it was, which I quoted before, competition pricing and so on. That is how we would look at it. The panel would then

have to make the assessment of the significance of the request, and the issues that you raise, in terms of timing, parliamentary approval and so on are a job for the panel, I am afraid.

CHAIR—Reading from 1.5.39, the request for proposals also refers to the extent that legislative and/or regulatory changes are required in relation to the development and the operation of the NBN these changes will be limited to those necessary to directly facilitate investment in the NBN and will not jeopardise the Commonwealth's other objectives, including open access and the achievement of interception, and it goes on.

Mr Dimasi—Yes.

CHAIR—In light of those criteria do you have anything further to add to the answer you have just given?

Mr Dimasi—No, I do not. I think what you have said speaks for itself. Hopefully the panel will need to consider that.

CHAIR—Would you not be building that into your advice to the panel?

Mr Dimasi—We would. I go back to 10.4.2, which I think gives us some pretty good guidance. The guidance goes to implications and advice on issues such as wholesale access, services, prices, likely impact on pricing competition, and long-term interests of end users in the communications sector. That gives the scope to deal with the issues that you have raised.

CHAIR—Do you have views as to priorities and which would come first in terms of all of those factors, both in 10.4.2 and 1.5.39? I am sorry; it is fine for me, as I have a document in front of me.

Mr Dimasi—As to priorities, at the end of the day we are guided by the objectives of the legislation that we operate under. The long-term interest of end users ultimately is what guides our approach, but I do not think the other things are necessarily inconsistent with that. It very much depends on how the proponents interpret it and what they put together.

CHAIR—Indeed. Thank you.

Senator BIRMINGHAM—Gentlemen, thank you for your time today. What evaluation of the submissions received to date has been undertaken?

Mr Cosgrave—The regulatory submissions?

Senator BIRMINGHAM—Yes.

Mr Cosgrave—There has been internal consideration of what is contained in those submissions. I think that process, which was a public process, was being run separately, as I understood it, from the broader NBN process, so no further consideration has taken place. Again, we will wait to see what regulatory amendments are sought in proposals.

Senator BIRMINGHAM—And internal consideration by the ACCC?

Mr Cosgrave—Yes.

Senator BIRMINGHAM—In what nature has that internal consideration taken place?

Mr Cosgrave—Obviously, it is of interest to us both in our role as advisers on NBN but more generally as the agency administering the relevant provisions of the Trade Practices Act to look at various parties' proposals as to what regulatory arrangements they have in mind.

Senator BIRMINGHAM—Let me put it this way: what is the nature that your internal consideration has taken? Have you simply opened the website that they are on and looked at some of the submissions or is it preparation of summary assessments of what they are?

Mr Cosgrave—Preparation of precis and referral for information to our communications committee. They are the processes I am talking about.

Mr Dimasi—Basically, it is preparing ourselves for the task of assessing the proposals.

Senator BIRMINGHAM—Those 100-plus submitters can have some confidence that their work or their concepts have received some consideration and will be referred to in the further consideration that the ACCC will be undertaking?

Mr Cosgrave—Absolutely.

Senator BIRMINGHAM—What do you consider to be the duration of the evaluation process?

Mr Cosgrave—Whose evaluation process?

Senator BIRMINGHAM—I am referring to 10.4.1, that the Commonwealth will draw on the expertise of the ACCC during the evaluation process.

Mr Dimasi—As we said earlier, we will be putting together a written report for the panel, which we will provide to the panel before it is due to report; otherwise it would not be much use. That will be, I guess, potentially the end of the matter, although we are always available if the panel wants to come back to us for clarification and further comment as it goes through its process; of course, we will be available to do that.

Senator BIRMINGHAM—At this stage you are not aware whether there is a role for the ACCC in the negotiation process that will take place with a preferred bidder or bidders subsequent to that evaluation process?

Mr Dimasi—No. I would suggest that the ACCC is unlikely to get involved in negotiations. The panel or the government will need to deal with that. But it may well be that our advice and input is sought on particular issues as that process gets underway. In the normal course of events we potentially would always be able to help, but we would not be negotiating any of those outcomes.

Senator BIRMINGHAM—I will return to where Senator Ludlam was going with the litigation issues before just to clarify something there. Obviously, in your enforcement procedures the ACCC is usually the initiator of legislation.

Mr Dimasi—Yes.

Senator BIRMINGHAM—Would it be fair to say that, where the ACCC is the respondent to litigation, telco is the No. 1 sector?

Mr Dimasi—That is correct; it is.

Senator BIRMINGHAM—The ACCC chairman, in Senate estimates just a few months ago, described the current communications regime as ‘fundamentally unduly complex’ and said that there are ‘unduly convoluted processes involved to implement any corrective action if a problem is identified’.

Mr Dimasi—I am sorry, but he was talking about the operational separation regime that applies within the regime. He was being very specific about the operational separation arrangements. I remember the answer very well. In fact, the question was asked by Senator Lundy, as I recall, and it was in answer to that question on operational separation.

Senator LUDLAM—Are they the types of complexities, though, that you would hope may be addressed in broader reforms that could be undertaken subsequent to any reforms that are necessitated by the NBN process?

Mr Dimasi—Certainly in the operational separation area we would hope so.

Senator LUDLAM—Finally, in understanding or assessing the FANOC proposal, which has been discussed a couple of times, you publicly released your assessment and draft position of the ACCC. Is there a reason why the ACCC has not sought to have that same public release approach applied to your assessment of proposals under the NBN?

Mr Dimasi—The assessment of FANOC’s undertaking to us, of course, was public, as are all our assessments of our regulatory decisions; they are always made public. That is the normal course of events and it would be, I think, a very strange regulatory scheme if it were not made public. Our assessment of the NBN proposal is quite different. That is a report that we have been asked to do. It is more akin to reports that governments often ask us to do in different things. It is not unusual for governments to ask us to do reports that are to government or to some other body and which are released by government. That has happened in the past and this is perfectly consistent with that. They are very different roles.

Mr Cosgrave—It is the difference between a statutory regulatory role and an advisory role to government. With a statutory regulatory role clearly there is usually a legislative requirement for publication of the decision. Where you are performing an advisory role to government, generally the government will tend to reserve to itself the decision as to what to do with your advice to it.

Senator NASH—Can I just jump in there on that issue?

Mr Cosgrave—Yes.

Senator NASH—I understand that Telstra came to you, I think, with a fibre to the node proposal for metropolitan. Did that fall under your statutory role? As I understand it, none of that was made public, was it?

Mr Dimasi—There were some discussions several years back, as I recall, which could have led to a proposal being put to us but that never eventuated. Again, it is not unusual that parties that might put an undertaking to us might come and talk to us in the preparation of that undertaking, for example. Of course, once they formally submit an undertaking it will be public and we will go through a public process. It never reached that stage.

Senator NASH—Whereas you are saying the FANOC proposal had reached that stage?

Mr Dimasi—It did; that is right.

Senator NASH—There was no public discussion before it got to that proposal stage—the FANOC proposal?

Mr Dimasi—No. I think obviously—

Mr Cosgrave—No discussion with FANOC?

Senator NASH—I am sorry; no public—

Mr Dimasi—No. What would have happened there is that FANOC would have come and talked to us pre lodging their undertaking to us.

Mr Cosgrave—In fact, they did.

Mr Dimasi—They did, because that is normal.

Senator NASH—And there was no public commentary at that stage?

Mr Dimasi—No. But once their proposal is lodged we release it publicly, we seek submissions and we go through a public process where people can put their views to us. We assess it in draft form and then it gets passed from draft form to its final form.

Mr Cosgrave—Just to explain in a little more detail as to why that would be the case.

Senator NASH—Just before we do that, can I ask: why would an organisation have discussions with you before they put in a proposal? Why wouldn't they just put in a proposal that they had worked up for you?

Mr Cosgrave—Which is what I was just going to get on to. Our decisions in relation to undertakings can only be of two sorts. We can either accept an undertaking or we can reject it. We cannot vary it; the legislation does not allow for that.

Senator NASH—So, why would somebody come and talk to you, other than to get a sense of whether you were or were not going to reject it before they bothered putting in a proposal?

Mr Cosgrave—Because they want to get a sense, subject to a public consultation process, whether from the regulator's perspective something presents an obvious red light.

Senator NASH—So, basically, they are not going to proceed if you say to them, 'Hey, this isn't going to work, guys; don't waste your time.'

Mr Dimasi—They have the option of putting something that might be more favourably or better received, I suppose. It is up to them.

Senator NASH—Sorry to jump in.

Senator BIRMINGHAM—That was very helpful. Do you expect a similar process to be undertaken with the ultimate successful bidder for the network in terms of their regulatory undertakings or otherwise and for public commentary to be available on those?

Mr Dimasi—It very much depends on the proposal that is put up whether that would happen. It is just too hard for us to say at the moment.

Senator BIRMINGHAM—And that is because the regulation itself is all up for review simultaneously?

Mr Dimasi—Exactly; that is right. That is an option, but there might be other options as well.

Mr Cosgrave—We are able to seek clarifications, but that is more from our perspective. If there is anything in a proposal that we see that we are unclear about there is a clause in the RFP that specifically allows us to do that. But that is turned around a little from the process you were describing. There is no obligation on a proponent to come to us and discuss any regulatory amendments it seeks.

Senator BIRMINGHAM—There is no obligation, but there may be at the end? It depends entirely on what regulatory framework the government decides on and what undertakings are then required by the proponent?

Mr Dimasi—Yes, that is right. For example, just speculating, a proponent might say, 'Here's our proposal and our proposal is that we go through an undertaking process to be assessed by the ACCC.' I am not suggesting that that is what anyone will put up. But, for example, if they did that, we of course would go through the normal process of assessing the undertaking. It very much depends on what the proponents put up.

Senator MINCHIN—I think Simon was referring to the end game.

Mr Dimasi—The end game; that is as I understand that, yes.

Senator MINCHIN—But have proponents had the opportunity to discuss their draft proposals with you prior to lodgement with the department and, if so, have any availed themselves of that opportunity?

Mr Dimasi—There have been bilateral discussions with potential proponents where they have talked to us about regulatory approaches. They have not necessarily put their draft proposals to us but have rather sought our views or questions—

Mr Cosgrave—And issues of clarification—

Mr Dimasi—Clarifying, yes.

Mr Cosgrave—in those bilaterals with the department, some of which we have been present at.

Senator BIRMINGHAM—Has the ACCC worked in an area before where regulatory frameworks are being written and drafted in tandem with the negotiation of a major commercial contract?

Mr Dimasi—Probably not. I cannot think of an example. I think in an earlier answer to Senator Minchin I mentioned that there are provisions in other parts of other legislation that we are involved in—for example, in gas laws—where the regulatory arrangements, if you like, the access arrangements, can be dealt with through a tender process. There are provisions for that. There have been attempts to use that in the past, as I recall. But I could not say it is an exact parallel to this. This is a pretty significant proposal.

CHAIR—Before I invite Senator Nash to ask a further question or two, in response to Senator Birmingham's question a couple of questions ago I think, Mr Dimasi, you said that all the regulations are 'in the process of'. You used an all-encompassing—

Mr Dimasi—If I did, I was very loose with my language.

CHAIR—Yes. I was just going to seek clarification.

Mr Dimasi—No. I think, as the words of the proposal indicate, proponents can suggest amendments or changes, but they are constrained by the quote that you also read out.

CHAIR—Precisely.

Mr Dimasi—I would not for a minute suggest that all the regulation is up for grabs or up for changes; far from it. We will have to see what is proposed, but that is not how I understood it, either.

CHAIR—So, as per the request for proposals—

Mr Dimasi—As per the request for proposals.

CHAIR—they are limited to investment in the national broadband network, et cetera?

Mr Dimasi—That is right.

Senator NASH—This just really follows on from that, I guess. I am a little intrigued by the process by which we are going to form regulations surrounding this new environment, if you like. As I understand it, the tenderers will put in their proposals and with that will be their requirements for regulation, I understand, in order for them to operate in such a way. But, really, it is a bit like letting a fox into the chook house, isn't it?

Mr Dimasi—I think that is an issue for government rather than for us. I can understand that proponents who are about to spend a lot of money want to make sure that they understand and that they have certainty around the regulatory arrangements; that I can understand. But beyond that it is an issue for government to deal with, not for the regulator.

Senator NASH—That leads me to my next question. It seems there are two parallel necessities for regulation, if you like. One is so that whoever the successful bidder is can actually operate the network. The other is to protect the consumer and ensure that there is competition. As I think one of you referred to before, it is going to be a natural monopoly, so the regulation has to be there. So while, on the one hand, we have this process where the bidders are putting in their submissions for what they would like to see out of regulation, obviously that is going to suit their environment. Concurrently, in determining the regulatory environment that is going to deliver competition and protect the end user, where is that coming from? Apart from, as I think Senator Birmingham referred to earlier, the submissions—and obviously there has been a big process for people to put them in, and you are going to, I guess, advise government on that—I am very concerned that at this stage it looks very weighted from what the proponents are going to need to operate their network. The committee has not heard a lot about how we can be assured that there will be a regulatory environment in place to ensure that there is that competition and that access so that the end user does not end up being disadvantaged.

Mr Dimasi—Again I think that is a question for government. We will certainly be there to enforce the regulations.

Senator NASH—That is an easy answer to give, but you have spent some time telling us how you are the ones that will be advising government on the regulation. You are the ones, indeed, that are the policemen for this thing, so to just say that it is a matter for government I think really is a bit of a fob off. If it is something you cannot comment on, I appreciate that, but to just say it is a matter for government, when you have been at pains to say how much you will be involved in this process, I think is a bit light.

CHAIR—Coupled with almost every witness having attested to competition being key.

Mr Dimasi—As I said, we will certainly be providing advice to government and that includes proposals for any changes; we are not excluded from providing advice. But, at the end of the day, the regulatory regime is a matter for government and the parliament.

Senator NASH—I am just trying to get my head around the process for all of this. What is the process then if one of the proponents comes back with their vision for what the regulation should be and it is not suitable? What happens then? We have the eight-week period. Say that you do not get to see them until the 26th, but you finally get to see them and you go, 'Hang on, when

measured against the other criteria of competition and access, this doesn't stack up', what happens then?

Mr Dimasi—If that is our view, we will be saying that to the panel and the panel will then to have decide how they assess those proposals.

Senator NASH—So is it possible—this is just hypothetical, of course, but I think it is interesting for the committee to consider hypotheticals—for none of the bids to contain a regulatory environment that could be approved by the ACCC or, indeed, recommended and they could all fall over?

Mr Dimasi—You can make all sorts of hypotheses about all sorts of things. Until we see it, I do not know.

Senator NASH—I understand that. But I am trying to ascertain if at that point you say, 'No, this regulatory environment you are proposing is not suitable' will it then go back to discussions with the proponents in trying to get some kind of accommodation? Is that a potential part of the process?

Mr Dimasi—That is not our call. The panel and the department will have to deal with that.

Senator NASH—Do you think in terms of getting the right regulation that should happen?

Mr Dimasi—At the end of the day, I think we all want to get the best outcome and an outcome that looks after the long-term interest of consumers. That is the objective surely and that is the objective that we will be pursuing in giving our advice. But the process by which that is done is not for us, so I cannot help you with that.

Senator NASH—Have you been advised how much weighting, if you like, is going to go to the regulatory aspects of the bids? A whole lot of things will be taken into consideration by government to determine what is the best bid, and there will be a whole range of categories, I am sure, that they will have to measure up and stack up and then eventually come up with the most appropriate bid. But have they given you any indication of where, I guess, in that priority of those criteria the regulatory environment will fall?

Mr Dimasi—No, we have not. Our understanding of course is that the regulatory environment is very important and we have no reason to believe otherwise. But it is the panel's job to trade off those requirements and the objectives. That is what they are set up to do, so they will need to do that.

Senator NASH—Finally, at the point where a decision is being made about changing the regulatory environment, do you think the industry should have the opportunity to comment, given that it will affect not just the proponent or the winning bidder but the industry as a whole? If changes are going to be made to the regulations should they have an opportunity to comment and have some input?

Mr Dimasi—That is a very good question for the panel to deal with.

Senator NASH—I hope the panel is listening.

CHAIR—Thank you very much, gentlemen, for your informative input today.

Committee adjourned at 3.43 pm