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# Official Committee Hansard

## SENATE

ENVIRONMENT, COMMUNICATIONS AND THE ARTS  
LEGISLATION COMMITTEE

**Reference: Telecommunications Legislation Amendment (National Broadband  
Network Measures No. 1) Bill 2009**

TUESDAY, 4 AUGUST 2009

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**SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS**

**LEGISLATION COMMITTEE**

**Tuesday, 4 August 2009**

**Members:** Senator McEwen (*Chair*), Senator Birmingham (*Deputy Chair*), Senators Ludlam, Lundy, Troeth and Wortley

**Participating members:** Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Sterle, Trood, Williams and Xenophon

**Senators in attendance:** Senators Fisher, Lundy, McEwen, Minchin, Troeth and Wortley

**Terms of reference for the inquiry:**

To inquire into and report on: Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009

**WITNESSES**

<b>BEAN, Ms Trudi, Senior Executive Lawyer, Infrastructure and DE Services, Department of Broadband, Communications and the Digital Economy .....</b>	<b>35</b>
<b>BOOTH, Mr Geoff, Group Managing Director, NBN Engagement, Telstra Corporation Ltd .....</b>	<b>24</b>
<b>ENGLUND, Mr Anthony, Policy Manager, Integral Energy .....</b>	<b>2</b>
<b>GALLAGHER, Mr William, General Counsel, Public Policy and Communications, Telstra Corporation Ltd .....</b>	<b>24</b>
<b>HAVYATT, Mr David, Manager, Regulatory and Corporate Affairs, Unwired Australia Pty Ltd .....</b>	<b>30</b>
<b>HUGHES, Mr Brett, Director, Policy, Australasian Railway Association.....</b>	<b>18</b>
<b>MARKUS, Mr Don, General Counsel, Department of Broadband, Communications and the Digital Economy .....</b>	<b>35</b>
<b>MASON, Mr Philip, Assistant Secretary, NBN and Fibre Roll-out Regulation Branch, Department of Broadband, Communications and the Digital Economy .....</b>	<b>35</b>
<b>PICCININ, Mr Claude, Deputy Executive Director, Water Services Association of Australia.....</b>	<b>7</b>
<b>SKENE, Mr Daryl, Asset Information Manager, Integral Energy.....</b>	<b>2</b>
<b>SPENCE, Ms Pip, First Assistant Secretary, Networks Policy and Regulation, Department of Broadband, Communications and the Digital Economy .....</b>	<b>35</b>



**Committee met at 9.55 am**

**CHAIR (Senator McEwen)**—I declare open this public hearing of the Senate Environment, Communications and the Arts Legislation Committee in relation to its inquiry into the Telecommunications Legislation Amendment (National Broadband Network Measures No. 1) Bill 2009. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the grounds upon which the objection is to be taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time.

[9.56 am]

**ENGLUND, Mr Anthony, Policy Manager, Integral Energy**

**SKENE, Mr Daryl, Asset Information Manager, Integral Energy**

**CHAIR**—Welcome. The committee has received your submission, as submission No. 8. Do you wish to make any amendments or alterations to your submission?

**Mr Englund**—No, thanks.

**CHAIR**—Do you wish to make a brief opening statement before we go to questions?

**Mr Englund**—Sure. I will not rehearse the submission. I have three points to make. First of all, Integral Energy is broadly supportive of the NBN project. The second point is that we think the NBN offers a natural synergy with some of the things that we are interested in doing as an electricity infrastructure business. In particular, we think the capacity of the fibre network will be useful in rolling out smart meter and smart grid services for the benefit of Australian energy customers. The third point is that we see the issues that we raised in our submission as essentially pragmatic issues. That is the extent of an opening statement.

**CHAIR**—Thank you. We will go to questions. Senator Minchin?

**Senator MINCHIN**—Thank you for appearing today and for your submission, which is very helpful to us in considering this legislation. Can I just ask when you learnt about this legislation and how you learnt about it?

**Mr Englund**—We actually found out about it through our industry association, the Energy Networks Association.

**Senator MINCHIN**—You are a member of that association?

**Mr Englund**—Yes, we are. They represent the energy distribution networks across Australia. We found out about the bill very late in the piece. We immediately made contact with the Department of Broadband, Communications and the Digital Economy to find out more, and they got in touch with our industry association. But it was very late in the piece. We were a little bit taken aback by the speed.

**Senator MINCHIN**—Meaning after it had already been introduced into the parliament?

**Mr Englund**—That is correct.

**Senator MINCHIN**—Were you disappointed that you had not had any advance notice?

**Mr Englund**—We understand that the government wishes to move very fast on this. We would have appreciated more of a heads-up time. Again, essentially our views are pragmatic. We recognise that the lead department probably does not have a lot of familiarity with our kind of infrastructure and that it would have been useful to engage with them—and we hope it will continue to be useful to engage with them as the process moves forward.

**Senator MINCHIN**—Could you inform us what consultation has now occurred, the department not having advised you in advance of this legislation? What exactly has occurred between you and the department since then?

**Mr Englund**—I should clarify. We were not given advance notice of this particular bill, but we did have meetings through our owners, the New South Wales state government, to give us a heads-up about the project and some of the implementation milestones associated with it and to open communication in that way.

**Senator MINCHIN**—You met with New South Wales government officials?

**Mr Englund**—We met with Department of Broadband, Communications and the Digital Economy officials in our capacity as a state owned corporation.

**Senator MINCHIN**—How would it be different if you were a private owned corporation?

**Mr Englund**—I do not know. I cannot speak for private owned corporations.

**Senator MINCHIN**—You said you met with them in your capacity as a government owned corporation.

**Mr Englund**—Sorry. The New South Wales government has put together a National Broadband Network Taskforce with a range of interests in the NBN process. Before this bill came out I believe that task force was contacted by the federal department. We had a couple of preliminary meetings to get an outline of their projects and timetable, including the expectations about legislation. That particular bill, the subject of this

inquiry, was not raised. But we did have preliminary meetings with them. With regard to your specific question, once we were aware that the bill was going into parliament, the department got in contact with and had a meeting with our Energy Networks Association, and we found out through them the nature and content of the bill.

**Senator MINCHIN**—As a result of that, have there been any discussions between your company and the department specifically about the information that is being sought under the auspices of this bill or under the auspices of the implementation study?

**Mr Englund**—No.

**Senator MINCHIN**—So in the intervening five weeks there has been no approach to you at all about your willingness or otherwise to voluntarily cooperate in the provision of this information?

**Mr Englund**—I did telephone the department last week and suggest that it would be worth having a discussion. Integral Energy has also encouraged our industry association to raise the matter with the department, but we have not had follow-up.

**Senator MINCHIN**—That is rather surprising given, as you said, everybody was in a desperate hurry to get this all done. That is why the legislation was introduced without notice to you. But there has been no contact. I will just leave that there. One of the things that concern the opposition is the extent to which, if any, it is actually necessary to provide in a piece of legislation a mechanism for the compulsory acquisition of this information. I would like to explore with you the extent to which you believe you are in a position to cooperate with the government in providing it with the information which you understand it might be seeking, without these sorts of onerous provisions in this bill which would compulsorily acquire this information with very significant penalties were you not to provide it. I would be interested in your reaction to that.

**Mr Englund**—We are entirely willing to provide the information on a voluntary basis provided there are the usual sorts of security of information requirement matters dealt with, appropriate cost recovery and appropriate time frames to make sure that it can be requested and delivered appropriately.

**Senator MINCHIN**—Thank you; I appreciate that. I am sure the government will, too. I am surprised there has been no contact to confirm that. Have you given any thought to the costs that you might incur in assembling and providing the sort of information which you understand the government would want and therefore that you would expect in the normal course of events to be recompensed for—that is, the costs you might incur in providing this information?

**Mr Englund**—We have not given consideration to a specific cost amount. The bill provides for quite a wide range of possibilities as to the information, not just in terms of where assets are located, for example, but also in terms of the construction and operation of some of those assets in theory. Therefore, it is a little bit tricky for us to narrow down specific costs as a result. That being said, we are looking forward to engaging with the department to narrow that range down, and from there we will come up with a cost estimate.

**Senator MINCHIN**—Would you assume that you would be reimbursed for costs you incurred in supplying this information either voluntarily or compulsorily?

**Mr Englund**—Yes.

**Senator MINCHIN**—In terms of the specifics, should it be necessary—based on your advice it would not be—to get into a compulsory mechanism, you have said that the five-day period provided in the bill, for consultation on the draft instrument that would be needed in order to set out the information required, would be inadequate. I think you recommend a minimum of 15 working days. Do you want to explain that to us?

**Mr Englund**—The first thing I would say is that we would look forward to an informal process rather than a formal process, but given the potential scope of the information request we think that three working weeks is far more appropriate. Five business days is not enough for us to be able adequately to consider the request. It is probably worth expanding a little bit on what the information request would mean to the business in terms of gathering the asset information together.

**Senator MINCHIN**—There are two different times frames here, aren't there?

**Mr Englund**—Sure.

**Senator MINCHIN**—We will keep them separate. The first one is the provision for a consultation period on the draft instrument setting out what it is that the government wants from you.

**Mr Englund**—Yes.

**Senator MINCHIN**—It was three days when it was just the request for tender; now the government has very generously said, ‘We’ll give you five days.’ But your proposition is that in terms of a consultation on the draft instrument that is insufficient.

**Mr Englund**—Yes.

**Senator MINCHIN**—So could you keep that separate from the actual supply of the information.

**Mr Englund**—One of the questions for us is: what kind of standard and format would they like the information to be delivered in? Again, we are uncertain as to what their requirements are and whether we would be able to do that. We have a fairly complicated asset management system, with thousands of assets comprising a range of databases—and even in some cases scanned documents. We would certainly need more than five business days—that is why we recommended 15—in order to provide a meaningful response on the actual content of the notice.

**Senator MINCHIN**—Again, the bill provides for 10 working days for providing the information, the consultation having occurred. I think you recommend 20—working days, I assume. Would you like to expand on that?

**Mr Englund**—Depending on the scope of the information required it may be relatively easy to deliver what the department wants. However, as I averted to in my last response, most of our asset information is contained within our GIS systems and is relatively easy to deliver, but about 30 per cent of our asset information, which largely relates to ducts underneath our larger metropolitan areas—we service the Parramatta, Liverpool areas and Western Sydney, into the Blue Mountains and down to the South of New South Wales—a lot of the assets were acquired pre-1990. We only have those in a scanned document format. They are not 100 per cent accurate and if, for example, the department is looking to acquire that information in a particular format or, perhaps more pertinently, they are looking to understand what level of capacity a particular electricity duct has, that would take us some time to acquire because we do not necessarily keep all of that information up to date. If they wanted cost information in addition to that, that would be another order of magnitude, because we would probably have to custom build something to deliver that.

**Senator MINCHIN**—It sounds as if even 20 working days might be—

**Mr Englund**—It would be pushing it but we are trying to be helpful.

**Senator MINCHIN**—I appreciate that. Thank you. One interesting aspect of your submission was your concern about the ACCC and its subsidiary, the Australian Energy Regulator, getting hold of some of this material. I think it is provided for in the bill that the ACCC would have access and you want to have the bill amended to restrict that. Can you explain that a bit more.

**Mr Englund**—Sure. As a monopoly distribution business we are regulated in an economic sense, by the Australian Energy Regulator, which is a subsidiary of the ACCC. I think the intent of the bill before this committee is to provide the ACCC with its powers in a telecommunications regulation sense, not an energy distribution regulation sense. The AER has ample powers under the national electricity law to acquire information from our business for the purpose of regulating it as an electricity business. We just do not want to see a Chinese wall situation where information goes to the ACCC for telco purposes and ends up in the hands of its subsidiary regulators for economic purposes.

**Senator MINCHIN**—So you would be satisfied with an amendment which just, in a sense, formally restricted the use to which the ACCC could put the information?

**Mr Englund**—That is right; yes.

**Senator MINCHIN**—Have you read the Energy Network Association’s submission?

**Mr Englund**—I have not, I am afraid.

**Senator MINCHIN**—It is quite a good submission; I commend it to you, as a member of the organisation.

**Mr Englund**—Thank you.

**Senator MINCHIN**—One of the things they raise which interested me was their understanding—and, again, we might pursue this with the department this afternoon—that information provided voluntarily, and you have indicated your willingness to provide it voluntarily, by an energy network business would not automatically be treated as protected network information until the authorised information officer has reviewed it and given a written undertaking. ENA believes that information provided voluntarily should automatically be treated as protected. Have you considered that matter? Would you agree with ENA on that?

**Mr Englund**—It depends on the nature of the information. I am sure there is scope for some of it to be public but, obviously, when you are talking about essential infrastructure there are security implications, and we would like to have a level of confidence about the ability to make sure that it is confidential sooner rather than later. In our own submission, we also raised a concern about where that information should go once it has been duly authorised and the sorts of people who could have access to it. Again, at the end of the day we are willing to provide the information, but we need to make sure that the right controls are in place, and I understand that the minister has the power to make a regulation which sets out the process for applying those controls. We think it would be helpful if the minister actually released a draft of that or the department consulted with us on that to make sure that those security issues can be appropriately managed.

**Senator MINCHIN**—So (a) you would not have any difficulty with what the ENA is suggesting here, about protection?

**Mr Englund**—No.

**Senator MINCHIN**—But (b) you are suggesting that the bill itself should formally provide for a consultation period with a business like yours on any instrument to protect the information?

**Mr Englund**—Yes.

**Senator MINCHIN**—That is a good point. The other couple of things that the ENA raised—which were technical but I think not unreasonable—were that any written instrument under what would be section 531C should be provided to the relevant minister. In this, the example they give is: information relating to an energy business would be provided, or the instrument would be copied to the relevant minister, the minister for energy. But they quite properly say that the bill should formally provide that a copy of the instrument should go direct from the minister for communications to that business. Presumably that is something you would like to see in the bill as well?

**Mr Englund**—Yes, we would agree with that.

**Senator MINCHIN**—The other thing that ENA expresses concern about—and it is something that does concern the opposition—is that, in relation to information going to the NBN company, the information can also go to an equipment vendor to the NBN company, and that businesses providing information appear to have no control over who the authorised officer chooses to give the information to. Is that something that—

**Mr Englund**—Yes, that was also raised in our submission.

**Senator MINCHIN**—So you would also like to see—

**Mr Englund**—Some controls around that, yes.

**Senator MINCHIN**—Okay.

**CHAIR**—Are there any further questions for this witness?

**Senator TROETH**—Yes, I have one. As you are a state-owned organisation, does the New South Wales government have access to your network, or the information that you already have, in the same way that the Commonwealth is asking?

**Mr Englund**—No, I do not believe they do. We operate under the state's electricity act and the Electricity Supply Act. We operate by fiat of licence. I do not think there is a dedicated information power that applies to us.

**Senator TROETH**—Right. So no-one in particular?

**Mr Englund**—I am sorry, Senator?

**Senator TROETH**—Are there any measures in place to protect the information that the New South Wales government may or may not have access to?

**Mr Englund**—I understand that there are contractual obligations that we have with various government departments about that information.

**Senator TROETH**—Right. Thank you very much.

**Senator MINCHIN**—I would like to pursue the question of the extent to which there is knowledge outside your company of the network. You say that, in terms of legacy assets, there is even some difficulty internally in determining specific knowledge of some parts of the network. Presumably that is quite tightly held and probably for good reason.

**Mr Englund**—Yes, absolutely. There are obviously key stakeholders within the national electricity market, such as the Australian Energy Market Operator, who have a good feel for our network. There are obviously suppliers who have some knowledge of where some of the assets are. We have a security policy that applies—a fairly detailed one—to make sure that there is not generally wide public recognition of where all those assets lie, particularly the critical ones.

**Senator MINCHIN**—Presumably there are national security implications to all this and presumably you work with national security agencies in terms of the protection of networking—

**Mr Englund**—That is correct—we do.

**Senator MINCHIN**—Thanks.

**CHAIR**—As there are no further questions, thank you very much, Mr Skene and Mr Englund, for taking the time to give a submission to the inquiry and for appearing before us today. We appreciate your assistance.

**Mr Englund**—Thank you.

[10.17 am]

**PICCININ, Mr Claude, Deputy Executive Director, Water Services Association of Australia**

**CHAIR**—Welcome. Thank you very much for your submission and for coming along to talk to us today. The committee has received your submission, as submission No. 2. Do you wish to make any alterations to your submission?

**Mr Piccinin**—None whatsoever.

**CHAIR**—Would you like to make an opening statement before we go to questions?

**Mr Piccinin**—First of all, we are not objecting to the department thinking outside the square. In fact, they should be commended for doing so. The issue is one of protecting the information regarding the location of assets, and there is the question of: if access is required, it should be sought in a way that minimises costs, not just of the deployment of the broadband network but of the future maintenance of the water utility and other utilities that might be a factor. That is basically our position.

**CHAIR**—Thank you.

**Senator MINCHIN**—I think you were sitting at the back so you heard some of the line of questioning. I will ask you a similar set of questions, if I may. From the perspective of your industry, I would like to know when and how you learnt of the existence of this bill.

**Mr Piccinin**—The way I learnt about it is that I was sitting at my desk on a Friday afternoon, minding my own business, winding down and looking forward to the weekend, when a journalist asked, ‘Would you care to comment on this?’ and I said, ‘What?’ It was a total surprise, shall we say.

**Senator MINCHIN**—You found out from the media—

**Mr Piccinin**—Indeed.

**Senator MINCHIN**—presumably after the bill had already been introduced?

**Mr Piccinin**—Indeed—yes.

**Senator MINCHIN**—So, to your knowledge, there was no attempt by anyone in the government or the department to give you any early notification of this bill coming and there was no consultation with you about the bill before it was introduced—nothing at all?

**Mr Piccinin**—No. We have since been in touch with the department and we understand that there was a conversation between the broadband department and the Department of the Environment, Water, Heritage and the Arts regarding this matter. The department that looks after water indicated that it would have been desirable for them to approach each water utility. My understanding is that the department did not have that time and therefore decided to not do that.

**Senator MINCHIN**—But they certainly would have had time to approach you as the peak industry body?

**Mr Piccinin**—They might have had that. It is a question of whether they knew about us, although we were actually mentioned in the bill. That is my understanding. I am not here to—

**Senator MINCHIN**—I am simply trying to elicit the facts. Now that the department is aware of your existence, can I ask what consultation has since occurred in relation to this bill itself and/or the voluntary supply of the information which the government is seeking in relation to the NBN.

**Mr Piccinin**—The executive director and I went to see the department about this and we had a fruitful discussion over a couple of hours. We have offered our assistance in looking at how assets were laid into the ground over different decades, because the history is different in different states. Each state seems to be doing it slightly differently. We will collect that information and provide it to the department. We have offered to be a one-stop shop for any request for information.

**Senator MINCHIN**—Has there been a formal request from the department for you to gather, collate and supply this information?

**Mr Piccinin**—No, it was not a formal request but when we offered it they were quite willing for us to seek that information from our members and—

**Senator MINCHIN**—So you instigated the process?

**Mr Piccinin**—We offered it as a way to smooth the process.

**Senator MINCHIN**—So is that process underway?

**Mr Piccinin**—Yes. We have written to our key members and sought information in different stages, from the 1900s to the current era.

**Senator MINCHIN**—And the information is, broadly speaking, the physical location of—

**Mr Piccinin**—No. We are looking at the practices for laying out the infrastructure. If they actually wish to have that information they can only achieve that by going to the individual utilities.

**Senator MINCHIN**—Sorry to be pedantic. Can you be a bit more specific about what it is you are seeking to supply to the government?

**Mr Piccinin**—Yes. Different utilities around the country have different approaches in terms of whether they lay their infrastructure in completely separate corridors or whether they have common corridors. Some of those practices, even within the same jurisdiction, have changed over time.

**Senator MINCHIN**—When you say separate corridors or common corridors, in common with what—with other utilities?

**Mr Piccinin**—With other utilities, like gas, electricity and even communication when it is laid underground.

**Senator MINCHIN**—So you are assembling the various methodologies—

**Mr Piccinin**—That is right.

**Senator MINCHIN**—But in terms of information regarding the actual locations, they will have to go to each utility?

**Mr Piccinin**—Absolutely. There is no way we would even want to keep that information.

**Senator MINCHIN**—You do not hold that and have never held that?

**Mr Piccinin**—Good God!

**Senator MINCHIN**—To your knowledge has the department begun the process of approaching members of your organisation to seek that information voluntarily?

**Mr Piccinin**—My understanding is that they have approached some utilities. Indeed, South East Water, which is one of the Melbourne retailers, has been working with the department and finding out where it could be done. Incidentally, it is pretty slim pickings, if I could put it that way.

**Senator MINCHIN**—Yes; I might come to that. To your knowledge, do you believe that the members of your association are in a position to voluntarily and cooperatively provide this information without the stick of civil penalties hanging over their head if they do not?

**Mr Piccinin**—I think they can be approached. It is a question of the information that they do have. It is a question of how accurate that information might be. I think this was discussed earlier. In Victoria, where there used to be 400 water utilities, which have now been collapsed into 15 over various stages, you can imagine that some of the legacy asset information is pretty vague, and quite often you know the location of a pipe when it bursts, basically—if I could put it in graphic terms. No-one needs to hold a gun to our head in terms of coming forward. It is a question of the reasonableness of the time frame that is provided and, if there are costs associated with it, those costs being met.

**Senator MINCHIN**—I was going to come to that. You and your members would expect that to the extent you are in a position to supply information you would expect to be recompensed for the costs you incur in assembling it, collating it and providing it in the form required.

**Mr Piccinin**—That's right. And that the security of that information be suitably guarded, and again we had discussions with the department on that and they have assured us that an instrument is being designed to provide that assurance.

**Senator MINCHIN**—Have they given you an undertaking to consult you on the instrument for the protection of the information?

**Mr Piccinin**—The existing document in respect of telecommunication was drawn to our attention. We looked at that and it seemed to be appropriate. We basically said that so long as that could be translated across to this we would be assured that that is done as appropriate.

**Senator MINCHIN**—As did the previous witness, you indicate in your submission that the period provided in this bill for consultation on the draft instrument for the request for information is too short. Could you expand on that and indicate exactly how long you think the period provided in the bill should be?

**Mr Piccinin**—If you are talking about recent assets and metropolitan cities, I think the five business days is appropriate. If you are talking about legacy assets that might be a bit more difficult, and if you are talking about regional water utilities perhaps two weeks would be more appropriate. I also hasten to add that we generally keep information with respect to location of assets, after they have been completed, assigned to us. Where the assets are being constructed as we speak—which ironically is where the probability is of finding common ground, if I could put it that way—that resides with whoever is undertaking the construction and seeking that information might take a little bit longer than the five days, because that sort of stuff is done by a separate entity. It is all contracted out.

**Senator MINCHIN**—The bill refers to the descriptor ‘working days’. When you say two weeks do you mean the provision in the bill should be 10 working days?

**Mr Piccinin**—So long as some flexibility is provided, I think that 10 working days is probably a reasonable thing to cover everyone, but certainly in metropolitan areas five business days is sufficient.

**Senator MINCHIN**—I do not think the bill is going to be able to distinguish so as a parliament we have to agree on what should be the minimum period for consultation.

**Mr Piccinin**—Point taken.

**Senator MINCHIN**—The previous witness also thought 10 working days was right so that is becoming a theme. We also explored with the previous witness the question of the minimum period the information provider is given to provide the information requested. In the bill that is 10 working days. Do you think that is adequate or should the parliament increase that period?

**Mr Piccinin**—So long as you are talking about existing assets that is enough, and as long as you are not talking about a general easement that may not be in use. The issue with the kind of easement that is not in use now but which has been set aside is that the utility would have to work out whether it is likely to use it in the next 10 years or whether it is likely to use it in the next 20 years or 30 years. That kind of decision making takes a little bit more than back of the envelope calculations.

**Senator MINCHIN**—I see. I had not thought about easements that might have been designated for water.

**Mr Piccinin**—That’s right and, in fact—

**Senator MINCHIN**—They are easements that are typically under the control of the utility?

**Mr Piccinin**—Yes, they are. Indeed, Hunter Water allows telecommunication companies to put their cables in their easements—and in fact it has got structured tariff charts for such approaches. So, yes, it is done. It is not unheard of but it needs to be managed and you cannot just look at the cost of deployment of the broadband network. You look at what it implies for other utilities in the future.

**Senator MINCHIN**—The previous witness thought a minimum of 20 working days should be put into the bill for that. Would you concur with that proposition?

**Mr Piccinin**—I think that would be a bit more realistic in respect of that kind of deliberation where you really need to make an assessment of what you are likely to do with that space over the next 40 or 50 years.

**Senator MINCHIN**—You did express some concerns about what appears in the bill to be fairly widespread access to this information. Would you like to expand on that?

**Mr Piccinin**—It is a question of providing the information for this purpose and that the security of that information be safeguarded regardless of who is using it. You made the point to the previous person that it could be a contractor—of course it can. All construction in our industry is contracted out—80 to 90 per cent of it. We face the same sorts of things when we construct desalination pipelines or pipelines that go to recycled plants, which is undertaken by a contractor, or sometimes by a subcontractor or sometimes by a sub-subcontractor. It is a question of managing that process to safeguard the security of the location of the assets.

**Senator MINCHIN**—Are you concerned that the bill provides that this information can go not only to those engaged in the implementation study but to the NBN company itself and vendors to the NBN company?

**Mr Piccinin**—It almost certainly would have to go to them or it would be virtually useless. They would not know where the assets that they are deploying are located. Just as we need to know where they are located, they would need to know. They should also know what other assets they are likely to find when they go

looking for the fibre optic. One of the things that concerns us about laying fibre optic on top of a pipe is that when we go and fix those pipes we use backhoes and jackhammers; we are not in a sort of archaeological dig mode. So it would not do the fibre optic much good if we went into it the way we normally go after it.

**Senator MINCHIN**—To your knowledge is there any joint transmission of water and communications equipment at the moment? I do not know anything about Telstra's network, but is there copper lying alongside water pipes at the moment?

**Mr Piccinin**—Sometimes they do mix, but you do need to mix them very carefully. Certainly in other countries it is not unheard of. In fact in France it is quite common to find, within sewerage infrastructure, telecommunication and broadband optic. The difference between France and ourselves is that where they do that there are no trees anywhere nearby, and there is nothing a tree likes better than to find a sewer and get water and nutrients. The way we handle that particular problem is, essentially, we put a corkscrew through the pipe which just chops off the roots and the root that remains in the pipe acts as a cork, so it is wonderful. But if you had a fibre optic in there it would not do it any good at all, I can promise you that.

**Senator TROETH**—Just on that point, you have mentioned in your submission that Hunter Water, which I presume is in New South Wales, has an established fee structure for telecommunications easement in its property or within its easements. Would you be able to give us an idea of how that fee structure applies if you are using that as an example?

**Mr Piccinin**—No, I have no knowledge other than they do it. That is the limit of my knowledge.

**Senator TROETH**—Is that the only company in Australia that would be doing that?

**Mr Piccinin**—I would not know if that was the case. In fact I would probably be astonished if they were the only utility that would do it.

**Senator MINCHIN**—Just on this question, the explanatory memorandum for the bill does say:

In other jurisdictions, such as France, the United Kingdom and Taiwan, interest has been shown in using water, sewerage and drainage networks for telecommunications distribution.

To your knowledge France is an example but you distinguish that on the basis of the issue of trees. Are you aware of other countries and is the same distinction to be drawn?

**Mr Piccinin**—My understanding is that Japan also does the same thing but, again, it is not universal throughout Japan and it is not universal throughout France. It is not a one-size-fits-all; they do it where it is appropriate and they do not do it where it is not appropriate. In fact, the discussion we had with the department was basically along these lines: 'There might be areas where you can use our infrastructure to mutual benefit, but it is not a silver bullet. Certainly, pressurised pipes: no way. If there is going to be tree intrusion: no way. If there is an area where we use trenchless technology to refurbish pipes, you could not put it in the pipe.'

**Senator FISHER**—You mentioned stormwater pipes before. What about them?

**Mr Piccinin**—We are not responsible for stormwater. Again, that is another difference with France, where stormwater and sewerage is in the one conduit. In Australia they are generally separate. We look after water and waste water—

**Senator FISHER**—Do you nonetheless have a view?

**Mr Piccinin**—It would, I guess, be easier because it is not pressurised. But, again, I would imagine that tree roots may be a problem. I have no idea what their refurbishing techniques are for dealing with tree roots in storm water mains.

**Senator MINCHIN**—To the extent that you are aware of communications cables being laid with water reticulation pipes, are they inside the pipes or do they sit on top or can you do either?

**Mr Piccinin**—The idea is to have it underneath the pipe. If it is underneath it is not a problem because if there is a burst water main we have to dig through the top anyway, so it is unlikely to do damage. But if you put it on the side you would have to know exactly where you put it, and if you put it on top it would probably be the worst place to put it. If the pipe is pressurised, there is no way you can put it inside. The way we fix broken pressurised pipe is by turning off the valves and as we turn them off we would smash the fibre optic.

**Senator MINCHIN**—To put it underneath you would have to do it at the time the pipe is being laid.

**Mr Piccinin**—In any case you would not generally speaking go back to that broadband fibre optic cable for another 50 years. By that time we would have done something about the pipe.

**Senator FISHER**—In a state like South Australia or a city like Adelaide where the water mains, on the figures, are bursting with significantly increased regularity—I think it is something up to 30 per cent in the relevant annual report—could you contemplate doing that?

**Mr Piccinin**—When a burst pipe is fixed you always need to decide whether you just patch it, whether you will replace 100 metres or whether you will replace a kilometre. You just would not use fibre optic on an ad hoc basis, if you like, for the next 10 metres or so. The best option is in respect of green field sites, where you are laying out the infrastructure to begin with.

**Senator FISHER**—In a state like South Australia, where the state government has said that the pipes may well be old but they are not replacing them, that would mean that the pipes coexisting with any sort of NBN infrastructure is out of the question, wouldn't it?

**Mr Piccinin**—Why would you replace a pipe if it does not require replacing.

**Senator FISHER**—That is debatable of course but, yes. Put it this way—if it is not being replaced.

**Mr Piccinin**—It all gets down to a cost and that cost is ultimately borne by the customers and not the utility. If you wanted the utility to replace all of its pipes and you provided it with the money they would be absolutely ambivalent about it. But you need to think in terms of the community, and don't forget that when you replace pipes you tear up roads. There is a fair amount of third party inconvenience. As with all these things, you should do things on a triple bottom line—the social impact as well as the utilities cost et cetera, if I can put it that way.

**CHAIR**—But in terms of greenfield sites it is a good option to use to share infrastructure for delivery of services.

**Mr Piccinin**—If you share it in a way that does not increase costs overall, I do not think that it is a problem. Ironically, when we took the opportunity to tell the department that as we were investigating the use of water smart meters the Broadband Network might provide a communication channel for us, we said, 'Take caution,' in terms of using our infrastructure but, 'By the way, can we use yours?' Thinking outside the box is not a thing that people ought to be condemned for. It is something they should be congratulated for. It is a question of making sure that you do it to the minimal cost of society, not necessarily to the deployment of the broadband in its narrow sense.

**Senator MINCHIN**—As I asked the previous witness, to your knowledge is information regarding the water reticulation network in Australia tightly held and a matter of, ultimately, national security?

**Mr Piccinin**—Yes.

**Senator MINCHIN**—So who typically has this information—just the utilities themselves?

**Mr Piccinin**—The utilities themselves.

**Senator MINCHIN**—It is not routinely supplied to federal government departments or state government departments?

**Mr Piccinin**—God forbid!

**Senator MINCHIN**—Are there periodic contacts with national security agencies about all this?

**Mr Piccinin**—There are, yes. In fact, there is an urban water national security network, so that, as things happen, people are informed and the lessons are learnt along the way. Also, that network has two people that coordinate with other security networks—for telecommunications, gas, electricity, ports, airports et cetera.

**Senator MINCHIN**—So your particular concern is the protection of this information.

**Mr Piccinin**—Yes. We live in a different world. I should point out that, at one stage, not our industry association but another industry association used to publish rough maps of networks. But that changed with a date that we can all think about.

**Senator MINCHIN**—I can imagine.

**Mr Piccinin**—So that does not get done anymore.

**Senator FISHER**—On that point, in your submission you talk about the provision of information which has national security implications—we will go to access to the infrastructure in a minute. You note that the government has said, 'Yes, we'll develop an instrument that deals with the confidentiality of such information once provided.' You observe:

Until such an instrument is drafted, it is not possible to provide any further comment ...

That may well be your position at the moment, but can you contemplate a scenario where an instrument could adequately provide?

**Mr Piccinin**—Yes, I can. Indeed, when we had discussions with the department, subsequent to that submission being lodged, we were made aware of the existing instrument with respect to the telecommunications industry. The provisions of that instrument would suffice, in our opinion.

**Senator FISHER**—You make the further point that, having provided the information about the location of infrastructure which has national security implications, who should then have access to that infrastructure, for what purpose, on what terms et cetera? Can you expand on your brief reference to third-party access? You say in your submission that third-party access is provided for under existing legislation and should not be bypassed. Can you expand on that?

**Mr Piccinin**—What I was expanding on is that the bill only dealt with the provision of information. It was left unspoken what arrangements would be made in respect of actually accessing our infrastructure. The comment basically lays on the table our expectation that, if the broadband company were to decide to use our infrastructure, it would either reach a commercial agreement with the utility whose infrastructure it wants to use or, alternatively, if no such agreement can be negotiated, they would then utilise the third-party access provisions.

**Senator FISHER**—Sorry, which third-party access provisions?

**Mr Piccinin**—The Trade Practices Act, part IIIA, which deals specifically with that for infrastructure of national significance. In the case of New South Wales there is the Water Industry Competition Act, WICA, state legislation which is about to receive certification by the federal government, in which case it would be the WICA Act which is applicable in New South Wales.

**Senator FISHER**—And that is an example of what you mean by bypassing, is it?

**Mr Piccinin**—No. Bypassing is basically introducing legislation that says you do not have to go through those processes: ‘We will do whatever we like.’

**Senator TROETH**—Still paying for the privilege?

**Mr Piccinin**—That is right, yes. It should not only pay but do so in a framework that looks at not just minimising the cost of the deployment of the broadband network but the costs and benefits to others.

**Senator FISHER**—And protects the security.

**Mr Piccinin**—The security is not negotiable. That is something that, if you like, must be done with respect to (1) the information and (2) when they actually get access to the infrastructure and start to use it. That security must be safeguarded—of course.

**Senator FISHER**—In your scenario, where you talk about a utility provider negotiating the terms upon which the access might be provided with NBN Co., what reassurance is there that that would sufficiently safeguard infrastructure of national security implications?

**Mr Piccinin**—Both the federal third-party access regime and the one in place in New South Wales have nothing to do with national security. That is a separate issue. Let’s assume that the broadband company were to say, ‘Yes, we have looked at all our options and in our mind we would like to lay them beside Sydney Water’s water pipes.’ We would assume that, if that were the case and they wanted to use a Sydney Water corridor, they would negotiate the cost of doing that with Sydney Water and also discuss the design specifications that would allow Sydney Water to utilise its existing techniques for maintenance, refurbishment, replacement et cetera. You do not want a situation where these guys get access at zero cost with Sydney Water having no say in it and then all of a sudden, instead of using the backhoe and jackhammers, they have to use a brush in an archaeological dig to find out where the fibre optic is, where the pipe is et cetera.

**Senator LUNDY**—In the presentation of the bill the minister’s second reading speech makes the following statement:

... safeguards will apply to all network information provided to the Commonwealth, whether it is provided by carriers and utilities voluntarily, or in response to an instrument made by the Minister ...

The minister went on to say:

Provisions in Part 27A of the Telecommunications Act permit the Minister to make rules in subordinate legislation about the storage, handling and destruction of information, which are intended to protect the confidentiality and security

of network information. These arrangements will continue to apply to information that is provided under the Act as amended ...

Why is it in your comments so far in your evidence that you are choosing to ignore that very clear statement by the minister that the security issues will be safeguarded as part of this legislation?

**Mr Piccinin**—All we are saying is that it should be.

**Senator LUNDY**—Okay, so you are affirming the minister's call for the security to be looked after.

**Mr Piccinin**—Absolutely. That is right. And, as I said, in discussions with the department we were pointed in the direction of the existing instruments with respect to telecommunications. They said that that would be translated across to our infrastructure and we said that that would suffice. So as long as that is done we do not have a problem with respect to how it would handle the security aspect of the location of the infrastructure.

**Senator LUNDY**—I just wanted to clarify that because the impression that you were giving was that there was still some outstanding concerns and that you did not appear to be aware of the minister's assurances.

**Mr Piccinin**—The outstanding concern is that we have not actually seen in place the instrument. The intention is there.

**Senator LUNDY**—But you have a statement by the minister there.

**Mr Piccinin**—That is great information, and we are comforted by that statement.

**Senator MINCHIN**—I would not rely just on that if I were you.

**Mr Piccinin**—As I said, we would prefer to see it in place.

**Senator LUNDY**—I would also like to ask you about the extent to which the organisation you represent is involved in the Commonwealth's critical infrastructure protection strategy. That is a Commonwealth strategy which was put in place under the former government and continues today. What is the involvement of your association in that?

**Mr Piccinin**—We provide two people to that organisation.

**Senator LUNDY**—It is a coordinated state-Commonwealth strategy. So you participate fully in that?

**Mr Piccinin**—No, I think we are talking at cross-purposes here. Are you referring to the work that has been done by Infrastructure Australia?

**Senator LUNDY**—No. I am aware that there is a critical infrastructure protection strategy that has been around for quite a long time—probably 10 years or so; it may be a little less. I want to find out from you the extent to which, if at all, your association is (a) aware of it and (b) participating in it.

**Mr Piccinin**—I am not sure of the title of the organisation which we have two members on. But, as I was saying to Senator Minchin, we do link with other industry associations and other infrastructure industries which have similar security problems. We will continue to do so.

**Senator LUNDY**—Given the sensitive nature of security issues, are the two people from your organisation involved in security and infrastructure protection security cleared?

**Mr Piccinin**—Involved in what way?

**Senator LUNDY**—You said you had two people who are involved.

**Mr Piccinin**—That is two of our members. That is right

**Senator LUNDY**—Can you tell me whether those members are security cleared by the Commonwealth?

**Mr Piccinin**—At least one of them is, yes.

**Senator LUNDY**—Can you take notice whether the other one is as well.

**Mr Piccinin**—Yes, I can.

**Senator LUNDY**—Just going to the actual assets themselves which your members manage, to what extent are the locations of those assets fully geocoded—that is, identifiable using global information systems?

**Mr Piccinin**—It depends. Some, particularly the metropolitan ones and those laid more recently, can be located by GPS. The question of the accuracy of that location is a moot point but it can be done. In the regional areas some utilities are a bit more advanced, some are less advanced and some still have, if you like, handwritten records rather than GPS based location.

**Senator LUNDY**—So to what extent are your members able to even offer to the Commonwealth an accurate description of the location of their assets?

**Mr Piccinin**—We are not offering anything.

**Senator LUNDY**—The word ‘offer’ is probably not the right one. But were the legislation in place and were the Commonwealth to request this information to inform their implementation study, which seems to be the purpose of it, will your members be able to comply?

**Mr Piccinin**—I would imagine that some would and some would not.

**Senator LUNDY**—If it is such an important security issue, why on earth are we in a situation where some of them could potentially not comply with the very issue that is the substance of the security concern—i.e. the location of the assets?

**Mr Piccinin**—The issue is whether you would provide information of the actual network, particularly close to sensitive locations. The question is whether that information should be out there in the public domain.

**Senator LUNDY**—Well it has not been suggested that it be in the public domain; it has been suggested that it be made available to the Commonwealth for the purposes of doing an implementation study for the NBN, with the appropriate security checks.

**Mr Piccinin**—That is right, and we have no problem with providing that. But providing what we cannot provide is a moot point.

**Senator FISHER**—The question, Senator, was really ‘will you be able to’ provide that information. The witness answered that question rather than ‘will you’ in terms of intent. You have to have the information to be able to provide it in the first place, I would have thought, if you are asking will they be able to.

**Senator LUNDY**—I will just go back to my question. I am not quite sure what that intervention was about. Your response implied that somehow this information would go into the public domain.

**Mr Piccinin**—No, what we are saying is that no instrument at this stage provides that level of security. We have received assurances from the department since that submission that such an instrument would be designed and so long as that is done we do not have a problem in that area.

**Senator LUNDY**—So what has your organisation done to protect this issue of security prior to this bill, seeing as it is such a concern?

**Mr Piccinin**—We do not protect that information because we do not have it. That information rests with our members. That is where it lies.

**Senator LUNDY**—So what do they do to protect the security of their information?

**Mr Piccinin**—Well, for one thing, they are liable for maintaining the security of that information.

**Senator LUNDY**—With respect to the position that your organisation is in now, were this bill to go through, with all the appropriate security assurances, to what extent will your members be able to provide that information within the time specified? I know that earlier you expressed concerns about the time available, but with all the notice they have had now through this inquiry and the debate of the bill do you think they would be able to muster it up in the time required?

**Mr Piccinin**—If you are purely asking for the location of underground assets, and that is all you are asking for, in a metropolitan area I do not think there would be much of a problem except for very old assets. In the regional areas you would probably be better off with twice that time period. As I said, if you are talking about the use of easements which have been allocated to the water industry but are not in use at the moment then that is a bit more problematic—not in terms of providing where the location is but whether they would be comfortable with handing that access to the easement across for, say, the next 30 or 40 years.

**Senator LUNDY**—Finally, in terms of the challenges facing some of your members in accessing the information in regional areas about easements and so forth, I would have thought that it was in their general interest as entities to have an ongoing program of upgrading their databases about these assets, particularly with respect to GPS location and so forth. Is that the case?

**Mr Piccinin**—Yes, it is the case.

**Senator LUNDY**—I know it is the case, for example, with local governments assessing their assets. Can you give us a bit of a feel for how committed your members are to upgrading their database in the 21st

century, seeing as we have GPS available now and it is relatively simple? I should say, there is a very good technological basis for identifying the location of these assets and keeping an accurate record.

**Mr Piccinin**—First of all, they are committed to that. They do a fair amount of international benchmarking on asset management procedures, and this is certainly one of them. But in terms of ‘very old pipes’, in London they still have wooden pipes. God knows where they are. Really, until they burst, you will not know.

**Senator LUNDY**—With all due respect, Australian cities have not been around quite as long as old London, and we do have very sophisticated technology. In fact, I would argue that we are one of the global leaders in GPS technology and asset assessment and location. I appreciate your point, but I would have thought we were ahead of the game in this kind of thing.

**Mr Piccinin**—To some extent we are, and indeed when crews go out around cities and repair they are able to communicate directly with head office and say: ‘I’ve shut that valve off. I’ve shut that valve off. I can repair that pipe.’ They get called away and they can indicate which valves they have opened and which they have not. But the real issue is with legacy assets, for which nobody provided details previously as to where they were. I pointed out that we used to have 400 water utilities in Victoria; we have 15 now. At amalgamation a lot of stuff gets lost along the way.

**Senator LUNDY**—I am sure all of the security people will be noting this with interest as well. Thank you very much for your time.

**Senator MINCHIN**—Senator Lundy was seeking to imply that information that your industry might supply to the government would be held very tightly. Are you aware that the bill provides for that information to potentially go to not only the NBN company but vendors to the NBN company, which could number hundreds of companies?

**Senator LUNDY**—For the purposes of the implementation study with the appropriate protections.

**Senator MINCHIN**—There could be hundreds of suppliers to the NBN company, and indeed some of those suppliers could be foreign owned, government owned corporations. Are you aware of that?

**Senator LUNDY**—What kind of scare campaign are you trying to muster, Senator Minchin? That is absurd. Read the bill.

**Senator MINCHIN**—I am trying to contradict your misleading evidence to this committee—

**Senator LUNDY**—No, your misleading evidence.

**Senator MINCHIN**—that there was some very restricted approach to this information. It potentially goes to hundreds of companies around the world—

**Senator LUNDY**—If you read the bill you will understand—

**Senator MINCHIN**—including government owned corporations overseas.

**Senator LUNDY**—it is for the purposes of the implementation study.

**Senator FISHER**—There is more not in this bill than is in it, Senator.

**CHAIR**—Order!

**Senator LUNDY**—If your government had done more about infrastructure protection, we would not be in the position of half-guessing where all these assets are in the first instance.

**Senator MINCHIN**—Senator Lundy, you deliberately misled the witness.

**CHAIR**—Order! Senators, let us get back to questions and answers.

**Senator MINCHIN**—Thank you, Madam Chair.

**Senator LUNDY**—You had 10 years to sort it out.

**Senator MINCHIN**—Madam Chair, Senator Lundy should not mislead the witness. I was seeking to just establish that this information can potentially go to a very widespread group of people.

**CHAIR**—Senator Minchin, I am sure you have assisted the witness with an answer in words that you would want to hear as well. Can we go back to Mr Piccinin, who was attempting to give an answer, I believe, to your question.

**Senator MINCHIN**—He was. He was interrupted by Senator Lundy. You are aware, are you, of the extent to where this information can potentially go?

**Mr Piccinin**—When you put major works to tender, you need to provide a certain amount of information to the broader number of people who may wish to tender. The amount of information that you actually provide in detail is generally left when you have narrowed down the group or consortia of companies that you deem could do the job. That is generally not in the hundreds; that is generally a handful. The fact that some of these companies might be overseas is neither here nor there. The current desalination plant contract for Victoria has been awarded to a consortium that includes a French company, Degremont—at least, that is my understanding. We use companies from overseas. The existing water treatment plant for Sydney at Prospect is run by Suez, which is a French company. I am sure that things will get done in a professional manner.

**Senator MINCHIN**—I hope so too. On this question of the instrument for the protection of this information, which you had placed great importance upon, would you prefer that the bill formally provided that the government should consult utilities involved in the drafting of that instrument? At the moment, it does not do so.

**Mr Piccinin**—So long as it translates all the features of national security that are already in existence with respect to the Telecommunications Act, then I do not think we have a problem.

**Senator MINCHIN**—Another submission seeks to have incorporated into this legislative framework immunities from suit for information providers in respect of any information supplied which may ultimately be proven to be inaccurate. You have indicated, quite properly, in response to questions from Senator Lundy, that, given the legacy assets involved in your industry, there could well be some difficulty in that respect. Is that something you have thought about or would like to see in the bill as well?

**Mr Piccinin**—I am not a lawyer, and I think it would help if a lawyer were asked that question. All sorts of things are printed on the back of ski lift tickets, claiming immunity from all sorts of things, but I think nothing can cover you for negligence.

**Senator MINCHIN**—Well, no. If, under penalty of a \$250,000 fine—which is what this bill is about—a company supplies information and says, ‘Look, this is legacy stuff—400 utilities—we’re not quite sure; we think this is where it is, but we can’t be sure,’ and the NBN Co. then incurs great expense and discovers that the pipe you said was there is not there and sues your utility for providing inaccurate information that has cost it hundreds of thousands of dollars, wouldn’t you like perhaps to have the government immunise you for that, given that you were forced to provide this information?

**Mr Piccinin**—I do not know about that, to be honest. I would have to take that on board.

**Senator MINCHIN**—All right. You can take that on notice and think about it. Let us know.

**Senator FISHER**—Mr Piccinin, you talked about the costs of providing information. Your submission says that your organisation assumes that urban water utilities would be compensated for incurring the costs. Do you have any actual basis for making that assumption?

**Mr Piccinin**—You can be overwhelmed with requests for information. If, all of a sudden, instead of doing the work that they should be doing in terms of locating burst water pipes et cetera, they are too busy providing information to some third party—

**Senator FISHER**—Are you essentially saying that you cannot see how it would or could be otherwise? Is your evidence necessity, in fact?

**Mr Piccinin**—Yes. That is basically—

**Senator FISHER**—So you do not have any basis—for example, no indication from the department or the government or anywhere else—that leads you to make that assumption?

**Mr Piccinin**—No, none whatsoever.

**Senator FISHER**—We have talked a lot about access to infrastructure which has national security implications. In the second last paragraph of your submission you talk about corridor allocations and third-party access to that sort of infrastructure. You observe the impact on the industry’s service level and increasing prices to customers, which we have talked about. Can you expand on the comment in your submission that ‘such access would essentially make redundant almost all existing maintenance techniques’? What do you mean and how do you know that?

**Mr Piccinin**—I will give you an example. With a pressurised pipe for water, when there is a leak or a burst, you need to essentially isolate that area. That means you turn off all the valves that bring water to or take water from that section. If the broadband fibre were put inside the pipe we could not do that.

**Senator FISHER**—So they are the sorts of scenarios that you outlined before?

**Mr Piccinin**—That is right. This is why I keep harping that, if you do not bypass the existing third-party access provisions, when people make decisions as to whether to grant access, rather than purely the information of location of the assets, you tend to make those decisions based on minimising overall costs and not just the cost of deployment. And you make sure that you do not minimise, for instance, the cost of deploying broadband but actually increase to an even greater extent cost incurred by essentially making techniques such as those redundant.

**Senator FISHER**—That is an example of a technique that may well be made redundant. Your submission says ‘almost all existing maintenance techniques’. Do you have a basis for saying that?

**Mr Piccinin**—Yes. We have spoken to asset managers and they were absolutely appalled that somebody would thinking of putting broadband inside either pressurised pipes or waste water pipes which have trees anywhere near them. The moment there is the possibility of any tree intrusion you essentially render inspection impossible, and tree root stripping and jetting techniques all go out the window.

**Senator FISHER**—This is not a criticism of your people, but surely there must be a significant degree of supposition from them at this stage. Have you had sufficient information to be able to make those assertions?

**Mr Piccinin**—If you are talking about laying broadband in the same trench and you place it underneath the pipe, then it is less troublesome. If you put it on top of a pipe it is troublesome because you cannot dig it out using backhoes. So all our techniques are pretty much brute strength.

**Senator FISHER**—There are only so many possible scenarios, aren’t there?

**Mr Piccinin**—Exactly. That is right.

**Senator FISHER**—Thank you.

**CHAIR**—Thank you very much, Mr Piccinin, for your submission on behalf of the association to the inquiry and for taking the time to appear before us today. We thank you for your assistance.

**Mr Piccinin**—Thank you very much.

[11.13 am]

**HUGHES, Mr Brett, Director, Policy, Australasian Railway Association**

**CHAIR**—Thank you, Mr Hughes, for coming along to talk to us today. The committee has received your submission as submission No. 3. Do you wish to make any amendments or alterations to your submission?

**Mr Hughes**—No, but I would like to make a statement.

**CHAIR**—Please do so.

**Mr Hughes**—Thank you for the opportunity to appear before the committee and describe the rail industry's position on the telecommunications legislation amendment bill. The Australasian Railway Association represents all the major rail interests in Australia. This includes track owners, operators, suppliers, manufacturers and contractors. It also includes public and private rail, freight and passenger rail and urban and regional rail.

The rail industry currently employs over 100,000 people in Australia. Governments, both Commonwealth and state, together with the private sector, are currently committed to investing \$36 billion in railways. Rail in Australia is experiencing a vital renaissance as the prospect of oil supply uncertainty, climate change and congestion all lead to a greater use of rail as the transport mode of choice.

The rail industry is concerned about the uncertainty and potential impact of this legislation. There are also issues which may relate to the introduction of the NBN as a project which we have also identified but which may be separate to the telecommunications legislation amendment, which we would like to raise as well, since the differentiation is not clear.

The rail industry is concerned about the lack of dialogue with government on this issue, which potentially has very significant impacts to the industry directly and to Australia as a whole. The wider observation is that there are too many government policy activities underway at the same time, and they are being pursued with undue haste. The result is the risk of poor policy decisions, which were evident recently, and the inability of industries to contribute at the level required to effectively contribute to policy development. There is simply not the time or capacity available in the industry. In this case the legislation was not discussed with the industry and the time frame for response was too short.

Getting back to the legislation, railways are vital for the nation as a whole. Safety is the No. 1 priority for railways, business, the community and ultimately governments. This is evident with every rail crash which are universally reported on television and newspapers, as we saw from just last week. The rail industry believes that every death and injury is avoidable and we need the best safety systems and technology in place to ensure this occurs. Railways also provide for public security such as antiterrorism as an integral part of their rail safety management.

It is worthwhile understanding that rail safety is legislated differently to some other utilities. All railways whether track managers or train operators are independently regulated by individual state rail safety regulators. Every railway must demonstrate it has the people, systems and processes in place to ensure safety to the satisfaction of the safety regulators. It is fundamental to the way we operate. Current national investment in level crossings and other rail infrastructure and incidents such as the Waterfall and Glenbrook crashes demonstrate that governments and the community demand improvements to safety. At the very least, safety of rail cannot be degraded; it is simply not acceptable.

There are four areas where the rail industry is concerned that the telecommunications legislation amendment could impact on railway operations. Firstly, access to physical rail corridors and facilities, secondly, access to telecommunications systems, thirdly, interruptions to operations, and fourthly, costs to business. Let me describe each of these simply.

Rail corridors are effectively a controlled environment. Railways are not like road reserves which have uncontrolled access. All people who enter the rail corridor are either controlled or are doing so illegally. Each railway has arrangements in place to manage people and activities in both categories. If the NBN company requires access to rail locations it must be done in a controlled manner or the railways will breach their rail safety accreditation. Every NBN worker will require full rail safety worker accreditation as well as full drug and alcohol testing. If access is provided there can be considerable costs to railways to ensure safe access by providing training, induction, supervision and information. If the railways and the safety regulators believe that safety is being degraded, it will close down railways.

Railways use telecommunications facilities for train protection and control. Telecommunications systems are essential for the safe and efficient operation of railways. In simple terms—no communications, no trains. Therefore rail communications must be reliable. They must not be subject to interference, delay or interruption. The rail industry describes telecommunications as vital. This means that communications are essential or railways cannot operate.

The rail industry is concerned that the telecommunications legislation amendment will allow the NBN company access to rail telecommunications systems and thereby degrade system efficiency or reliability. This cannot be allowed. Any work in rail reserves or on associated rail facilities and systems such as telecommunications systems, including the gathering of information, must be done in a managed way to ensure safety and to minimise the interruptions to rail operations. This will apply to the NBN company or the railway will breach its safety accreditation. In the worst case the railway might have to cease train operations while such work occurs.

All three of these issues can introduce costs to the railways directly and to their customers. These issues can degrade safety and interrupt operations. Interruptions result in operational costs, cost increases to customers, reduced service and reliability, and downstream costs to business. Ultimately, it can degrade rail system performance resulting in adverse community and environmental effects. In short, the nation suffers as a whole.

There are however additional administrative costs, which I want to raise, which may also occur in the provision of information to the NBN company. According to the legislation, railways will be required to provide information on land infrastructure and other facilities under their control. I am sure that you will appreciate that there are millions of pieces of information which may be requested varying from digital location information to the size of ducts. There are over 44,000 kilometres of rail track in Australia and countless stations, terminals, offices, yards, sidings, depots and other facilities. A simple question such as the boundaries of land under railway control represents an enormous amount of work to answer with any degree of accuracy. Yet this is exactly what the rail industry fears could be required under the legislation. If such information is required without due regard to reasonableness or compensation, it will impose an unacceptable burden on the industry.

The rail industry does not have confidence that the telecommunications legislation amendment provides protection for railways or the safety of the general public. This risk is evident by past experience of telecommunications companies in Australia. I expect that all utilities and many private landowners have had the experience of a telecom company demanding access or other work which impacts negatively on them. Unfortunately those adversely affected have no recourse to protection because the telecom is operating under Commonwealth law.

The rail industry needs the telecommunications legislation amendment to be amended to provide protection from adverse impacts. The industry needs legislation to guarantee the primary authority for railways control of its vital communications systems to ensure safe operations. Thank you for considering the industry's concerns. I am happy to answer any questions you may have.

**Senator MINCHIN**—Thank you very much for that very comprehensive and very useful submission, Mr Hughes. I will just begin again by asking you when and how you learned about this bill, which, as you say, you are quite concerned about. How did you come to know about this bill, and when?

**Mr Hughes**—I cannot give you the date that we heard about it. I received a contact from someone in the media asking for my comment on it.

**Senator MINCHIN**—Presumably, that was after it had been introduced into the Senate.

**Mr Hughes**—I do not know when it was introduced so I cannot tell you the timing.

**Senator MINCHIN**—But certainly you were not advised by the department or by anyone from within the government about this bill, nor was there any approach to you either by way of consultation or notification prior to its introduction, to your knowledge?

**Mr Hughes**—That is correct.

**Senator MINCHIN**—What has happened subsequently between your association and this department of communications in relation to the bill itself and/or the acquisition of the information which the government is seeking concerning, in the first instance, the implementation study and, secondly, the company itself? What has occurred in the five weeks since this bill was introduced?

**Mr Hughes**—The only communication that I have had with the department or other arms of government was one meeting with officers of the department and I found the officers helpful, constructive and positive. However that only occurred recently—

**Senator MINCHIN**—When was that?

**Mr Hughes**—That was yesterday.

**Senator MINCHIN**—Was that meeting at your instigation or theirs?

**Mr Hughes**—It was at theirs.

**Senator MINCHIN**—At that meeting did they seek then to outline the sort of information which they would be seeking from your members? What was the real purpose of the meeting?

**Mr Hughes**—The purpose of the meeting was to dialogue our issues and clarify any detail.

**Senator MINCHIN**—So it was really in response to your submission, was it?

**Mr Hughes**—I would say so, yes. They did not outline the type of information which might be requested. They were sympathetic to the position which we had put in the submission which I clarified slightly differently, and they talked about the process of providing the information which we have not had the time to review in terms of the instruments and so forth.

**Senator MINCHIN**—Are you aware, in the last five weeks, of any more direct approaches from the department, or the government generally, to members of your association with respect to the acquisition of this information that they seek on a voluntary cooperative basis?

**Mr Hughes**—The officers told me that they had approached the Department of Infrastructure, Transport, Regional Development and Local Government and through that department had had discussion with the Australian Rail Track Corporation, the government owned national track owner. But I know of no other contacts with railways with regard to this information.

**Senator MINCHIN**—And yet we are told that this is all terribly urgent and important. One difficulty I have with your submission is the overlapping of two issues. This bill purports to be about the provision of a stick for the obtaining of, in a sense, network information. There is a genuflection to a desire to obtain this information voluntarily and cooperatively but if that is not possible then ‘here is the big stick’. So that is at one level and you express concerns about that, but in your submission you do go on to talk about what I assume to be physical access to your network, which I guess is a separate issue. Our job with this bill is to look at the issues it raises in relation to the potentially forcible acquisition of network information. I guess it is a separate issue, but a very important one, as to the use of that information to physically access your members’ facilities. Do you understand the distinction that we have to draw?

**Mr Hughes**—I do. The point is what information is going to be required and how it is going to be acquired. There are many ways to acquire information. One of them is by physical observation. Sometimes you can even do that by taking photographs or whatever it might be but if it comes to the point where an NBN worker decides that they really need to eyeball a location then there is a physical access issue. I also draw the distinction, as I mentioned in my opening remarks, about open access to locations. If the NBN company wants to survey a road, they can go out and survey the road. They can do it directly or hire a surveyor and go out there because it is an uncontrolled access environment. But you cannot do that with railways. So it is not necessarily obvious to the NBN company that if they are looking for certain information they are going to have ease of ability to acquire it, and sometimes it may require physical location on that area.

**Senator MINCHIN**—But this bill is about seeking information, presumably in electronic format, about the layout of your network. Isn’t it the case that you are going on to ask the question of what they might then do with that information?

**Mr Hughes**—No, I am not actually saying that. We do not make the assumption that it is electronic information. There is a lot of information which is not electronic. It can be physical. It can be the old linen blueprint drawings. It can be data in all sorts of different manners. Sometimes it is descriptive; it is text, pictures.

**Senator FISHER**—Google maps.

**Mr Hughes**—Yes, Google maps. I know of one railway which has photographed its whole network.

**CHAIR**—Did you ask the department yesterday whether there was an expectation that the NBN company employees would survey railway lines or whether in fact the NBN company would ask your members to

provide that information, in whatever format it is? Or are we just speculating about hordes of NBN employees going out and looking at railway lines?

**Mr Hughes**—I did not ask that question, but the uncertainty is that the legislation does not describe how that information is to be provided.

**CHAIR**—But at the same time it also does not say that there is an expectation that NBN company employees will traipse all over railway lines. Maybe we should clarify with the department what exactly they are going to get the information from.

**Senator MINCHIN**—The point of this information is to give the minister a power to command you to provide information that he requests. That is the purpose of this bill. It goes to the point that the chair is making; that is one set of issues altogether. You are really drawing to our attention another related potential problem of ‘NBN Co’ or other government employees, of their own volition, seeking to acquire that information and potentially putting themselves or the railway safety at risk. But there would be another set of laws that govern that now. If Telstra wants to put copper down alongside a railway line, presumably there is a set of laws that govern that sort of access now that would equally govern ‘NBN Co’ workers. Is that not the case? This bill is only about a power of the minister to order you or your members to deliver up information to the government.

**Mr Hughes**—I think it is a fair point. I have not gone through all of the legislation and checked whether that is the case. Therefore, I am reluctant to presume or assume what situations occur.

**Senator MINCHIN**—Can you briefly describe to us how the law at state and/or federal level currently governs access to railways? Are there in existence special exemptions for anything to do with telecommunications that gives them rights that other companies, citizens or organisations do not have in relation to railways.

**Mr Hughes**—I do not know that information but I could find that out for you.

**Senator MINCHIN**—But presumably, in the context of what you are talking about, there are. When you say that people cannot just go and walk along a railway line, is that because of relevant state laws that make it an offence to walk alongside a railway track? What governs that now?

**Mr Hughes**—The way the rail safety legislation works is that the railways have to manage their risks to the satisfaction of the safety regulator. So the railway will say, ‘There is a risk that people will wander down our rail tracks and therefore these are the mitigations that we will put in place to ensure that safety is not compromised,’ and they will submit that to the rail safety regulator as part of their safety management system or SMS.

**Senator MINCHIN**—But presumably railway owners and operators have the legal authority to prohibit trespass onto existing rail corridors?

**Mr Hughes**—Yes.

**Senator MINCHIN**—Although you are right, there are in the existing telecommunications legislation certain rights granted to telecommunications carriers to access facilities. I want to explore this a bit. What is the current experience with Telstra, as the current operator of the fixed-line network, and the railways? To what extent does Telstra make use of railway assets for its existing communications network? Do they cause you difficulties at the moment?

**Mr Hughes**—I do not have that information. I suspect that national telecommunications companies do not make wide use of railway areas because of the risks that I have introduced. I also understand that railways are cooperative with respect to telecommunications and do not seek to interfere in any way; however, those two operations need to occur in the same area.

**CHAIR**—Is it common for railways to have telecommunications infrastructure now?

**Mr Hughes**—Absolutely.

**CHAIR**—Such as the overhead cables that often go down the railway line.

**Mr Hughes**—Not overhead cables. There are a variety of telecommunications facilities. Some of it is just through radio frequency and some of it is fibre optic. In the old days it used to be copper, and there is probably still some copper out there, but that is being replaced by more modern systems. One of the railways I understand runs their telecommunications down the rail line; that is down the track itself. So there is a variety of options.

**Senator MINCHIN**—Just to pursue that, what you are concerned about is that ultimately any use of railway facilities by NBN Co. to lay optical fibre could well interfere with your own dedicated communications systems. Is that correct?

**Mr Hughes**—That is correct. Or the rail operations itself; the tracks and other facilities.

**Senator FISHER**—Would it not also increase the incentive for third parties to access your property and map the physical location? In response to Senator Minchin you were talking about your safety management systems and how it is against the law in many cases for people to do just that. Surely you are assessing the adequacy of the existing legislation as of today. But if it were the case that there were also national broadband network infrastructure built alongside, does your organisation think there would be an added incentive for third parties to try and do what they may? For example, across the Nullarbor. So there may be increased attempts with which your organisation and the rail authorities have never had to deal with before.

**Mr Hughes**—If there is any new activity in the rail reserve there is obviously an increased level of activity in the rail reserve. One of the things that we have to be careful about as well is rail safety, which is currently regulated by the states, and this is Commonwealth legislation. Therefore we have to be careful about the primacy of Commonwealth legislation over state legislation, and we have not assessed that possibility.

**Senator MINCHIN**—From your understanding of the nature of your members, do you believe they would be prepared to voluntarily and cooperatively come to arrangements with the government for the supply of this information on a recompensed basis without the threat of force as is contained in this bill?

**Mr Hughes**—I believe that railways have no interest in introducing undue impediments to an NBN company. It is not the railways business to interfere. There is no advantage, there is no incentive and there is no reason to do so, and past experience is that railways have been cooperative with many other utilities and activities, and I expect that that would continue in the future.

**Senator MINCHIN**—You did say in your submission that you would expect further consultation with your industry before the legislation is actually passed. Is that still your position? Did your meeting with the department yesterday resolve the outstanding issues for you or would you still be of the view—and put the view to this committee—that the Senate should not pass this bill until you have had the opportunity to have further consultation with the government?

**Mr Hughes**—Yes, we would. As I said in the introductory remarks we believe that the legislation should be amended to include protections from unreasonable impacts on railways and from unreasonable costs. Sometimes the simple questions can be enormously costly to answer and can take a significant amount of time depending on what that request might be. Partly depending on, for instance, the state of the information, and where information is not accurately known, whether it has to be acquired in some way by the railway or another provider directly.

**Senator MINCHIN**—From the point of view of the Senate's consideration of this bill you at the very least would like to see, I presume from your comments, an amendment that required the government to recompense utilities such as yours for reasonable costs incurred in meeting these requests?

**Mr Hughes**—Correct.

**CHAIR**—Can you just clarify that your members would be recompensed, not the—

**Senator MINCHIN**—Yes, sorry.

**Mr Hughes**—Yes.

**Senator MINCHIN**—I used the word 'utilities'. There were two quite specific issues which you may have heard raised earlier about the consultation time frames—the initial five-day time frame for consultation on the draft instrument setting out what information is required and then 10 days for the supply of information. The witnesses we have heard from and submissions that we have seen want at least a doubling of those time frames. Would you concur with that proposition?

**Mr Hughes**—Yes.

**Senator MINCHIN**—Also, as I raised with the previous witness, there is this interesting issue—and I do not know whether you have looked at this—that, if you are going to be forced to provide information that may be, for reasons beyond your control, not as accurate as you would like, should the bill should actually provide some immunity from any civil action based on any inaccuracy in that information? Is that something you would like to see in the bill?

**Mr Hughes**—I have not looked at that issue directly. It is certainly something which I think we should look at, but I do not have a conclusion about it. It seems unreasonable on the face of it if a utility acts in good faith and to the best of its ability to provide the information required that it should be penalised when it is doing the best it can.

**Senator FISHER**—You talked in response to Senator Minchin's question about the degree of consultation, and your website lists about 25 track owners and a lot of smaller tourism and heritage operators. Were you speaking on behalf of those organisations and entities as well in your answer to Senator Minchin about consultation?

**Mr Hughes**—Yes, I was.

**Senator FISHER**—So you are able to say that they have not been separately consulted by the government, the department or anyone in respect of the bill?

**Mr Hughes**—I do not have a definitive response from all of those railways, but the ones I have been in contact with have had no direct contact with the department, with the possible exception of ARTC.

**Senator FISHER**—In your opening statement you talked about how communications were essential for the railways. Is it possible that the government's proposal could be good for railways?

**Mr Hughes**—It could be. I would have to figure out why or how. Anything is possible, I guess. For instance, if the NBN company was after certain information which was not available but was willing to contribute to the cost of the acquisition of that information then it might be in the interest of the railways to acquire that information which would have an internal benefit.

**Senator FISHER**—But then surely it goes to the other issues that you have talked about—the use for which that information is being provided, the use to which the information is then put and the degree of potential interruption or interference with rail services that might result from that?

**Mr Hughes**—Correct.

**Senator FISHER**—Other submissions have talked about the absence of and necessity for a cost-benefit analysis essentially of the whole of life of this proposition. Have you seen anything like that? What is your organisation's view of those suggestions?

**Mr Hughes**—Railways will collect data and information where they see that there is value in doing so. That should be on a whole-of-life proposition. But they do that only with respect to their own internal issues; they do not collect information for others because they pretty much operate on a commercial basis—even the public railways.

**CHAIR**—Thank you very much, Mr Hughes, for the submission the association made to this inquiry and for taking the time to appear before the committee this morning. We appreciate your assistance. Thank you. We will now break for lunch.

**Proceedings suspended from 11.45 am to 12.32 pm**

**BOOTH, Mr Geoff, Group Managing Director, NBN Engagement, Telstra Corporation Ltd**

**GALLAGHER, Mr William, General Counsel, Public Policy and Communications, Telstra Corporation Ltd**

**CHAIR**—We will now resume proceedings. I welcome Mr Geoff Booth and Mr William Gallagher from Telstra. Good afternoon, gentlemen, thank you very much for coming to talk with us today. The committee has received your submission as submission No. 7. Do you wish to make any amendments or alternations to your submission?

**Mr Booth**—No, we do not.

**CHAIR**—Would you like to make a brief opening statement before we go to questions?

**Mr Booth**—Senator, we are on the record as seeking very constructive engagement, and we believe our submission offers ways for the legislation to be improved. We do support the need for the legislation. I think the submission largely speaks for itself. There are four major points that we want to emphasise. The security measure associated with this information, and we have made some points in regard to that. The certainty of the nature of the information to be provided in our submission. We believe that the language in the draft legislation could be amended and my colleague, Bill Gallagher, is able to give some examples of that should you require. We believe that the competitive neutrality pieces of the legislation need to have a filter that there is a process for ratifying the national broadband network body's requirements. We also believe that for the info that is provided it should be very clear that it is for building the network, so actual information to build a national broadband network. We have also made comments on protection for parties who are providing the information. Also we have included a short para on some unintentional drafting oversights that we believe may be within the document, specifically in regard to previous information provided by this company to the previous national broadband network.

**Senator MINCHIN**—Thank you, officers from Telstra, for presenting to this committee—we do appreciate it very much—and for your very useful to this submission in its consideration of this legislation. As you know, this legislation builds on amendments made to the relevant act with respect to the previous, now abandoned, tender process for a fibre-to-the-node network. I wonder if, perhaps, you could for the benefit of this committee relate Telstra's experience with that process under the current legislation which this bill proposes to amend. My understanding is that Telstra was in a sense the main supplier of information under the existing legislation for the RFP process. So I would just be interested in your experience of that, the way in which that was handled between you and the government, the provision of information, the commerciality, whether you were recompensed, and your understanding of what then happened to the information you supplied. This goes to what you describe as a drafting oversight, as well. I think it would be useful if the committee had a bit of a background on what the experience was like for Telstra under the previous arrangements.

**Mr Booth**—If I may, I will make a couple of comments, and then I might hand over to Bill, because he was a part of that process and may be able to add some more detail. The first comment I would make is that we do not believe that there was any systemic issue with the process. As a matter of fact, from what I am advised, and not being a direct part of it, Telstra actually did provide the information prior to the request. So we were broadly in support of the process. In terms of recompense and what happened, I might ask Bill to make a few comments.

**Mr Gallagher**—I think your question goes to our experience as, in a sense, a provider of information and then as a party who might access the information. Perhaps if I deal with the latter first because it is a very simple position. We did not access any information in the RFP process. As you said, we were the major provider of information and we formed the view that we did not need access to any information from any other party in order to prepare our RFP response, so we did not access it.

In terms of the process of providing information, I think our experience was that it was a fairly consultative process. It ran from about March through until early August, about this time last year. We had a number of meetings with the department in relation to the initial request and refining the request for information over time, and we provided a substantial amount of information through the course of those discussions. Ultimately, a formal request was issued but by the time it became active or by the time we were actually required to provide the information we had actually already complied—we had provided voluntarily all the information that had been requested. The legislation provides a mechanism whereby, in effect, the department can issue you a certificate or an undertaking certifying that you have complied voluntarily. That information, when it is

supplied voluntarily, then attracts the protections under the legislation. So, as I said, it was a three- or four-month process, a consultative process. Ultimately we provided the information voluntarily.

**Senator MINCHIN**—Were you recompensed for costs you reasonably incurred in providing the information?

**Mr Gallagher**—We were not.

**Senator MINCHIN**—Did you seek, at any stage, recompense?

**Mr Gallagher**—I do not have any recollection that we did. I would have to go back and check the correspondence, but I do not think we did.

**Mr Booth**—We could take that question on notice.

**Senator MINCHIN**—I would appreciate that. Off the top of your head, were the costs incurred in assembling and providing this information significant?

**Mr Gallagher**—They were. There was a significant amount of information that was provided. I think the amount of information that might be provided under the proposed bill would be an order of magnitude greater, but nevertheless it was a significant amount. The costs of compiling it were internal costs. So it was management time and staff time in terms of extracting information from various different databases and systems.

**Senator MINCHIN**—Nevertheless, there are effectively costs incurred.

**Mr Gallagher**—Indeed. There are costs involved.

**Senator MINCHIN**—Would it be your hope and desire that, under this regime relating to the implementation study and NBN code, suppliers of information like yourselves would be recompensed for costs reasonably incurred?

**Mr Booth**—We have not really developed a position on that so it is probably a little early for us to say.

**Senator MINCHIN**—You would not knock it back if it was offered though.

**Mr Booth**—Obviously we are constantly bidding for different deals right across Australia and so we do have units already established which prepare responses to tenders.

**Senator MINCHIN**—Yes, although this is not a response to a tender.

**Mr Booth**—No, it is not.

**Senator MINCHIN**—You said that at one stage a request was made under the existing act effectively ordering you to provide information.

**Mr Gallagher**—That is right.

**Senator MINCHIN**—Why was that done? How did it get to that point that such a formal order had to be issued?

**Mr Gallagher**—Certainly it was not because there was noncompliance or there was no cooperation from Telstra. We were cooperating the whole way through. It might be a question better directed to the department. I would only be speculating on why ultimately that occurred.

**Senator MINCHIN**—Sure. Were you surprised though to receive it?

**Mr Gallagher**—I think we were told that they were going to do it. The drafting of the formal notice was very much in accordance with the original refined request as we discussed with the department. So the actual nature of the request when it was formalised was not a surprise at all. We knew exactly what information the department was seeking.

**Mr Booth**—As I recollect, our concerns would have been very similar to those which we have expressed in this response—the security of the information, in particular; how it was going to be used; and that a process was in place to make sure that that very sensitive information was looked after appropriately.

**Senator MINCHIN**—I would like to come to that security issue. To what extent if any were you in fact motivated to cooperate with the government in providing information for the RFP process by the existence of these powers to compel you to provide the information if necessary?

**Mr Gallagher**—My recollection is that a decision had been made by the company to cooperate and to provide the information even before the bill for part 27A of the act as it currently stands was introduced. So we were cooperating. The bill was introduced, from memory, relatively early in the process so it was there

through the process. I am not sure that it necessarily provided any incentive beyond what we knew—which was that the government was going through with the RFP process and it had formed the view obviously that it needed information to provide to the various different proponents or tenderers. No doubt it would have extracted that information from various parties, at the end of the day, if it needed to.

**Senator MINCHIN**—Nevertheless I think it is pertinent that, at the end of the day, you provided everything that was asked of you on a voluntary basis and at no stage were you in a sense actually forced to provide anything.

**Mr Gallagher**—No.

**Mr Booth**—If I may add to that, from my recollection Telstra had been an advocate for a national broadband network from 2005.

**Senator MINCHIN**—That is my recollection too, Mr Booth.

**Mr Booth**—Yes, and as I have said our main concerns in that process, from being around the process as distinct from being in it, were back to these concerns about how the information was to be used and the security of it.

**Senator MINCHIN**—Yes. I would like to come to that in relation to the existing arrangements and the information you supplied. Were you ultimately satisfied with the arrangements that were put in place for the handling, storage and protection of the information you did supply to the government?

**Mr Booth**—We have discussed this, obviously, and we saw no systemic issues with the process. So, yes, I would say that we were satisfied.

**Senator MINCHIN**—Are you aware of any leak—which is the word used around here—or any inadvertent or unfortunate release of that information in any way that has been a difficulty for you since the collapse of the RFP process?

**Mr Booth**—Could you clarify the question for me?

**Senator MINCHIN**—You have provided information to the government.

**Mr Booth**—Yes.

**Senator MINCHIN**—In the intervening period since you provided that information are you aware of any breach of the security of the information that was provided?

**Mr Booth**—We have been advised of one potential breach or failure. We were advised by the department and we have responded to the department for some more detail. We have not received that. As a matter of fact, we are in the process of responding right now. So that process is currently in play and we do not have the specific detail of that, or a response.

**Senator MINCHIN**—The department simply informed you that there was a problem and that they needed to talk to you about it?

**Mr Booth**—The department did write to Telstra advising that there may have been a technical breach. I think ‘technical breach’ is the correct word?

**Mr Gallagher**—I do not have a copy of the letter with me, I am afraid.

**Mr Booth**—We are just examining our response to that right now. It was a relatively minor breach.

**Senator MINCHIN**—What do you understand about the information that you did provide for what is now an abandoned process, which presumably was then provided to other tenderers to the RFP process? Has that been destroyed? Do they still hold it? What is your knowledge of the status of that information?

**Mr Booth**—In drafting our response, and pointing in particular to part 5 of that response—and I will hand over to my colleague here in a second—we did want to seek some clarity in relation to the status of that information because it was fairly extensive. I think the whole point of point 5 is just to raise that in this environment and as part of the legislation to make sure that the information is destroyed or returned.

**Senator MINCHIN**—So you are concerned that this bill would give some sort of protective status to information which other tenderers currently have that they would then be legally able to use if they wanted to establish their own—

**Mr Booth**—I think our concern is to make sure that there is a process to protect the information should it not be used or required for the process of building a national broadband network.

**Senator MINCHIN**—In other words, you understand that other tenderers for the failed FTTN process still possess this information.

**Mr Booth**—No, I do not understand that that is the case. We would like assurance that it is covered.

**Senator MINCHIN**—Well, you simply do not know what has happened to that.

**Mr Gallagher**—I think we know that one of the proponents or one of the tenderers has destroyed the information. We have not been advised about the information that is in the hands of the other proponents or tenderers and their various advisers and contractors.

**Senator MINCHIN**—Exactly what would you like to see put into this bill with respect to that information previously supplied?

**Mr Gallagher**—I think the point that we identified in our submission was that the definition of ‘protected network information’ included in its shopping list a category which was effectively ‘the information we provided under the RFP process last year’. Our concern was that, because that was included as a category of information, it would then be available to parties who were authorised under the legislation, including those authorised last year, to continue to use that information as long as it is for one of the authorised uses under the legislation. We thought when we read it that it was just a drafting error, so I am sure it is something that could be fixed relatively easily.

**Senator MINCHIN**—Okay. I do not know whether you feel free to comment on this, but I would generally like to cover this issue of competitive neutrality, because this bill could have simply provided for this information to be made available to the department and others for the purposes of the implementation study, but the bill goes further and provides that it be available by way of further instruments to the NBN Co. and any vendors to the NBN Co. I understand if you are reluctant to comment on this, but it does go to this issue of competitive neutrality because, may I say, it presumably remains feasible that, if we ever see this NBN Co. and its optical fibre network, it could be a competitor to the existing Telstra network. That is presumably a possible scenario, is it not?

**Mr Booth**—Yes, I believe that is a possible scenario, although I would reiterate the CEO’s position that we are seeking constructive engagement.

**Senator MINCHIN**—Yes, I understand that. But in terms of us dealing with this legislation we have to deal with different scenarios. The explanatory memorandum itself makes clear that other departments are concerned about the extent to which this bill raises issues of competitive neutrality, and one of the obvious issues is, frankly—you do not need to respond—that a bill which we are being asked to pass which by force of law requires you or other potential competitors with the NBN Co. to hand over material which is then of commercial value to NBN Co.

So would you feel more comfortable, from that perspective, if this bill only related to the implementation study process and not to NBN Co. on the basis that, if the government as a result of the implementation study did decide to proceed with NBN Co., we would have a separate piece of legislation to deal with that possibility? That is not certain at this stage and even the EM says, ‘If appropriate, instruments will be devised to deal with the NBN Co.’ but the masthead legislation, which is what this is, does contemplate information going to NBN Co. and its suppliers.’ One issue we need to think about is whether in fact the bill should be amended to restrict the recipients of the information, at least at this stage, to those connected to the implementation study. I am wondering if you want to make a response to that or whether you would feel more comfortable with a bill that did only deal at this stage with the implementation study.

**Mr Booth**—I would say that we are reasonably happy with our response in point 3, and the response is that we believe that the language needs to be tightened up quite significantly in terms of the current legislation to make sure that information provided is strictly for the building of the NBN and that it is much more specific than it currently is. As we have said in our response, the type of information, if not clearly specified, could raise some issues around the topic that you are discussing and it points to our concerns should different scenarios evolve.

**Senator MINCHIN**—Rather than relying on the written instrument from the minister to specify information, this overall legislation ought to be much more specific about the sort of information which the written instrument can then seek—is that what you are saying?

**Mr Gallagher**—Yes, I think that is right. The draft at the moment is very broad. It talks about information about ‘things’. That can be used in connection with three things: firstly, in essence, the building of the NBN;

secondly, the provision of services over the NBN; and, thirdly, from memory, things ancillary to either the building of or the provision of services over the NBN. So it is information about 'things' in connection with those three things. It is very broad and may, as Mr Booth said, stray into areas of information which may raise genuine competitive neutrality issues.

**Senator MINCHIN**—Yes. Thank you for that. You also raise in 2.3 that the bill itself should specify the principles governing the development of the rules related to security. Is that because you believe at the moment that it is, again, far too broad or that there is too much latitude and lack of—

**Mr Gallagher**—We just have not seen the rules of what the legislation—

**Senator MINCHIN**—It is being provided in an instrument—

**Mr Gallagher**—That is right. It contemplates that there will be various rules and conditions made at some point in the future. I think we are making substantively two points in 2.3. Firstly, we think there should be some guidelines provided which might shape those rules when they are made. Secondly, we think the relevant government security agency should be very heavily involved in and consulted on the development of those rules.

**Senator MINCHIN**—Presumably your network goes to natural security. Does it? Presumably the details of your network are essentially tightly held. Is that right?

**Mr Gallagher**—Very tightly.

**Senator MINCHIN**—We have had one submission that says, 'Most of the stuff is on the public record anyway and people should just turn it over.'

**Mr Gallagher**—That is certainly not the case at all.

**Mr Booth**—There are examples of criminals disabling that network that have recently been in the media. Also, a lot of the information that is held within our records is very important to the security of major corporations around Australia. In putting in 2.3, what the Telstra group wanted to point to was that the security issues should be treated very seriously in the national interest and commercial interest.

**Senator MINCHIN**—This is a relatively fine point, but some other witnesses have specifically sought to have the bill require the minister to consult with any utility involved on the drafting instrument providing for the security and handling and storage, which I gather is not in the bill. It does not actually require the minister to do so. Presumably you would like to see that in there on top of this.

**Mr Gallagher**—We would. I think it is the case that they consulted last year. They had to go through a consultation process when they developed those rules for the purposes of the RFP process. We would certainly like to see that happen again.

**Senator MINCHIN**—Just in terms of this information to be provided, you said in 3.1 that the approach adopted in this bill is an improvement on the current regime. What did you mean by that? What is the deficiency that this bill overcomes that you refer to in 3.1?

**Mr Gallagher**—I think it was just that, under the previous bill, the nature of the information was pretty much at large, whereas now at least—although we say it needs to be tightened—there is at least some attempt to contain the nature of the information that can be requested.

**Senator MINCHIN**—Can I ask on that: were you actually consulted about the drafting of this bill, at all?

**Mr Booth**—No, we were not. We have been having ongoing discussions with the department around a broad range of issues—we talk with the department almost every day—but, on this particular issue, no.

**Senator MINCHIN**—So you were not given notice about this bill—it just appeared?

**Mr Booth**—I would seek my colleague's view but, from my point of view, I think that is how it happened.

**Mr Gallagher**—I understand that at some point the department did mention that there might be a need for an information bill or an information regime of this type, but certainly when the bill was introduced it came as a surprise to us. There was certainly no detailed consultation with us on it.

**Mr Booth**—Having said that, we fully acknowledge the need for it, and we welcome the opportunity to make these comments back in regard to it.

**Senator MINCHIN**—Sure; I appreciate that. I do not want to know more generally about any of the discussions you might or might not be having with the government about the NBN, but have there been, since

this bill was introduced, detailed discussions about the provision of information relating to the implementation study with your company?

**Mr Gallagher**—No, there have not.

**Senator MINCHIN**—So in the five weeks since the bill appeared you have not been asked to provide particular information?

**Mr Gallagher**—No, we have not.

**Senator MINCHIN**—You also raised an interesting issue at 4.2—this issue of the bill providing an immunity from claims against any carrier who provides information under the regime. Do you want to expand on that, and on what sort of risks you are concerned about, why such a claim might arise and how that would be prosecuted?

**Mr Booth**—The information that we would be providing would be provided on a best-efforts basis. The network that we have deployed has been used over decades. Fibre moves; ducts become full; you can get natural interference with some of the plant. So we believe that, even though it is being provided with our best efforts—the information being provided from our records—we could not categorically guarantee that the plant is in the order that may be required for some other party to effectively use it. So that was the issue that we were alluding to in 4.2.

**Senator MINCHIN**—So the amendment that really said information supplied in good faith would attract some immunity at law from any action based on—

**Mr Booth**—From some third party, who may be a contractor—

**Mr Gallagher**—Who may place some reliance on the information in the future.

**Senator MINCHIN**—What sort of scenario are we talking about—somebody, spending a few hundred thousand to dig a trench or something, assuming that that is where your duct was and it not being there or something?

**Mr Booth**—Something like that, or maybe damaging existing plant because the records were maybe incorrect, physically, or a road verge or a road had been moved. In these kinds of records, there would inevitably be that situation.

**Senator MINCHIN**—If this bill dealt only with the implementation study stage, presumably that might not be necessary. You are looking down the track, are you, in terms of NBN Co. or any of its suppliers relying on this information—is that correct?

**Mr Gallagher**—I think our fear is primarily with NBN Co. and probably even more particularly with its contractors, the parties that go out and do the civil works.

**Senator MINCHIN**—So this was not an issue with the RFP, for example? Did you at any stage seek any immunity in relation to information you supplied to the RFP, because presumably there was none?

**Mr Gallagher**—We certainly did with the department but we were told that we would not get it.

**Senator MINCHIN**—So even if this bill was restricted to the implementation study, you would feel more secure were there to be some sort of immunity in relation to the information supplied?

**Mr Booth**—I think so. Even during a study, assumptions could be made that may lead to the wrong conclusions. We do think that that is necessary, whether it be in the implementation or the construction.

**Senator MINCHIN**—Finally, on two issues that came up with other witnesses in relation to the timelines provided in the bill for consultation on the draft instrument requesting the information and the timeline then for the provision of the information, other witnesses have sought to have the bill double both time periods from five to 10 days in the first instance and 10 to 20 working days in the second instance. Is that something you would support or like to see in the bill?

**Mr Booth**—Clearly, being the major provider of information in the situation, and it could be information of scale and some complexity, we would always do our best to meet whatever is required. But we may need some latitude because if you cannot do it, you cannot do it, and we are talking about issues of scale.

**CHAIR**—Thank you for your submission and your evidence today.

[1.07 pm]

**HAVYATT, Mr David, Manager, Regulatory and Corporate Affairs, Unwired Australia Pty Ltd**

**CHAIR**—Welcome. Thank you for your submission to this inquiry, which we have received as submission number 4. Do you wish to make any amendments or alterations to the submission?

**Mr Havyatt**—The only correction is that I have since noted that the issue around publishing on the internet that I mentioned in the submission, whilst it is still incorrect it, is not redundant in the sense that the relevant instruments are not legislative instruments and therefore not covered by the requirement to be published on Comlaw. The statement that the publishing on the internet is functionally incorrect stands; I just do not want to pursue it any further. I just want to correct that piece.

**CHAIR**—Would you like to make an opening statement.

**Mr Havyatt**—One of the pities about the fact that the *Chaser's War on Everything* has come off air is that we will no longer see the segment known as 'If life were a musical', because I have envisaged seeing Andrew Hansen bowl in here today doing *Tradition* from *Fiddler on the Roof* with words made up to demonstrate the grand Australian tradition of our utilities not talking to each other and regarding all their information as private despite the fact that every single one of those utilities builds their infrastructure by virtue of some kind of government licence, be it a federal one or a state one, irrespective of whether they are a state owned enterprise or a private enterprise.

I was further surprised to read the Business Council of Australia's position in their submission—the late submission—given the historic position of the BCA about the importance of national planning for infrastructure. When the BCA has advanced that position in the past it has not been the idea that they see government as an essential Stalinistic planner in the middle but as having an important role to play in providing information to the market about where infrastructure is and where it is available so that the market itself can fulfil the function of filling those voids.

The other thing I have been fascinated about is the fact that the discussion so far has failed to mention some of the other relationships in the telecommunications industry between telcos and utilities. For example, the focus on the water supply tended to focus on the idea of fibre through sewerage lines or pressurised water pipes because that is what was referred to in the explanatory memorandum. But the NBN itself includes a provision of wireless infrastructure and a large amount of wireless infrastructure is mounted on water utility infrastructure, notably water towers. So there is already a relationship between the water industry and telcos.

Similarly, the electricity supply authorities and railways are both organisations that utilise communications intensely and are provided with an exemption under the Telecommunications Act from requiring a carrier licence to provide those services. They can actually also provide those services to the public and still not require a carrier licence under the exemption for primary use. That means that there are in fact railways and energy authorities who today sell telecommunications services in the marketplace on fibre on their infrastructure and yet we did not seem to hear any reference from any of those representatives of the utilities industry about the ongoing relationship between utilities and telcos.

The final one we did not talk about was existing aspects of the telecommunications regime. In the submission, we refer to the fact that the information being requested of telcos by the department could be requested by the ACCC or ACMA for the purposes of undertaking their regulatory function but, through some quirk of drafting, we are not allowed to ask our carriers that information for the purposes of developing public policy, which does seem to be a slight oversight. The second thing is that the existing regime in terms of the competitive neutrality, Senator Minchin might be interested to know, already provides an extensive facilities access regime whereby carriers access each other's infrastructure, and under that facilities access regime carriers are required to provide to each other information about their underground infrastructure and towers. So if the implementation study were a licensed carrier, it would be able to acquire some of this information under the facilities access code that already exists.

That brings us to the current state of discussion. I do not really want to go much further into the issues about consultation and compulsion versus cooperation except to note that cooperation is good unless one person does not cooperate, at which point we would then have to worry about compulsion. So it seems to me to be an adequately sensible process to put in place a regime that can require compulsion. If we do not need to utilise it, that is grand, as long as everyone is prepared to cooperate. There seemed to be little evidence, however, of that cooperation being willing and able to be provided.

Finally, I note that in our submission we do talk about the fact that a large amount of the information that people are claiming is necessarily part of national security is actually physically available already, be that in topographical maps, or be that by just physically sighting. The Telstra witnesses talked about attacks that have been reported in the press—in fact, there was an article in the *Courier-Mail* yesterday which I can provide you—but that was just attacking infrastructure because we put logos and brands on our infrastructure all over the place. You can figure out where every Telstra exchange is by looking up in the sky and looking for their logo. You can see where telco infrastructure is in the street by looking down and looking for logos on manhole covers. What we are talking about here is in fact just providing information within a secure and controlled environment for the purposes of making it possible to get on and plan the National Broadband Network.

This brings me to my final piece. The BCA in its submission, and others, have been critical of the government for its failure to thus far do a cost benefit analysis of the NBN. I do not want to comment on that in general except to comment on the fact that you cannot do the cost component of that process before you know the information that is being requested in this process, and this process is requesting that information from carriers and utilities in such a way that it can be made available to the implementation study so that policymaking can be properly informed.

It would appear to me that the best thing we could do is move quickly to enable the implementation study to get underway to provide us with the information we need about the possible ways of building this network and the costs that will be entailed. Any further delay is only going to continue to create the problem we have today, which is an ongoing uncertainty in the telecommunications market about what the NBN would look like. It has been widely reported that it is already creating uncertainty for existing investors. Unwired, as a wireless infrastructure provider, is one of those players. We do not know yet what the scope of the NBN will be. We would like people to get into the position of helping to hurry up the process and not delay it.

**CHAIR**—Thanks very much.

**Senator TROETH**—I gather that you would like to see a single process for recording and sharing details about utility infrastructure. Could you tell the committee what benefits there would be in setting up this process.

**Mr Havyatt**—This is beyond the scope of the current legislation. It is not something that I would suggest you delay the current legislation for. Senator Lundy referred to the fact that we have a great deal of utility infrastructure out there which the utilities have seen no particular reason to date to bring forward into geographic information systems so that that information is available for other parties in terms of what existing infrastructure is available. That means that if I am trying to do any infrastructure deployment—be it another piece of electricity infrastructure, water infrastructure or whatever—I am entirely dependent upon whatever the manual slow processes are for obtaining that information. If you are thinking in terms of national planning of infrastructure or even geographically local planning of infrastructure, the best way of obtaining that is if the information is retained and recorded in a consistent manner in a consistent geographic information system.

**Senator TROETH**—I can see the point that you are making—that it is desirable to do that—but why in particular would there be benefits in having a single database when at present, as I understand it, both land and water use are regulated by the states?

**Mr Havyatt**—I think you will find that I referred to a single process rather than a single place. The wonders of geographic information systems is that they do not need to be in one place, as long as they are coded consistently so that you can access the information in a consistent manner.

**Senator TROETH**—From the layman's point of view, such as mine, you have suggested removing from the bill references to 'broadband' where it proceeds 'telecommunications network'. Why do you want to do that?

**Mr Havyatt**—The only reason I propose that is because it is currently redundant in the bill. It refers to a broadband telecommunications network and then defines a broadband telecommunications network as a telecommunications network that provides communications on a broadband basis. It does not otherwise define 'broadband'. The definition is currently circular. I do not think the bill is particularly damaged by simply deleting the word 'broadband' and leaving 'telecommunications network' in. It is highly unlikely that anyone is about to run around seeking all this information to build a network that is other than broadband. So it is a piece of redundant drafting and the way it is written is circular.

**Senator TROETH**—Given that the legislation is to facilitate the rollout of the NBN, should you make those references even more specific so that it just refers to the NBN instead?

**Mr Havyatt**—I am neutral on it. All I pointed out was the fact that the existing definition is redundant and my suggestion was that you should ask the department the question as to whether it is necessary or not. It is not a point that I particularly want to pursue.

**Senator TROETH**—How did you first learn about the legislation?

**Mr Havyatt**—I first learnt about the legislation by reading the 7 April document on the NBN regulatory framework which foreshadowed the fact that the government would be looking at additional rules for accessing infrastructure beyond telco infrastructure. Regarding the actual details of the legislation itself, I was like everyone else and did not see it before it was published. I must admit, I have been somewhat surprised by the three infrastructure industry associations suggesting they had no idea that there was any implication for them in the NBN, given that the public commentary around the 7 April release talked about, for example, the idea of more infrastructure being deployed aurally and the fact that there was a regulatory discussion paper released that specifically referred to that. Quite frankly, if I were a member of one of those associations, I would be pretty upset with my association for its failure to keep itself well informed of public policy.

**Senator TROETH**—Well, from what we are hearing, there was little public discussion before that anyway. So what action did you take?

**Mr Havyatt**—There was plenty of public discussion about the fact that the government intended to—because there is another element to this. In case they do not know, let us put it on the record: in the regulatory discussion paper—which is referred to by the department as the ‘blue book’ but is titled ‘Regulatory reform for the 21st century’ or something similar—the department is actually foreshadowing that it is going to consider further legislative amendments for improving the ability of telcos to access other utilities’ infrastructure. That is in the document dated 7 April. So, in case those associations are still listening, they might like to turn their minds to that and think about what the implications of that are for them.

**Senator TROETH**—So what further steps did you take to acquaint yourself further with what was happening after you read about this?

**Mr Havyatt**—I have been in regular consultation with the department about all sorts of aspects of the NBN. I have no difficulty in having conversations with the department about aspects of the NBN when I feel that I need to consult.

**Senator TROETH**—So you contacted them?

**Mr Havyatt**—I contacted them. That is what I am paid for.

**Senator TROETH**—And they were able to provide you with the information you needed?

**Mr Havyatt**—Any information I have requested I have been provided with.

**Senator TROETH**—Good. Thank you.

**CHAIR**—Are there any further questions?

**Senator LUNDY**—Let us go back to the broader issue that this bill is seeking to address, which is making sure that all of the available information is there to inform the implementation study. Just given your experience with Unwired, what is the current quality of information that is actually available in the network, particularly in relation to your experience with Telstra over the years? I will contextualise my question by saying that we have certainly had experience at Senate estimates where it has been clear that the quality of the information that is able to be provided is less than perfect.

**Mr Havyatt**—There are two issues there, and this answer covers my experience at Unwired, AAPT and Hutchison over the last decade and a bit. The two issues are: what the quality of the information is at source, and then what the process is of providing the information that is available. Once again, I will refer to the BCA submission, because it had that lovely little bit that has clearly been written by an economist that says, ‘Well, of course, an infrastructure owner who is potentially going to earn money from a piece of facility would be more than happy to provide you with all the details about their facility so that you can access it.’ The bottom line is that it is actually not core business. We are all well trained in business to focus on core business. But very few organisations—be that Telstra and a facilities access regime, or the water authorities or the railways—actually have much interest in answering your questions about, ‘What facilities have you got that I can utilise?’ As a consequence, the process itself is always slow and always less than ideal, and it also tends to be run very much along the lines that a colleague at Optus used to call ‘pick a card’—you have to guess the right question to ask before you get given the information. So you cannot sort of say, ‘Do you have some infrastructure in this area that could be useful to me?’ You have to say, ‘Do you have a trench that goes from

there to there,' and you might get the answer, 'No,' and then you have to ask, 'Well, do you have a trench that goes from there to a metre away from there?' 'Oh, yes, we have one of those.' It is that kind of constraint on information provision that is the issue.

The second part is that, in fairness to Telstra and all these other utilities, many of them do have old pieces of infrastructure that they have been less than rigorous in their process of preparing records for. The difficulty you face is that, as an outsider, you never know whether, when they say, 'We don't have that record,' that is in fact the truth or, 'I have not been bothered to find out if we've got the record.'

**Senator LUNDY**—Thank you for that. In the context of the minister having provided for and the bill providing for all the relevant safeguards in association with security and the purposes for which this information is going to be used, how essential is the information sought by this bill for the implementation study to the capacity of NBN Co. to actually move forward and define the requirements of the National Broadband Network?

**Mr Havyatt**—The information is, in short order, critical. Unwired's interest in the NBN is multifaceted. As a wireless provider, we only have spectrum licences in Metropolitan markets, though we are interested in having conversations with the government about what we can do to help them with the wireless infrastructure in regional areas. There is a great deal of information that would be available to the NBN Co. about the ability to access back haul transmission and what other infrastructure elements may be available to assist in that kind of build. The NBN Co. is going to be faced with a giant optimisation task of trying to figure out what is the best way to build this network.

But it is doing something which we, quite frankly, have not done for quite a while, which is analyse what is the best way of building a new piece of infrastructure. Up until now, the fixed line infrastructure decision has been an incremental add-on to what has existed in the past, and we have not really built something from scratch. So it is particularly critical to be able to make a decision about how that would be deployed. There has been a lot of talk about the relationship of the NBN Co. to Telstra's infrastructure. Quite frankly, the bit that is interesting in the Telstra infrastructure is not its copper; it is holes in the ground, be they vertical pits or horizontal pipes. I do not think the implementation study can do a reasonable job of estimating the cost of building the network without this data.

**Senator LUNDY**—What are the cost implications to NBN Co. if that information is not available or some of it is withheld or delayed in being provided? Can you speculate? I understand I am asking you speculate on that, but I think it is important to get a sense of perspective about the implications.

**Mr Havyatt**—When we have talked about fibre-to-the-home networks in the industry in the past, one of the figures that was frequently quoted was that 85 per cent of the cost of building a fibre network is the civil engineering works—that is, either digging the holes in the ground or putting the poles in the air. You can make a significant saving on those costs if you can utilise existing pieces of civil engineering works. What the level of saving will be will depend upon exactly how much utilisation there could be. If 85 per cent of the cost of a new network is civil engineering, you could imagine that it is a sizeable proportion of the cost base that the NBN Co. will be facing. The glass itself is not the expensive piece; it is somewhere to put the glass that is the expensive piece.

**Senator LUNDY**—Once again, given your experience within telecommunications companies and the discussion that we have had today about the security implications of managing such assets, can you provide the committee with an insight as to the capacity of, perhaps, infrastructure companies or telecommunications companies providing information of the sort requested? In your view, can the security issues be well managed within the auspices of the proposed bill?

**Mr Havyatt**—I think the short answer is that of course they can because, firstly, I would assume that the department can be trusted to be as secure, at least, as a telco—although sometimes one is not sure—and that the implementation study contracted to the department will have the same kind of contracts as any other contract to the government when they access government information, and that NBN Co. will look like a telco. We are all quite used to managing information in this manner. We are used to having other providers' information. We do not seem to have anywhere a systemic issue of misuse of information in our industry—in fact, across anywhere in the utility industry. As I said, the few cases where people have made attacks on Australia's utilities have been on visible points of attack—the telephone cabinet in the shopping centre, in the case of the matter that Telstra raised. So there is no reason why we should be particularly concerned about that. On the flip side, I am not aware of telcos having requirements for any of their staff to have national security

clearances before they access the plant records of the company. This idea that it is somehow a national security issue does not seem to completely wash in that position.

**Senator FISHER**—Obviously, your organisation is optimistic about the NBN bill. In your submission you talk about the prospects of this particular bill being broadened in its scope to enable the department to get further information to basically carry out its policy. I think the words used are ‘policy and program functions’.

**Mr Havyatt**—Yes.

**Senator FISHER**—What limits should there be? Should there be any limits? If the bill were so broadened, where would you stop if anywhere in terms of the reasons for which a department and this department would be able to access information?

**Mr Havyatt**—The actual phraseology we used in the submission was ‘does not infringe private commercial rights or expose assets to unnecessary risk’. If it is, say, providing it to a government department then I usually rely upon security processes in those departments to suggest that the assets would not necessarily be exposed to risk. I am not aware of any particular circumstances where it is likely that the provision of information to a government for policy purposes is likely to infringe our commercial rights.

The infrastructure we are talking about in telecommunications is all built by virtue of a licence from the government to build it. Much of it is built by virtue of planning exemptions that override local and state government planning laws. It just seems to me strange to think that the policymakers themselves cannot get information about where that infrastructure is—and yet they have given those selfsame powers to two regulators. The ACCC and ACMA have got wide-ranging powers to require information, but the government, which actually sets the policy, cannot. That just seems strange.

**Senator FISHER**—On the one hand you are talking about the department determining policy and on the other hand the government determining policy. You are suggesting broadening access for the department. They are not necessarily one and the same, are they?

**Mr Havyatt**—Last time I looked, departments are responsible to ministers and ministers constitute the government. So I am not sure there is a distinction.

**Senator FISHER**—All right. In terms of the broadening that you would see if you had your druthers, to your knowledge is there any other government department federally that would have similar access to information or similar powers?

**Mr Havyatt**—I have not questioned that.

**CHAIR**—Thank you very much, Mr Havyatt, for your submission to this inquiry and for taking the time to appear before the committee this afternoon. We appreciate your help.

**Proceedings suspended from 1.33 pm to 1.38 pm**

**BEAN, Ms Trudi, Senior Executive Lawyer, Infrastructure and DE Services, Department of Broadband, Communications and the Digital Economy**

**MARKUS, Mr Don, General Counsel, Department of Broadband, Communications and the Digital Economy**

**MASON, Mr Philip, Assistant Secretary, NBN and Fibre Roll-out Regulation Branch, Department of Broadband, Communications and the Digital Economy**

**SPENCE, Ms Pip, First Assistant Secretary, Networks Policy and Regulation, Department of Broadband, Communications and the Digital Economy**

**CHAIR**—I would like to welcome you. Thank you for coming along to talk to us today. I note that the Senate has resolved that an officer of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. Do you wish to make a brief opening statement before we go to questions?

**Ms Spence**—No, thanks.

**CHAIR**—Then we will go to questions.

**Senator MINCHIN**—I thank the officers of the department for appearing today to assist us with any questions we may have. I wonder if you could assist us first by just relating your experience with the current legislation and its operations with respect to the RFP process on the basis that this legislation essentially builds on that and expands it to accommodate the changed circumstances but that the framework and the architecture is the same. From your perspective, was all the relevant information required for the purposes of the RFP ultimately obtained to enable the RFP to proceed?

**Ms Spence**—I might ask Mr Mason if he can respond to that question.

**Mr Mason**—Yes, I will respond to that. As the committee would be aware, a number of subordinate instruments were made under part 27A as it existed at that time last year requiring carriers to provide information for the NBN process. I think one carrier provided information voluntarily before the required date. The regime provides for that kind of information to be accepted by an authorised information officer, who in this case was me. That was accepted. As a result, that information received protection under the regime.

**Senator MINCHIN**—Was that on the basis that it was received voluntarily?

**Mr Mason**—No, on the basis that it was accepted as being relevant information that warranted protection. Other information was provided by other telecommunications carriers. Technically it was provided under the framework. As a result, it was checked and it was accepted by the department as the appropriate information and it gained the protection of the scheme as well. In terms of the carriers who responded, all the carriers who were asked to provide information provided the information requested of them and in the form requested. That information was then provided to the RFP proponents who requested it. So it was their choice as to whether or not they wanted it.

**Senator MINCHIN**—Just to clarify, ultimately no information was acquired as a direct function of the exercise of a formal demand for the information? Ultimately all information was provided on a voluntary basis and without the force of law required; is that right?

**Mr Mason**—I noted that one carrier had provided information voluntarily. Whether or not it would have actually provided that information voluntarily without the legislation is unclear. Basically, as you would probably be aware from last year, there was a process by which the government sought to obtain information voluntarily. It turned out to be a longer process than was anticipated, and one of the issues was about how adequate protection was given to information that might be provided. Part of the solution to the problem was actually the enactment of the framework that provided the protection. So, ‘Would they have provided the information if they had not had the framework that provided the protection?’ is a little bit of a chicken-and-egg question, I guess. In relation to the other carriers, technically that information was provided under the framework of a mandatory basis, but I think it is well known that the telecommunications industry was generally well disposed to participating in the process last year.

**Senator MINCHIN**—Sorry, but did you say that one carrier provided information as a result of mandating the request?

**Mr Mason**—No, I said one carrier provided information voluntarily, and I believe that it provided the information voluntarily because it knew that it would get the protection of the legislative framework. For example, if information was otherwise provided voluntarily, it would depend, for example, on contractual arrangements being put in place, which may not have been acceptable to the Commonwealth. So the regime that was put in place last year does actually provide a legislative framework to protect the information, which is a very important aspect of the framework.

**Senator MINCHIN**—Sure. I am just trying to go to the point of the necessity or otherwise of the compulsory mechanism in the bill and to establish whether in fact any information was ultimately supplied only because it was compulsorily acquired, so to speak. What I am putting to you is that, ultimately, even though a formal notice was given, all the information was provided voluntarily. That is what I am just trying to find out.

**Mr Mason**—It is a little bit of a hypothetical question because the majority of the carriers who provided information did so under the legislative framework that was put in place. An instrument was issued asking them to provide the information, which they did, within the time frame specified. I would see that as responding to the mandating, regardless of the fact that they expressed a willingness to participate voluntarily.

I think the other thing that I would note in relation to this framework—the amendments that have been proposed—is, as the explanatory memorandum says, that the government’s preference is to obtain information cooperatively and commercially, and that the continuation of the framework is intended to be a safety net.

**Ms Spence**—I think it was just probably a bit of speculation on our part as to what carriers would or would not have done in the absence of the mandating.

**Senator MINCHIN**—I am just trying to get at the way this did work and might work in relation to the implementation study. It is one thing to have a framework which protects information provided, whether voluntarily or compulsorily. The issue is whether the information that was supplied was supplied voluntarily—that is, did you approach these companies and say: ‘This is the information we need for the RFP to proceed. We would like you to volunteer to provide this information. If you do so, it will, subject to clearance, receive the protection of this,’ as opposed to saying, *ab initio*, ‘Hand this over because if you don’t you will be subject to penalty.’

**Mr Mason**—As has been discussed previously, the government approached carriers last year and asked about them providing information voluntarily. In general, they said that they were happy to do so, and some initial steps down that path were taken. The problem that we had was in coming to agreement in relation to the protections for the information provided—that was the real sticking point. So, notwithstanding the fact that people said they were happy to provide information, it was basically subject to this caveat of getting adequate protection. Seeing that that could not be resolved, it was decided to make use of the legislation, and that solved the impasse, as it were, as well, because that provided the protection.

**Senator MINCHIN**—I see. When we had Telstra in earlier, they said that they had cooperated and provided all the information. I asked them, ‘Was any written instrument issued requiring the production of information?’ They said it had been but that they had provided it voluntarily anyway. I said, ‘Well, why was the instrument issued?’ They suggested that I ask you. What you are suggesting is that the instrument was issued in order to provide the requisite protection—not so much to compel the acquisition of information that would not otherwise have been produced but in order to provide that information with the protection which the supplier sought. Is that a fair summary of the situation?

**Mr Mason**—It is a reasonable summary of the situation. The instrument that was actually issued covered—I think, from memory—about 15 carriers. I would have to go back and check the records to be able to give definitive advice as to how many were absolutely happy to do it voluntarily and how many placed caveats on that. But another interpretation of the situation, as well, was: yes, Telstra were providing information voluntarily; whether or not they were providing all the information—again, I would want to go back to the files and check exactly, but I have a very clear recollection that the protections they were seeking for the information they were being asked to provide were a sticking point, and the enactment of the legislation provided the protections.

**Senator MINCHIN**—Sure. That is fair enough. I am still sticking with the original process, but this goes to a submission made to us that asked, ‘Would it not have been better with the RFP process, and perhaps be better

with this, that information supplied voluntarily automatically attracts that protection?' As I understand it, it only attracted it if it was supplied under the guise of the formal command. Why not provide that protection to information supplied voluntarily ab initio?

**Mr Mason**—I do not know that we have said that that process cannot apply. Just because—

**Ms Spence**—The same arrangements.

**Mr Mason**—In practice the same arrangements, because we have talked about the government preferring to obtain information if necessary by a cooperative and commercial process, but presumably the parties who would like to provide that information would still want to have protections for that information. From a practical perspective, it would seem to make sense that we make use of the legislative framework as opposed to negotiate contracts with potentially multiple information providers.

**Senator MINCHIN**—I am gratified that the preference is to try to seek this information voluntarily or cooperatively and commercially rather than to resort to law. I think that is appropriate. Wouldn't that desire be enhanced or facilitated by satisfying suppliers of information that information they supplied voluntarily was automatically protected rather than having to invoke or go through what might be a facade of the issue of a written instrument compelling the supply of the information in order to attract the protection?

**Mr Mason**—Yes—sorry, the written instrument is not a facade in relation to giving protection.

**Senator MINCHIN**—No, I am sorry; I did not mean that. I meant that the written instrument of which you speak is one that compels the production of the information, is it not?

**Mr Mason**—Yes.

**Senator MINCHIN**—So why get to that stage in order to provide the protection which the suppliers of the information are seeking? Why not make that an automatic function under the legislation after supply of the information voluntarily?

**Mr Mason**—I understand the question, I think. The question really is: why have a compulsory scheme if the preference is to seek the information commercially or cooperatively and you can give the protection administratively?

**Senator MINCHIN**—Yes.

**Mr Mason**—The basic reason for the safety net is, as the explanatory memorandum states, to provide a safety net if for some reason a party who holds information that may be quite important or vital to the process is reluctant or unwilling to provide that information on a cooperative or commercial basis, and there may be a range of strategic reasons why that may happen. In relation to the provision of information voluntarily, as I understand the operation of the framework it will be open to the Commonwealth or the authorised information officer to accept information provided voluntarily and for it to continue to receive protection. So in some ways the regime does two things in particular: it offers protection to the information that is provided, whether voluntarily or on a mandatory basis, and equally it provides a mechanism to compel the provision of information if a party is unreasonably withholding that information.

**Senator MINCHIN**—Yes. I do not want to get bogged down on this point but if there is a preference for cooperative and commercial then that would be, in my view, facilitated if at the outset potential suppliers of information knew that by providing it voluntarily it was automatically protected. You said before in relation to the RFP that there was a concern about the security of the information. Why not do that right up front. That would encourage people to provide it cooperatively and commercially. You might still want the big stick. But why not facilitate a more cooperative arrangement by providing the protection right upfront?

**Mr Mason**—Yes, sorry, I forgot to answer that part of your question. The reason why there is not automatic protection is that there is a range of information which the Commonwealth does not necessarily accept as being commercially confidential or confidential information and a decision is actually required in relation to the range of information.

**Senator MINCHIN**—Yes, although you could reverse of the process I suppose. You could have an automatic protection but then subject it to exceptions or something.

**Mr Mason**—For example, many carriers publish maps of their trunk network architecture on the internet. If they submitted that then we would not want to give that a protection.

**Senator MINCHIN**—Again, I would like to ask about what happened to the information supplied under the RFP process and ultimately its passage from you to tenderers to that process—and I presume you have

read Telstra's submission, and item five of that submission which goes to this question. What arrangements were put in place to deal with that? Is it still sitting there with tenderers? If so, what legal obligations bind them? Is there a process for the destruction of this? Does Telstra have a point in relation to item five? Could you comment on that raft of questions.

**Mr Mason**—I think Telstra has a valid point in that the information that we could be seeking from information providers is potentially very sensitive information, and it needs to be treated very carefully. That has always been an understanding in relation to the scheme as it was originally implemented, and obviously in relation to the new bill as we seek to continue the scheme. Part 27 provides for the minister to make an instrument relating to the storage, handling and destruction of network information. That is used to enable very comprehensive rules to be put in place in relation to those kinds of things. There is such an instrument in existence in relation to last year's process. So that would give the committee a very good understanding of the kinds of rules that we had in place there. It relates, for example, to the storage in a physical sense of information, and the storage in an electronic sense of information and how it should be handled—including in relation to its return to the department or its destruction. Those rules were actually developed in consultation with the Attorney-General's department and other relevant national security agencies. Similarly, we would envisage an instrument for future use to be developed on the same basis.

**Senator MINCHIN**—Telstra goes to this issue of RFP proponents holding information supplied to them under the RFP and, in their view inadvertently as a result of this bill, being able to use that information to create or develop their own broadband network. Is that theoretically correct?

**Mr Mason**—That is not the intention of the bill and I do not believe it is correct. Those proponents do not have the information anymore—it has been recovered from them.

**Senator MINCHIN**—So you can say with confidence to this committee that every RFP tenderer has handed it back.

**Mr Mason**—They have handed back or they have destroyed it.

**Senator MINCHIN**—Do you audit that process to make sure that that occurs?

**Mr Mason**—We have not yet audited the process but they have confirmed that through statutory declarations.

**Senator MINCHIN**—Do you intend to do some sort of audit to ensure that in fact that is the case?

**Mr Mason**—It is under consideration. The instrument that I referred to before does provide for the facilities of proponents to be visited by Commonwealth officers.

**Senator MINCHIN**—In coming to this bill, I get the impression from submissions made to us that there was, effectively, no consultation with any carriers or utilities in the framing of this bill. Is that correct?

**Mr Mason**—Unfortunately, that is the case. We prepared the bill very quickly with a view to getting it into parliament during the last sitting. Yes, we would have preferred to have undertaken wider consultation but in practice it was not feasible in the time available to us.

**Ms Spence**—Although it is worth noting that the intention to introduce the legislation and to cover not just carriers was flagged in the national broadband network regulation reform discussion paper which was released on 7 April.

**Senator MINCHIN**—Although it is the case that there was considerable surprise, may I say, from utilities, particularly when rung by the media to say guess what, but I appreciate your answer. The government made its announcement on 7 April, this bill was introduced around 26 June, did it require 2½ months of preparation? You effectively had 2½ months notice, did you not?

**Mr Mason**—We had many other things to be working on as well.

**Senator MINCHIN**—Okay. Anyway I do appreciate your acceptance that it would have been preferable to have been able to consult on this bill and the reasons why that did not occur. To what extent have consultations occurred subsequently from your perspective in relation to this bill? Have you actively sought to consult with all the parties involved?

**Mr Mason**—Yes, Senator, I have met with the Energy Networks Association, the Water Services Association, the Australasian Railway Association, and we have had other meetings with carriers on a range of issues of which this was one of the items that they were free to talk to us about.

**Senator MINCHIN**—As a result of those discussions, is it possible that the government may wish to move amendments to this bill?

**Mr Mason**—We have not yet provided advice. One of the things we are interested in, obviously, is the committee's report and other evidence provided to the committee.

**Senator MINCHIN**—To what extent, if any, have discussions commenced with potential suppliers of information about them supplying that information on, as you put it, a cooperative and commercial basis given that all this is, we understand, to be done with great haste and you were required to get this bill in early? Have you already commenced those discussions in the five weeks or so since the bill was introduced? If not, why not?

**Ms Spence**—There have been no detailed discussions on the detail of the sort of information that would be required. I think one of the key points that the bill refers to is that the information will be to assist the implementation study and the lead advisers will be appointed shortly.

**Senator MINCHIN**—Yes, I have heard that before.

**Mr Mason**—Can I just add to that. While there have been no detailed discussions, the discussions we have had with the parties we have met have gone into the kinds of things that we would envisage being covered by instruments, if it got to that stage, or the kinds of things that we imagine they would be approached about by the implementation study.

**Senator MINCHIN**—You are putting to me a catch-22 that you cannot really start seeking or outlining the sort of information, which you would like utilities and carriers to start preparing, until the lead adviser is appointed to the implementation study.

**Ms Spence**—We are saying that we have not had detailed discussions with the utilities about the specific information that we would be asking from them but we have given them some guidance on the nature of the information to be sought.

**Senator MINCHIN**—But the action point is the appointment of the lead adviser, is it, in terms of the formal commencement of specific discussions about the information that is needed?

**Ms Spence**—That is what I would expect, Senator.

**Senator MINCHIN**—In terms of that appointment, it is shortly?

**Ms Spence**—Yes, Senator.

**Senator MINCHIN**—I do not want to compromise you and I am conscious of the chair's injunction, but one of the issues that has been raised and is of concern to us is that this bill seeks to cover two processes. One is the implementation study which we have discussed, but it is also to cover the NBN Co. and its suppliers as well which is a separate process. I do not want to go to policy questions because I presume it was a policy decision to do that but from your perspective presumably it would be entirely feasible, possible, practical, however you want to describe it, to have a regime in this instance which only applied with respect to the implementation study and the acquisition of information for the purposes of the implementation study and subsequently, if deemed necessary, provide further amendments to enable the acquisition of information for the purposes of the NBN company and its rollout?

**Mr Mason**—In some ways the regime that the government has proposed does, in fact, work in that way in that a decision will need to be made by the government for information to be provided to the NBN company, but it does not have a legislative trigger to that effect, as you have suggested.

**Senator MINCHIN**—I appreciate that a written instrument would be required under the auspices of this legislation, but this legislation does provide those auspices for a written instrument to seek or require information. All I am saying is that presumably you could have a bill or amendments to the existing legislation which go to the implementation study only and authorise written instruments to be enacted under it for the purposes of acquiring information for the implementation study, and subsequently have amendments to the bill to enable written instruments to be issued to deal with the NBN Co. itself. Would that be right?

**Mr Mason**—Technically I believe it could be drafted in that way.

**Ms Spence**—But that is not the way it is—

**Senator MINCHIN**—I appreciate that and I do not want to go to policy. I appreciate it was presumably a policy decision to do both.

**Ms Spence**—You are right, it was a policy decision.

**Senator MINCHIN**—I accept that. Is it also a policy decision not to make any provision in this bill for reimbursement of costs reasonably incurred in supplying information to the government for the purposes set out in the bill?

**Mr Mason**—It goes back to the way the regime as envisaged would work. Again the intention and preference is to obtain the information on a cooperative and commercial basis, so decisions parties make between themselves would be a matter for them to the extent that they would be compelled to provide information as a last resort. There is currently no mechanism for compensation in relation to costs.

**Senator MINCHIN**—But certainly you as the administrators of all this, as I understand it, do envisage that you would seek to have this information supplied cooperatively first without reliance on written instruments?

**Mr Mason**—Yes.

**Senator MINCHIN**—You said commercially and presumably that means there would be scope to enable suppliers of the information to be recompensed for any reasonable costs they incurred in supplying that information. Is that what you mean by commercial?

**Mr Mason**—Yes.

**Senator MINCHIN**—Who would be the parties to that? Are we talking about the lead advisers; would they be the ones, or would it be the department conducting these negotiations?

**Mr Mason**—We envisage it would be the implementation study part of the department.

**Senator MINCHIN**—Yes, and the advisers to it.

**Mr Mason**—Yes, and the advisers.

**Senator MINCHIN**—So as part of the budget for the implementation study there would be provision for commercial acquisition of information required?

**Mr Mason**—There is a budget for the study, yes.

**Senator MINCHIN**—And that budget contemplates purchasing on a commercial basis information needed in order to undertake the implementation study?

**Mr Mason**—It would need to.

**Senator MINCHIN**—Presumably only the department itself could authorise that expenditure, would that be right?

**Mr Mason**—That would be my understanding, yes.

**Senator MINCHIN**—Not KPMG or whoever it is?

**Mr Mason**—I think I should say that I am not privy to the appointment of lead advisers. I do not know exactly how their proposed contracts work and so forth. There are other things that are conceivable, I guess.

**Senator MINCHIN**—At this stage it is unclear whether the department or the lead advisers would be authorised?

**Mr Mason**—It is not clear to me; I do not know.

**Ms Spence**—We can take that on notice.

**Senator MINCHIN**—Thank you. I was interested in the reference to the inscription of some of these provisions to setting aside what might otherwise be common law obligations in relation to the provision of information. Do you understand the references I am making?

**Mr Mason**—Yes.

**Senator MINCHIN**—I think it was in relation to the setting of the periods which are in dispute for the consultation in the first instance in provision of information.

**Mr Mason**—The consultation period in relation to an instrument.

**Senator MINCHIN**—That is obligations on the part of the department, is it, that we are referring to there?

**Mr Mason**—Yes.

**Senator MINCHIN**—To what do you refer there?

**Mr Mason**—Generally, when instruments are prepared, there is a formal consultation process whereby parties affected by those have the opportunity to comment. It is guided to some extent by the legislative instruments.

**Mr Markus**—Although that does not seem to be targeted as such.

**Mr Mason**—As you would appreciate it is best practice regulation to consult. What the time frame does in this instance is to set a maximum otherwise parties could dispute the amount of time that they were given. The reason it sets that maximum is so we can get feedback on it within a set time as opposed to having a long process drawn out.

**Senator MINCHIN**—As a matter of law if a specific time period is provided, that waives any common law obligations on you in relation to allowing a party to be heard, does it, in relation to the matter? That is the advice you have received?

**Mr Mason**—They need to provide a feedback within that time, yes.

**Senator MINCHIN**—On that matter, because it has been raised by several witnesses, on the consultation period on the draft instrument relating to information, I gather it was three days under the RFP and you have extended that to five.

**Mr Mason**—Yes.

**Senator MINCHIN**—And that is because, why, this information is somewhat broader in scope?

**Mr Mason**—We appreciate that three days is a limited time. It was put in last year because we were working to a tight time frame again. We still appreciate that five days is of concern to some people but we thought it was better to extend it to the extent we could, and we thought that was a reasonable extension.

**Ms Spence**—We are working on the basis, Senator, that by the time it gets to the point that you are consulting on an instrument there would have been your commercial discussions with the utility or the carrier in question in terms of the nature of the information being sought. So it is not as though the draft instrument would be a total surprise.

**Mr Mason**—Further to that, the time frame is the mandatory time frame. It does not preclude informal discussions about instruments as well.

**Senator MINCHIN**—No, but it is a mandate without any discretion and, presumably, if they want longer they have not got it. You can then issue your written instrument at the conclusion of that five days.

**Mr Mason**—I would expect that parties with objections to the instruments would be able to articulate those concerns satisfactorily within five days.

**Senator MINCHIN**—Most witnesses have sought to have the bill amended to double that, to 10 working days. From your perspective is that a major concern to you?

**Mr Mason**—Obviously the longer the time frame is the longer any process that is necessary to seek information is extended. So it puts pressure on our time frames, yes.

**Senator MINCHIN**—Equally you will have heard evidence that what is now 10 days in the bill for the actual provision of the information is inadequate and there was a request that that be at least 20 working days. I presume you would have the same concerns?

**Mr Mason**—Yes. I would point out that the 10 days is the minimum amount of time, so a longer period can be provided. Yes, your conclusion is correct as to a 20 day minimum.

**Senator MINCHIN**—But if it is 10 days then I can imagine a minister being inclined to sign-off on 10 days. If you supply the information on the 11th day you are prima facie guilty of an offence under this bill, is that correct?

**Mr Mason**—It is a breach.

**Senator MINCHIN**—You have contravened the act. And the maximum penalty for contravening this act, as I understand, is \$250,000?

**Mr Mason**—Yes. It depends on the nature of the party in some ways because for a carrier it is a carrier licence condition.

**Senator MINCHIN**—I am just reading part 31, civil penalties, section 570(3), body corporate not to exceed in any other case \$250,000 for each contravention,

**Mr Mason**—Senator, that does sound correct but we might be best to check the reference. We will take that on notice.

**Senator MINCHIN**—Thank you. The other issue that attracts my interest is a request made by some for the bill to provide a mechanism by which suppliers of information are granted an immunity from civil action based on any inaccuracy in the information provided that may incur damages to a third party. Has that been considered and rejected? Has it not been considered at all? Are there difficulties from your point of view in such an immunity?

**Mr Mason**—It is an issue that we are very aware of. It was something that was actually considered last year in the context of part 27A generally. We understand the sensitivity from the perspective of information providers but the other side of it is that there does need to be an incentive, we think, for information providers to provide the best quality information that they can. We would be concerned if there was too much immunity or too great an immunity that they may be perhaps a little lax in checking the details or the accuracy of it, which could have consequences for network planning and so forth.

Having said that, we recognise that there are sometimes limitations to carrying databases. For example, some of the utilities have indicated a lot of their infrastructure is quite old and it may not be that well recorded. So that is the countervailing one. In terms of how that can be dealt with in practice, it needs a degree of understanding, I suppose, on the part of the Commonwealth in seeking information from the implementation study and potentially, if it gets that far, from the national broadband network company in relation to the quality of the information. It is potentially open to the information providers to state limitations to the information when they provide it, as well.

**Senator MINCHIN**—Yes, that is true. I know Senator Lundy expressed some surprise, but it is clear from evidence, particularly from utilities, that there is quite a bit of legacy network information that is stored on papyrus or something and not exactly well documented. Even with the best of endeavours, some of these utilities may have considerable difficulty supplying information which they could vouchsafe to be absolutely accurate. It would be unfortunate if they then paid a penalty for that. I understand you are sensitive to that, and that is something we may be able to pursue.

There are a couple of other things I want to mention. The Privacy Commissioner has suggested that there should be a privacy impact statement in relation to this bill. I presume that has not occurred; is that correct?

**Mr Mason**—We did consult with the privacy commission in the preparation of the bill. Notwithstanding the time frame issue, we approached some Commonwealth departments in the time we had. They made similar observations at that stage. We took the view that at the moment the bill provides a head of power; it does not specify what type of information may be sought. On that basis we considered it impractical to do a meaningful privacy impact statement—a privacy impact assessment, I think it is called technically. We consider that such an impact assessment would be more appropriate at the stage at which an instrument was prepared, if such an instrument were prepared.

**Senator MINCHIN**—Would it be your intention to ensure that a privacy impact assessment was made in relation to any instrument that was ultimately drafted?

**Mr Mason**—Yes, it would. If you have had a look at the forms, it is a very long assessment process in some ways and it does tend to go to whether or not you are going to seek information of a personal nature. It may well be that that kind of information is not even sought. It is not envisaged at the moment, from my perspective.

**Senator MINCHIN**—There was also concern expressed, particularly by the energy networks, about the provision of this information not only to the ACCC. I can understand their nervousness and request that the bill be amended to restrict the purposes for which information could be supplied to the ACCC. Would you see that as a sensible provision or do you think their concerns are unwarranted? Has this occurred to you?

**Mr Mason**—I understand why they have the concern. I think it is very unwarranted. The legislation is drafted for information to be provided for the purposes of designing a network. Technically, you can prescribe other purposes, but I do not envisage that that is one that would ever be prescribed.

**Ms Spence**—The bill is very clear about what the intention is, so we would not have thought that it was necessary.

**Senator MINCHIN**—Although presumably there is nothing in the bill that prevents the ACCC using whatever information it does glean for whatever purpose.

**Mr Mason**—The information could be provided to the ACCC. The authorised information officer responsible for its disclosure would have to make a decision to do that. If it were released to the ACCC it would have to be solely in relation to the development of the national broadband network, the network that is intended to be built.

**Senator MINCHIN**—How does that caveat on the supply—

**Mr Mason**—In terms of the people to whom the authorised information officer can provide the information, that requires a conscious decision on the part of the authorised information officer, and the limitation on purposes is set out in the bill.

**Senator MINCHIN**—But he can provide the information.

**Mr Mason**—Yes. In fact, anybody who is provided with it can use it only for those purposes.

**Ms Spence**—So there are restrictions. Even if the decision was taken to provide it to the ACCC it could not be used for anything other than in relation to—

**Senator MINCHIN**—So you think there is sufficient protection in it now?

**Ms Spence**—We do.

**Senator MINCHIN**—There are a couple of things that occurred to me in relation to Telstra's submission. Section 2.3 of their submission proposes that the bill set out rules governing the security arrangements rather than being as open ended as it is. This is not an unreasonable point and I think it is one you acknowledged in relation to the RFP—that the confidence of suppliers of information to do so cooperatively and commercially is considerably enhanced if they have some confidence in the security of the information they supply. Do you see any practical difficulties in doing what they have suggested?

**Mr Mason**—I think the practical difficulty would go to the degree of complexity that would be required in the drafting. The storage and handling instrument that was prepared last year goes to about 15 pages. So that is one issue. As you would be aware, drafters prefer to leave that level of detail to the subordinate legislation. The other issue we found last year in consultation with the relevant security agencies is that they like to ensure that information is treated in accordance with its level of sensitivity. If information is sought under this regime and it is of a lower level of sensitivity than perhaps might otherwise be expected, they may have less onerous obligations or they may think less onerous obligations are acceptable. So I guess the issue is that there is a degree of flexibility in relation to what information is sought.

**Mr Markus**—The kinds of matters that they are proposing be put in the principal legislation go to matters of detail that would not, in my experience, be found in primary Commonwealth legislation. Particularly for measures relating to software and particular technical means of securing information that might be likely to change from time to time, it would be unusual to have that level of detail in primary legislation.

**Senator MINCHIN**—Is it envisaged that the rules would be very similar to, or modelled upon, the existing 15-page document that you have?

**Mr Mason**—That would be the basis we would work from. We have already been talking to the Attorney-General's Department as to whether they think it should be supplemented or changed in some ways.

**Senator MINCHIN**—The other matter they drew to our attention in a sense goes to the considerable concern, which I gather even other departments have expressed, about issues relating to competitive neutrality and the acquisition of information for a commercial enterprise—to wit, the NBN Co. They have suggested in section 3.3 of their submission that the bill should specify that it should only be information about the location, physical and functional characteristics of network facilities. Is that not unreasonable?

**Mr Mason**—It is quite clear that the bill needs to cover that type of information, but the bill does not limit itself to that type of information. I guess the issue is that it is not clear what the full range of information that might be desirable is. Having said that, it is not envisaged that the kind of information that Telstra has mentioned would be sought because, as you say, it would raise concerns from a commercial and competitive perspective. In terms of the safeguards in relation to the type of information that is sought, any request for information via the framework does need to be through an instrument. There needs to be consultation on that instrument, and that instrument is ultimately disallowable.

**Senator MINCHIN**—Yes, which is some comfort to us. But from your perspective—and certainly from what I understand—the information that is being sought does go to essentially, as they describe it, the location and physical and functional characteristics of network facilities. That is the whole purpose of this, is it not?

**Mr Mason**—Yes, that is the obvious purpose. But in many ways the type of information that might be sought will depend on the work of the implementation study.

**CHAIR**—Thank you very much for appearing before the committee today. We appreciate your assistance. There are a few questions from senators that you have taken on notice. Given the short timeline for preparing the report of this inquiry, would you be able to provide answers to those questions by 2 pm on Friday?

**Mr Mason**—Yes, that should be okay.

**CHAIR**—That concludes today's proceedings. I thank all witnesses for their presentations.

**Committee adjourned at 2.32 pm**