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## SENATE

ENVIRONMENT AND COMMUNICATIONS LEGISLATION  
COMMITTEE

**Reference: National Broadband Network Companies Bill 2011;  
Telecommunications Legislation Amendment (National Broadband Network  
Measures—Access Arrangements) Bill 2011**

WEDNESDAY, 9 MARCH 2011

SYDNEY

BY AUTHORITY OF THE SENATE



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**SENATE ECONOMICS  
LEGISLATION COMMITTEE  
Wednesday, 9 March 2011**

**Members:** Senator Hurley (Chair), Senator Bushby (Deputy Chair) and Senators Cameron, Pratt, Williams and Xenophon

**Substitute members:** (As per most recent Senate Notice Paper)

**Participating members:** Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Cash, Colbeck, Coonan, Cormann, Crossin, Eggleston, Faulkner, Ferguson, Fierravanti-Wells, Fielding, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Joyce, Kroger, Ludlam, Ian Macdonald, McEwen, McGauran, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood and Wortley

**Senators in attendance:** Senators Birmingham, Cameron, Fisher, Ludlam, Ian Macdonald and Wortley

**Terms of reference for the inquiry:**

To inquire into and report on:

National Broadband Network Companies Bill 2010; Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Bill 2011

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**Committee met at 9.05 am**

**CHAIR (Senator Cameron)**—I declare open this public hearing of the Senate Standing Committee on Environment and Communications in relation to its inquiry into the National Broadband Network Companies Bill 2010 and the Telecommunications Legislation Amendment (National Broadband Network Measures-Access Arrangements) bill 2010. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to requests to have evidence heard in camera or may determine that certain evidence should be held 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 ground 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 always be made at any other time.

[9.07 am]

**KRISHNAPILLAI, Mr Maha, Director, Government and Corporate Affairs, Optus**

**SHERIDAN, Mr Andrew, General Manager, Interconnect and Economic Regulation, Optus**

**CHAIR**—Welcome. The committee has received your submission as submission 17. Do you wish to make any amendments or alterations to your submission?

**Mr Krishnapillai**—No.

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

**Mr Krishnapillai**—Thank you Senators and thank you for the opportunity to appear before the committee today. NBN will be the owner and operator of the only national fixed high-speed broadband network in Australia. This will give it a dominant position in the supply of wholesale fixed-line broadband access services. Retail service providers will rely on access to the NBN, and the terms of access will directly impact their ability to compete and maintain viable businesses.

NBN Co.'s access terms will have a direct impact on customers in terms of the affordability of high-speed broadband services and the utility they will get from accessing these services. Given its position in the value chain, it is essential that NBN Co. is subject to clear, binding and transparent governance and access arrangements. These should narrowly define the scope of its activities to offer specified wholesale access services on genuinely equal terms with the terms of access subject to detailed regulatory oversight. It is appropriate that specific legislation is enacted by parliament to lock in place these governance and access arrangements.

Optus is pleased to note that the government has positively responded to feedback it has received from the industry in developing its proposed legislation. We note that a number of important changes have been made to the bills from earlier exposure drafts. Whilst Optus therefore supports the current bills, we have recommended that a small number of important changes are made to them. These changes are aimed at addressing four remaining and important concerns: (1) to tighten up the equivalence obligations that will apply to the NBN and remove any scope for access seekers to gain a unique advantage on the NBN; (2) to more clearly ringfence the activities of the NBN Co. to providing clearly defined and specified wholesale only fixed-line access services; (3) to improve the level of transparency that will apply to the operations of the NBN; and (4) to rule out the potential for future conflict of the ownership structure of the NBN. That concludes our opening statement—thank you.

**Senator BIRMINGHAM**—Good morning and thank you both for joining us. Optus, as you indicated, have outlined some further changes that you would like to see to the bill, particularly in relation to the tighter equivalence arrangements. There are several others, but we will start there. Could we go through where those equivalence arrangements are lacking currently and at what point you think they should be tightened?

**Mr Krishnapillai**—We have actually put forward some specific legislative amendments or suggestions. In principle, the goal is that as much transparency as absolutely possible should apply to any differential pricing available to any access seeker through the NBN. Effectively we are suggesting that, although there has been an exemption for volume based discounts and there is a definition around if that is efficient use, we want to make sure that the definitions and criteria around efficient use are more tightly defined and that the governance process around who approves that differential pricing is very clearly specified with the ACCC. So it is about tightening the definitions and making sure there is an appeal process through that.

**Senator BIRMINGHAM**—You accept having these differential pricing arrangements, including on volume matters. Why does Optus think that NBN Co., as a wholesale provider meant to be providing fair access to all retail players in the market, should be having such a differential, especially in relation to providing price discounts for its biggest customers?

**Mr Krishnapillai**—I think it is appropriate that the NBN have some flexibility in terms of offering services, where it is more efficient, at differential pricing rates. But we want to make sure that there is a review process, a very clear and open review process against specified criteria, about under what circumstances that would apply. So we have no major issue with the principle, but we want to make sure that there is the ability for transparency and review, if you like, by the ACCC.

**Mr Sheridan**—The concept of 'aids efficiency' is not very well defined in the bill. Therefore I think it is very important that we have some third-party oversight over that concept and particularly how it is applied. I



think it is important also to remember NBN Co.'s likely position in the market. It will be the dominant wholesale provider. To be honest, as an industry we have found ourselves in difficulties in the past where we have had a dominant wholesale provider deciding, in a backroom process, what the concept of 'aids efficiency' is and how that ought to be applied. So we think it is very important that, if there is any differential pricing, that it should be subject to a transparent and rigorous third-party approval process. The ACCC is best placed to undertake that approval process. We are not ruling out differential pricing, but it must be critically scrutinised.

**Senator BIRMINGHAM**—I want to home in on whether differential pricing should be available for providing volume discounts. Optus would presumably be one of NBN Co.'s largest customers, largest retail service providers. Isn't that a position that will benefit you in being able to potentially seek discounts to pricing? How does that aid competition and particularly competition with smaller players who may not be able to get the same benefits?

**Mr Krishnapillai**—There are two parts of that. Clearly, if we were looking from a self-interested point of view, we would argue there should be no review of differential pricing. In fact, in our view we are taking what we see as a very pro-competitive view here—that there should be a review process so that all players are treated equally in their negotiations with the NBN and have a review process with the ACCC. Contrary to what some might think, we would actually much rather have an open and fair review process. Secondly, there will be circumstances—and we want to give the NBN the opportunity to address those circumstances—where it is more efficient to work with particular players, and there should be some pass-through for investments made by those particular players. Clearly the largest player will be Telstra but, you are right, we will be the second major player or buyer, I suspect, in NBN terms.

**Senator BIRMINGHAM**—I will move off that topic because time is very tight. Some of the other areas you have highlighted as issues relate to where NBN Co. potentially will step out of the realm of being a wholesale provider and step into the realm of being a retail provider. Once again, you have provided some potential amendments in that space; but, for the benefit of the committee and the *Hansard* record today, what is the threat in this issue? Why does Optus think there needs to be changes? The government and NBN Co. highlight examples such as smart grids as something where they believe NBN Co. should be able to provide direct services. Why do you think there needs to be changes that potentially rule that out—or why would your changes still allow for those particular things but not provide the risk of retail competition?

**Mr Krishnapillai**—Once again, I think the principle that we have been articulating is pretty clear: NBN Co. should not be entering into any area where there is potential for competitive alternative provision of service. We have said consistently that it should be a wholesale-only player at the layer 2 provision of services to retail service providers. We are very concerned that there not be, effectively, mission creep or temptation by NBN Co. to start moving into more and more areas directly aside from what should be tightly prescribed core business. For example, the exception around utilities, state governments and other areas like that is one that we are very concerned about. It clearly is a major area of business for us today, as it is with many other players in the telco sector. That, first, effectively forecloses the ability for us to address that market directly. Second, it introduces a wedge temptation for NBN Co. to start moving further and further into those areas. I am not exactly sure where that definition would stop. Third, the recommendation we put forward is that the only people who should be buying from NBN Co. should be licensed carriers or CSPs so that they have all the obligations and requirements that we have as a carrier and should only be buying those services to offer them to an end user.

**Senator BIRMINGHAM**—The first thing you did not really touch on that the defence used is particularly the example of things like smart grids and smart metering. Why can it still be done under the amendments you propose—or should it have to be done through a retailer rather than through NBN Co.? Secondly, I trust that Optus will have had a look at Telstra's submission. I imagine that is normal practice. Telstra have raised some questions as well about the definitions of carrier and carrier service provider. Do you share those concerns of Telstra that that could further open up the potential for NBN Co. to sell direct to retailers?

**Mr Krishnapillai**—Firstly, in terms of smart grids I guess the principle is the same as we were talking about before. We would argue that NBN Co. should be tightly prescribed in the services that it offers to any retail service provider. Many of the services that are being talked about in terms of smart grids and elsewhere can and will be provided by retail service providers over time. Although there have been some arguments about where there could be exceptions to that rule, we are simply trying to pull that line back as far as we possibly can to prescribe a very tight definition. We do not want to make the mistake we had in the past, where

we had a fully integrated retail and wholesale player that had temptations to give itself preferential treatment and over time developed down that path. That is clearly what we are worried about in year to come.

In terms of the direct amendments of Telstra, Andrew may want to comment on the CSP or carrier definitions.

**Mr Sheridan**—We have had a look at Telstra's amendments, particularly around the issue of how the layer 2 services should ultimately be provided. I think it is fair to say that, in a rare moment of industry support, we support Telstra's amendments and think there is some merit in them.

**Senator IAN MACDONALD**—Where are you at with your proposed amendments? Has there been a government response at all?

**Mr Sheridan**—We have had some discussions with the government. We have also had some discussions with the department. I think it is fair to say that they understand our position and the issues that have been raised, but at this stage I would not go so far as to say there has been an acceptance of those positions. But I think they have heard the arguments.

**Senator IAN MACDONALD**—So you would hope that before the bill gets to a final vote there would be some amendments.

**Mr Sheridan**—We certainly would be hopeful that there would be some amendments.

**Senator IAN MACDONALD**—I mean expect them, not just be hopeful from your discussions with the department.

**Mr Krishnapillai**—To be clear on that, we have said also that we think it is more important to have some governance processes around the NBN, because at the moment the NBN is actually operating in a vacuum. Our biggest concern is that we do not have any legislation. So number one is: we are very supportive of having some legislation passed in the near future to prescribe very tightly the role, governance and responsibilities of NBN Co. That said, there is another small number of amendments that we put forward—but that is at the margin—that we think will significantly improve the bill, particularly in terms of the lessons of history we should all have learnt in terms of Telstra's behaviour in the past around being a wholesale and retail provider.

**Senator IAN MACDONALD**—Have you had any indication that anyone—the department or other players—objects to your amendments?

**Mr Krishnapillai**—I think the principles we are putting forward are ones that are hard to argue with, and that is around equivalence, transparency, et cetera. I guess the difficulty sometimes becomes, as you well know, how we define that in legislation, and that is where we are at. The principles, we would argue, are largely well accepted across the industry and certainly, as Andrew pointed out, almost universally accepted across the industry.

**Senator IAN MACDONALD**—Going back to Senator Birmingham's question about the equivalence, do you have a view on how much volume you need to realistically get a discount?

**Mr Krishnapillai**—I think that is the real difficulty, because I do not know that volume per se should be the criteria for effectively some sort of discount. The key is around definitions of aiding efficiency and how you define 'aiding efficiency'. There are no definitions around that, so I do not know that there is a number we—

**Senator IAN MACDONALD**—It would be in the eye of the beholder, wouldn't it?

**Mr Sheridan**—I think the important step in the process is to be able to demonstrate that at a particular set of volumes you somehow change the economics of supply for NBN Co. So for example you lower its cost of capital or, for example, you lower its operating costs—

**Senator IAN MACDONALD**—That is a valid—

**Mr Sheridan**—That is a valid test; and if you can demonstrate that and you can demonstrate it in a transparent process which is subject to third-party approval, then you ought to get a differential price discount, for example. But it is not reasonable just to say: 'Because we have got double the volumes of company X we should get a discount of X per cent.'

**Senator IAN MACDONALD**—Finally from me, on private ownership, you are urging that the McKenzie recommendation of a 15 per cent maximum equity when NBN eventually privatises—I do not think any of us will be alive—

**Senator BIRMINGHAM**—Not if Senator Ludwig gets his way.

**Senator IAN MACDONALD**—Why has the government not accepted McKenzie's report? Have they indicated that to you?

**Mr Krishnapillai**—They have not actually indicated anything directly in terms of this structure around what—

**Senator IAN MACDONALD**—I mean, you are proposing that that 15 per cent be written into the—

**Mr Sheridan**—We are. I think it is fair to say that we have not had a very detailed discussion on that point with them. It is not fair for me to speak for the government.

**Senator IAN MACDONALD**—Really the question was: they have not indicated to you why they have not gone along with McKenzie's recommendation in that regard?

**Mr Sheridan**—I think they have pointed to the fact that there are other provisions that have been put in place which will examine this issue at some point in the future. We think you should address it here and now.

**Senator LUDLAM**—I feel as though we are kind of dancing around this issue of nondiscrimination and maybe trying to have it both ways a little bit. Would it not be easier to simply have the level playing field that I think most people thought we were getting and just not have any kind of volume discounts at all?

**Mr Krishnapillai**—You can imagine that we have obviously debated that internally and there are pros and cons around that. We have said already that, as the second largest player, we think there would be advantages, clearly, in our being able to say that we are more efficient in terms of buying. What we are trying to do is mirror normal commercial negotiations and normal commercial practices. Those normal commercial practices say that if you are effectively helping the supplier in terms of their cost of providing services to you—effectively aiding efficiency—then there should be some recognition of that in the commercial discussions.

**Senator LUDLAM**—I just worry that nobody has been able to say, black or white, whether that is the case or not. I could understand it if we were dealing with the electricity or water markets, but is it actually true for photons flowing down fibre or not? No-one seems to be able to say yes or no.

**Mr Krishnapillai**—That is our concern as well—in the sense that we do not have any definitions around what will be considered as aiding efficiency. So I agree with you in that sense. But I think you can point to a number of examples where it probably would be more efficient to purchase or sell to a large player, in terms of your interconnect and other arrangements. I suspect there would be a number of operational costs that would be cheaper if you did that, but I would be speculating and I would rather that be defined through sufficiency and very transparently reviewed by the ACCC.

**Senator LUDLAM**—NBN Co. will be able to argue that it is more efficient to have only one or two customers because they would not need elaborate billing systems, for example. I will just play devil's advocate for a second: wouldn't it be most efficient, particularly for the utilities or a big university, to eliminate the retailer since you are going to be in the middle and putting your mark-up on things. What value are you adding and how is that efficient?

**Mr Krishnapillai**—I think we have to go back to the original proposition, which is that we have reluctantly accepted, in light of the lessons of history, that there will only be one wholesale core network. I think we have all learned the lessons of the history. We have rolled out an HFC network with Telstra. We both ended up losing a lot of money—Optus wrote down over a billion dollars through that process. So reluctantly I think we have concluded that there is a wholesale single network. Secondly, though, you can push that boundary back to another layer—a basic cable service, effectively. We would argue that the third layer, which is ultimately where all the intelligence, switching and other IT capabilities reside, should be open to full competition. If we are going to invest in providing those third layer services et cetera, and we think they should be competitively provided in order to differentiate to customers, then effectively we are saying that that should be open to competition.

**Senator LUDLAM**—You did not actually say why.

**Mr Sheridan**—I think in the example we used, in the short-term there might be some superficial attraction to having just the single supply—

**Senator LUDLAM**—Well, it would be cheaper.

**Mr Sheridan**—Except that you would be back in the days of the 1970s and 1980s of just having Telstra as a monopoly provider. Very quickly you would find that it would take a long time to provide services and your

prices would tend to rise over time because there is no competition interjected into any point in the market. In the model that we are proposing, you have the benefits of having not only a national wholesale-only provider but also vigorous retail competition that will tend to keep prices down, keep processes efficient and will ultimately deliver long-term benefits for end users.

**Senator BIRMINGHAM**—Isn't the simple risk that both you and Telstra are highlighting that NBN Co. will cherry-pick the best bits—the high users or, presumably, the big profitable corporations or utilities—and the retail sector will be left competing over smaller users and households, and therefore householders will be the ones paying a higher price because that is the only service market you will be delivering in?

**Mr Krishnapillai**—There is that risk, which is why we have highlighted that they should firstly have a tightly prescribed role. Secondly, we have also said that we make no apologies for our belief that competitive pressure and competitive dynamics will force down prices and improve innovation. I think it is counterintuitive for some people, but ultimately investment follows competition. We have seen that in the mobile market, quite aggressively. When one player introduces an innovation or when one player needs to invest in differential services—pricing et cetera—other players have to follow. If there is not that pressure on NBN Co. then we have to do two things: firstly, make sure that there are limitations on what they can do in review through the ACCC and, secondly, push competitive pressure as far down that chain as possible so that retail service providers can offer those services. It is the third layer of functionality that really adds the value. The intelligence of the network, the features and billing functionality that end users will be delivered, and the sort of experience that customers will get at the end of NBN Co. will largely be delivered by the IT systems of retail service providers.

**Senator LUDLAM**—In your submission you go as far as you feel comfortable in advocating against the Commonwealth selling the network down. Rather than trying to ring-fence this thing and safeguard it from turning into another Telstra, would it not be simpler to not sell it at all? Would we be better off holding it in public hands?

**Mr Krishnapillai**—We would not go as far as to say what should happen in a number of years time. We have certainly said that we want to make sure the rules in place today are the right ones. But we understand that future parliaments will have to review when and if any further sale would be appropriate. You are right. We have said all the way through that we need to make sure that there is very tight prescription around any circumstances where a sale is considered.

**Senator LUDLAM**—I suppose one of the reasons why you do not want this thing forcing its way into various retail markets is that, if we then sold it, it would be a bit of a monster.

**Mr Krishnapillai**—That would be called Telstra mark 2.

**Senator LUDLAM**—It would be indeed, at a great public expense. Senator Birmingham put to you the issue that Telstra raised around the fact that I could go out tomorrow and get myself a carrier licence and be a retailer even if I was not a retailer. Is that something that needs to be fixed in the drafting of the bill or do you think that that might be jumping at shadows?

**Mr Krishnapillai**—We are concerned that there be very tight prescriptions around who can buy from NBN Co. That should be a carrier or CSP. The exemptions that are in place there are ones we, as we have highlighted before, do have some concerns with. If someone chooses to be a carrier—and every entitlement, utilities and others, would head down that path—then as long as they abide by the obligations and requirements of getting a licence then clearly that is an open market. So we probably should not limit their ability to do that, other than by the normal licence conditions that we have today.

**Senator LUDLAM**—That is interesting.

**CHAIR**—Mr Krishnapillai, you spoke about efficiencies earlier. Are there cases where efficiencies may not involve volume approaches? What would they be?

**Mr Sheridan**—You could, for example, enter a long-term contract which might lower the risk profile of NBN Co., which could have a cost benefit. There are other examples which do not necessarily involve volumes. Again, they would need proper scrutiny to understand exactly how they change the cost profile of NBN Co. and therefore how that is then linked to any specific discount offered.

**Mr Krishnapillai**—What we are saying is that, rather than having some sort of vague sense that because we are big we should get a discount, we want it tightly prescribed that there must be an efficiency gained by NBN Co. in order for them to pass that through and that that be reviewed by a third party. As Andrew said,

there would be a range of issues, as with any commercial negotiation—longer contract times, interaction in operating costs and taking on other areas—that would reduce the cost for NBN Co. That should flow through.

**Senator IAN MACDONALD**—NBN have the onus of proof to demonstrate that under your amendment.

**Mr Krishnapillai**—Yes, exactly. It is an important principle. We have said all the way through there should be a review process rather than just accepting what a monopoly provider says on face value. We have learnt that lesson the hard way.

**CHAIR**—You are not directly comparing NBN and Telstra, are you?

**Mr Krishnapillai**—Yes.

**CHAIR**—You are.

**Mr Krishnapillai**—What I am saying is there are lessons that we should have learnt in the last decade or two in terms of how a fully integrated provider—or a temptation of a fully integrated provider—should behave in a marketplace.

**CHAIR**—But there are significant checks and balances in this legislation, even without the amendments, in terms of NBN becoming a fully integrated provider. That is the reality isn't it?

**Mr Krishnapillai**—Yes. We are trying to make sure that is as tightly prescribed as possible. I think we all expected the '97 legislation to have a more pro-competitive outcome. I certainly did. But we were underestimating the sheer market power and creativity of an effectively integrated incumbent to distort competition.

**CHAIR**—I do not suppose NBN will have decade upon decade of experience like Telstra would have. They are not coming into it on that basis, are they? They are a new company.

**Mr Krishnapillai**—Say Sol Trujillo took over NBN Co. in a decade's time and Phil Burgess was the new minister, how would that play out in terms of behaviour? We are just trying to make sure, in spite of the respect we have for the current management team at NBN Co. and the current minister, that in future iterations of either of those we have legislation that precludes that sort of behaviour.

**CHAIR**—I have asked one question. Mr Krishnapillai, you are not saying that the dead hand of conformity should apply in terms of the legislation. What happens if a small—what they describe as 'nimble'—competitor comes in and needs some flexibility? How do you deal with that?

**Mr Krishnapillai**—I think that is what we were saying before, that we have agreed that there should be some differential ability to negotiate and accept that principle, as long as—as the senator pointed out—the onus of proof is on NBN Co. to show that there has been a better way of dealing with that particular player and as long as there is a review process. So, as long as it is fair, we have absolutely no concerns with that approach at all.

**CHAIR**—But NBN does not have the same incentive that Telstra had. Telstra were a vertically integrated company and NBN will not be that, so they do not have the incentive that Telstra had to behave in a certain way, do they?

**Mr Krishnapillai**—They equally do not have the incentive like a normal commercial negotiation to crush down costs, and I think that is one of our concerns—that, if you become a cost-plus organisation, which is what traditionally will happen if you do not face competition—

**Senator IAN MACDONALD**—It traditionally happens with monopolies.

**Mr Krishnapillai**—Correct. Firstly, we will need to make sure—as much as possible—that there is some discipline around competitors offering services and, secondly, that there are as many review processes in place so that sort of complacency cannot creep into an organisation.

**Senator BIRMINGHAM**—However unrealistic it is, the government has made it clear they expect a rate of return from NBN Co., and the NBN Co. board is going to seek whatever means it can to get that rate of return, one would imagine.

**Mr Krishnapillai**—Yes, and we have been on record saying that we think that is highly achievable. If you look at the history of this industry, at the growth rates we have had in the past decade or two, and then forecast to the future—dangerous as that might be—I suspect you will see quite significant growth in usage, in terms of how broadband is used.

**CHAIR**—The other check and balance in the legislation is the ACCC. Surely they will be able to have that control over NBN if they seek to operate outside of what is normal commercial practice.

**Mr Krishnapillai**—And I guess that is the criticism that has always been levelled at the current legislation, which is that they can only do that if the ACCC is given the authority and power to do so. There have been enough loopholes in the current legislation for Telstra to wriggle through quite a few of those. That is why we are so concerned to make sure that this legislation minimises the ability for NBN Co. in any future iteration to wriggle through that.

**CHAIR**—I cannot get in my mind Telstra wriggling anywhere; they are pretty big for wriggling. But anyway, I will now pass to Senator Fisher.

**Senator FISHER**—Thank you. Gentlemen, you have talked about your view of the exemption for utilities to purchase wholesale directly from the NBN. Broadly speaking, if I understand it correctly, the Energy Networks Association submission, for example, says: ‘You’d better give us the exemption because we are special. You don’t want to do without us,’ and that if they don’t get the exemption it will deter them from using the NBN and it will, as their submission says, ‘encourage socially inefficient duplication of communications infrastructure.’ So my question out of that is: in your view, is there any benefit of the NBN to those utility providers?

Secondly, they seem to be saying, ‘Don’t force us to purchase this stuff from retail service providers, because they value-add stuff to the basic service that we do not want or need and we would have to denude it to get what we want and then build it up ourselves anyway.’ So, what do you say about that? Does providing the exemption force others out of the market who would otherwise be, as you said, Mr Krishnapillai, wanting to provide those services to service utilities?

**Mr Krishnapillai**—There are probably a few things in there. The first thing is: I am personally of the view that in a decade’s time we will be looking back and wondering what all the fuss was about; because the connection of broadband to every home and every business and the capacity that it will enable—in my view—will lead to a flourishing of business opportunities and applications that we cannot forecast today. I know it is a difficult equation to add into any cost-benefit analysis. Firstly, I do think they will be using these services in many ways that none of us can really forecast.

Secondly, if I go back to my earlier comment about the principle as to competition, I think the goal here is to make sure that NBN Co. as a monopoly provider does not have the temptation to get into areas that it really should not get into. So I think we want to tightly prescribe all that. That is not from a purely self-interest point of view. We are quite happy for there to be as much competition as absolutely possible. We are simply saying there should be a level playing field for competitors who offer services as RSPs and that should be pushed as far down as possible away from NBN Co. offering those services to direct end users. We accept the legislative amendments that have gone through. They have tightened it up quite sufficiently to be wholesale-only et cetera. We would just like that to be a little bit further prescribed.

Finally, in terms of the comment as to whether they can use those services, like other players we intend to offer wholesale style services that will have a variety of options and services that are attached to the services we would be offering to end users.

**Senator FISHER**—Do you have a direct response to what might be their allegation that you are adding stuff on the top that they do not necessarily want or they could do themselves and you will charge them a price for that on the way through—so ‘thanks very much but we do not need you and we shouldn’t be forced to use you’?

**Mr Sheridan**—Our response is that we are not persuaded by the argument at all. There are products and services that can be tailored specifically for their needs. This is an area of the market which is potentially new and will develop. Optus and others in the market will look at offering those services.

**Senator FISHER**—To that I suppose they would say, ‘You’d better get it right otherwise the community is going to have to do without us.’ That is the implied objection I hear from them to that. Do you have any further comment on that?

**Mr Krishnapillai**—Hopefully, electricity companies will be also competitive so if one company does not do it then another company will. That is probably the short answer. If you going to have any effective cherrypicking type of carve-out and you allow utilities to start offering and doing their own services like that, why wouldn’t we?

**Mr Sheridan**—If you push that door open it is open for anyone to come in and plead a special case and suddenly you do not have a telecommunications market and you are back to the 1970s and 1980s scenario where you have got a single national provider at both the wholesale and the retail levels.

**Mr Krishnapillai**—So we are going to see hospitals arguing the same thing and we are going to see a whole lot of other players arguing the same thing, that ‘we just want to buy straight fibre’, and then the hospitals will build their own IT system on top of that and that will go bankrupt, as it did in Queensland in the 1990s. I suspect that is what we are trying to preclude here, a market structure that does not work.

**CHAIR**—But the market structure at the moment is that these utilities do provide their own services internally. That is the position. There is a very strong submission from the Energy Networks Association that that should not change. They argue that they were the ones with the technical expertise, that they were the ones that built these systems up, that there were special technologies involved for utilities, that you would still supply their retail telephony and that the special network tools that they use were really germane to their operation.

**Mr Krishnapillai**—I think everyone will argue they are special. That is my first comment. My second comment would be that we have also built up a number of networks and invested very heavily—a billion dollars a year—in infrastructure. A lot of that is in direct fibre or direct networks. I go back to Andrew’s comment: it is a matter that once you open that door it is very hard to shut it and also it is very hard to direct how that gets used in the future.

**CHAIR**—But the door is open now, because they do supply those services internally and if you can supply an external service that is more efficient and more technically adept then that would be competition, wouldn’t it?

**Mr Krishnapillai**—As long as they are caught up in the same regulatory requirements. Our networks are effectively offering at wholesale and there are the licence requirements that overlay us and others.

**Mr Sheridan**—That is right. Given the proposition that we have put forward, if they want to set themselves up with a net carrier licence then they can continue to sell—

**Mr Krishnapillai**—Fine.

**Mr Sheridan**—But that comes with certain sets of obligations. That helps ring-fence this problem of this perceived risk that we have put forward.

**Mr Krishnapillai**—So as long as they are a carrier we see no issue with that.

**CHAIR**—We are running out of time, so we will finish on this one. Senator Birmingham put to you that prices would go up in the retail sector for households if there was a widening of the commercial sector having access to what you would see as your business. That would not be the case as it is currently configured, would it, because you do not have access to some of these utilities now? There will still be a very competitive recent retail household pricing sector, won’t there?

**Mr Krishnapillai**—First of all, we do have access to state governments in a lot of the utilities and we provide a lot of services to those governments. Our worry is that that is foreclosing markets. We want to make sure that the legislation does not foreclose our ability to offer those services. Secondly, that is only on the basis that the ACCC review when and where those services are available. As we said, the carrier licence is absolutely fine. Other players offer those services. No. 2, we want to push back as far as possible definitions around when any player can directly connect to NBN Co. No. 3, as long as there is an ACCC review of those processes, that is fine.

**CHAIR**—There is a parliamentary review as well, so there are a number of checks and balances there. Thanks.

**Senator IAN MACDONALD**—This is a clarification: did you say you did not mind NBN Co. being a retailer as long as they were subject to the same regulation?

**Mr Krishnapillai**—No, I said an electricity company, certainly not NBN Co.

**CHAIR**—Thanks, Mr Krishnapillai and Mr Sheridan.

**Mr Krishnapillai**—Thank you for your time.

[9.46 am]

**GALLAGHER, Mr William, General Counsel, Strategy and Corporate Services, Telstra**

**SHAW, Mr James, Director, Government Relations, Telstra**

**van BEELEN, Mrs Jane, Executive Director, Regulatory Affairs, Telstra**

**CHAIR**—Welcome. Thank you for coming to talk to us today. The committee has received your submission as submission 16. Do you wish to make any amendments or alterations to your submission?

**Mr Shaw**—No thanks, Chair.

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

**Mr Shaw**—Telstra thanks the committee for the opportunity to appear and talk to the submission on these bills. Before turning to the bills themselves and the issues raised in our submission, I think it is worthwhile to reflect on the wider environment in which these bills fit. Telstra supports the government's vision for the ubiquitous availability of high-speed broadband across Australia. Following the government's announcement of its fibre-to-the-home rollout in April 2009, Telstra indicated its desire to engage in constructive dialogue with the government over the implementation of that policy. Subsequently, on 21 June 2010, we announced that we had reached a non-binding financial heads of agreement with the NBN Co. around our participation in the NBN rollout. More recently, in our half-year results we indicated that we had finalised the key commercial terms with NBN Co., which are expected to deliver approximately \$9 billion in post-tax net present value to the company. In addition, we also indicated that we had reached in-principle agreement with the federal government over the specific measures that are expected to deliver a further approximately \$2 billion in post-tax net present value.

These agreements were reached following 18 months of extremely complex negotiations. We are now working to complete the necessary documentation to enable the finalisation of these agreements. Once the agreements are finalised we will provide shareholders with detailed information on the substance of the proposal. What I can say about the agreements reached is that Telstra has provisionally agreed to commercial terms relating to copper network decommissioning, dark fibre and duct usage, exchange usage, certain rollout arrangements and a number of other matters with NBN Co. The parties are working to complete the associated operational details and ensure that all contingencies are addressed as part of the documentation process that is expected to be completed in the near future.

The company will then commission an independent expert report for shareholders so that the proposal and the report can be put to shareholders at an EGM which is provisionally scheduled for 1 July 2011. Given the complex and sensitive nature of these discussions, we are restricted in what we can say publicly about the status of the NBN negotiations. In our appearance today we do not propose to go beyond the information that I have just provided, and we trust that the committee understands the situation.

In terms of the bills before the committee, at the outset we would like to indicate that we support the passage of the bills. We think they are an important step in the creation of the NBN; however, we believe that aspects to the legislation could be strengthened to ensure the NBN holds true to the fundamental principles behind its creation. The government has clearly stated that its objectives for the NBN are to deliver significant improvements in broadband voice quality for all Australians, reshape the telco sector and establish a wholesale only open access network which will provide open and equivalent access at the lowest levels and the network stack necessary to promote efficient and effective retail competition via a layer 2 bitstream service and/or accommodate the reasonable expectation of retail competitors' equipment in anticipation of multiple retail competitors.

Our concern is to ensure that the government's stated purpose of a wholesale only open access network is achieved while, at the same time, ensuring that the retail service providers are not displaced from already competitive retail markets. For that reason we propose a number of amendments to the bill and express a number of concerns. Our first concern is the failure to ensure the core policy of wholesale only or prevent NBN Co supplying value added services in competition with RSPs. The companies bill fails to effectively enshrine the government's key policy of wholesale only and there are three gaps in the NBN Co line of business that we think makes it possible. The first is that, because the restriction is based on the regulatory identity of NBN Co's customer rather than the purpose of the wholesale supply being for on-supply to communication service to the public or large retail customers, these large retail customers could easily identify



themselves as carriers or carriage service providers to acquire services directly from NBN Co. We think this concern could be addressed amending clause 9 of the bill. Secondly, the bill exempts certain customers, utilities and the like and state government entities from the wholesale only requirement in certain circumstances. We think the omission of clauses 10 to 16 of the bill would address that concern. Thirdly, NBN Co will be permitted to own interests in retail service providers for a period of 12 months, enabling it to be vertically integrated. We think that could be addressed by amending schedule 1 of the bill.

The companies bill also fails to enshrine protection against NBN Co moving up the value chain beyond layer 2 bitstream services to offer value added services and compete with retail service providers who are in fact its customers. The minister retains a discretion to restrict NBN Co but is not yet committed to doing so. The implementation study commissioned by the government made it clear that there are powerful incentives for NBN Co as a monopoly to move up the value chain. The industry needs certainty that this will not be permitted, and this can only be achieved in our view by providing a clear restriction in the companies bill. While we have no reason to believe that the current government's intention is to act counter to its announced policy, we cannot ignore the risk that future governments may exercise powers to expand the marketplace occupied by NBN Co or to relax its regulatory environment in the future. That uncertainty is something that industry participants do not need if they are going to invest in the capabilities to supply services off the NBN. So we see it as important that a clear and unambiguous line is drawn from the outset in regard to what activities the NBN Co can and cannot undertake as a wholesale only provider of layer 2 bitstream services and thus recommend the bill be amended accordingly. We also have concerns around the provisions of the NBN access bill that regulates superfast networks to protect NBN Co from competing networks. We think this has the potential to reduce competition by deterring investment. We do not see these provisions as being in the interests of consumers and believe they should be excised from the bill.

Finally, the NBN access bill imposes a general obligation on NBN Co not to discriminate between access seekers and price and non-price terms of supply—that is in section 152AXC of the bill—nor to undertake specified related activities, including developing new services, extending facilities and providing information to access seekers. We believe these requirements will inefficiently straightjacket NBN's activity and deter innovation to the detriment of efficient competition and ultimately to consumers. Telstra believes the NBN Co should be able to discriminate where this aids efficiency. We believe that the ACCC already has ample powers to monitor and review any discriminatory arrangements to ensure that such efficiency grounds do exist.

Thank you for the opportunity to make that statement, Chair. We would now be happy to take questions on our submission.

**CHAIR**—Thank you, Mr Shaw. It is quite interesting: you sound like Optus when they came to see me two years ago. How things change! Senator Fisher.

**Senator FISHER**—Gentlemen and Mrs van Beelen, thank you. In terms of volume discounts, what do you think of the arguments that the scope for volume discounts will unfairly favour Telstra?

**Mr Shaw**—As was stated in the opening remarks, where they aid efficiency we think that is a fairly well understood economic concept that applies in a number of markets across the economy generally. As long as it clearly abides by that criteria of aiding efficiency, we do not think it should necessarily be restricted to Telstra; it could be to any nimble organisation, as the chair indicated in previous evidence. We think it is not something that is there for Telstra's benefit only. We think it is there for any organisation that can aid the efficiency of the NBN Co in providing services to consumers.

**Senator FISHER**—What do you think of the scenario painted in Optus's submission about how, for example, Telstra could be unfairly advantaged in that respect?

**Mr Shaw**—We believe that the ACCC has sufficient powers to ensure that the market operates properly.

**Senator FISHER**—I want to move to the exemptions. In respect of the utilities—aside from them arguing that they are special because they are special—what does Telstra think? You have addressed it in your submission, but for the record: what does Telstra think of the argument that, if you do not provide them with the exemption, they will not use the NBN; they will do this themselves? Secondly, what does Telstra think of the argument that, even if retail service providers try to provide them with the services for their internal users, they will not want what they do or they will not want to pay what they charge them for doing it?

**Mr Shaw**—First of all, we do not think that the utilities generally have made a sufficient case to be treated specially. We believe that the retail service providers will want to provide services to the utilities of the types that they will want in the future. With issues around the smart grids and smart metering that they want to roll

out, we are talking about future networks, not existing infrastructure. We believe that there will be a market there for retail service providers to provide the type of service that the utilities want and that it can be done in a way where we add value to what the utilities are after. It is an area where there will be competition and therefore there should be no need for these organisations to deal directly with the NBN.

**Senator FISHER**—How are you going to convince them of that? Are you saying, for example, that they do not know because we have not been there before and that they should just wait for you to show them?

**Mr Shaw**—No. We would say that the history of the telco sector of meeting the needs of consumers is well credentialed. A lot of innovation goes on in our sector. A number of companies have sprung up off the back of opportunities to provide specialised services. There are plenty of examples of larger companies setting up particular business units to deal with a particular area of the economy that needs an innovative solution. There are a lot of good minds in our businesses, not just in Telstra but across the sector. If we think we can make a buck out of it, then we will invest in it, and we believe that providing utilities for the types of services they want in an NBN world—

**Senator FISHER**—Is worth a buck?

**Mr Shaw**—Is worth a buck.

**Senator FISHER**—What do you say, then, of their argument—in my words—that you better get it right, because the community does not want to do without, for example, electricity if the retail service providers get it wrong?

**Mr Shaw**—If they believe that we are not providing the type of service that they want, they have options of going elsewhere within the sector or they have the option of getting a carrier licence and sourcing from NBN Co. I do not think that there is only one shot in the locker here.

**Senator FISHER**—That was essentially Mr Krishnapillai's suggestion earlier: if they get a carrier licence then so be it. But, if I understand your submission correctly, you are saying there should be an additional requirement in respect of the carrier service provider that the services be around internal use.

**Mr Shaw**—That is correct. If they are going to provide it for internal use, they would need to source it from an RSP under the amendments that we propose, so they would then have the opportunity to shop around to RSPs. As I say, we have a very innovative sector of the economy here, the telco sector, and we have a good track record of meeting the needs of customers, be it our company or other companies.

**Senator FISHER**—So you are essentially saying that the licensing requirements are not sufficient to police self-use because the licensing requirements are written envisaging supply to the public.

**Mr Shaw**—Are you referring to clause 9 in the bill and our suggested amendment?

**Senator FISHER**—Yes.

**Mr Shaw**—Yes, we believe that the framing of clause 9 at the moment would allow a large entity to get its own carrier licence and then source from NBN Co. directly for self-supply. We see that as working around the intent of the principles of the NBN Co., which is to provide a wholesale only service and therefore it should be providing to carriers and carrier service providers who are then on-selling to consumers, be they large businesses or households.

**Senator FISHER**—I did not pursue this with Mr Krishnapillai because of time, so I am not sure what his view would be on this. But I heard him saying essentially that if a utility service provider were licensed as a carrier then so be it. That leaves open the issue that the services could then be self-consumed. But if I understand you correctly you are saying that for a carrier service provider, particularly in that scenario, there would be a requirement that there be on-supply to the public—

**Mr Shaw**—Correct.

**Senator FISHER**—under the existing regime.

**Senator IAN MACDONALD**—Do you have a concern that at some time in the future the wholesale network will not be as schmick as it appears to be now. It is a monopoly. It will not have those competitive pressures that we all talk about in the retail sector. What if they adopt the old Telecom stance and sit on their rear ends and do nothing as the world moves on?

**Mr Shaw**—There are a couple of answers to that. In the first instance, as colleagues from Optus said, if we keep NBN Co. as far down the value stack as possible—and that is at layer 2 albeit with some provision, as we suggested in our submission, around some services at layer 3—the pressure from the vibrant retail service providers will assist in ensuring that there is a consumer benefit there. The second thing is that the ACCC will be all over NBN Co.

**Senator IAN MACDONALD**—But you cannot go anywhere else. I have got no idea how you might upgrade a network in 10 years time. Who knew 10 years ago what we could do with telephony these days. But, being a monopoly, how are you going to be concerned or aware that there is not a better system around but you simply cannot get it because they are the wholesaler.

**Mr Shaw**—A lot of people have accused us in the past of being a monopoly and maybe back when we were the PMG that might have been the case, but in more recent decades there has been investment in the telco sector that has kept us keen in many areas. Second, we have always felt the hot breath of the regulator. They are very keen to ensure that the price—

**Senator IAN MACDONALD**—We will then have governments deciding what is the best system—the regulators.

**Mr Shaw**—I am sorry, in terms of pricing; I thought we were looking at pricing.

**Senator IAN MACDONALD**—No, I am not talking about pricing at all. Perhaps I am rehashing arguments that were relevant three or four years ago, but how do you as a major player—and I would have liked to have asked Optus this, too—know that the NBN is going to keep up with the latest in networks?

**Mr Shaw**—There is always the option for someone to step in and compete.

**Senator IAN MACDONALD**—Okay, let us get into the executive summary of your submission:

The provisions requiring regulation of all new superfast broadband networks risk damaging investment and foreclosing future network competition.

[sound missing]

as you go into a superfast broadband network in competition with NBN?

**Mr Shaw**—That option exists, but under the current formulation of the bill there are certain restrictions and obligations put upon you. We do not believe that those provisions are necessary, which is why—

**Senator IAN MACDONALD**—Is that the regulations you are talking about?

**Mr Shaw**—The cherry picking arrangements.

**Senator IAN MACDONALD**—If those provisions were not there what is to stop you tomorrow setting up your own network in competition with NBN?

**Mr Shaw**—In theory, any carrier could do that.

**Senator IAN MACDONALD**—Having got \$11 billion for old stuff that you could never use any more.

**Mr Shaw**—Which is why I would rather not answer any specific questions. I would rather talk about the capacity of the industry generally.

**Senator IAN MACDONALD**—You will laugh all the way to the bank with that. What is to stop it, except these regulations? So governments will say when the right time is to set up in competition to NBN.

**Mr Shaw**—I am not quite sure how those provisions would operate. So that if you go down the track—

**Senator IAN MACDONALD**—Can you explain to me what your submission is. In regard to the first dot point under the ‘NBN Access Bill unduly restricts future competition’ heading in your executive summary, can you explain to someone who is not as familiar with these things as most others in the room what that actually means.

**Mr Gallagher**—The access bill places a requirement on the ACCC to declare a new service, a layer 2 bitstream service, and it requires anybody who invests in and builds a new superfast broadband network or upgrades an existing network so it is capable of providing superfast services to then supply that layer 2 bitstream service, which has been declared—

**Senator IAN MACDONALD**—Which is what Telstra has allegedly been doing for the last four or five years. Others would disagree but you would say you were.

**Mr Gallagher**—Upgrading networks?

**Senator IAN MACDONALD**—No, supplying your network to anyone who wants it at a reasonable price.

**Mr Gallagher**—Yes, we do. We provide access to the CAN, to the copper network.

**Senator IAN MACDONALD**—But you are saying you are concerned that the regulator has that power now to insist—

**Mr Gallagher**—No, not at all.

**Senator IAN MACDONALD**—Sorry, I have interrupted you. I really asked you to explain in simple terms, in practical effective terms.

**Mr Gallagher**—Our concern is that the actual effect of these provisions is that it will act as a deterrent to people who want to make those investments. That is the simple explanation for it.

**Mrs van Beelen**—The legislation basically specifies the wholesale service that must be supplied and that it will be regulated upfront. So it is a bit of a deterrent to invest in such infrastructure.

**Senator IAN MACDONALD**—If it were not there, wouldn't you, the industry, go back to where you were?

**Mrs van Beelen**—The stated purpose of the provision is to level the playing field, but I think we would argue that with national scale and the substantial government investment in NBN Co it does enjoy certain advantages. So I am not sure that the playing field needs to be levelled.

**Senator IAN MACDONALD**—You would go a long way to convince me that government is the best one to be running these sorts of high-tech industries. People would say that NBN is not the government—

**Mr Gallagher**—It is certainly true that the ACCC can always declare a new service on a network and has done so in the past. So the ACCC could declare a layer 2 bitstream service on a superfast broadband network that is built. It has not to date and the reason it has not to date is because it has formed the view that intervening in those sorts of markets will deter investment, which is the very argument we are making.

**Senator IAN MACDONALD**—You still have your wholesale lines between, say, Sydney and Melbourne.

**Mr Gallagher**—Correct.

**Senator IAN MACDONALD**—And you will be using those rather than NBN's.

**Mr Gallagher**—NBN is substantially an access network, so it is more the reticulation network into the suburban streets than it is a provider of backhaul services.

**Senator IAN MACDONALD**—But you provide backhaul services.

**Mr Gallagher**—We do, and the others provide backhaul.

**Senator IAN MACDONALD**—I am trying to work out how your proposed amendment would change things from how they currently are.

**Mr Gallagher**—It would leave it to the regulator to determine in future whether or not declaring such a service is appropriate. The regulator is the best party to make that decision. We do not think it should be mandated from the start.

**CHAIR**—Senator Macdonald, we are going to have to move on.

**Senator LUDLAM**—Is Telstra okay in principle with preventing cherry-picking?

**Mr Shaw**—We have recommended that the current provisions in the bill should be taken out. We think that cherry-picking has been a natural part of the telco sector since competition existed.

**Senator LUDLAM**—Which is why we have got good service in Sydney and crap service in Laverton, because the free market cannot be bothered taking it out because it cannot turn a profit. Can I just get a yes or no on that. Are you proposing that cherry-picking provisions be repealed?

**Mr Shaw**—Correct.

**Senator LUDLAM**—I would draw your attention to page 14, section 41 of your submission:

If by cherry-picking the government means competitive entry in areas where this is efficient, it is not clear why this should be discouraged.

I thought the government has made reasonably clear that should be discouraged because private industry will want to go into the CBD, where it is a lot cheaper to provide services where people are a lot closer together, and you will leave the taxpayer picking up the rest of the country, where telecommunications are a lot more

expensive to provide. Can you see the public interest argument in preventing Telstra, or anybody else for that matter, coming in and just pinching the easy bits and leaving the taxpayer to pick up the rest?

**Mr Shaw**—We look at it through the prism of economic efficiency, which says that if the market can function with competition in it then competition should be allowed because that will drive greater innovation and better prices.

**Senator LUDLAM**—That comes straight out of a textbook. How is the taxpayer meant to provide services to the far-flung parts of the country with the current cross-subsidising of the very same areas where you would be quite happy to run your entire business?

**Mr Shaw**—I think addressing those sorts of issues is precisely why the government has set up the NBN.

**Senator LUDLAM**—But it is why they have also put their antichoking provisions in there to stop you from just turning up and pinching the good bits.

**Mr Shaw**—And that is where we have a difference of opinion with the government.

**Senator LUDLAM**—Let us be clear: that is just commercial self-interest; there is no rational economic theory that underpins that.

**Mr Shaw**—No, we would say the theory of markets does underpin that: if you can support competition that will drive efficiencies and innovation and let consumers benefit.

**Senator LUDLAM**—It has not driven it very far into the bush with your mobile networks notwithstanding.

**Mr Shaw**—I think the mobile networks are a good example of how competition is improving services in regional areas. We are feeling our competitors building out by the day in response to our investment in the Next G network.

**Senator LUDLAM**—How do you think that applies to fibre build, which Telstra had many years as the incumbent and, as a business, you never did it because it was not profitable. NBN Co. is only going to be able to do it by cross-subsidising services in the bush by levying a slightly higher price on people in the city. I would have thought that that is a reasonably uncontroversial proposition.

**Mr Shaw**—I think we just have a difference of opinion on that.

**Senator LUDLAM**—Thank you for clarifying that. The Internet Society has raised some concerns with a touch of amusement that we are determining and locking into legislation the definition of superfast broadband that is probably not going to look like super anything in 10 or 15 years time. Have you got concerns about locking in a technical standard into a piece of legislation in that way?

**Mr Shaw**—In our suggested amendments, they go to our suggestions around Layer 2 and the like, which I think starts to pick up some of the language that is used elsewhere around superfast broadband in the legislation. Our advice has been that it is an appropriate thing to do, so we do not share those concerns.

**Senator LUDLAM**—So the standard—I think it is 25 megabits per second and above—is classified as superfast. I would have thought the speed at which the technology is shifting and Moore's Law et cetera would tend to mitigate against putting that kind of standard into a bill. We are going to have to come back every couple of years and get it up to speed. Do you think your amendments in particular would catch those concerns?

**Mr Gallagher**—Our amendments would take those provisions out and leave it to the regulator to make those decisions in the future.

**Senator LUDLAM**—That deals with that. There are issues that you have raised around people taking up a carrier licence so as to become effectively an internal retailer. I put the question to you that I put to Optus more as devil's advocate: if companies can get a cheaper service by dealing directly with NBN Co. as their own retailer, why would it somehow be efficient to insert a retailer who is going to want to whack their own margin on their service into the middle?

**Mr Shaw**—We would suggest that over time it would not be cheaper for those people to go down that route. We see that the retail service provider is going to add a lot of value between the service acquired from the NBN Co. and that provided to the entity at the end of the day. That will go to putting a whole lot of network applications and services across the bitstream product, putting a lot of security protocols and other things across those, and tailoring those individual needs of the entities that are needed. We see that there is a lot of value add from the RSP; however, there is a superficial attraction, we believe, for people to go out in the first instance and say, 'We'll do all this ourselves.' I think, as Optus said, we are back to a situation of several

decades ago. We want to preclude from that potential outcome by drawing a bright line very early on in the fees to say that this is how the market is going to be restructured because that is effectively what we are doing with the NBN Co. We are restructuring the telco market. We are not restructuring it with a view to increasing ambiguity or allowing ambiguity to occur in the sorts of areas that are identified here; we are restructuring the market with the clear understanding of how it will function and what the component pieces are.

**Senator LUDLAM**—I do not necessarily disagree with you. I think the government sold this as a wholesale-only network and I have got some concerns about scope creep as well. But I am also very much aware that the entities that you refer to do not necessarily want you there. So you are saying, ‘We can provide all this added value,’ and they are saying, ‘Well actually we just want cheap service; we do not want you there at all.’ I was not completely satisfied with the answer that Optus provided either. If you are a big enough institution and you are more than happy to provide these services yourself, why do we artificially need to insert a retailer into the picture just to satisfy some kind of competition principle?

**Mr Shaw**—I think it is more than a competition principle; I think it is a fundamental principle behind the restructuring industry to start with, Senator. Over and above that, it does not necessarily follow that you are going to get the market functioning most efficiently and appropriately by having that sort of structure where people are buying off NBN Co. for self-supply. There are a whole range of issues—Optus have raised some of them and I think we touched on some in our submission as well. The capacity for the retail service providers to continue to innovate and provide a whole range of different services and products is, I think, greater than the capacity of individual institutions to continually do that for themselves. So I think there are a lot of benefits in having a vibrant RSP component to the telco sector for end users.

**Senator LUDLAM**—It is a wonderful irony having Telstra come and run these arguments to us.

**Senator FISHER**—Mr Shaw, you think the cherry-picking provisions should go. If they stay, will Telstra continue to roll out fibre in areas where it is profitable?

**Mr Shaw**—Senator, I think we are getting into areas that we would prefer not to touch on, given that we are negotiating the status of our network in the future with NBN Co. at the moment.

**Senator FISHER**—Thanks. We will wait and see.

**CHAIR**—We are running a few minutes over time, but Senator Wortley has a few questions and then we will have morning tea.

**Senator WORTLEY**—Thank you. Mr Shaw, in the absence of level-playing-field rules in the bill, will Telstra be out there building new networks as a vertically integrated operator?

**Mr Shaw**—I think I just touched on that in terms of the question from Senator Fisher. We will certainly continue to invest in things such as our mobile networks, our enterprise fibre and the like, but we are currently in discussions with the government and NBN Co. about the status of our access network.

**Senator WORTLEY**—Would you still support the legislation without the level playing field provision?

**Mr Shaw**—We have indicated we think the bills need to be passed. Our suggested amendments we think would strengthen the bills, but nonetheless if the parliament chooses otherwise, we would just move forward with the legislation that is passed, so we would not be seeking to oppose it.

**Senator WORTLEY**—Thank you. We have touched on a whole number of areas. If you were in the shoes of one of the smaller players, in what circumstances might you ask for different terms of access?

**Mr Gallagher**—Different players have different advantages, so there is no doubt that players like Telstra and Optus have scale. That is one of our advantages. Smaller players have the fact that they are more nimble, they can be innovative. So one advantage that they might have and that they might take to NBN Co. would be to ask NBN Co. to build a particular process or system around the supply of the service. That may be something where NBN Co. might in a sense discriminate and build a process for them.

**Senator WORTLEY**—You have also expressed concerns about NBN Co. moving up the stack offering more layer 2 services. Do you see any difficulties with having such a technology specific registration set out in the legislation?

**Mr Shaw**—No, Senator, we do not.

**CHAIR**—So there would be enough flexibility for NBN to carry out all of its technical operations?

**Mr Shaw**—In the formulation that we have provided in our submission, we believe so, yes.

**Senator WORTLEY**—One of the areas that I wanted to ask you about was the exemption for utilities. It is very narrow. Is that right?

**Mr Shaw**—No, we do not think the exemption is very narrow, to be quite honest. We think that in some parts it is quite broad.

**Senator WORTLEY**—They cannot provide retail services to the public, can they?

**Mr Shaw**—That is correct. They can provide a variety of services to themselves internally, which we believe as a retail service provider we could provide to them in a value-add situation. That is our concern.

**Senator WORTLEY**—They can only use NBN services internally?

**Mrs van Beelen**—That is retail purchasing. If you buy services for your own consumption, then that is a retail supply. That conflicts with the wholesale-only policy.

**Senator WORTLEY**—Does Telstra supply the utilities at the moment or can you see it as a market that you could move into?

**Mr Shaw**—I believe that we supply a number of utilities and state government authorities, and entities of the type that are listed make those exemptions in the bill.

**CHAIR**—You said you support the passage of the bill. What are the imperatives in the bill's passage and what hangs off the passage of the bill?

**Mr Shaw**—We have stated that we would like to take a proposal to our shareholders for an EGM on 1 July this year around our participation in the NBN and how the NBN will operate. The rules in which it will be providing services and the like is part of what we need to know in order to inform our shareholders for that vote.

**CHAIR**—Thank you very much for your attendance here this morning.

#### **Proceedings suspended from 10.21 am to 10.33 am**

**BROOKS, Dr Paul, Director, Internet Society of Australia**

**HILL, Mr Tony, President, Internet Society of Australia**

**RAICHE, Ms Holly, Executive Director**

**CHAIR**—Welcome. The committee has received your submission—submission No. 9. Do you wish to make any amendments or alterations to your submission?

**Mr Hill**—No.

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

**Mr Hill**—Yes. We have outlined briefly in our submission that we have links to the worldwide Internet Society. For your benefit I want to expand on the role of that society, a global, non-profit organisation which was founded almost 20 years ago. It has a key role in relation to the development of standards by which the internet operates all around the world.

A key point I would make about those standards is that they are entirely voluntary. There is no compulsion that you adhere to internet standards except that if you want to connect to the internet you need to use those standards, so from that point of view they are voluntary. ISOC, the worldwide Internet Society, embraces the processes called the Internet Engineering Task Force and the Internet Architecture Board. The Internet Engineering Task Force develops all these standards.

We are one of probably more than 80 chapters of the Internet Society around the world, and our mission is to promote the development of the internet in Australia for the benefit of the whole community, including business, academic, professional and private internet users. As a result of that mission we are very keen to see development of the National Broadband Network and you should mark us down as a strong supporter of the development of the National Broadband Network.

In our submission we have made a few high-level points about principles by which we would like to see that National Broadband Network developed, but I will just draw out three implications from those that we would recommend to the committee in your deliberations at the moment as being key factors. One is reach: in order for Australia to maximise its benefit, the reach of the National Broadband Network has to be as wide as possible. We have heard discussion about the 93 per cent target for the National Broadband Network. We do not want to see the rest of Australia left behind in that movement; therefore, the speed which reaches the rest of the population is absolutely as critical as the reach to the 93 per cent. The second point I make is in relation

to competition. We regard the previous history of telecommunications policy in Australia as having produced not very effective results in competition, particularly in relation to delivery of the internet, so, as we move forward in this discussion about the National Broadband Network and legislation related to that, we want to see action taken that allows for maximisation of competition in delivery of services. The third point I would make is that we need public reporting of the performance metrics of the National Broadband Network to ensure that people know what they are getting. We have just heard discussion of some reporting in the UK about the delivery of internet speeds to users which have been pretty short of the marks advertised, and we want to make sure that when we come out of the NBN process people know what they are getting.

That is the end of my overall opening remarks, but there are a number of other technical issues that we raised in our submission, so Holly Raiche and Paul Brooks are available to comment on those as well.

**CHAIR**—Thank you.

**Senator BIRMINGHAM**—I will start off on the first couple of points you raise. You state fairly openly in your submission that you are supportive of the wholesale-only service provisions in the legislation. We have heard that both Telstra and Optus have queried whether those provisions are tight enough and whether there is potential for some delivery of services directly on a retail level by NBN Co. Do you genuinely think those provisions are tight enough, or could they be tightened further to stop the potential for NBN Co. acting as a retailer to public utilities and the like?

**Mr Hill**—I might pass that question to Paul Brooks.

**Dr Brooks**—The carve-out for public utilities is similar to the existing Telecommunications Act 1997, where utilities are one of the organisations, along with Defence, emergency services and a number of others, that are exempted from acquiring a carrier licence to roll out their own facilities. Those utilities, to the extent that their services are for themselves and for the monitoring of their own networks, are quite different from the types of products and services that NBN Co. would provide for residential or small business internet or communications access. So, as the Internet Society, we do not actually have a problem if utilities purchase directly from NBN Co. provided that they are not then on-selling that to other end-user organisations and it is just for internal use. It is the same as if Defence needs a point-to-point link for internal use or some other aspect like that. That is not a problem in our view. They already have the ability to buy directly from a telecommunications carrier.

**Senator BIRMINGHAM**—Telstra have highlighted particular concerns about the risk of onselling, the definitions that apply to carrier and carriage service providers, and the potential for misuse of those definitions by organisations. Do you think that is a real potential and do those aspects need to be tightened up?

**Dr Brooks**—The definition of a carriage service provider does need to be looked at because at the moment a carriage service provider is effectively anyone who puts up their hands and says, 'I'm a carriage service provider.' So even if the definitions were tightened to say, 'only carriage and carriage service providers' there is nothing that really prevents the IT department of an electricity authority putting up their hands and saying, 'I'm a CSP and I provide communication services to the electricity industry' and then being perfectly legally entitled to purchase directly from NBN Co. in that regard.

**Senator BIRMINGHAM**—Or there would be nothing to stop a big bank with a nationwide footprint, who would be a very lucrative customer for an RSP to have, to declare themselves or seek to have themselves declared as a carriage service provider and buy directly from NBN Co.

**Dr Brooks**—That is correct, absolutely. If they were happy with taking on the obligations of a carriage service provider under the act, including being members of the TIO and all the other obligations under that, then there is currently nothing stopping an organisation doing exactly that.

**Mr Hill**—I can just add something to that answer. One of the concerns that we have is that the number of customers of NBN Co. might be low. If that happens we do not think the interests of competition will be served. Anything in the legislation that has implications about reducing the number of potential customers for NBN Co. would be a problem from our point of view.

**Senator BIRMINGHAM**—That probably flows nicely into debates about equivalence, and the potential for distortions in what may or may not be equivalence to ultimately compress the number of carriers or RSPs operating. If NBN Co. is providing favourable terms to those who have large volumes, does that risk shutting out smaller RSPs and leading to a potential duopoly or something bordering on that?

**Ms Raiche**—We have made a submission on that.



**Dr Brooks**—The word ‘efficiency’ is so broad that any lawyer can drive a truck through it, and it is unclear whether those efficiency gains, as the legislation is currently drafted, would be enjoyed by NBN Co., by an RSP or by the end user. More to the point of the volume discounts specifically as a criterion for price discrimination, if NBN Co. is doing its job properly and has set up all its automated flowthrough provisioning, there should not be any rationale for a reduction in cost to NBN Co. to service a volume of customers. Whether that gets presented to them as one block of 10,000 or as 10,000 individual orders, the cost to NBN Co. to process those should be identical because they are automating the whole thing. We find it difficult to see how there could be an argument that there is an efficiency gain on volume or volume forecast grounds in any case.

**Senator BIRMINGHAM**—You have been relatively supportive of the way that the government ownership requirements are structured. Optus, however, have proposed that even before you get to the 50 per cent threshold or get to the government totally selling off, there should be some limitation on how much an RSP can invest in NBN Co. Do you think they would be valuable additions to the legislative framework?

**Dr Brooks**—I did not hear what the comments from Optus were but—

**Senator BIRMINGHAM**—I do not know if they touched on it this morning, but they are proposing a 15 per cent cap, from memory, in their submission.

**Dr Brooks**—Optus, as a carrier, obviously has quite different commercial interests to the Internet Society, which represents end users rather than the service provider community. So I do not know if the Internet Society has a comment on the degree of RSP ownership within NBN Co, to the extent that it does not create a conflict of interest within NBN Co. in providing identical services to all RSPs, and keeping that level playing field and wholesale ethos that the NBN is based on.

**Mr Hill**—There is an additional dimension to this, which is the way in which some of the competition provisions of the telecommunications regulation regime relate to the general competition regulations within the economy. We have found a problem with the way in which those two things seem to interact. We find a situation where issues can fall through the cracks between the two regimes or situations where there can be delay in resolving issues for years, which can frustrate competition. So if any of those factors came into play in the scenario that you are talking about, they would cause considerable difficulties. That is why I made the point in my opening remarks about competition.

**Senator BIRMINGHAM**—Surely the Internet Society would not want to ultimately see a situation where effectively you ended up with a functionally separated outfit somehow by virtue of an RSP acquiring ever-larger stakes in NBN Co.

**Mr Hill**—In the debate up to this point we have not had much confidence in solutions around functional separation.

**Senator BIRMINGHAM**—I would not have thought you would in future though.

**Dr Brooks**—We certainly would not want to see any situation that resulted in a conflict of interest with NBN Co. as to who they served and how.

**Senator FISHER**—Gentlemen and Ms Raiche, thank you for coming. You are concerned that ‘ethernet’ is not defined. Are you suggesting that it should be?

**Dr Brooks**—No. We are actually suggesting that the word ‘ethernet’ should be removed. Layer 2 is an area sufficiently broad so that is a reasonable way of defining a service, but ‘ethernet’ is a very technical term. It might be valid for today, but if this legislation had been drafted five years ago, we would have used a different form of technology and in five years time we might want to use a different form of technology again that is not ethernet. ‘Ethernet’ itself is a very precise technical technology which comes in a 1,500- to 2,000-page technical standard from the IEEE with a number of options and things. So if the word ‘ethernet’ were to be enshrined in legislation it would need to be defined much more clearly as to what that actually meant. In fact, doing so could well prevent innovation in the future if a newer technology were found by the industry to be more preferable than the ethernet technology that is being rolled out today. So we would actually prefer to see the word ‘ethernet’ removed and see the provisions for the industry to do technology standards for what a layer 2 service might be and leave that process for defining what the actual technology and implementation should look like.

**Senator FISHER**—I presume you would not be accepting that a future legislative amendment could insert ‘ethernet mark 2’ or whatever might be the successor, because forever you would have the dog chasing its tail?

**Dr Brooks**—Absolutely; that is right.

**Ms Raiche**—I think you can do that as there are ways, through legislative instruments and licence conditions, if in fact there is a need to prescribe something. That is far less prescriptive and far easier to change if you want to use a legislative instrument to do something specific. But to put into legislation something that is ill defined and perhaps temporary and perhaps something that will be succeeded does in fact limit it.

**Senator FISHER**—Hence your submission that the regulation should be outcomes based, so it is regulation of the outcome rather than of the medium.

**Ms Raiche**—Yes, absolutely.

**Senator FISHER**—Can you detail a bit more how you would regulate that outcome? I ask because I do not get that from your submission with sufficient particularity. Occupational health and safety is outcomes based as an employer shall provide a safe place of work, which has inherent in it a whole lot of difficulties in itself. So how are you going to do that?

**Mr Hill**—Can I state some general principles that we are interested in in relation to this. One of the critical issues here is to do with the speed by which there is change or that the policy or regulations can keep up with the development of the industry. One of the major benefits out of the internet has been the generation of innovation in the economy, and the OECD has commented on how important that is to economic processes. What we see here is the potential to get slowed down if we start defining technical terms in the legislation.

**Senator FISHER**—I understand that but I am wanting a bit more detail around your solution, because I do not quite see your solution. It would be nice but how?

**Dr Brooks**—The intention of the legislation is to create the wholesale-only framework and to provide some limits to how far up that communications stack the wholesaler should be able to go and where the retailer should take over. For our purposes, leaving it described as layer 2 is sufficient. As an analogy, all the areas in the legislation about voice network interconnection do not ever mention ISDN or C7 or any of the currently used signalling protocols. That is left up to the industry to work out what is the best way to achieve the outcome. If the outcome is wholesale-only infrastructure services then that, in our view, is a sufficient description.

**Senator FISHER**—In respect of the exemptions and the ability of exempt utilities and potentially others to purchase wholesale directly from the NBN, what is wrong with that and is it only wrong if those purchases are then utilised—for example, in the case of utilities—internally?

**Dr Brooks**—We do not think there is a problem.

**Senator FISHER**—Then I have misunderstood.

**Ms Raiche**—We do not think there is a problem. Our response to Senator Birmingham was those exemptions are already in the Telecommunications Act, in provisions that describe when you must acquire a carrier licence. If you look at the wording of those exemptions in that context you will see it says—to paraphrase the legislation—that if you actually have what is called a network unit and you use it for your own purposes then it is not a problem. If you look at the wording of that part of the Telecommunications Act that exempts providers from having a carrier licence, that does confine what a person who is installing a network unit under the exemption can do. If you are the defence forces and you are acquiring a network unit then you have to use it for your own purposes. If you want to confine it, that language is the sort of language you might use as a model.

**Senator FISHER**—Thank you, I had misunderstood. I thought you said it was a bad thing and that is why I was asking why.

**Dr Brooks**—It is understandable that service providers might want to make sure that they can get as much business as possible. Utilities are already capable of running their own fibre and not having a carrier licence. We do not see a problem with them buying services directly from NBN Co. for their own internal purposes.

**Senator LUDLAM**—Thank you for coming in. Noting that I do not think any of us around the table are network engineers, can you talk us through why you pulled out the issue of the definition of a super fast carriage service and what you propose we should do with that?

**Dr Brooks**—Again, one of the issues is that it is likely to become very dated very quickly. What might be considered super fast now at 20-odd megabits is, in three or four years time, likely to be laughably slow. The

other definition for the superfast network issue that we have a problem with is that it is defined in only one direction. The definition includes only a download speed and does not include any parameters on what the upstream speed should be and does not even require that there be an upstream data connection component to the broadband network. A one-directional broadband service is pretty useless.

**Senator LUDLAM**—Television.

**Dr Brooks**—It may be television or it may be upstream dial-up and download over satellite or something. The definition itself seems rather artificial. Why it is 25 megabits, compared to 30 or 100 or 10 does not seem to have any logic to it.

**Senator LUDLAM**—So what is your proposal?

**Dr Brooks**—I do not know that we had a proposal.

**Ms Raiche**—We did not have a proposal. We thought high speed would probably do because it is going to change. What is high speed today is going to change to what tomorrow—

**Dr Brooks**—By enshrining the number of 25 megabits in there you are effectively limiting the ability of the legislation to encourage innovation in decades down the track for when 25 megabits may be too low as a benchmark for what people need to participate in society.

**Senator LUDLAM**—I do not get too hung up on it. I thought it was worth pointing out that you have made that distinction. I would have thought staying silent on where the threshold should be is just a recipe for lawyers' punch-ups into perpetuity.

**Ms Raiche**—Possibly; but it may be a better way around that if you actually do need a definition. I suspect that definition was used to say that this is not ADSL and as a way of saying, 'If this is not ADSL; it's something else,' and if you want to have some kind of legislative instrument that could be used to define it over time and include both upstream and downstream speeds, then that would be a better mechanism than putting 25 megabits into a piece of legislation.

**Senator LUDLAM**—Okay.

**Mr Hill**—Could I just add something to that: I think it would be a mistake if Australia felt too self-congratulatory about having discussed speeds up to 100 meg. If we are not planning now for 1,000 meg then we are probably at risk of falling behind. We are on record as saying that.

**Senator LUDLAM**—You are one of the witnesses who have come forward with no declared commercial interest, unlike some of folk, who are advancing public interest arguments under the cover of commercial self-interest—or the other way around. I just wonder what your take is on the proposed ubiquity of the network when something like up to a quarter of Australian households do not yet have a computer in them? How do we look after people and make sure we are not just deepening the digital divide? Is that something that the society has a view on?

**Dr Brooks**—Certainly, one of the society's main aims is to increase the ubiquity of broadband access and to ensure that everybody can get access to broadband services regardless of where and who they are. One of those methods of increasing participation is to make sure that there is, in fact, a means of getting access to the network. Computers are not the only ways of accessing the internet and broadband services any more. There are those types of technology which are being built directly into televisions, telephone handsets and all sorts of devices and appliances that a home might have installed into it, even though people do not feel that they need a computer.

And broadband is not just about access to the worldwide web and visual-type media, which are typically thought of as what people access on the internet. There is communication with electronic voting systems, there is communication with utilities for paying bills, all your internet banking and all that sort of stuff conducted over the broadband network, whether or not it is conducted from a computer, as it is currently recognised, or by pressing the red button in the front console in your car, which happens to have a wireless connection to a base station or to the highways. That is all part of broadband networking. The increasing ubiquity of the network through the NBN as a way of allowing organisations like highways to create smart traffic signs which benefit the population in those areas, whether or not they use a computer or not, is all good stuff.

**Ms Raiche**—Can I just add—

**Mr Hill**—We all want to add to that!

**Senator LUDLAM**—That is a great answer to get us started with—carry on.

**Ms Raiche**—In other submissions to the Senate—not this submission, which has focus on the two pieces of legislation—we have also stressed the importance of education; educating and making sure there is a skill set so that people can take advantage of the use of a computer, whether it is in their car, their television set or whatever. This has been concentrating specifically on legislation, but we do have a much broader look at education in schools and by other means to ensure that people have the ability to actually use the technology.

**Dr Brooks**—It is important to realise that one of the properties of optical fibre, and one of the attractions of the NBN is not the speed—that is actually a very handy by-product—but it is the distance. Copper-networking technologies can travel to a distance of only two or three kilometres for reasonable speeds from the exchange. Optical fibre can go 20, 30, 40, 50 or 60 kilometres and effectively bring broadband connectivity of whatever speed the service is to places that have absolutely no connectivity whatsoever at the moment. We feel that is more important than the high-speed aspect. That is actually a bonus from the optical fibre technology; it is the reach that optical fibre provides in eliminating black spots that is actually more important.

**Mr Hill**—We would recommend that the committee focus on how widely that fibre can reach. Current plans have certain boundaries being developed for them, but the wider that reaches the better.

The other point that I think we need to make, and it sounds like a bit of a technical point but it has to do with internet technology, is that the more extensively people can have access to the internet protocol, then the cheaper their services are likely to be. I think there has been an interesting analysis, for instance, on the cost per character of sending information via SMS versus email. The difference in price is typically orders of magnitude. So in terms of outreach to a wide population, use of the internet protocol has turned out to be an enormous cost-saving and price-saving advantage.

**Senator LUDLAM**—Thank you.

**CHAIR**—Senator Macdonald?

**Senator IAN MACDONALD**—You mentioned earlier 93 per cent; what about the other seven per cent? Are you satisfied that there are provisions in place to look after the other seven per cent at a reasonable cost; and do you agree it will always need to be cross-subsidised in some way?

**Mr Hill**—I will not deny that we are on a mission here. We want to see this go as far as possible and therefore we would not necessarily accept that 93 per cent is good enough—it is fantastic to have it, but we would not accept that it is good enough at the moment. The discussion about the solution or the solutions for the other seven per cent is interesting. It tends to revolve around voice communications to some degree, because we think in terms of the previous telephone network. From our point of view, the full range of services that are available via the net at the fastest possible speed is what this is about. If you get a differential, say, between at least 100 megs download on a fibre connection and, say, 12 megs on a wireless or a satellite connection, if you are in the seven per cent there would be a substantial differential in experience.

**Senator IAN MACDONALD**—Is there anything in either of these pieces of legislation that comforts you that it will get to 100 per cent or indicates that it will not?

**Mr Hill**—I am not sure that we can answer that straightaway but we might be able to come back to you with some more information on it.

**Dr Brooks**—I do not think there is anything in this legislation that actually refers to the wireless or the satellite aspects of the network at all. Most of it is focused very much on the optical fibre footprint of the network. In terms of being satisfied of the extent to which the radio parts of the network might satisfy the requirements for internet access at a reasonable cost, we simply do not have the information from NBN Co. yet on their technical specifications for the service to be provided via radio or satellite. We have a lot more information and technical documentation from NBN Co., currently, on the fibre part of the network, much less on the wireless and satellite parts and, of course, no indication of what the costs are likely to be other than the cost will be uniform regardless of whether you are in a satellite, wireless or fibre area.

**Senator IAN MACDONALD**—So it will be subsidised in some way.

**Dr Brooks**—Yes, absolutely.

**Senator IAN MACDONALD**—Which?

**Mr Hill**—To draw out a bit of an implication there, previously we have had a universal service obligation regime in Australia which produced different technical solutions for different locations. To a high degree, that paid for a lot of copper to be laid to premises where the price might have been astronomical compared to the average price of doing it to any other premises. I am not sure to what extent that has been taken into account in

planning the NBN. People might have drawn a line and said, 'Obviously, the cost is going up per premises when you get to this distance,' but that may not be the kind of public-objective criterion involved. You might be able to wear a cost increase if you want to reach another two, three, five per cent of the population.

**Senator IAN MACDONALD**—Who might be prepared to wear a cost increase?

**Mr Hill**—If you took a universal service obligation attitude to the policy.

**Senator IAN MACDONALD**—It is always my view, as one who has an interest in remote Australia, that it is a service that always has to be subsidised by a government.

**Mr Hill**—And we certainly are keen to fuel debate on that question.

**Senator IAN MACDONALD**—I asked Telstra and Optus this, privately: are you as representatives of the end users concerned that, somewhere in the distant future, having a monopoly provider of the wholesale network without any competitive pressures, they might fall back into the old Telecom days of not bothering to keep up with the rest of the world? Is that something that your society has had a look at?

**Ms Raiche**—I would say that there are two answers to that. The first, which I think is a flaw in the drafting in part 3 of schedule 1, is that the monopoly should be confined to the access network, and the way that this is drafted it is not. That does leave a lot of room for competition in terms of both backhaul transmission as well as—right now, if you think about the so-called structural separation, all that really will happen will be that Telstra will gradually migrate its copper wire. It still has a wireless network and people still have wireless so there is still some competing infrastructure. In fact, we did not say much in our submission about the cherry-picking in terms of whether we are happy or not because we probably do take a deep breath and ask: 'Do we need to have that monopoly?' I realise the government in its a statement of expectations has said that this is what will be a natural monopoly because we have to cross-subsidise. I think we have taken a deep breath and thought, 'Do we have a level of conflict with this?'

**Senator IAN MACDONALD**—After the deep breath, what conclusion did you come to, or are you still breathing?

**Ms Raiche**—I would still like to breathe for a little while. Certainly what we have said in the context of other issues is that we would like a review of the competition regime. We do not know how it will play out. We are basically at the stage where NBN is trialling sites and we are still working through what the regime is. I think it would be appropriate in the not too distant future to look at the competition regime and whether NBN is behaving in a way that the former monopolist did.

**Dr Brooks**—In a sense, the wholesale only aspect of the NBN Co. fixes a conflict of interest in terms of dealing with wholesale customers while also having a retail customer base. But the monopoly aspect of it, when there is no risk of losing business to another network, could create a degree of complacency in terms of not further innovating the network because you really are not going to lose any business by not doing so, and that could be a concern. But it is still at the stage that it is now and we will not actually know whether that is the case for four, five or 10 years down the track. There are certainly many technical innovations that will come down the line over the next 10 to 20 years that we can forecast, and there is a lot of concern by service providers as to whether NBN Co. will have any incentive at all to take on those improvements and that new technology if they are still trying to pay off the old stuff as part of trying to maintain their business case. We probably will not know for many years down the track whether that is an issue.

**Senator IAN MACDONALD**—Is there an authority to what you have just said?

**Dr Brooks**—I am sorry?

**Senator IAN MACDONALD**—When you said that a couple of the current retail service providers are concerned about whether NBN Co. will move forward; is there some authority for that?

**Dr Brooks**—Historically, there are arguments that Telstra's network, if we look at the installation of ADSL1 and ADSL2+—they brought that on—it is an analogy that NBN Co., having a monopoly on the network operation, may not have the incentive to invest more in upgraded equipment if they think these will do.

**Senator IAN MACDONALD**—It stands to reason.

**Ms Raiche**—I would like to make just one comment. In the UK, where, in fact, there was a genuine functional separation between BT and its wholesale arm, openreach. Probably two or three years down the track now, certainly last year, when an OECD representative was speaking at a conference that I attended he

said that there is genuine concern that, openreach, even though it deals equitably with all of the comers who want service from it, is falling behind in terms of innovation. That probably supports Paul's point.

**Mr Hill**—I guess the three points we would be looking to closely watch, because obviously monopoly is always a concern, are: firstly, how do you define the remit of NBN Co. in performing the NBN function, particularly vis-a-vis other fibre providers in the country? Secondly, what is the competitive regime in which they are operating? And, thirdly, there is the point I mentioned in my opening remarks about publicly available performance information.

**CHAIR**—We have a number of questions, so we might just run a little over. Can I ask you to be as concise as possible and not have everyone answer the same question, please. You keep talking about 93 per cent, but the NBN footprint is 100 per cent. That 100 per cent is made up of wireless and fibre and satellite, so you do except that it is a 100 per cent coverage?

**Dr Brooks**—Yes.

**CHAIR**—Are there technical issues that you are aware of that NBN might need to deal with that would be a difficulty if it were classified only as layer 2?

**Dr Brooks**—There are some aspects that are picked up in the current technical documentation relating to the delivery of television services where their equipment needs to look at the layer 3 information that the service provider and customer's equipment is sending through to affect things like channel change on IPTV services and things like that. They are very minor. We do not see any issue with the drafting of the legislation that would prevent that from occurring, because effectively they are reacting to the service provider and the service provider's customer's layer 3, not really providing a layer 3 service in their own right.

**CHAIR**—But you are saying there has to be a little bit of flexibility there between layer 2 and layer 3 for technical reasons?

**Dr Brooks**—Yes, layer 3 services drive layer 2 performance.

**CHAIR**—Is that similar to why you say do not define 'ethernet'? You think we should not define layer 2 for similar reasons?

**Dr Brooks**—No, we think layer 2 is a sufficiently good definition for legislation and that anything more specific than that should be left to an industry technical standard.

**CHAIR**—You say there are no technical reasons that costs should decrease with volume, but wouldn't you need different access terms to allow a small, nimble entrepreneur and a provider to compete effectively?

**Dr Brooks**—Not if you are NBN Co. NBN Co. can deal with that organisation the same as all the rest. Certainly, if you are a small organisation, the economies of scale are stacked against you in terms of building a national footprint, but NBN Co. are not holding that back.

**Mr Hill**—Our concern was that a large wholesale service provider buying services from NBN Co. might achieve a lower price from NBN Co. and that would disadvantage a small and nimble entrepreneur.

**CHAIR**—The other area you have raised is the minimum speed. Would it be better if minimum speeds were set over time—say, 25 now, 50 in year X and 100 in year Y? Would that solve some of the issues you are raising?

**Dr Brooks**—No. I do not think it is possible to forecast that accurately, even a few years into the future. The minimum speed that an individual house might need will depend entirely on what services they are looking to access, so trying to specify that, particularly in legislation, I think would be a mistake.

**CHAIR**—I want to come back to the issue of wholesale services and layer 3 characteristics. We had a bit of discussion at the last hearing that there are some layer 3 characteristics on satellite and wireless, so wouldn't there need to be some flexibility for NBN there?

**Dr Brooks**—This is one of the reasons why ethernet should not be specified in legislation. It is possible to build something that looks like a layer 2 service using layer 3 tunnels that act like point-to-point virtual links the same way that the ethernet does on fibre. So, without the word 'ethernet' used, you can create something that looks like layer 2 on layer 3 infrastructure, but at the end of the day you are limited to the capabilities of the technology platform. If a satellite is fundamentally incapable of providing multiple customers with parallel layer 2 streams then the industry will need to work out something that is close enough to achieve the desired result.

**CHAIR**—What would be your preference: a legislated wholesale only network, an open access monopoly, which is basically what we are proposing, or a vertically integrated incumbent? What sort is the best?

**Dr Brooks**—The open wholesale network is by far preferable to what we have seen over the last 20 to 30 years that we have been trying to unwind.

**CHAIR**—You said there would be access on other than computers. What would that access be?

**Mr Hill**—All sorts of mobile devices are becoming widely accessible by internet technology. In fact, that layer 3 internet technology is becoming a platform of choice for all sorts of provisions. The key question is whether the users can get open access to that internet protocol on their device so that they get a free choice of applications that they can implement.

**CHAIR**—Thanks Ms Raiche, Dr Brooks and Mr Hill. Thanks for giving evidence here this morning. It has been helpful.

[11.15 am]

**CORBIN, Ms Teresa Margaret, Chief Executive Officer, Australian Communications Consumer Action Network**

**GADIR, Mr Jonathan, Senior Policy Adviser, Australian Communications Consumer Action Network**

**CHAIR**—Welcome, thanks for joining us today. The committee has received your submission—submission 11. Do you wish to make any amendments or alterations to your submission?

**Ms Corbin**—No, Senator.

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

**Ms Corbin**—I do. First of all, I want to thank the committee for the opportunity to appear and share ACCAN's perspective on the bills. Obviously, for the purposes of the record and not for your purposes directly, I would like to explain what ACCAN is. We are a peak body, the Australian Communications Consumer Action Network, and we represent residential and small business consumers in the area of communications access. Our mission is affordable, available and accessible communications for all Australians. It is also worth mentioning that as a peak body we have a large membership of over 100 organisations and just over 40 individuals who include academics and interested Australian consumers and citizens.

ACCAN's approach to these bills is along the lines of the four principles of our broadband future for policy work that we have put out prior to this inquiry. The principles cover four very important areas for Australian consumers. The first is high-quality, affordable and accessible broadband. The second—and I know I have discussed this particular principle with this committee before—is that consumers should not be worse off because of any policy changes. The third is that there should be consumer protection rules built into policy relating to broadband. The final one is that services should be provided in the context of a competitive and fair market.

ACCAN believes that these bills are very important and represent a significant achievement. We are finally looking at the creation of a communications marketplace that will serve the interests of consumers and enable retail-services competition to flourish right across both metropolitan and regional Australia. The National Broadband Network will deliver structural separation in this industry for the first time. We think the strong regulatory framework for NBN Co. provided by the bills demonstrates that we have learnt the lessons from the Telstra experience and are moving to arrangements where consumers can really exercise choice and where customer service can become the focal point of retail competition.

We welcome the wholesale only supply obligations and the line of business restrictions on NBN Co., which we believe will help to ensure a healthy retail competition. We also welcome safeguards such as allowing the minister to require NBN Co. to supply a specified telecommunications service and allowing the ACCC to declare a service and thereby have NBN Co. supply a service that will be in the long-term interests of end users. We join with ATUG in supporting minimum technical standards and open access obligations for other superfast networks to ensure that all Australians experience at a minimum NBN-grade choice between multiple services and multiple service providers.

Given the views of some in the industry, in our submission we thought it was important to show that we have thought about and considered carefully the possible downsides to a level playing field in the arrangements but that ultimately we believe these are theoretical issues that are unlikely to come into play for consumers, whereas the benefit of the NBN overall now to all Australians is real. We are heartened by the fact that recently NBN Co. have approached us and we are in the process of setting up a direct dialogue with them and that we will be having further consultation along the way. We believe that this consultation will help us address any concerns, particularly whether any consumer might be worse off with the introduction of the National Broadband Network.

**Senator FISHER**—Thank you for appearing today. You talk in your submission about the dangers of privatisation and you say that there should be full flexibility for the government. Is your suggestion of flexibility for the minister so that he or she can then ensure that there is no takeover of NBN for private sector interests, or is your concern something different or deeper than that?

**Ms Corbin**—There are a number of considerations with privatisation of NBN Co. in the future. Obviously a decision about privatisation is going to be up to the government and the parliament of the day, and that is



made clear by the way the legislation is structured. But our submission draws attention to the fact that the bills are laying out a road map towards privatisation. We know from our Telstra experience that the public cares a great deal about public utilities being privatised, whether it is good or not, and in every circumstance and at every time it is different, mostly because of the fact that the Australian public really wants to make sure that there is full transparency and accountability in the debates about privatisation. This is exactly why, despite the fact that there are safeguards in the bill, ultimately it is absolutely crucial that the Productivity Commission does its inquiry. Another vital element is the joint parliamentary committee.

**Senator FISHER**—Indeed.

**Ms Corbin**—Obviously there are all sorts of commercial imperatives and commercial realities that will be judged at the time, seven or eight years down the track; they are impossible to comment on now. But the test for us will be about whether a full privatisation has an impact on affordable broadband or whether it will have implications for equity and social inclusion. Those are the things that we will come back to judge. We think it is very important that that inquiry go ahead and explore those elements of privatisation. That is not to say that your concern is not also warranted but that our focus is more on the social implications and implications for consumers generally.

**Senator FISHER**—I am really just trying to get you to expand more on your concern; I did not mean to put it as mine. In advocating that the government of the day get more flexibility in attempted privatisation, are you confident that that is sufficient to take care of those social equity concerns, for example?

**Ms Corbin**—I think it will very much depend on the political circumstances at the time. A lot of elements will come into the debate and discussion. Ultimately, what we are doing now is putting a stake in the sand and saying that we think this is still a matter of great public concern. We have our experience of the Telstra privatisation, which, really, in effect is going to be small compared to this experience—the privatisation of NBN Co. is going to be a much larger exercise than the privatisation of Telstra over a much shorter period of time, as predicted by this legislation. We need to learn from that experience and make sure that there are fulsome debates and proper discussion with all sorts of opportunities to bring forward evidence to have that debate and discussion.

**Senator FISHER**—My final area of questioning is around your support for the exemptions—for example, for utilities. You say in your submission:

By helping to keep the prices paid by utilities for network services down, these provisions may encourage new and innovative uses of the NBN ...

On what are you basing that contention? That may well not be the case, particularly if the exemptions prevent the market from tendering.

**Ms Corbin**—I would like to hand over to my colleague Mr Gadir to answer that question.

**Mr Gadir**—Yes, Senator, you are quite right: it may not happen. Where we can, we seek industry experts to advise us on things that are beyond our direct expertise. What we have heard is that, if the prices are kept down, if the utilities are allowed to and if they are given these exemptions which are already in the Telecommunications Act, more innovative uses may eventuate.

**Senator FISHER**—So your support for the exemptions is based on that hearsay or anecdotal evidence that there may be the prospect for utilities to keep their prices down, is it?

**Mr Gadir**—No. There is also the other advantage of simply having services that are provided in the public interest, which is what utilities generally do, provided at a better price for consumers.

**Senator FISHER**—But surely that is dependent on the legislation? Are you able to say that allowing the utilities the exemption will result in that scenario?

**Mr Gadir**—Sure. It is a reasonable piece of crystal ball gazing that if they do not have to pay the middleman, the telecommunications provider, then maybe it will be cheaper. It is a possibility.

**Senator FISHER**—You are speculating at the moment, aren't you? I am sure that the retail service providers would be saying, 'We want the opportunity to provide those services better and cheaper.'

**Mr Gadir**—Sure.

**Senator FISHER**—All right. Thank you.

**Senator LUDLAM**—Given that it is crystal ball gazing, in that context how is a retailer able to provide services at a lower price than the wholesale price that they are getting from NBN Co.? Isn't that where this is going?

**Mr Gadir**—I think we are getting into areas that are beyond my expertise, but we take advice from people in the industry who say that it is going to be a benefit overall.

**Senator LUDLAM**—I do not know how much of the previous witnesses' evidence you heard. Folk in the industry have said, 'We want that to be contestable. We want to be in there. We do not want to be eliminated from providing the services.' It is in the long-term benefit of competitive market for them to be able to do that, even though I think people have considered that it may be cheaper in the short term to simply bypass the retailer altogether, the middleman, as you put it. If a utility, why not a university offering education services in the public interest?

**Mr Gadir**—It is not an area that we have given much consideration to, so I would not be able to answer that. I can certainly research it and come back to you with something.

**Senator LUDLAM**—You have brought an argument that is different from what we have heard so far. So far we have heard mainly from folk with a commercial interest in being a retailer and providing a service and sticking themselves into that market. They would like it to be contestable. In fact, they would like NBN Co. to be excluded. They think that NBN Co. should not be able to play in that space at all. I understand why they take that view. You seem to be arguing here that there could well be a public interest argument that says, in the interests of somebody not sticking themselves in the middle and putting on a 15 per cent mark-up or whatever, there might be an opening for allowing NBN Co. to supply directly.

**Mr Gadir**—Sure, yes.

**Senator LUDLAM**—So I am reading that correctly.

**Mr Gadir**—Yes.

**Senator LUDLAM**—You raised issues around privatisation. You have put up a couple of concerns over the privatisation provisions, which I feel a bit precious about since I helped draft them. Do you think we would be better off just not selling the network in the first place and keeping this thing running in the public interest rather than in the interest of shareholders?

**Ms Corbin**—We have put out a position statement that says we are concerned about the privatisation of NBN Co. We are concerned that, even forward-gazing now and setting it out so that we know that it is going to be privatised, that will affect the bill, pricing and all sorts of things. We recognise the work that you and others have done to put in some specific public interest tests. We welcome that. We just think it is important, from our membership's perspective, to highlight that there are still significant groups in Australia who have some great concern about the privatisation of public utilities. That is not debatable. We know that that is the case. We think it is important that that be stated. We are happy to move on and discuss the public interest tests that have now been put in place and the transparency and accountability measures that are there to assist any future debates. We are not suggesting that there be any additional consumer safeguards; we are simply saying that we think it is absolutely vital that we do have that debate at that time and that we have as much independent information from a productivity inquiry as possible.

**Senator LUDLAM**—You have not directly addressed the cherry-picker provisions in your submission, but I wonder if we can take you back to the principle on which that is based, which is as with the electricity and water service provision when the government rolls these networks out. We cross-subsidise services in regional areas by charging a little bit more in the cities. Is ACCAN comfortable with that principle applying with regard to the NBN?

**Mr Gadir**—Yes, we are. Just to correct something you mentioned, we do have a segment at the end of the submission which deals with the level-playing-field arrangements broadly, but we have not used the term 'cherry picking'.

**Senator LUDLAM**—Okay. I just scanned that.

**Mr Gadir**—So, yes. We would look favourably on that principle—a metro to regional subsidy.

**Ms Corbin**—The reason is that we actually believe that that increases the value of the network to all Australians, not just people living in rural and regional areas. If rural and regional people have equal access, then it is likely that people in metropolitan areas also benefit, so there is a very good argument for making sure that those cross-subsidies exist.

**Senator LUDLAM**—That is a nice line of argument that I do not think has been put very strongly so far. But that gives rise to the question of: why shouldn't wholesale competitors to the NBN be allowed to cherry pick and carve out niches in the inner cities where it is cheaper to provide the services? We have heard a few points of view around that today.

**Mr Gadir**—We welcome any private sector investment, but experience does suggest that in Australia so-called facilities based competition is not a realistic prospect, at least not for the consumer market. We do not see the evidence that supports that there are lots of players out there willing to roll out superfast access infrastructure for consumers. I think that is a theoretical and far-off prospect and the benefits on the other side of having a sustainable NBN are really in the here and now.

**Senator LUDLAM**—Telstra were here this morning saying, 'Why don't we just abolish this cherry-picker business so that we can carry on working in the inner cities?' I suppose it is a fairly active area of—

**Ms Corbin**—I think also, given that we know that the broadband network is not going to be available just for voice services or internet but also for e-health, et cetera—many other services that we probably cannot even predict now—it is pretty important that we do not create a two-tiered system, particularly when it comes to standards and making sure we have got baseline for price, speed and quality.

**Senator IAN MACDONALD**—Your submission and your opening statement indicate that one of your pillars of interest was that the consumers will not be worse off with the introduction of the NBN. Do you include price in that? Cost?

**Ms Corbin**—Yes. Obviously we have got further ground to go through yet before we understand how the wholesale price actually gets applied across the whole of Australia to multiple different types of services. We are obviously very concerned about what the retail price will ultimately be, and we also really want to put on the record that we expect that there must be some low-income measures. There are at the moment, in relation to voice services. We are looking forward to the debate and discussion and being involved in that debate and discussion as to the future of those low-income measures and how they will apply in a broadband world.

**Senator IAN MACDONALD**—I notice you say you have got direct dialogue with NBN, which is good. Bearing in mind that for most Australians cost will be the determiner of whether they hook up they do not, and bearing in mind that there is, we say, \$55 billion investment which the government has said it is going to get a return on, and you are going to pay back the capital at some time, it just defies mathematical logic to think that you could get a return, pay back the capital and deliver the service at a price that most consumers are going to be able to afford.

**Ms Corbin**—I think at this stage we still do not have enough information—

**Senator IAN MACDONALD**—Your direct dialogue does not go to that extent?

**Ms Corbin**—Not to that point yet, but I do expect that it will—that we will get to the point of having discussions about pricing and that we will also have discussions about what areas of the market need to have some extra measures and whether they be specifically for low-income consumers or other areas. We expect to have that discussion also with the government, and with Telstra and USO Co. So we expect that these discussions are going to be quite multilateral.

**Senator IAN MACDONALD**—You talk about low-income Australians; I always talk about remote-area Australians, who must be subsidised by a government. It has always been the case, and you cannot do it otherwise. Have you had a look at the Tasmanian pricing, which for over a year was a bit of a secret? I think the Tasmanian prices have come out recently, and my preliminary look at them shows that, once you add in the charge for the NBN—which until 1 July is being given away free—it is not going to be anywhere near cost effective or cost competitive, compared to what it used to be.

**Ms Corbin**—This is probably a question that my colleague and I would both like to comment on. I think two important factors come in initially. One is that we are heartened by the fact that there will be one, uniform wholesale price, so we have a good starting point even for rural and remote consumers, which we have not had to this point. The second is that we have welcome statements by the government that people paying for a telephone service, a plain old telephone service, will not pay more. So they are fairly important base points to start from. But, obviously, we are watching what is happening in Tasmania quite carefully.

**Senator IAN MACDONALD**—Does it make sense to you that they will not pay more, yet we have \$55 billion to pay off?

**Ms Corbin**—I think there are other things that we do not fully know about—that is, the commercial realities that are at play here. We have been calling for a lot more information about pricing for quite some time, and as soon as that comes out into the public domain we will be very open and ready to participate in those discussions. I do not know if Jonathan wants to pick up the point about the Tasmanian experience.

**Senator IAN MACDONALD**—We are running out of time. Good on you. Let us hope your direct dialogue with NBN can nail those things down, because that has always been my concern—that you cannot spend \$55 billion—

**Ms Corbin**—Yes.

**Senator IAN MACDONALD**—and provide a cheap service if you are going to get a commercial return, which is the whole principle underlying this sorry fiasco. I mean that in a political sense, not in a technical sense!

**Ms Corbin**—Yes. And, looking towards the future, we realise that there will be people who will still want just a phone service and may not use any other services for some time, and we absolutely cannot have a situation where we are going backwards, not forwards.

**Senator IAN MACDONALD**—Okay. Thank you very much.

**CHAIR**—Senator Wortley.

**Senator WORTLEY**—I was going to ask some questions regarding the privatisation provisions; however, I think they were mostly covered by Senator Ludlam. Can I just clarify, though, that you would acknowledge that there are stronger checks and balances in place now than there were in the exposure draft of the bill?

**Mr Gadir**—I think, with the way those provisions are now, we can see it is a reasonable compromise. Obviously, there are commercial realities that should not be given out willy-nilly. I think that is what we would say.

**Senator WORTLEY**—Ms Corbin, in your opening statement, you said that the NBN ‘will deliver structural separation’. Can you explain what you meant by that—the benefits of that?

**Mr Gadir**—Sorry, could you please repeat the question?

**Senator WORTLEY**—In the opening statement, Ms Corbin said that the NBN will deliver structural separation, and that is something that a lot of people actually lose sight of.

**Ms Corbin**—Sure.

**Senator WORTLEY**—So can you explain what you mean?

**Ms Corbin**—Maybe I will start, and then perhaps Jonathan might want to pick up. In the past, consumers have argued quite strongly for the structural separation of Telstra. The reason for that was the belief that there was a major conflict of interest when you had a retail service provider also owning the network and providing the services. This resulted in many, many years of arguments in courts, to the detriment of consumers as far as price goes in the long term. That is a very simplistic analysis. There are also other areas of consumer protection that have been affected by the fact that we have not had structural separation. So we welcome the fact that not only is this an open-access network but also it is a wholesale network. We welcome the changes made to the original legislation, which actually removed some possibility of there being direct services to some end users; we agreed that that muddied the waters somewhat. So we think that this approach is much better. Jonathan, did you want to add anything?

**Mr Gadir**—I think the whole problem that has been widely discussed—a vertically integrated incumbent exercising its market power—will continue to be a problem during the rollout of the NBN for the next eight or nine years. I think it is going to provide us with a lot of work because it is still the case that Telstra does not treat people who are retail customers of other competitors in the same way as it treats its own customers.

**CHAIR**—In relation to the issue Senator Macdonald has raised about the viability of the network, have you read the NBN business plan? Are you aware of it?

**Ms Corbin**—I have not read it cover-to-cover but my colleague has—in fact, I think he has read it more than once.

**Mr Gadir**—I cannot claim that it is cover-to-cover.

**Ms Corbin**—He is our broadband guy, that is why.

**CHAIR**—After reading the business plan, is there any reason that the NBN would not be viable and provide a return to the taxpayer?

**Mr Gadir**—That is beyond my expertise. What I have been looking for are statements about how those most vulnerable in our community are going to be looked after. I was heartened to hear Mr Quigley before this committee saying that he is talking to Telstra about looking after people who only have a phone and only want a phone, and making sure they are not worse-off. Looking at the wholesale prices that NBN Co. has published in their corporate plan, we are pretty positive that that can be achieved.

**CHAIR**—I am not sure if this has been asked before, but are you comfortable with the checks and balances in the legislation on the NBN moving to a retail platform?

**Mr Gadir**—I think the protections and wholesale-only obligations are quite strong.

**CHAIR**—Did you hear any of the evidence this morning from Optus and Telstra?

**Mr Gadir**—I did not, but I have heard Optus speak on this issue.

**CHAIR**—Have you read their submissions?

**Mr Gadir**—Yes.

**CHAIR**—Do you think there is some rent-seeking going on between Optus and Telstra over their carve-out proposals?

**Mr Gadir**—I could not comment on what they are doing. Obviously they have businesses to run and they have their priorities.

**CHAIR**—Thanks very much.

#### **Proceedings suspended from 11.43 am to 11.49 am**

**LEE, Mr Peter, Group Manager, Strategy, Wholesale and Regulatory Affairs, TransACT**

**SLAVICH, Mr Ivan, Chief Executive Officer, TransACT**

**CHAIR**—Welcome. The committee has received your submission as submission 13. Do you wish to make any amendments or alterations to your submission?

**Mr Slavich**—Nothing that is material, Chair.

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

**Mr Slavich**—Yes, I would like to. We would like to thank the committee for the opportunity of putting in a submission and also for being able to answer questions that you may have with regard to our submission. TransACT has been in this space for over 10 years, delivering high-speed fibre broadband services over a customer access network, or a CAN—this industry is full of acronyms, as I am sure you are aware.

**CHAIR**—We haven't noticed!

**Mr Slavich**—We deliver over a CAN to over 200,000 premises in the ACT, Queanbeyan, Geelong, Ballarat and Mildura. We have good market penetration in all those areas. Since 2006 we have been involved in delivering fibre to the premises, which is exactly what NBN Co is looking to deliver. We now have under contract or under negotiation 16,500 premises in the ACT in the suburbs of Forde, Franklin, Bonner, Crace, Casey 2, Flemington Road Corridor, Harrison 4, north Weston and, more recently in the big growth area of the ACT, Wright and Coombs. Of these areas, 1,800 sites are now live with fibre to the premises and 3,500 have been passed. We offer voice broadband, pay TV and mobile phone services. The other thing that we do is bundle with our sister company, ActewAGL. We do an energy telecommunications bundle to our customers.

We have an open access network. We have 11 ISPs on our network. We provide that open access over a layer 3 delivery in the open system interconnection model, or the OSI model. We are also very active in the local community. We sponsor the Mildura Country Music Festival. We sponsor a ladies basket ball team, who happen to be in a final this Sunday in Melbourne against Bulleen.

**Senator IAN MACDONALD**—No advertising!

**Mr Slavich**—We are a very big active community participants. We are not just about the telecommunications side of things. We have 270 employees who work for the company. Clearly, we do have some concerns with the bills that are currently before the Senate. We absolutely share the government's vision of rolling out broadband to Australians; however, we are concerned with some of the aspects in the bill, particularly the requirement for layer 2. We provide layer 3 over an open access model. Anything that requires

upgrading or altering or that gets rolled out in the current environment will be required to have layer 2. The statement of expectation that was released by the Prime Minister and the Minister for Broadband, Communications and the Digital Economy indicated that there will also be an amendment to this bill to provide wholesale only. We are not quite sure exactly what that means. Does that mean we now have to split our business between the network and the retail side? Also a levy may be imposed upon us. We do not see ourselves as cherry pickers or greenmailers, so we are concerned about some of the level playing field options.

We are also upgrading our HFC networks in Victoria to DOCSIS 3.0 and our VDSL to VDSL2. The big aspects for us are the layer 2 requirement and the wholesale only requirement. We are not a new entrant. We are not cherry pickers. We are concerned about the dollars. There is a pretty big cost to the organisation. We are a mid-sized communications company; we are not the huge end of town. We are worried and our shareholders are worried about the cost associated with layer 2 and wholesale. In effect, we are seeking amendments to the bill or an exemption from the bill because of our status. We also have some concerns about what will happen in the future to greenfield areas. This is a really big growth area for TransACT with 16,500 premises now under contract. We have been actively consulting on this. We have consulted widely with the department, with the minister—with anybody who will listen basically—and also, of course, with the committee.

With regard to the companies bill, in a very similar way to the other submissions that have been put in, we are worried about NBN Co. mission creep. We also want to make sure that NBN stays within layer 2 in the OSI model. We are part of the Competitive Carriers Coalition, so we share a lot of the views that were in their presentation last Friday. On the volume discounts, our understanding from reading the bill is that there is the ability to have volume discounts if there is a special access undertaking to the ACCC with regard to those volume discounts.

**Senator BIRMINGHAM**—Mr Slavich and Mr Lee, thank you both for your time today. You have highlighted just how TransACT is in a unique situation in this debate. I would like to go to the 2 v 3 argument. We have a number of submissions arguing that NBN Co. should be very clearly restricted to a layer 2 situation and in fact that it requires a tighter definition than is currently the case in that regard. Do you share those perspectives when it comes to NBN Co., notwithstanding your own concerns about the impact on your business?

**Mr Slavich**—I think it would be necessary for NBN Co. to stay within that mandate and not move outside the layer 2 model within the OSI model. In a previous role, I was in the energy industry, and the energy industry had structural separation from the wholesale and retail perspective. As a consequence, I think there is merit in NBN Co. sticking in that layer 2 framework, to ensure that there is not mission creep outside of that in competing with RSPs on the network directly. For example, most of our operations are in the ACT, so it would be of concern if one of the competitors we had as an RSP was the NBN Co. itself.

**Senator BIRMINGHAM**—In relation to your own specific situation, I assume you commented to the government on the exposure draft. Did you succeed in achieving some changes to address some of your concerns in that?

**Mr Slavich**—I think there is no question that they have listened to our concerns. As to whether we have achieved the appropriate amendments that we would like to see in the bill, I would say that they have not completely flowed through. The main one is, given that we have been operating in an open access environment in the layer 3 space now for over 10 years—and our model when we first rolled out within the ACT was really a function of coming from the ACT government owned ACTEW Corporation, and in some respects I think of TransACT as being the NBN but 10 years ago in the ACT—I would think that there should be provision in the bill to allow TransACT to continue to operate in a layer 3 environment, given that we are an open access network.

**Senator BIRMINGHAM**—Are there any examples of similar providers to you that you think would need a similar type of exemption or special treatment within the legislative framework?

**Mr Slavich**—I do not really want to comment on others. I really want to focus our comments on our own submission and our own circumstances.

**Senator BIRMINGHAM**—In terms of advancing the case of your own circumstances, if the government is attempting to provide this as a national solution—and it is attempting to do that—and essentially a one-size-fits-all national solution, what are the justifications for recognising legacy framework, in a sense, such as what

exists in the ACT? Indeed, has the government or NBN Co. sought to potentially discuss with TransACT the type of commercial buyout arrangements that they have looked at with Telstra?

**Mr Slavich**—Logically, from a commercial perspective Telstra is the largest player in the market place, so it would make sense for NBN Co. to engage with Telstra given that they have substantially more customers than we have. We hope that in the future the government would view TransACT—we have been effectively delivering, for Australians who happen to reside in the ACT, Geelong, Ballarat and Mildura, this vision of fast broadband, so our shareholders are concerned as to what will happen to the business in an NBN Co. environment.

**Senator BIRMINGHAM**—I think you almost hinted there that you are hopeful that at some stage NBN Co. will come knocking on your door. Is it the case, in terms of the risk management for your business, that, if the legislation as it is proposed goes through and therefore potentially knocks some value off your business by restricting what you currently do, you would then be in a weaker bargaining position should NBN Co. seek to strike a similar deal to access some of the infrastructure of TransACT?

**Mr Slavich**—I think given the way the bill is structured at present we would have to incur significant costs in order to comply with the current bill. If we are required to move from our layer 3 capability to a layer 2 capability and then also separate our wholesale and retail businesses, there is no question that there would be multimillions of dollars associated with having to do that. So they are costs that the shareholders would incur without necessarily gaining any additional revenue or margin. So those are really what our concerns are with the bill.

**Senator BIRMINGHAM**—This question from me is in relation to volume discounts. Obviously, the bill does allow for volume discounts to be provided. Does TransACT believe that is reasonable? You have highlighted that they could become contentious and could be anticompetitive. Should they be allowed?

**Mr Slavich**—We do not think they should be allowed. So what we would be proposing is that those special access undertaking provisions within the bill be removed so there are not any volume discounts.

**Senator BIRMINGHAM**—In relation to equivalence in general, there have been other opinions put that have argued for a more transparent process as to what arrangements are struck under an equivalence framework. Do you think the current legislation provides enough transparency there or do we need a more open process to see exactly what deals NBN Co. strikes with the individual RSPs, especially the larger RSPs?

**Mr Slavich**—If those provisions were to be retained in the bill, then, yes, we would like to see as much transparency as possible. Having that transparency would avoid the situation of special deals being done. Given that in the current bill there is provision for volume discounts via the special access undertaking to the ACCC, as long as it is transparent then that should be okay but if that is not transparent then any greater degree of transparency would be welcomed.

**Senator BIRMINGHAM**—Thank you, Mr Slavich.

**Senator IAN MACDONALD**—For you at TransACT, which has a very enviable record of providing telecommunications services over a long period of time, the NBN is not going to do anything. Is that so?

**Mr Slavich**—I think it certainly creates an opportunity for TransACT as an RSP in markets outside of where we operate. We are certainly very keen to become an RSP on NBN Co. and to be able to go into those markets in which we currently do not operate. There are still some pockets within the ACT and in Geelong, Ballarat and Mildura where perhaps the NBN Co. would be beneficial for consumers, in which case we would hop on as an RSP in those circumstances. But for the majority of our population base in Canberra, Queanbeyan, Geelong, Ballarat and Mildura TransACT does provide a very good broadband service to its customers, hence we have been quite successful in the marketplace in picking up residential customers. We are very successful with small to medium enterprises and, increasingly, in the corporate and government space with the ACT government taking their voice services from us. We have just over 40 Commonwealth government departments taking services from us.

**Senator IAN MACDONALD**—That is interesting. Your shareholders are effectively the ACT government, aren't they?

**Mr Slavich**—Through a government business enterprise. ACTEW Corporation is a substantial shareholder in TransACT.

**Senator IAN MACDONALD**—There is no private shareholding?

**Mr Slavich**—There is a private shareholding.

**Senator IAN MACDONALD**—Is there?

**Mr Slavich**—Yes. We have Prime Television as a shareholder, the Motor Traders Association and TVG.

**Senator IAN MACDONALD**—I will rephrase my original question. Are the services provided by NBN going to do anything for you in the areas that you currently serve? Will the NBN give a better service?

**Mr Slavich**—We do not believe there is a need for NBN Co. in areas where we have fibre deployed and are providing 80 megabits per second. For example, in our networks in Victoria we are operating to DOCSIS 3, which will provide 80 megabits per second. In our FTTP areas, the 16,500 we have under contract, we are supplying up to 100 megabits per second. I do not think it would be logical for taxpayers' money to go into areas we are already servicing well. However, there are areas we do not service and NBN Co. would—

**Senator IAN MACDONALD**—But that is the current plan, is it not?

**Mr Slavich**—We are concerned with the potential overbuild of our network.

**Senator IAN MACDONALD**—Hence Senator Birmingham's question, that the sensible thing would be for NBN to buy out your network, as it did with part of Telstra's.

**Mr Slavich**—Yes, that would be—it would not make sense to overbuild where we have our extensive fibre networks in the ACT. The other unique circumstances in the ACT is that electricity poles in backyards, not in frontyards. That makes it a lot more difficult to roll out a broadband network in the ACT.

**Senator IAN MACDONALD**—Good point. You are having discussions—I do not want to know what they are, of course, and I would not expect you to tell me—with NBN Co.?

**Mr Slavich**—We are having various conversations.

**Senator IAN MACDONALD**—Have any of those conversations talked about price? I do not know whether you heard the previous witness, but if NBN Co. is going to make a profit, pay back \$55 billion and produce a service which you have already paid the capital on and, I assume, are getting a return on, have you questioned them about, if you do join in, how they are going to charge you?

**Mr Slavich**—No, we have not had the conversation.

**Senator IAN MACDONALD**—Again, I do not want to diminish in any way your negotiations with NBN Co. but you would be in a state of high uncertainty with this legislation going through and NBN rolling out. Do you have a time when you will have to make some decisions?

**Mr Slavich**—As I indicated before, our shareholders have a concern with the current bill, particularly the requirements to deliver layer 2 and to be a wholesale owner, given the costs that will be incurred within our business. As I said before, I do not think it is logical for NBN Co. to roll out where we already have high-speed networks because ultimately in that scenario the penetration from both organisations will end up being low.

**Senator IAN MACDONALD**—Finally, and perhaps this is straining into an area where you cannot respond: do you know whether your major shareholder has had a talk to Senator Conroy about your situation?

**Mr Slavich**—Yes, through that process, I and the chairman representing the board have consulted widely with the minister's office and with the department and, as I said before, anyone who will listen to TransACT's course. That is also why we have put in a submission and appearing before this committee.

**Senator IAN MACDONALD**—Your principal shareholder being indirectly the ACT government—are they adding their weight to the argument?

**Mr Slavich**—Yes. I have certainly consulted with the Chief Minister of the ACT—I met with him last week. He is aware of the situation we are in.

**Senator LUDLAM**—Thank you for coming in. You have thrown up some issues which nobody else has raised. Is there anyone else in the country in the position you are in or are you feeling unique in this regard?

**Mr Slavich**—In terms of customer access networks, I think there are differences between organisations which put DSLAMs in Telstra exchanges—digital subscriber line access multiplexes—and what we do. We do have some DSLAMs deploy it in the marketplace but, effectively, we provide a customer access network which is somewhat different from what a lot of the other ISPs and telecommunications companies provide. We are also a member of the Greenfield Fibre Operators of Australia group. There are some members of the group who may be in similar circumstances.



**Senator LUDLAM**—You said in your submission you have got 10 ISPs that use your network and provide retail services. In the areas which you described to us before, do you provide retail services on those networks? Is there a degree of vertical integration with the services you provide?

**Mr Slavich**—Yes. For example, iiNet is an ISP that uses our network. We also have wholesale arrangements with other carriers in order to provide retail services over their network. So we do have arrangements in place. For example, our mobile phone business is an MVN—a mobile virtual network—operator. MVNO deal with Vodafone; we use their network to provide mobile phone services for both voice and data. We also have wholesale arrangements with Telstra. We do utilise the networks of other suppliers and carriers.

**Senator LUDLAM**—It is a tangled web isn't it? You are one of the few network operators in the country that I would have thought is actually providing last-mile fibre services to people's premises, which puts you in a bit of a different place to a lot of the other people who might be considering themselves competitors to the NBN Co. and backhaul space. Do you provide retail services over those networks?

**Mr Slavich**—We provide the retail service on our own network, yes. We provide voice services and we provide ISP services through our 100 per cent owned ISP, Grapevine. Yes, we do provide retail services on our network. We are an open access network but we are effectively vertically integrated. We are seeking clarification of what does 'wholesale-only' mean. There are various degrees of separation. One can be ring fenced or one can have complete separation—where you have to have a separate network business and a separate retail business—or you can go completely separate as is the case with NBN Co. being a completely separate network supplier.

**Senator LUDLAM**—Are you a bit concerned that we might be 10 days out from legislating this package and you are still seeking clarification? I feel that is getting very close to the wire.

**Mr Slavich**—We have picked up this concept of wholesale-only and the potential for a levy being imposed in the statement of expectations that was released on 20 December. We do not see that in the current draft bill. We would like to see clarification on what exactly that means so we can comment on it.

**Senator LUDLAM**—That is probably fair enough. I would not have thought you folk would really qualify as being a cherry picker in the sense in which I think the bill intended.

**Mr Slavich**—Absolutely not. Transact is definitely not a cherry picker. When we deliver our network, we deliver that across a broad geographical area. We also have situations where we have some customers that are more profitable than others. Therefore, one could say that a customer that is more profitable subsidises, to some extent, a customer who is less profitable. Having said that, we are a privately owned company and we are in the business of making a return for our shareholders, so we are not in the business of extending our network if it is unprofitable. Absolutely, we do not see ourselves as a cherry picker at all.

**Senator LUDLAM**—Thanks for turning up and for providing more questions than answers.

**Senator BIRMINGHAM**—Are you confident the definition and framework of cherry pickers within the legislation will not accidentally capture you?

**Mr Slavich**—We are concerned that the way the bill is written now would capture us as a cherry picker, and we do not see ourselves as a cherry picker.

**Mr Lee**—Picking up on your comment that we are leaving it too late; prior to the bill being introduced on 25 November, we did consult with the department on the bills. We saw the bills just prior to their release. At that point in time we did raise the issue that we had serious concerns with the level playing field provisions in the bills. Since that time we have continuously consulted to try and get clarification around those provisions. We also tried to get a bit more detail around criteria for exemptions. To date we have not seen that. It is not that we have not been trying extremely hard and consulting widely with the department on the issues.

**Senator LUDLAM**—I certainly did not intend that as a criticism.

**Mr Lee**—No; just a comment.

**CHAIR**—In relation to discussions you had with NBN Co.—I do not want to go to any of the commercial issues you are raising—do you think there is an opportunity to use some of your network as an interim measure until the full fibre rollout is concluded?

**Mr Slavich**—Without question, TransACT's network is state-of-the-art; in fact, the technology that we are deploying in our fibre-to-the-premise areas is the same kit: it is Alcatel-Lucent. Some three years ago we used Corning fibre, which is the same fibre that NBN Co. is rolling out, and we provide a UPS service. We note that originally NBN Co. were not going to provide a UPS service but they are now—that is an uninterruptible power supply. The other thing we provide is an RF overlay, which means that homes receive free-to-air television in the fibre-to-the-premise footprint which we understand NBN Co. will not be doing with its rollout. Without doubt, I see that there would be significant advantage to the government to talk to TransACT about speeding up the NBN rollout, particularly in markets where we operate.

**Senator WORTLEY**—Mr Slavich, you would be aware that the default position in the bill is that the NBN not discriminate between access seekers but that there is limited scope for discrimination where this aids efficiency. This is a process overseen by the ACCC. Do you agree with the principle of discrimination that aids efficiency?

**Mr Slavich**—We believe that there should not be any volume discounts provided and there is provision within the bill under the special access undertaking with the ACCC to get those discounts. The concern we have, given our size, is that the larger players could gain the system by getting a price point which is lower than what we could gain in terms of supplying an end customer. I do not see how that would necessarily be efficient.

**Senator WORTLEY**—In your view, are there any circumstances where it would be warranted?

**Mr Slavich**—It is hard to have a crystal ball and think of every conceivable or possible situation. Where we are coming from is as a retail service provider on NBN Co. We would be concerned if we missed out on a customer because we were not able to access the same type of pricing or services as perhaps a larger player would be able to access.

**Senator WORTLEY**—What do you think is wrong with the current protections against the pure volume discounts?

**Mr Slavich**—I think it is better than having no protection in there. I think that the protections that are in there—that is a fact that an SAU is required with the ACCC—go some way towards providing that protection, and it is better than having no protection at all. Our view is: we just cannot see why that is necessary.

**Senator WORTLEY**—Thank you.

**CHAIR**—Mr Slavich, would it be fair to describe you as a mini Telstra in the ACT: vertically integrated—

**Mr Slavich**—Our company name starts with T. The reality is that, where we are rolling out our network in greenfields areas—and I listed all those suburbs that we are going out to—we are the only network, and Telstra are not rolling out their network in those suburbs. We see ourselves as a very valuable organisation, particularly in those markets that we operate, providing valuable voice, broadband, pay TV and mobile phone services to our customers.

**CHAIR**—In the national bill there is a carve-out for utilities. What is the situation in the ACT with your broadband?

**Mr Slavich**—We certainly have arrangements in place with ActewAGL to use their electricity infrastructure in order to roll out our broadband network. We have ActewAGL as a customer of TransACT on our network, but it is all done on a commercial basis. If other utilities wanted to use our network, we have a wholesale area within TransACT and we ringfence that wholesale area from our retail area to ensure that anyone who wants access to our network gains access on the network through our wholesale delivery mechanism.

**CHAIR**—Do ActewAGL have their own internal network?

**Mr Slavich**—Yes. They have their own electricity network. We do provide fibre services to ActewAGL, and that helps them with control of their network.

**CHAIR**—At the national level, do you see the ability for utilities to have their own internal networks as an issue?

**Mr Slavich**—Yes. Having come from the energy industry sector myself, I think energy networks certainly utilise their own fibre networks in order to control their equipment on their network. I do, however, see telecommunications companies being able to provide that service to energy utilities or water utilities in order to help them provide cons to their equipment. Traditionally they have built those networks of their own accord,

and there are probably commercial reasons for doing that, or for the purposes of having a secure network. I think telecommunications companies can provide that security and competitive pricing in order to control those.

**CHAIR**—But that has not been done nationally up until now, has it?

**Mr Slavich**—Traditionally energy utilities have put in their own fibre networks. Indeed, many of the transmission companies have fibre across the electricity transmission lines that they sell to other suppliers as well.

**CHAIR**—So the market has not penetrated utilities' internal provision of services, has it?

**Mr Slavich**—Not extensively, but certainly within the ACT we have a very close working relationship with ActewAGL and help them in their provision of communications services.

**CHAIR**—You have a special relationship with them, have you not?

**Mr Slavich**—Effectively, TransACT started from ACTEW Corporation. As I said before, TransACT was effectively the NBN in the ACT 10 years ago.

**CHAIR**—So actually it has been the other way around: the utilities have built out to the community?

**Mr Slavich**—Correct.

**CHAIR**—You are saying that the retail providers should now be moving into utilities. You see a potential there.

**Mr Slavich**—I think there is certainly scope for business activity both ways between utilities and telecommunications providers.

**CHAIR**—The submission we have from the Energy Networks Association is very strong about the specific skills and the specific technology in utilities and the experience they have built up over the years. They are very strongly arguing for that exemption. It seems to me, because they have that experience and they have those efficiencies internally, that is probably reflected back in some lower cost to consumers.

**Mr Slavich**—From a B&A perspective, these internal networks and these capabilities have been developed over many years. There would need to be a transition period, I would think, before it was all handed over to telecommunications companies. All I am saying really, as a telecommunications service provider, is that we cherish the idea of being able to provide those telecommunications services to network companies. Whether that should completely happen tomorrow is another question.

**CHAIR**—But cherishing the idea is a bit different from utilities handing stuff over, is it not?

**Mr Slavich**—Correct.

**CHAIR**—There would have to be a commercial reason for utilities to use the retail services of providers. That would be lower cost and better technology, would it not?

**Mr Slavich**—At the end of the day, I probably should be talking about our submission and not necessarily what is beneficial for the energy industry, other than to say that as a telecommunications supplier we certainly look to provide telecommunications services to energy utilities.

**CHAIR**—You see, Mr Slavich, when you sit up there you are not completely in control, are you?

**Mr Slavich**—No.

**Senator FISHER**—Hearing your concern about the level playing field and level two, what if the legislation were to allow networks to be able to be at level two or higher, so referring to a level three prospect? Would that change your view?

**Mr Slavich**—I think the fundamental principle is that a network ought to be open access. The reality is TransACT has had an open access network for over 10 years and, indeed, we have 11 ISPs using our network in an open access environment. I think that is the fundamental principle. Whether it is layer two or layer three in the model is not necessarily the deciding factor. I think the deciding factor should be whether it is open access or not.

**Senator WORTLEY**—It has always been government policy for NBN Co. to operate as wholesale only. The government is certainly not trying to create another vertically integrated monopoly. While I share some of your interest in keeping NBN Co. from moving into retail, I am sure the committee would be interested in hearing what you actually think is deficient about the current drafting.

**Mr Slavich**—In the companies bill or the access bill and the companies bill?

**Senator WORTLEY**—Both.

**Mr Slavich**—In summary, our main concern is the layer two requirement. That would impose significant costs on our business and we would like to be able to continue to operate an open access network in the layer three environment. We are also concerned with the cherry picking level playing field provisions within the bill. Also the statement of expectations on 20 December that was released by the Prime Minister, the minister and Deputy Prime Minister said that we would have to operate in a wholesale-only model. We are concerned about the cost being imposed on the organisation as a result of operating just in that environment and also the possibility of having levies imposed if we are able to do it more efficiently than NBN Co. given that we do not see ourselves as a cherry picker. I understand that provision for organisations that are very selective in what they do. But from a TransACT perspective we do not see ourselves as a cherry picker and therefore would not want to have that imposed upon us.

In terms of the companies bill, it is really a concern about the volume discounting concern. We do not think there is a need to have the SAU or the ACCC involved. We just prefer there to be no volume discounts at all.

**CHAIR**—Thanks very much, Mr Slavich and Mr Lee, for your information today. It has been very helpful. We will reconvene at 1.30 pm.

#### **Proceedings suspended from 12.29 pm to 1.31 pm**

**EDWARDS, Mr David, Deputy President, Australian Primary Principals Association**

**SAAB, Ms Peggy, President, Association of Catholic School Principals of New South Wales**

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

**Ms Saab**—We do. I am here representing Australian Catholic School Principals of New South Wales but also, with Dave, I am part of the national executive council for all primary principals across Australia. I want to start off by saying that, as we all know, the world of technology is growing and changing rapidly, and there are both knowns and unknowns. Schools need to be prepared for both of those. Currently in schools we know that we need the capacity to work remotely, we need the ability to deliver video. Even in our primary schools we need that ability. We know that we need bandwidth that is able to service the massive growth that has been occurring over the last couple of years. We also know that in schools we have already reached our threshold. Our work is all now cloud based. We require access on a daily basis.

The trends are already here and they are already growing. Our challenge now is to maintain adequate levels at affordable prices. We need the ability to provide a rich environment with multiple users. We need scalability and we need economy of scale. E-learning is truly already a reality in our schools. We have moved from paper to e-books to personalised learning and now to e-publishing in a relatively short time. Scalability is necessary to allow us to continue to grow, as I said, and to provide 21st century skills, which we hear about all the time around collaboration, innovation and creativity.

The other point is affordability for our schools. It is crucial. You would all know that as schools we operate on very limited budgets. You would also perhaps be aware that there has been massive growth in one-to-one devices in schools. Large number of students and staff are now trying to access the internet at the same time, which leads to very long delays. Ten years ago, schools were centres of technology. That is not the case now. Now mobile technology is everywhere. Our students arrive in kindergarten experienced users of technology already. They are digital natives.

According to the recently released Horizon report, by 2015 80 per cent of people will be accessing the internet from mobile devices—iPods, smart phones, iPads, netbooks and the like. Our students are accessing the internet on a daily basis right now. They use it as a reference tool and to access their email—even our little kindergarten people are accessing it for communication. They are using apps for education, productivity and creativity; they are using e-book readers, doing note taking, accessing maps—that is very much a part of our maths lessons now, using GPS—using mobile technology for dictionaries, as a thesaurus; and using them for many other things. The connections beyond classroom walls have the potential to promote global citizenship through cultural exchanges. Reliable internet is the tool of the trade for teachers in 2011 for communication, professional development, wikis, blogs and myriad Web 2.0 applications.

Currently, my own primary school, which has 824 students, is running over 350 devices. Our wireless network and our wired network are very much up to date within our school. We have planned and prepared for the present and into the future. However, once we walk out the school gates we are working with connections

off the street that cannot cater to that volume—they can cater to 50 devices, but we have 350. Our school cannot meet the needs of the 21st century learner with 20th century infrastructure. Hence, the broadband is so important to us. Students are, as we know, the very greatest asset we have. The children of Australia, we believe, deserve an education that enables them to be global citizens of the 21st century. The 21st century classroom is currently grinding to a 20th century halt without fast reliable access to the internet. As educators and as parents—myself as a grandparent—we dream of the possibilities for our children and believe that national broadband really does have the potential to make some of these dreams a reality for our students.

**Mr Edwards**—One of the key messages that we got in our recent work at the Primary Principals Association related to the goals that came out of the Melbourne declaration. We welcome those absolutely enthusiastically. For every child we are looking for equity and excellence—no matter where they are located and no matter their circumstances. We are also looking for them to become successful learners, confident and creative individuals and active and informed citizens. For that to happen, we need high-quality internet access. Lots of schools, we have already said, have got the structures, but it is actually about making sure of the supply to schools, at the front gate; it is about making sure that they actually have networks that support and enhance learning and that are reliable in quality. Lots of connections are occurring already but the quality of service is extremely low, particularly in rural and remote areas. It is about making sure that the speed is suitable for purpose—so much of our work is streaming, so much of our work is about accessing clouds. It does not matter where you are in the school—it is affordable management of accessing your resources. Therefore, you need continual access. No longer is everything just stored on a server; it is out there and we need to be able to access it.

There needs to be equal access for all students in primary schools around Australia, not just those who are near the strongest hubs and where there are currently good strength and large pipes. It needs to be affordable. The costs we have heard about from our members around Australia are quite significant. We hear of numbers of schools that have got a supply and services but then have to go outside those services to get something that can actually support learning in their school communities. The last issue is around being global citizens. If you want students to be citizens, even of their local community, not all of that appears within the four walls of their school. Therefore, whether they engage at a local community level, a state level or more broadly—nationally or internationally—they need some sort of service that is going to be able to provide that so we can provide the outcomes that have been designated in the Melbourne declaration.

**Senator BIRMINGHAM**—Obviously, a lot of your comments go to the overall arguments around having an NBN, not having an NBN and so on. In relation to the proposal that is on the table, in particular the 93 per cent fibre to the premises with the remainder to be serviced by fixed line, wireless or satellite, you highlighted some of the remote and regional school issues. Does the association have an understanding yet as to whether all primary schools can expect to have a fixed line service and, if not, how many might miss out on the fixed line service? What response have you had to representations to government on such matters?

**Mr Edwards**—We do not have the statistics of how many would have it but we do know those that are in remote areas of Queensland, Northern Territory and Western Australia in particular would require a different sort of service whether it be satellite or something else. Our comment is not so much about the form of service but about the quality of service which comes in. When you are talk to remote schools in Western Australia at the moment, their satellite services are about 126 or 256 kilobytes per second. It is going to take you your whole lesson to get one map loaded. It cannot support you. You are using online resources to support a lesson and a lot of those you cannot unload. It is not so much about the manner in which it is delivered; it is the quality and speed of service that would be most important to us. I do not have the percentage figures at hand but most of those are single or two-teacher schools and they are extremely remote.

**Senator BIRMINGHAM**—The manner of delivery impacts on the quality of delivery and the speed of the service. Do you have concerns that some of those schools that are currently enduring a second-rate or suboptimal outcome will continue to face that in comparison with other schools?

**Mr Edwards**—There is going to be that differential, yes. When you look at the reality of how you can deliver those services, you cannot deliver some services just by the nature of the location. That can be because of rivers; most of it has got to do with the physical landscape. Our goal would be that each site gets the best possible service that they can and at a reasonable cost.

**Ms Saab**—That would include our urban services because both of us are in urban schools and we can assure you that our service leaves a lot to be desired as well. A comparison was made to me by one of my colleagues, when they knew I was appearing here today, that for their students it is often a Third World

technological environment that they come into at school because we do not have the sorts of services that many of the students are able to access in places other than schools yet their main learning, for primary school students, occurs with us, within our walls and yet we cannot provide them with the sort of access they have at home.

**Mr Edwards**—There are far greater technologies available than the ones that are currently being used to service those communities. If it is satellite technology, there is better satellite technology than these schools currently have access to. That would be the main thing. If we are unable to deliver other forms of connections to those sites then we need to put in place a quality of service that is going to provide them access to the resources they need, the same as every other child.

**Senator BIRMINGHAM**—Have you made any representations to the government or had any thoughts about the prioritisation of the schools that receive services and how quickly services are provided to the schools that, Ms Saab, as you have put in colourful terms, have technologically Third World services? It is not quite that bad but certainly they are very poor services compared with other areas.

**Mr Edwards**—No, we have not. A large number of actions predominantly through state education systems have been made. The one I most aware of in relation to that is in Western Australia where they are lobbying for upgrades so they can have a better delivery of service than currently. I am not sure where that is along its points of consideration. In relation to the others, the difference is that most places that want that speed of service are paying for it themselves and paying quite considerable amounts of money. What we are after is making sure that that affordability element is significant. If there is one answer instead of 58 answers, it is going to be far better. Whether it be a local government answer, a state government answer or a national answer, it needs to be connected and it needs to provide like with like so that the kids in certain places have the same access as children who are attending other schools and so that the funds that should be directed to learning are not redirected to core infrastructure needs in the way that they are.

I was talking to the principal of a school in the Barossa Valley, in South Australia, and her response to me was that, once their office staff use the connection, their service no longer lets them do anything else in the school, and a lot of their stuff is online. Therefore, they have to buy in an additional service for their school. That means that educational support or student support officers are then not utilised in those schools, therefore money that should be directed to other areas of student need is being directed to core services. We are seeking a service that would support all of that happening.

**Ms Saab**—Our issue really is equity for all of the students in our well over 7,000 primary schools across Australia, that they should all have access to the best possible connections that they can have, regardless of where they are.

**Senator BIRMINGHAM**—My last question goes to price equity. You would hope to see an outcome where regional and remote schools can access a service at a comparable price for a comparable service to those in built-up areas?

**Mr Edwards**—I would actually say a comparable price across the board. For example, a comparable price for the school where I am currently principal, where just the connection download and upload cost is \$17,000 a year, for a school of 200. I think that \$17,000 could be better spent elsewhere.

**Senator IAN MACDONALD**—But is it going to be any cheaper under the NBN?

**Mr Edwards**—I do not know all the prices, but where infrastructure is not linked to just one avenue, when you start to roll that out, my understanding is that that cost is then spread over a broader range and, therefore, the service is providing it. If it was not coming down the road just to our place and then going back out again, it would be that other people in the area could use it—the other businesses in the area and the other schools in the area. I work in a Catholic school. There is a government school 2½ blocks away and—

**Senator IAN MACDONALD**—Have you made any inquiries about what the cost might be to you once it comes along?

**Mr Edwards**—No.

**Senator IAN MACDONALD**—The idea of NBN is great, and everybody wants it. We want faster broadband for our kids but at what cost? We have to pay off \$55 billion and get a commercial return on it.

**Mr Edwards**—Yes.

**Senator IAN MACDONALD**—Have you made any inquiries?

**Mr Edwards**—No, I have not. Our school has not. My understanding is that, at the moment, for us to do that is quite a significant challenge, to actually get the money for our downloads—

**Senator IAN MACDONALD**—I do not think anyone knows at the moment. All we know is that it is going to cost \$55 billion and we are going to get a commercial return on it, so someone has to pay.

**Ms Saab**—The commercial return for us, though, is the future. We do believe that in terms of our students.

**Senator IAN MACDONALD**—Sure, but where do you get your money? Who pays for this? Can you tell me about school funding very briefly?

**Mr Edwards**—It depends which sector you are talking about. The money that goes to the government—

**Senator IAN MACDONALD**—Does your \$17,000 come out of your general schools funds? The parents in Catholic schools pay?

**Mr Edwards**—It is the money that is on the My School website.

**CHAIR**—Senator Macdonald, Mr Edwards has started the answer so can you let him finish, and then you can ask again.

**Senator IAN MACDONALD**—I am sorry, Chair, I was trying to speed it up. I am sorry, Mr Edwards.

**CHAIR**—I am not pushing you for time, at the moment. Continue, Mr Edwards.

**Mr Edwards**—For any school, all non-government schools, it would come out of recurrent funding and is reflected in the amount of money that is on the My School website. So for government schools it is included because of the central costs that are downloaded. But if they then want to access additional services they have to pay for that out of their recurrent funding as well.

The other part with the NBN, which sort of links into that, is that where I live at West Beach there is not a broadband service. In my part of West Beach there is not a broadband service and there is not likely to be.

**Senator IAN MACDONALD**—Where is West Beach?

**Mr Edwards**—It is 12 kilometres from the city centre in Adelaide.

**Senator IAN MACDONALD**—I am a north Queenslander, so I do not know these minor states.

**Mr Edwards**—There is another West Beach in Western Australia, and I was talking about that before. I am sorry that I did not clarify that. It is all across Adelaide. My understanding is that it is the same in any metropolitan area, there is built-up. Most of the children who come to our school can get a better connection speed at home, but some kids actually cannot. The only access we have at home is a poor wireless service. It is the best of the wireless services you can get through a toggle, but the quality of it does not allow you to do what you need to do when you have children—one in year 12 and one in year 8. So it will actually allow us to provide a service. My understanding is that this is crucial. Not only is there access to a faster speed and a quality service. It is not just about doing what we used to do better; it is about doing a whole range of other things as well. The amount of information you can get, actually communicating with people in different parts of the world, accessing different sorts of information, and the way you sort and manage information—all of those aspects are actually new things that we do instead of enhancing. There are lots of things that are far easier to do using interactive whiteboards.

**Senator IAN MACDONALD**—As long as you can pay for them.

**Mr Edwards**—Yes. One of the challenges in our sector at the moment is that it is a small sector, like the Catholic sector. If we were to supply that by ourselves—if we actually had larger capacity—you would imagine that the costs would come down.

**Senator BIRMINGHAM**—We hope for your sake that they do.

**Mr Edwards**—So do I.

**Senator WORTLEY**—Ms Saab, you refer in your opening statement to ‘very, very young children’. What age group were you referring to?

**Ms Saab**—Five-year-olds. I work in a primary school, so five- to 12-year-olds. If any of you have young children to raise, or if you are grandparents, you will relate to this. My two-year-old granddaughter can navigate my iPhone quite well and pick out what she needs to get access to. Our children are coming into schools very much as digital natives now, so they do need access and they need it when they arrive. They are using one-to-one devices from the moment they come. Many schools, mine being one of them, now invite students to bring their own mobile devices to school if they have them at home. Most parents can afford a

\$300 netbook, so many of my students bring their netbooks to school now to get access to the internet at school, which of course then increases the traffic on the bandwidth and it cannot manage it.

**Senator WORTLEY**—It cannot cope with it. Mr Edwards, how long have computers been used in schools—in particular, online computers?

**Mr Edwards**—In the 1990s they started to come in. Coles probably had a bit to do with that, with the Apples for Students approach—lots of computers came into schools. They were very slow and were not linked to the internet. Probably the most radical change would have happened within the past 10 years, during which the online aspect and use of computers has radically sped up and that sort of thing. That is for a range of reasons. One of those reasons is the question of what else is out there that can actually be accessed. The other reason is that there is a whole range of online resources that can now be used as well. So instead of us buying a resource to support children with a particular learning need—difficulty with reading or a need in another particular targeted learning area—we can actually go online and find one that is free and that suits that child explicitly. Those can be accessed from around the world, whether from the BBC in the United Kingdom or from Arizona in the United States. There is a whole range of different resources that can be used. That is doubling time and time again.

**Senator WORTLEY**—You were saying that in West Lakes in South Australia you do not have access to broadband. I have become familiar with a number of schools in South Australia over the years—

**Mr Edwards**—West Beach?

**Senator WORTLEY**—Yes.

**Mr Edwards**—I was talking about at home. At home, our part of West Beach, you cannot—

**Senator WORTLEY**—Are you familiar with schools that actually have issues with access to the internet for lessons or research?

**Mr Edwards**—Not in having a connection. The connection is there, but it is the speed of the connection and the quality of the connection that are the problems. The majority of those are in country areas and rural areas, but not far from the city. Therefore it is the quality of service; although the school might have a designated 10-megabyte-per-second link or, using an example from Western Australia, a 512-kilobyte-per-second link, in reality the quality of service is so poor that it actually never operates anywhere near that. If they are lucky it operates at half of that.

**Senator WORTLEY**—What is the impact on the educational outcomes for children who are in that situation?

**Mr Edwards**—They are probably in two sets. One is that they cannot access learning that they could otherwise access, and that learning is around access to resources, development of skills and a broadening of their learning opportunities. That means that they go back to a style of learning very similar to what happened when I was at school: using hard resources.

In other places it is the speed. You can imagine 30 children sitting around and developing PowerPoint presentations. They are cutting and pasting, researching and putting it in, but every time a page has to load it scrolls down slowly—which we used to think was fast. If the class is sitting there watching a screen load, it is not overly interesting, so they get off task and they start doing something else. So it has an impact in a whole range of different ways.

**Senator WORTLEY**—So it is waste of education time.

**Mr Edwards**—Yes, it is a waste of time or not giving children access to opportunities that they otherwise would have.

**Senator LUDLAM**—It is nice to have some people in the room who are excited about the uses to which we might put this network, because mostly we have just been hearing this clash of commercial interests. So thanks for coming in and giving us your point of view. I do not notice in your submission that you have taken views on the specific provisions in the bill that we are debating in the next couple weeks. Are you of the view that it should be passed as soon as possible?

**Mr Edwards**—The Australian Primary Principals Association has 7,000 members in three sectors. We are the only organisation that operates with independent, Catholic and government schools. What we would say is every single child has to have access to a quality of service that is like other countries around the world. We are demanded to show results that are the very best around the world. We are not given a service that allows us



to do that. We are compared to Shanghai, Hong Kong, Singapore for maths and all the other places, but we do not have opportunities to support our children's learning in the same ways that they do. We are not ICT technicians and do not have a wealth of knowledge in that area about all the specifications, but I do know the difference that I have seen in my school, where we have gone from a slow-speed connection to a 10-megabyte-per-second connection. We can now stream stuff in class. We can now load and access it. Therefore, it is not so much the specs and having it at no cost. We have a duty to the children in our schools to deliver a service that can support an education in the manner it should be delivered and in the manner that most of our teachers can absolutely deliver already except where they cannot, where they cannot it is because they have never had an opportunity.

**Senator LUDLAM**—Not being able to get a piece of glass fibre out to every premise in the country—for obvious reasons—we are going to have an eightfold disparity between the remote areas and metro and regional schools and towns. How do you propose, given that enormous disparity which is perhaps inevitable, to level the playing field for the schools?

**Mr Edwards**—That is the reality that we have been told is going to exist. My understanding is that the reality of the satellite technology is far ahead of what is currently delivered now. We talk about the personal excellence of the students in our schools. We would like it to be as close as possible. If there needs to be a disparity, do we not have it for anyone? My argument for that is that we do not have nothing because it cannot all be equal.

**Senator LUDLAM**—That was not my argument.

**Mr Edwards**—I might have misunderstood.

**Senator LUDLAM**—To be devil's advocate for a second, are kids spending too much time in front of screens these days and not enough time out passing the footy around and interacting with each other?

**Mr Edwards**—In school?

**Senator LUDLAM**—Yes, or in life, because they are going straight home and looking at screens as well.

**Ms Saab**—We are still out at morning tea and lunchtime playing cricket, handball and all the sorts of activities that were probably the same when you were at school. It is what children are still doing at lunchtime. We do not have control over what happens at home. We need to recognise that we only can look at the school day and what we do during it. To repeat what Dave just said, we need to provide our children with the best possible education we can. They deserve that.

**Senator LUDLAM**—Sure. I am not disputing any of that.

**Ms Saab**—So I do not know if you can argue to educators that they are spending too much time in front of a screen. We can only deal with our own families at home, not with the population.

**Senator LUDLAM**—It has been a while since anyone here was at primary school. How much of a kid's day at school is spent in front of a screen these days?

**Mr Edwards**—It would depend. It would happen in a whole variety of different ways. There would be times when they were working at a screen one on one in that environment. Usually you will find that they will be there but they will also be having a conversation—the same as the work that I do in my workspace, where if I am writing a report I will still go off and have other conversations but come back to get information. There will be times when that screen is sitting on the floor in amongst the group. There will be times when they are not having anything to do with that and are manipulating hard materials in a mathematics lesson. Usually what would happen is that one of the reading group rotations each week would be doing an individual comprehension or sound activity using computer hardware or software. It really depends what year level they are in.

It depends a lot on the access. In our school they use them much more readily now because we have a connection that allows you to use them. Therefore the time you are in front of them is diminished because you are not waiting for something to load all the time. When you clicked for the next page you could literally walk around the school before it loaded. Now it happens really quickly. I have not done the studies but it would really depend incredibly on the school.

**CHAIR**—I do not suppose you have read the NBN Co. financial business plan.

**Mr Edwards**—No.

**Ms Saab**—No.

**CHAIR**—I would not have thought so. If you were told that the government has to pay interest on the \$50 billion or taxpayers have to pay interest on \$50 billion, you would not know whether that was a proper statement or not, would you?

**Mr Edwards**—No, I would not.

**CHAIR**—Would you be surprised that, within the NBN Co. business plan, all of the money that the government pays out to NBN Co. to start up the NBN will be paid back by about 2033? Would that surprise you?

**Mr Edwards**—I will be very honest. In looking at the specifications and how it works, I have not considered that. I suppose it is looking at that in terms of the length of life and those sorts of things as well.

**CHAIR**—And the business plan also has an internal rate of return on public money that is invested of 7.04 per cent. Do you think that is a reasonable investment for government to make for the future capacity of this country?

**Mr Edwards**—You probably need to ask me more from a personal point of view than as a representative from our association. From my understanding of business that would be a reasonable return.

**Senator IAN MACDONALD**—You are schoolteachers. Can you multiply \$55 billion by seven per cent and divide by 22? If my arithmetic is right—

**CHAIR**—They may be English teachers, Senator Macdonald.

**Mr Edwards**—That is part of the reason why we need good access to technology.

**Senator IAN MACDONALD**—That is \$175 per man, woman and child in Australia every year just to pay the interest, not to repay the debt. Actually that is not a question.

**Mr Edwards**—I am pleased about that.

**Senator IAN MACDONALD**—It is an argument that Senator Birmingham made perhaps three or four inquiries ago. Finally, have you had a look at the legislation? Are there any sort of things in that that really concern you or do you think it all looks pretty good?

**Mr Edwards**—We actually have not looked at the fine detail of the legislation. We primary principals around Australia saw this as a chance for us to say, 'This is what children in our schools need.' We would then say, as we would like to be seen as absolutely professional in our area, that we believe that other people have the skill and the capacity to respond to those questions. We trust them in doing so the same as we ask people to trust us that, in our energies, time and benefit, our expertise is directed in the way they can.

**Senator IAN MACDONALD**—But you would not know anyone in Australia that does not want full price broadband for their kids?

**Ms Saab**—No, you would not. You spoke about the \$175 per head. For me that would be a small cost for our future.

**Senator IAN MACDONALD**—But for every man and woman and child—and every year.

**Ms Saab**—Again, we would not say that it was important to quote you.

**Senator IAN MACDONALD**—That is for interest only. I take your point. Everybody wants fast broadband. There is no question about that. It is a done deal. How are we going to pay for it? How are your kids going to pay for it?

**Mr Edwards**—If we want this for Australia to deliver the best education for these kids, the bipartisan way is my understanding. The Melbourne guidelines were absolutely embraced. They were really clear, they were driving our new national curriculum and they were clearly laid out. For us to meet those guidelines, we need high-quality internet access that is the best capacity. I understand the monetary and financial implications and those things, but it needs to be as good as it can be for every kid around Australia. Having heard the stories of colleagues around Australia talking about things, you just would not find that. I went to New Zealand a couple of years ago. Our situation is far worse than what they were complaining about then. For us to support every kid to achieve those goals we need far better than what we have now. We think that a single focus is going to be far better than everyone coming up with their own focus.

**CHAIR**—I suppose that you could look at this two ways. You could look at it as a cost to the community and to every man, woman and child. Or you could see it as an investment in the future of our kids and in the future of our industry. I suppose you see it the latter way and not the former.

**Mr Edwards**—Absolutely.

**Senator IAN MACDONALD**—It is perfectly laudable; I think everyone agrees with that.

**CHAIR**—Mr Edwards and Ms Saab, thanks very much. It is has been very refreshing to hear the enthusiasm that you have in the education area for the NBN. Thanks for coming here and helping us today.

[2.06 pm]

**ENDRES, Mr James, Senior Regulatory Adviser, NBN Co. Limited**

**LOVELL, Ms Caroline, Principal, Regulatory Affairs, NBN Co. Limited**

**CHAIR**—Welcome. Thank you for coming along today. Do you wish to make a brief opening statement before we go to questions?

**Ms Lovell**—Yes, we do. NBN Co. welcomes the opportunity to appear before the committee today. The two bills that are the subject of this inquiry are very important to NBN Co. as they will formalise our governance, ownership and operating arrangements. Accordingly, the timely passage of these bills is very important to NBN Co.

As this committee is well aware, NBN Co. has been established with the explicit objective that it will promote competition in retail communications markets by being a wholesale only open access network provider of high-speed broadband services. NBN Co. believes that the proposed bills will allow NBN Co. to achieve this important objective.

In relation to being a wholesale only open access network, the companies bill contains a wholesale only supply obligation along with lines of business restrictions. Accordingly, NBN Co. will not compete in downstream retail markets, nor will it have the incentive to supply services to itself on terms and conditions that are more favourable than what it provides to NBN Co.'s customers. In this way the companies bill addresses the industry's longstanding concerns about vertical integration and discriminatory behaviour in favour of the network owner's downstream business units.

In relation to the promotion of competition in retail markets, the non-discrimination obligations contained in the access bill mean that NBN Co. will be unable to favour any one access seeker or group of access seekers to the detriment of competition in the downstream retail market. NBN Co. does not in fact have any incentive to do this. In relation to the efficiency based exceptions to the non-discrimination obligations, NBN Co. acknowledges the concerns of some industry participants. However, we believe that such concerns may be overstated. In particular, discrimination is commonplace in competitive markets. This is particularly so where the provision of a good or service involves high fixed costs or when customers are not homogenous. Indeed, both of these features are pervasive in telecommunications markets. It is not clear to us why telecommunications should be treated any differently.

Additionally, and perhaps more importantly, the access bill allows for discrimination when such behaviour will result in measurable benefits. Moreover, the details of any favourable terms and conditions offered by NBN Co. must be made available to and published by the ACCC. This will allow all other access seekers to determine whether they have like circumstances and in which case they will qualify for the same terms and conditions of access. Accordingly, in our view, the proposed non-discrimination regime strikes a balance between promoting the efficient supply of broadband network services and safeguarding a level playing field for ISPs.

While NBN Co. is operating in a manner consistent with the bills, as requested by the government's statement of expectations, this does not diminish the importance of the timely passage of the bills through parliament. This is for several reasons. Firstly, the passing of the bills will allow NBN Co. and other industry stakeholders legislative certainty. Secondly, the passing of the bill will formalise the ACCC's role in relation to the NBN. For example, it will provide the ACCC with the necessary legislative authority to provide guidance on the legislation, and it will enable NBN Co. to lodge a special access undertaking and to publish a standard form of access agreement.

**CHAIR**—Thank you. Senator Birmingham.

**Senator BIRMINGHAM**—I turn firstly to the measurable benefit that you speak of in terms of what might allow the provision of different price regimes. What type of benefits does NBN Co foresee that would justify it?

**Ms Lovell**—It is fair to say that we have done a lot of work in trying to come up with various examples and hypothetical situations in which benefits might be achieved whether for us or access seekers or for the industry more generally. We have done that in anticipation of our customers approaching us in due course and ask us for such terms and conditions and also as part of an ongoing dialogue we have been having with the ACCC. I

might get James to give you a few specific examples, but it is fair to say we have put a lot of thinking into it since this was put into the draft bill, in preparation for making sure that we have thought it through carefully.

**Mr Endres**—There are a lot of potential efficiency benefits but it depends on what sorts of things access seekers come to us with. It is not for us to go to access seekers and say, 'We think you are more efficient so we will offer you this price.' It is up to them to come to us. There are a range of different things ranging from technical and operational efficiencies in billing or ordering and provisioning or potentially there could be things like lowering our risk profile and that may result in a lower cost of capital for us somewhere down the track, immediately or even further. So there are a range of benefits that may or may not eventuate but it is not for us to speculate at this stage. It is up to the industry to come to us with proposals about where they believe they can bring us cost savings and efficiency gains. Then we can go away, measure them and then say, 'Look, this is what it is worth to us.' We can translate that then into what that means to our terms and conditions and then we would negotiate on that basis.

**Senator BIRMINGHAM**—I will come back to a couple of those examples. Firstly, I ask around the issue of volume, which is a key part of this discussion and debate. Does the NBN Co see volume in and of itself as an efficiency element?

**Ms Lovell**—No. I think our CEO has made that very clear in the press and in our industry forum most recently to say that is not something that we see as a current intention. It has come under a great deal of focus since the bills were introduced into parliament because it has been added to the list of things in the particular provision, but the first hurdle is to get through of efficiency. Even if we were to design some sort of mechanism by which volume discounts were to be made available, it will have to be embedded in our undertaking and approved by the ACCC and therefore scrutinised by the ACCC, and we will have to continue complying with whatever mechanisms are in the undertaking or we will be in breach of the undertaking. So there is no concept of volume discounting at large, although it has been a great focus of attention in many submissions.

**Senator BIRMINGHAM**—So would an RSP of small magnitude which comes along and seeks access to identical services as an RSP of large magnitude and volume expect from the outset, if neither were offering any particular efficiency benefits, to be charged the same price for access to the same service?

**Ms Lovell**—I think the key thing is not offering any particular efficiency, so the answer is they would receive the same terms and conditions as anyone else in the same circumstances.

**Senator BIRMINGHAM**—In that case, what is the benefit of leaving volume flexibility in there as something that could be a determinant of efficiency?

**Mr Endres**—There may be examples where in the future an access seeker comes to us and seeks a volume discount on the clear proviso that there is an efficiency benefit related to it. That is just a flexibility. It is not saying it will happen, it is just a possibility.

**Ms Lovell**—It is probably also worth noting how that provision came to be in there. After the exposure draft went out without that subclause that refers specifically to volume discounting, the department that is responsible for policy decisions about whether there will be such a provision there at all took into account feedback that was received. A view was taken that what was required was that flexibility but appropriately constrained and with appropriate transparency. So in the event that anyone came to us and sought to justify an efficiency based differentiation of their terms and conditions that happen to include a volume element, firstly we would have to comply with the arrangements and the undertakings for that purpose—and we have not even made a decision about whether there would even be any such arrangements in any undertaking. We would then have to make sure that it was consistent with the guidance that the ACCC is going to be publishing as soon as practicable in relation to these terms and concepts in the legislation. We would then have to publish and provide to the ACCC the differences between any standard terms and conditions and the ones which had provided some sort of benefit justifying a differential, and then they would be available for all of our customers to see publicly on the internet. So if anyone looks at that and says, 'Right, I think I'm in the same circumstances and I can bring to bear the same efficiencies,' they will be coming to us and asking for that the very next day, one would imagine. It is not happening behind closed doors. It is all out there in public and scrutinised by the ACCC.

**Senator BIRMINGHAM**—Technically is there any capacity in which NBN Co. can see obtaining a volume discount that would not be something that could be offered by a company that thinks it can be obtained even if volume were not an option to seek a discount? In essence, if a company, by having a

particular volume, thinks they are going to be able to apply a different billing mechanism that achieves efficiencies where the volume was not on the table, they can still come to you and say, 'We've got a billing mechanism that offers efficiencies.' So is there any area in which you can see volume itself providing a discount?

**Ms Lovell**—It is hypothetically possible. I think that as a policy matter that is how it came to be in the bill in the first place. A policy decision was made by the government that they wished that flexibility to be preserved with appropriate constraints and scrutiny around it. As we sit here right now, at the beginning of the project, there is some time to go before we will be either rolling out or providing services at volume. I do not really think it is appropriate or possible for us to speculate about all the terms and conditions that people may seek from us in the future over the next 10, 20 or 30 years. They are trying to set up a regime that will be appropriate for the period of time over which we may operate.

**Senator BIRMINGHAM**—Have you had a chance to review the proposed amendments of Optus and Telstra?

**Ms Lovell**—Yes, we have.

**Senator BIRMINGHAM**—In this space Optus have proposed further amendments to, as they claim, tighten the public scrutiny of and the accessibility to the type of arrangements that may be struck with RSPs. What is your response to Optus's proposal? Is there any reason why that would harm the commercial operation of NBN Co.?

**Ms Lovell**—I do not know that that is appropriate for the company to comment upon. I think that might be something perhaps to be explored with the representatives of the department this afternoon. It is their role to review these proposals and to form views about whether those things are appropriate or not. We have been working within the parameters of the bills as introduced into parliament and on the basis of the statement of expectations that we have been given. It is a different way of going about the scrutiny and we are working with the one that has been presented to us to work with so far.

**Senator BIRMINGHAM**—Surely though the department has consulted with NBN Co. as it has been going backwards and forwards in the drafting of these bills to ensure that they obviously meet the government's objectives and that NBN Co. believes they are commercially and operationally functional.

**Ms Lovell**—Indeed, but I think you asked me about our view about the Optus proposals where we are commenting on the provisions as in the bill. That is what we discussed with the department.

**Senator IAN MACDONALD**—If I could interpose there, but you were involved with the drafting of the bill—not as the principal doer but you were consulted all the way through the drafting.

**Ms Lovell**—We were a stakeholder whose views were obtained in that process.

**Senator IAN MACDONALD**—But are you absolutely and entirely happy with the bills as they are? Would you like to see amendments?

**Ms Lovell**—I think NBN Co. understands that it is the position that has been reached after due consultation with relevant stakeholders.

**Senator IAN MACDONALD**—No, no. That is not my question. NBN Co. is a government business entity which is completely independent of government. Is that not right?

**Senator FISHER**—They are a government business enterprise, according to their CEO.

**Senator IAN MACDONALD**—But they are completely independent of government.

**Senator BIRMINGHAM**—They are probably independent of the FOI Act too.

**Senator IAN MACDONALD**—But, as a commercial entity, when you looked at the bills was there anything where you said, 'It would be better for us if we did X or if we cut out Y and put in Z or something'?

**Ms Lovell**—I think I can say that when the volume discounting subclause was added to that provision we could see that it was likely to elicit the reaction that it has. We saw that it would indeed involve some challenges in making sure that relevant stakeholders were comfortable.

**Senator IAN MACDONALD**—But you are happy with it as it is.

**Ms Lovell**—Yes.

**Senator BIRMINGHAM**—Has the government sought your opinion on the proposed amendments, either those that were debated in the House or in the submissions of Telstra, Optus or any other parties?

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**Ms Lovell**—No. We have been informed about them and we have seen them in the submissions, but our views have not been sought.

**Senator BIRMINGHAM**—You have your own internal analysis of them?

**Ms Lovell**—Yes, we have.

**Senator BIRMINGHAM**—It does go to how NBN Co. thinks these things could operate. This committee will make decisions in its report as to what amendments it may or may not recommend to the parliament. The Senate will then make its decisions, partly based on this committee and the evidence given here. So I do think it is important to know whether NBN Co. has an opinion as to, operationally, whether the more transparent arrangements that Optus proposes for striking agreements with RSPs would impact on NBN Co., whether you would be able to live with them or whether there would be any marked detriment to NBN Co. compared to those in the draft legislation.

**Ms Lovell**—May I ask which particular bit you are referring to?

**Senator BIRMINGHAM**—We can go through each of them if you would like.

**Ms Lovell**—I am just wondering what I am comparing.

**CHAIR**—We do not have time to do that, Senator.

**Senator BIRMINGHAM**—In particular, could we look at the reporting obligations of NBN Co. to start with, please.

**Ms Lovell**—We reviewed this only at a relatively high level, given that we are being asked to implement the bill as it currently stands. Nevertheless, I think our view on this one would be that it does not really add very much to what is already in the bill as it stands, nor to the overall reporting arrangements to which NBN Co. will, in any event, be subject.

**Senator BIRMINGHAM**—Does it impose unnecessary obligations on NBN Co., in your opinion? Will it impede the commercial operation activities of NBN Co.?

**Ms Lovell**—We do not think it is substantially an improvement or much of a difference. If you put them next to each other, we think the one that is already in the bill is perfectly adequate for the purpose.

**Senator BIRMINGHAM**—But if it were this one it would not necessarily get in your way either?

**Ms Lovell**—We have been preparing to use the one that is in the bill for some time, so we do not see any point in drafting another version of that that has a similar effect. Why not just go with the one that is already there, if it achieves very much the same purpose?

**Senator BIRMINGHAM**—I appreciate your judgment on that. So if this were the requirement in place for the long term you could live with it?

**Ms Lovell**—No, I did not say that. What we have become comfortable with is the one that is in the access arrangements bill as it currently stands and the other reporting obligations to which we are subject. We do not think there would be any need for this. It is effectively an additional overlay of further record-keeping rules. We do not know why you would need to use that particular path for making record-keeping rules when you already have the things which are in the access arrangements bill about publishing every difference from our standard terms and conditions. What is the need for an additional overlay? It could be complied with but at extra cost and time. It is not terribly efficient.

**Senator BIRMINGHAM**—I will move on to page 4 of Telstra's submission. They highlight, and go through over several paragraphs, issues around the definitions of the carrier and carriage service provider. They cite various examples of types of entities that may be able to access services directly through NBN Co. Are Telstra's concerns in this area warranted?

**Ms Lovell**—No, we do not believe so.

**Senator BIRMINGHAM**—Why not?

**Ms Lovell**—I understand the same amendments have been proposed by the opposition. Telstra's concerns are really about controlling the nature of the customers to which NBN Co. can supply. They do not seem to be about anything NBN Co. does or does not do. In fact, we are rather curious about them. In preparing for today we took another look at them. The effect of these provisions, by requiring customers to only acquire in order to supply end users, would in fact be to prevent any wholesale competition of layer 3. Telstra appear to be proposing a change which would stop Telstra from being an aggregator or buying our services on a wholesale

basis to sell to wholesale customers of their own. Telstra must be intending not to have any further wholesale operations in this area, because this amendment would appear to preclude them from doing so. We are quite curious about that.

**Senator BIRMINGHAM**—That is something that we can go back and ask Telstra to respond on, or if Telstra are reviewing the *Hansard*—as I am sure they will be—they will be able to write to the committee and respond on how it may or may not impact on them. In relation, though, to the operation of NBN Co., Telstra claim that this would, for example, allow NBN Co. to have a direct retail relationship with business customers such as Woolworths, with local government customers such as the Banana Shire Council and the Towong Shire Council and with the Library Board of Victoria. Are these real concerns—that NBN Co. could have a retailer relationship with those entities?

**Ms Lovell**—If those entities are prepared to acquire a carrier licence or comply with the obligations of a service provider, surely that is just more customers for the network and more competition as between our customers. That would add additional retail competition, so we are not sure where the problem is.

**Senator BIRMINGHAM**—These entities are, according to the Telstra submission, already carriage service providers, but they are carriage service providers because, in the case of the supermarkets, we understand, they are a mobile reseller. If they were not reselling the fixed-line services of NBN Co., then why should NBN Co. be able to provide them with a retail service that they may just use purely for their own businesses and ends?

**Ms Lovell**—I think it is a policy question essentially, as to what the government is trying to achieve in relation to retail competition, but if that just leads to another entity buying a large amount of services to be used by their individual consumers within those organisations, then that is just more competition as between Telstra and others. We are not sure we see the difficulty. That ought to be a positive.

**Senator BIRMINGHAM**—It is not more competition if they are purely using it for themselves. It is them bypassing the retail outlet to buy direct from the wholesaler, and you have NBN Co. effectively then operating for any large entity that feels that it can validly define itself as a carriage service provider and meet the conditions of that, which, if all of these types of organisations do meet those conditions, clearly are not to onerous to meet and would not prevent a major bank or anybody else who saw this as a good shortcut way of getting a cheaper service from going through a wholesale means and cutting out all of the retail providers. Doesn't this potentially circumvent the entire goal of NBN Co. being a wholesale-only operation?

**Ms Lovell**—No. I do not think so. I think we are underestimating what is required to comply with the requirements of being a service provider. I think we are also underestimating the types of services those organisations may need. If they wish to buy layer 2 services directly from us, that will not meet the needs of a Woolworths or a bank. They will still be needing the types of services that a Telstra or an Optus will be packaging up from our services and providing. It is either competition at the retail level, which surely could not be perceived to be a bad thing, or they are just buying those particular services because they have a need for those services and they are prepared to become a service provider or a carrier to do so. I am really not sure we see the problem.

**Senator BIRMINGHAM**—I understand that NBN Co. may not see the problem, because it is potentially more customers for NBN Co., but the object of this from the government's perspective, which has been spelt out time and time again, is that NBN Co. is very clearly designed to be a wholesale service provider. Isn't it a reasonable requirement to ensure that anybody purchasing NBN Co.'s services is in fact an on-seller of those services to third parties?

**Ms Lovell**—I think the suggestion would cause the problem we identified at the outset. I think we also should not lose sight of what it is NBN Co. is actually selling. We are not selling services which are suitable for end-user consumption in anything except quite a small subset of cases. If those people are prepared to meet the requirements of being a carrier or a carriage service provider, then perhaps they are entitled to become a customer and to compete with those who are also prepared to take that role. You asked us if we saw a problem with it and whether it undermined the policy. We do not. We think it is consistent with the policy and in fact could lead to further competition at the very level that the government wishes to encourage it.

**Senator FISHER**—How would they be competing in that scenario? Wouldn't you be the competition in that scenario?

**Ms Lovell**—I am not sure I understand.

**Senator FISHER**—In your answer just then, you said, 'And they could be in competition with'. But it would be NBN Co. with whom the competition is being contested.



**Ms Lovell**—No, those entities would be buying the same thing. There may be differences as to what they do with it. If Woolworths or Coles wanted to buy our services and then add additional capabilities to those services and sell them on, they would be able to enter the market to do that. It would be up to them what they do with the services they buy from us. We would be selling the same thing into both channels.

**Senator FISHER**—Swinging the question around the other way: what would be the operational impact on NBN Co. of removing the exemptions?

**Ms Lovell**—It could reduce the number of customers to whom we could supply services. It would also cause, we think, quite a number of issues at the layer of those who might be our customers. We really do not think the amendment which Telstra suggested has been fully thought through.

**Senator FISHER**—Would the reduction in customers to NBN through that route matter and, if so, how?

**Ms Lovell**—I cannot answer that question in detail. We would have to take that on notice. Our corporate plan was devised and our uptake and revenue figures were devised on the basis of the legislation as introduced into parliament where that restraint was not imposed.

**Senator LUDLAM**—You said a couple of times that you cannot see the problem of NBN Co. being perceived to have moved into the retail space. Telstra's submission, which I presume you have had a quick look at, lists large corporate and business customers including Woolworths, some universities and big government departments and some local government authorities as already being technically carriers or CSPs.

**Ms Lovell**—I would like to correct one thing. I did not say we would be moving into the retail space. We are very clear that the types of services we provide are normally needed by wholesalers. We have not suggested that we move into the retail space. We are selling at layer 2 service, which is normally of no use to anyone except a wholesale customer.

**Senator LUDLAM**—Thank you for that clarification. But Telstra has made the point, which I will bounce back to you, that these large entities are already technically carriers and could, therefore, be directly supplied by NBN Co. and, if they have the technical wherewithal to take the service you are offering, could bypass the retailer altogether. Is that a fair point?

**Ms Lovell**—We would be speculating about what they require the services for but I believe it is more likely to be a concern for those at the retail level than it is for us.

**Senator LUDLAM**—Yes, we have had retailers in here being very concerned about that.

**Ms Lovell**—I am not sure there is much more we can say about that point.

**Mr Endres**—To the extent that they do that, there is obviously an efficiency benefit for them to acquire a layer 2 service from us. We are still selling exactly the same service but they can obviously find it more beneficial and more efficient to do all the bits they have to do in order to make it a usable service for their staff or whoever it may be than to buy directly from an ISP.

**Ms Lovell**—So perhaps Telstra would prefer that they have to buy them through Telstra but that provides a margin, another overlay and another efficiency concern.

**Senator LUDLAM**—That was the issue I put to them this morning. I think you have characterised that quite correctly. I cannot see the point of inserting a retailer if all they are doing is adding another mark up on the way through, but then they are going to have to stop calling you a wholesale-only provider because you have just skipped the retail.

**Mr Endres**—No, we are selling a wholesale service to a carriage service provider and whether or not that carriage service provider sells it on to a mum and dad or whether or not they use it internally for their own business it is still a wholesale service.

**Senator LUDLAM**—That is very interesting.

**Ms Lovell**—It makes the people who buy from us another layer of wholesaler; it does not make them a retailer.

**Senator LUDLAM**—They are wholesaling to themselves.

**Ms Lovell**—Yes. They may create another wholesale layer and that may be perfectly consistent with the policy.

**Senator LUDLAM**—That is very interesting.

**Ms Lovell**—It does not make us a retailer.

**Senator LUDLAM**—I think we are dancing around with some pretty fine semantics.

**Senator BIRMINGHAM**—It is like mum or dad going to a factory outlet to buy clothes rather than going to a retailer to buy clothes. They are buying the same product.

**Senator LUDLAM**—Does NBN Co. hold a view over eventual public or private ownership of itself? Is that something you are able to contemplate?

**Ms Lovell**—Not at this stage.

**Senator LUDLAM**—The other issue that we have heard quite a bit about today is the cherry-picking provisions. I think we heard from Mr Quigley at our recent estimates hearing that it is quite important. You are being tasked with providing a subsidised service to regional areas and you are taking that out of margins in the cities. Is that oversimplifying it or is that what your business does.

**Ms Lovell**—That is part of it.

**Senator LUDLAM**—How important are the anti-cherry-picking provisions to you, to the figures in the business plan, for example?

**Ms Lovell**—Extremely important. Our corporate plan talks about the potential adverse impact that cherry-picking could have on our financial return. I refer you to page 52 if you wish to look it up at some later time. We have done quite a bit of sensitivity analysis. There could be a decrease in lucrative regions or greenfield areas of up to 50 per cent. If we are required to roll out across the country and we are not able to selectively pick high-revenue, high-density, low-cost areas and we have to go everywhere then we are at risk of being cherry-picked.

**Senator LUDLAM**—Telstra have proposed—and they have even been helpful enough to draft amendments for us—that those provisions be knocked out altogether. What happens to NBN Co. if they are successful and someone is mischievous enough to introduce those amendments?

**Ms Lovell**—It could have a very significant impact on our uptake and revenue. Our ability to, in fact, achieve the objectives have been set for us by the government. If we are not ultimately able to supply everywhere, including the cross-subsidy elements that you have mentioned, it has the potential to undermine the government's investment in NBN Co.

**Senator LUDLAM**—I have been on board with that up till now, and I think the legislation was draft with the idea of somebody like Telstra coming in and nibbling away at the good bits that they think they can get a margin on. How do you handle an existing incumbent, albeit a smaller one like Transact, who were here a little bit earlier, who have had a quite successful business for 10 years or so and are directly in your path and will fall foul of the cherry-picking provisions as they stand?

**Ms Lovell**—We acknowledge there is some complexity in terms of achieving the provisions. I think the most recent articulation of them is in the statement of expectations of late last year. We have been working with the department about this and no doubt you can speak to them about that later this afternoon, but there is certainly some complexity in making sure that the scope of the provisions in terms of timing and application and so on are appropriate and do not overreach. We understand that clearly.

**Senator LUDLAM**—Thank you for your time. Thank you, Chair.

**Senator IAN MACDONALD**—On the last point, has it actually been determined that you will cross-subsidise from your own revenue or is the option still open for government to do what governments have been doing for decades which is to effectively subsidise those services that are not commercially viable?

**Ms Lovell**—Do you mean directly; a direct subsidy?

**Senator IAN MACDONALD**—Well, a universal service obligation just to direct subsidy to NBN Co. to provide this so it does not impact on your bottom line. Has that decision been made was my question. You have answered as if you have to bear it, and I know the minister has said there will be the same price across Australia. I have not seen anything and I am asking if I missed something and whether the government has said that you will do it out of your revenue and there will not be any outside help to you to do it.

**Ms Lovell**—We are operating in accordance with the statement of expectations, which I think makes it fairly clear that we are expected to provide a uniform wholesale national price, which inevitably will involve some cross-subsidy.

**Senator IAN MACDONALD**—You are providing uniform across-the-board national price, but are you going to get subsidised by government for the non-commercial bits? Your answer is that you have not worked on that.

**Ms Lovell**—No.

**Senator IAN MACDONALD**—You have worked on the basis that you will be paying it.

**Ms Lovell**—Yes, we have.

**Senator IAN MACDONALD**—In all of your assessments in this legislation and to do everything you do—whether you are going to be successful and, as you say, whether you are going to meet the government's goals, which you are charged to do—you must have some idea of the pricing you are going to charge Mr and Mrs Stringbag—as Senator Vanstone used to call them.

**CHAIR**—Stringbag? You could get a better name than that.

**Senator IAN MACDONALD**—Senator Vanstone used to use that. She used to talk about Mr and Mrs Stringbag. That is going back a long time. I do not think she was here where you were here, Chair.

**CHAIR**—She would say it in Italian now, wouldn't she?

**Senator IAN MACDONALD**—Yes, she would. But for the average mum and dad consumer—if there is such a thing?

**Ms Lovell**—We will not charge consumers anything, we will supply services on a wholesale basis to ISPs, who will then package them up and come up with retail prices.

**Senator IAN MACDONALD**—Sure, okay—you are perfectly correct. But what you supply to the retail service provider will depend upon what they charge the customer. For example, in Tasmania—and I have raised this point before—nobody knew what you were going to charge the retail service providers until fairly recently. Now you have got a figure; but perhaps this is not the inquiry to ask if you are going to make a profit on your Tasmanian operations. Or perhaps I could throw that in; do you know if the sums have been done? Is what you are charging the retail service providers going to give you a commercial return on your investment in Tasmania.

**Ms Lovell**—I am not in a position to comment on that this afternoon. I think our corporate plan sets out what our revenue expectations are in relation to the pricing that our plan is based upon.

**Senator IAN MACDONALD**—I am not sure that it did, because nobody could tell me until a couple of months ago what you were going to charge in Tasmania.

**Ms Lovell**—There will not be anything different about Tasmania to anywhere else, eventually.

**Senator IAN MACDONALD**—So what you are charging the retail services providers in Tasmania is what you are going to charge Telstra and Optus right around Australia?

**Ms Lovell**—We will have one price nationally, yes—that is what—

**Senator IAN MACDONALD**—But you have got a price for Tasmania now, haven't you? It starts in two months time, so I assume you have?

**Ms Lovell**—That pricing will be the same nationally.

**Senator IAN MACDONALD**—Okay—what you have done in Tasmania will apply across Australia. So we do know your costings?

**Ms Lovell**—Our proposed prices are as announced in our corporate plan just before Christmas. We are in the process of aligning all of our activities across Australia, and I am not in a position to comment on what has or has not been done in Tasmania in the first release trial, trying to—

**Senator IAN MACDONALD**—No, the trial has finished.

**Ms Lovell**—Yes.

**Senator IAN MACDONALD**—On 1 July you come on stream for big-time, real-time activities—

**Ms Lovell**—And our pricing will be as announced in our corporate plan, yes.

**Senator IAN MACDONALD**—So I can look at your corporate plan and find out what every retail service provider is going to be charged—not in dollars and cents, but how it is going to be calculated?

**Ms Lovell**—That is our current intention, yes. We would like these bills passed so that we have a regime finalised under which we do it.

**Senator IAN MACDONALD**—I am assuming the bills will pass. But you are saying that what you are charging in Tasmania is what is going to be charged elsewhere, so we can look at the long-term return for NBN Co. and how you are going to pay back the return on investment and the capital cost of the \$55 billion or whatever it is?

**Ms Lovell**—It is a uniform wholesale national price.

**Mr Endres**—And it is detailed in our corporate plan.

**Senator IAN MACDONALD**—Is it detailed in actual figures?

**Ms Lovell**—Yes.

**Senator IAN MACDONALD**—Okay. And that is based on what sort of take-up?

**Ms Lovell**—We would have to look at the detail of that, but that is all in the corporate plan.

**Senator IAN MACDONALD**—When was the corporate plan released?

**Ms Lovell**—It was 20 or 17—

**Mr Endres**—It was 17 December 2010.

**Senator IAN MACDONALD**—I confess to not having read it in detail yet, but perhaps I should.

**Ms Lovell**—It is all in there.

**Senator IAN MACDONALD**—You said somewhere that in dealing with efficiency—and these are my words—and dealing with the big players that you ‘lower your risk profile’.

**Mr Endres**—We may.

**Senator IAN MACDONALD**—What do you mean by that? In simple terms, are you saying that the little fellas may not pay you but you know that the big guys will?

**Ms Lovell**—I think we should just qualify that. I do not think we said anything about larger or smaller players; we said that one hypothetical example of an efficiency could be a different approach to risk sharing to that which is in standard terms and conditions.

**Senator IAN MACDONALD**—My question really is: what is the risk profile you are trying to avoid?

**Ms Lovell**—We are not trying to avoid it; it may be the way in which a contract allocates liability, for example—it could be a different way of sharing risk. That is a very simplified example.

**CHAIR**—Telstra and Optus have been concerned about what Telstra calls ‘scope creep’. Could you outline to the committee what checks and balances are in place against scope creep?

**Ms Lovell**—First of all, I think we would possibly take a little bit of an issue with that characterisation. We do not see what has been happening over the last year, 18 months, et cetera as scope creep. We would describe it as an iterative and consultative process to define and implement NBN Co.’s activities. This has included a lot of engagement with our potential customers as to what type of service they want to have supplied to them, which is one of the reasons for the layer 2 requirement. The bills that we are considering today will provide a very clear framework as to what we are supposed to be doing, in what way, under what terms and conditions and subject to what transparency and scrutiny arrangements. In addition, we were provided with a detailed letter late last year which also gives us considerable guidance as to what we are supposed to be doing and in what way, and that is reflected in our corporate plan as well.

There are various mechanisms in the bills under consideration which would provide ongoing ability and mechanisms to deal with any issues that may arise. For example, the minister has powers to make licence conditions, should that become necessary, which has traditionally been a way of dealing with things in this industry where a carrier needed to be required to do something or, alternatively, to not do something.

**CHAIR**—So it is ministerial control, but there are aspects other than simply ministerial control.

**Ms Lovell**—The bills provide the primary framework. They are consistent with and will implement the directions and the information we have already been given by our shareholders. Sitting underneath the legislation, like any other bill, and it is traditional in this industry, there are various delegated lawmaking powers to make ministerial instruments or for the ACCC to issue guidances and all of those things we will be operating in accordance with in due course.

**CHAIR**—There has been some discussion about level 2, which is the wholesale level, and level 3, which is the retail level, and there has been discussion about the requirement for some aspects of level 3 to apply to your satellite and wireless operations but not as a level 3 retailer. Can you explain that position?

**Ms Lovell**—We are possibly not best qualified for that, because neither of us are engineers, but we will give it a go. Essentially our services will be layer 2, but there is some what I think is described as layer 3 awareness in relation to some of the services—satellite and multicasting being another example—and some of our internal network management, the protocols and signals that will be sent backwards and forwards to manage our network, will involve what I think could be described as some layer 3 awareness. Our view is that it is not necessary to try to define all of this in legislation. It would be quite complicated. It is not usual to include those sorts of technical definitions in primary legislation and we are quite clear about what we are supposed to be doing and it has been based on substantive engagement with our potential customers. We think they are pretty clear about what we are providing too.

**CHAIR**—Do you have an ability to go to some of the financial aspects of your business plan?

**Ms Lovell**—No, I do not think that is something that we have come this afternoon to address.

**CHAIR**—Could you take a question on notice, thanks, in relation to the issue Senator Macdonald raised earlier about the cost of NBN and the cost that has to individual taxpayers? I would like you to have a look at what Senator Macdonald has put on record.

**Senator IAN MACDONALD**—Not taxpayers, users.

**CHAIR**—I do not want to verbal Senator Macdonald, but the *Hansard* will have what he has indicated. It is about the cost to the individual and the cost to the taxpayer overall of the NBN. Could you then come back and tell me whether you would want to change your financial forecasts—which are on page 133 of your corporate plan—arising from what Senator Macdonald has raised.

**Ms Lovell**—I am not sure I understand what it is that has been raised that could have an impact—

**CHAIR**—Senator Macdonald has raised costs. Your business plan—exhibit 10.1—shows that by 2033 you will have paid back the funding that has been brought to NBN by government.

**Ms Lovell**—Yes.

**CHAIR**—Could you have a look at what Senator Macdonald has said and see how his proposals change the financial forecasts in exhibit 10.1?

**Ms Lovell**—Could I ask for clarification? What is it that has been suggested? We are not clear about what has been suggested and what the flow-on you are asking about could be.

**Senator IAN MACDONALD**—This is where you multiply \$55 billion. I can give it to you.

**Ms Lovell**—But why are we multiplying \$55 billion by anything?

**Senator IAN MACDONALD**—It is by seven per cent to get your annual commercial return and then dividing it by 22 million, or every man, woman and child in Australia, then seeing what you come up with. I am sure your corporate plan is not that simple—more is the pity—but that is what he is talking about. I am not asking the question—the chair is—but that is what I think he is referring to.

**Ms Lovell**—We are happy to take a question on notice if it can be articulated. We are still not sure what the question is.

**CHAIR**—The report has to be back tomorrow, so you will not have *Hansard*. Could you take this on notice? With regard to exhibit 10.1 in your corporate plan, is there anything that would cause you to change the financial forecasts?

**Ms Lovell**—Such as?

**CHAIR**—Any of your financial forecasts about paying back.

**Ms Lovell**—Are you asking us whether there has been any change to what is forecast in our corporate plan? As far as I am aware, the answer to that is no.

**Senator IAN MACDONALD**—If you did it in December last year I would assume it has not changed, but put your hand up if you believe it.

**CHAIR**—All I am raising is that Senator Macdonald has raised the spectre of the cost to the public purse. 10.1 demonstrates that the cost to the public purse is diminished over time and, by 2033, there is not a cost but a net return.

**Ms Lovell**—The amount of government equity involved in the project and the financial forecast over which that might be repaid is clearly detailed in our corporate plan. As far as I am aware, nothing has changed.

**Senator BIRMINGHAM**—I have a question on the issue of cherry picking. If amendments were made to the bill that had an impact on cherry picking and the share of greenfield sites were Mr Endres spoke of earlier, what would that mean to the returns for NBN Co. and the return on government equity investment?

**Ms Lovell**—That is discussed on page 52 of our corporate plan.

**Mr Endres**—Section 3.2.

**Senator BIRMINGHAM**—If you think that adequately covers it—I do not have it right in front of me. If there is anything you would like to add, please feel free to take that part on notice.

**Ms Lovell**—That is the sensitivity analysis.

**CHAIR**—Thank you both for your contribution. It has been helpful.

[2.53 pm]

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

**HOME, Mr Richard, General Manager, NBN Engagement and Group Coordination Branch, Australian Competition and Consumer Commission**

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

**Mr Cosgrave**—No, thank you. We are here to assist the committee in whatever way we can.

**CHAIR**—Okay.

**Senator BIRMINGHAM**—Thank you very much for your time, gentlemen. We hope for and trust in your assistance, as always. I will ask at the outset whether you have had an opportunity to review some of the submissions and the proposed amendments to this legislation.

**Mr Cosgrave**—In general terms that is correct. We are certainly familiar with the legislation and the proposed amendments and have had a quick look at some of the more major submissions.

**Senator BIRMINGHAM**—We have had discussions with Optus, for example, about how potential amendments could impact on the means by which agreements between NBN Co. and retail service providers are struck, how they are struck and what information is publicly released during that process. Have you had an opportunity to review those amendments in particular?

**Mr Cosgrave**—No. Optus has not shared those with us. I have seen some reference to them in a summary of the evidence Optus gave this morning, but I have not actually seen the Optus amendments.

**Senator BIRMINGHAM**—That being the case, does the ACCC believe that the current legislative requirements in the legislation are adequate to ensure that there is adequate transparency of different arrangements that are struck between NBN Co. and retail service providers?

**Mr Cosgrave**—Speaking in the broadest of terms, we do think that the provisions strike a balance between the general obligation that NBN Co. has to supply services on a non-discriminatory basis and the flexibility to discriminate in circumstances in which discrimination may aid efficiency. That is in the broadest of terms, but I suspect you might want to drill down on that a little bit.

**Senator BIRMINGHAM**—Are there any particular ways you think those broad objectives could be better met than are proposed in the legislation?

**Mr Cosgrave**—None immediately come to mind, but as we work through them there may be matters of detail that we can reflect upon.

**Senator BIRMINGHAM**—Perhaps I can go to a particular issue that has been raised, and that is the question of whether volume should be a consideration of discounted rates or the like that may be struck between NBN Co. and RSPs. Does the ACCC have an opinion, have you been asked for any views or have you undertaken any research on whether volume of sales is a reasonable basis on which discrimination can occur?

**Mr Cosgrave**—Perhaps I can start at a conceptual level around the issue of price discrimination. At its broadest level, it has been the subject of much debate over a number of decades in relation to the Competition and Consumer Act. Obviously volume discounting is a subset of price discrimination more generally. You would be aware that at one time some price discrimination actually fell foul of the Trade Practices Act, the predecessor of the Competition and Consumer Act. That provision was ultimately withdrawn as a consequence of the Hilmer review in the 1990s, when it was recognised from an economic perspective that at the broadest level price discrimination can, to pick up a term used in the act, aid efficiency. So I think a competition regulator would generally take the position that at a conceptual level price discrimination can aid efficiency.

When you go back in this field to some of the access pricing principles the ACCC put out in the early days of the previous regulatory regime, which commenced in 1997, there is a fairly general reflection of that orthodox principle and a fairly general reflection that volume discounts might be something to look at. That said, during the course of the ACCC's role in setting prices during that regime, no party sought to convince us that in setting regulated prices we should seek to differentiate on the basis of volume, and nor have we done so over the 13 or 14 years in which we have had those powers.

Broadly I think we would say, conceptually, we might be able to see where volume discounts could be something you would consider. I do not think we would underestimate the significant information

requirements in convincing us that such discounts aided efficiency or did not have an impact on downstream retail markets. I am differentiating between the conceptual and thinking about the regime that is proposed here, where proposed arrangements would be registered with us and you would presume we would look at them fairly closely, particularly in the early days of the regime. We would want to see some fairly convincing information that suggested to us that such volume discounts did aid efficiency. I should also add that there are other hoops in terms of volume discounts that we are aware of that are contemplated by the legislation. I think they were referred to by the previous witness to the extent that any volume discount has to be consistent with what is put to us by NBN Co. in a special access undertaking which would need to be approved by us.

**Senator BIRMINGHAM**—Is there an example you can give us from that conceptual space of how a volume discount may actually be justified, how it may provide the efficiency that would warrant approval and justification of it?

**Mr Cosgrave**—At the conceptual level we would probably think in terms of an overall competition analysis or efficiency where the volume discount was allied to other factors. We have undertaken, for purposes of preparing ourselves for whatever regime comes, a comparative analysis of some external regimes, domestically and internationally, and have also examined our past practices not only in this sector but across sectors. We are struggling to find an example where we have effectively ticked off on a volume discount by itself. I guess we are saying we would expect in the event that such arrangements were put to us that there would be a fairly high hurdle for people to convince us that they would aid efficiency.

**Senator BIRMINGHAM**—Can I shift to greenfield sites and how they are treated by the legislation. Is there a competition benefit in allowing only NBN Co. to be the wholesale provider in greenfield sites?

**Mr Cosgrave**—I think that is a policy decision that was taken; I do not know that it is an issue we have specifically focussed on from a competition perspective.

**Senator BIRMINGHAM**—Are you able to focus on it at this point in time, Mr Cosgrave?

**Mr Cosgrave**—It comes back to issues around—and this comes up in the so-called overbuild protection provisions—the extent to which you perceive the fixed access network as a natural monopoly. As I say, a policy decision has been taken in relation to greenfield estates. I am not sure the commission has much to add to what I have already said, that we have not focussed on it in depth from a competition perspective. We certainly have made comments around the extent to which we think of the fixed access network as a natural monopoly. That, in turn, influences the extent to which you think various network investments will be efficient investments. That is a broader question.

**Senator BIRMINGHAM**—Has the ACCC looked at all at the situation in Canberra and the relationship between TransACT and NBN Co. where there may be an overlap of services or how this legislation may impede on TransACT continuing even with its existing business model?

**Mr Cosgrave**—TransACT has not made any representations to us in relation to NBN Co.

**Senator BIRMINGHAM**—And you have not been asked for any advice by the government in relation to those issues?

**Mr Cosgrave**—No.

**Senator BIRMINGHAM**—I will turn to one other issue that has been canvassed today and is reflected in the submissions, particularly in Telstra's submission. Telstra highlighted issues around the definition of carriers or carriage service providers and the potential for allegedly open definitions there. It seems many different types of entities have already met or could meet to see a proliferation of potential customers of NBN Co. who are not on-sellers of a product to anyone else. Would the ACCC have a concern if NBN Co. started effectively providing a retail type service as a result of this to large banks, large supermarkets, library services, councils or the like?

**Mr Cosgrave**—There a couple of things about that. I think the first half of your question was a commentary in relation to carriers and carriage service providers. I am not aware of those definitions having been changed from what they are and have been for some time under current legislation. In relation to the second part of your question, where I think you are talking about what broadly I hear described occasionally as mission creep or scope creep, the ACCC has already put a couple of things on the record in relation to that, most specifically on the advice we gave to the government when requested on NBN Co.'s points of interconnection. We reflected some fairly fundamental regulatory orthodoxy there where we said that, firstly, regulation should generally only extend where there is an access problem, an economic bottleneck. It is the



fixed access network that we consider as being the enduring bottleneck in this space. That underpins our approach to where regulation should occur. Secondly, we did reflect, broadly, a concern that the model that was proposed by NBN Co. in relation to points of interconnection had the potential to engage in mission creep. Following that through, our view is that NBN Co.'s mission is and should be around where an economic bottleneck exists. That is a longwinded way of saying that there clearly would be concerns in an expansion beyond being a wholesale-only provider.

**Senator BIRMINGHAM**—Clarifying the first half of the question that I asked, working off Telstra's submission, they highlighted the current types of companies and entities that I mentioned in that question as companies that already meet the definition of a carriage service provider.

**Mr Cosgrave**—But, arguably, that can be an increase in competition. If people are entering the market to become carriers, that is an increase in competition and you would expect, in an NBN environment, there to be a number of new entrants into that space.

**Senator BIRMINGHAM**—If Woolworths meet this definition because they are a mobile reseller who find it profitable and viable to get their own stores, outlets and offices connected by NBN Co. but not to onsell the fixed line service then that would effectively make them a retail customer by clever means of the legislation. Would it not be preferable to have a clear legislative requirement that NBN Co. sell its products to customers who have an intention of onselling them?

**Mr Cosgrave**—I would accept that there are always issues at the margin about whether the provision of services reflects the underlying policy intent of wholesale only. I do not know that it is appropriate for us to comment on the best mechanism for that. What we are saying is: 'Yes, we have a concern if NBN Co. moves beyond what we perceive as its mandate and what we perceive as its mandate is based on fairly traditional competition regulator grounds.' The best way to ensure it does not do that is really a matter for policymakers, not for us.

**Senator LUDLAM**—This might go some way down the track that Senator Birmingham was asking about. He was specifically asking about volume discounts, but I am more interested in whether you have done any formal or informal investigation into a mechanism for NBN Co. to offer price discounts reflecting whatever efficiencies there are. Have you been tasked with coming up with some kind of mechanism via which NBN Co. might make those judgments or against which it might be judged?

**Mr Cosgrave**—The legislation contemplates the provision of guidance by the ACCC. Clearly this is a matter NBN Co. and its prospective customers are all going to be intensely interested in. It is highly likely that we would provide such guidance. We have already started a process of interaction with NBN Co. to, in the first instance, understand their perspectives on it. I have already indicated that we have started a bit of a comparative analysis—not simply around price discrimination but how non-discrimination provisions generally are handled internationally. We would expect, consistent with our ordinary practice, that before we finalised any guidelines, we would put them out for public comment. Given the interest in the issue before this committee, we would expect to get quite some comment.

**Senator LUDLAM**—Is it the intention that such decisions made by NBN Co. would be disputable by third parties—if someone thinks they have made the wrong call on an efficiency or somebody is getting an unfair discount?

**Mr Cosgrave**—Yes.

**Senator LUDLAM**—Those disputes are going to land on your doorstep?

**Mr Cosgrave**—Yes, as I understand the current state of the legislation, there is a requirement that agreements that involve provisions which depart from either the NBN Co. standard form of access agreement or their special access undertaking would need to be registered with the commission. The commission is required to keep a register of them—no more than that—but clearly the commission would also undertake some scrutiny based on its own notion of those provisions. We would think that actually places some incentives, on NBN Co. in particular, in the early days of any legislative regime, to be quite clear about the commission's views on such matters before it enters any such contractual arrangements.

**Senator LUDLAM**—You have already started giving this some fairly serious thought. Did the government ask you to do that or did NBN Co. ask you to do that?

**Mr Cosgrave**—I do not think either of them specifically asked us to do it. I mean, it was clearly a central tenet of the overall policy. It has been clear from a very early stage that the commission was highly likely to be

tasked with a role in relation to non-discrimination provisions, and clearly we have, whatever the final shape of that role, started the preparatory work to arm ourselves to perform that function.

**Senator LUDLAM**—Haven't we just opened up a very slippery slope here? We have said that it must be non-discriminatory, but you can discriminate on the basis of this unformed, undefined concept called efficiency. We may have bought ourselves an enormous amount of work and, potentially, alarm and despondency. Why don't we just have NBN Co. offer the same service to all comers, which is what most people thought would happen?

**Mr Cosgrave**—I guess because it is not an unfamiliar concept in legislation. We already have the concept of price discrimination that aids efficiencies already in the Competition and Consumer Act, in the general access regime in part IIIA.

**Senator LUDLAM**—Are we going to wind up with a Coles and Woolworths retailer situation in the telecommunications space? It does not seem to be working out so well elsewhere.

**Mr Cosgrave**—Is that a comment or a question, Senator?

**Senator LUDLAM**—You could take it as either.

**Mr Cosgrave**—I will take it as a comment, because I am not sure that I see a question there.

**Senator LUDLAM**—Fair enough. Have you taken any advice, or what kind of view have you formed, around how you measure efficiency—efficiency for who? Where are we going to find that? The question that I put right at the beginning of the day, it might have been to Telstra or to Optus, was: in theory, it is more efficient for NBN Co. to have to deal with one large RSP than 50 little ones—is that an efficiency that would give you a discount?

**Mr Cosgrave**—There are a couple of things to say about that. The first I have said already, which is that concepts around 'aids efficiency' are not unfamiliar to the ACCC in terms of access. Secondly, we have already considered those concepts in a number of other sectors such as aviation and railways—albeit I suspect not with the degree of scrutiny that we may get in this sector, so I would not suggest that our analysis in those sectors is as highly developed. What I would expect is that the ACCC will approach the concept of efficiency in the existing legislation in the same way that it does in all its regulatory roles, which is that it will consider efficiency as an economic concept and not a more loosely defined concept. The impact of that is that it is unlikely that we will be looking at what individual parties might see as the efficiencies for their individual business cases as a determinant of whether a particular arrangement aids efficiency. In other words, we are likely to do a substantial competition analysis and we are likely to be highly cognisant and cautious about the impact of any arrangement upon competition in any downstream market.

**Senator LUDLAM**—Are you not balancing something very difficult there, and I presume that this is what you do for living, but don't efficiencies accrue to economies of scale and favour large players over small ones?

**Mr Cosgrave**—You are right, that is what we do for a living. But, again, it is not dissimilar to the sort of weighing exercise you have to do under the statutory test for our current access regime, which requires us to balance up to the promotion of competition with the efficient use of and investment in infrastructure. There is absolutely a weighing-up exercise and it is precisely the sort of exercise that you would expect us to need to follow in this instance. It is exactly why you would expect us to consult broadly around the guidance we give industry on this.

**Senator LUDLAM**—The more we pursue this line of questioning, the more Soviet style command economies start to sound attractive. I will leave it there.

**Senator FISHER**—Why should NBN Co. be exempt from scrutiny by the Standing Committee on Public Works?

**Mr Cosgrave**—We don't have a view on that.

**Senator FISHER**—Are you familiar with the basis upon which the minister wrote to the Governor-General seeking that exemption?

**Mr Cosgrave**—No.

**Senator FISHER**—Would it be a surprise for you to learn that one of the bases, if not the only basis—I am trying to recollect because I do not have a copy of the letter with me—was that NBN Co. would be in competition with other providers?

**Mr Cosgrave**—I have not seen the correspondence and I do not have a view on it.

**Senator FISHER**—If that were the basis of the exemption from scrutiny by the Public Works Committee, on what basis, if any, could it be claimed that NBN Co. would be in competition with anybody?

**Mr Cosgrave**—NBN's principal infrastructure asset will be a fibre-to-the-home asset that, as I understand it, will reach to 93 per cent of the population. I am well aware of the debate around whether these are complements or substitutes, but clearly that network will be in competition with a range of wireless networks, being the most obvious form of competition.

**Senator FISHER**—Isn't the intent of clause 9 of the companies bill to restrict NBN Co. to the provision of wholesale only?

**Mr Cosgrave**—Certainly.

**Senator FISHER**—If that is the effect, how is there any competition at all?

**Mr Cosgrave**—I am sorry; I must be missing the point of your question. Can you repeat it?

**Senator FISHER**—If the intent of clause 9 of the companies bill is to restrict NBN Co. to the provision of wholesale only and if clause 9 of the companies bill achieves that intent, then how can NBN Co. be said to be in competition with anybody anywhere? And how can that be a basis for claiming exemption from scrutiny by the Public Works Committee?

**Mr Cosgrave**—I will not answer the second part of your question, but, as to the first part of your question, competition self-evidently works at a range of different levels—wholesale and retail—and, depending upon the provisions that ultimately emerge from this legislation, there may or may not be wholesale competition for NBN Co. in the fixed-access market. That is still clearly a live question. But there are a variety of other infrastructure providers, particularly mobile infrastructure providers, who I think NBN Co. would see as certainly competing with it for some part of its services and/or market.

**Senator FISHER**—Can you expand on the basis upon which you say there may be wholesale competition?

**Mr Cosgrave**—Again, it depends what arrangements ultimately emerge in this sector, but all I am reflecting is the current state of the sector—that you currently have a copper network and two HFC networks. It is a matter of public comment that there are various kinds of negotiations in play between people as to what might be the future of those networks, but that is what I was referring to. I do not have any more of a crystal ball than anyone else as to the competitive environment that will emerge over the next little while.

**Senator FISHER**—The government obviously thought it did have, or the minister obviously thought he did have, in seeking the Public Works Committee exemption from the Governor-General on this basis. Senator Macdonald, did you want to ask a related question?

**CHAIR**—Senator, I am chairing. Are you finished?

**Senator FISHER**—No, but I thought Senator Macdonald wanted to ask a related question, in which case I was more than happy for him to do so.

**CHAIR**—You finish, and then I will go to Senator Macdonald.

**Senator FISHER**—Okay. What about competition in the provision of retail, Mr Cosgrave? You also referred to that as a possibility.

**Mr Cosgrave**—That is fundamentally, as I understand it, one of the policy constructs upon which the NBN is set to be based, which is that with a ubiquitous fibre to the premises network new retail competition will emerge.

**Senator FISHER**—But did I misunderstand you to be saying that it is at least possible that NBN Co. could be in competition in the retail market with others?

**Mr Cosgrave**—I think you have misunderstood.

**Senator FISHER**—Okay, good. I am reassured by that. Therefore, the only basis upon which, if I understand you correctly, you are suggesting that it could be claimed that NBN Co. would be in competition with anybody anywhere in the new regime is in respect of the provision of wholesale.

**Mr Cosgrave**—What I am putting to you is that the shape of the sector is clearly fluid at the moment. There are a variety of both commercial negotiations and legislative provisions in play that will have an impact upon the shape of the sector. I do not have a crystal ball to see what the outcome of all of those will be. In the absence of that, I cannot speculate as to the competitive environment that will emerge.

**Senator FISHER**—Therefore, implicit in your answer, is it not, is that NBN Co. could end up being a competitor with others?

**Mr Cosgrave**—That is one of a myriad of possibilities, yes.

**Senator IAN MACDONALD**—Following up on Senator Fisher's question, would it concern you if following these publicly reported negotiations which you refer to the NBN did end up as a monopoly fixed line provider in Australia? What would that do to competition principles?

**Mr Cosgrave**—That is an issue that at least in one particular scenario might come to the commission's consideration in the event that Telstra submits a structural separation undertaking to the commission. Given that that is at least a very real possibility and that it is something that we will have to determine in those proceedings, I prefer not to answer that at this stage.

**Senator IAN MACDONALD**—Nothing in this legislation moves our communications system to a situation where there is one monopoly provider.

**Mr Cosgrave**—Is that a statement?

**Senator IAN MACDONALD**—No. I am asking, 'Would nothing in the legislation before us that we are inquiring in to, in your view, move of us towards a situation where we would end up with a monopoly provider?'

**Mr Cosgrave**—No. My understanding of the legislation is that it is to set up the corporate basis on which the NBN Co. will operate and the access arrangements under which it will operate. So the answer to your question is no.

**Senator IAN MACDONALD**—As you see it, subject to the qualification you just made about perhaps having a need to determine this at some time, nothing in this legislation in any way prevents competition at the wholesale level, either for fixed line or wireless.

**Mr Cosgrave**—There are clearly potential competitive impacts from the provisions I have seen described as level playing field provisions.

**Senator IAN MACDONALD**—Sorry, how does that answer that? Could this legislation lead to a situation where there is a monopoly provider?

**Mr Cosgrave**—No, I am saying that those provisions may well have an impact upon investment in the sector.

**Senator IAN MACDONALD**—Is that another way of saying, 'Yes, we may end up with a monopoly provider?'

**Mr Cosgrave**—No, it is not. It is in response to your question that asked whether there was anything arising from this provision—I may be paraphrasing your question—that impacted upon the way in which competition emerged via infrastructure.

**Senator IAN MACDONALD**—My understanding of general announcements that have been made in the general political ether is that it is the government's intention to end up with one monopoly fixed line provider of services in Australia. If that is the intention, does that cause you concern as the competition regulator, and what does it do to competition, for instance?

**Mr Cosgrave**—I am going to repeat my earlier response, which was that that is an issue that may well come before us in a structural separation undertaking. I will also repeat that we have made some statements over the last couple of years that indicate that we do think the fixed access network has significant bottleneck characteristics that tend towards a natural monopoly.

**Senator IAN MACDONALD**—Could the government legislate to exclude your concern about that? I am not saying that you have got a concern, because I hear what you say, but—

**Mr Cosgrave**—I do not know.

**Senator IAN MACDONALD**—It is not in this bill anyway.

**Mr Cosgrave**—Not that I am aware of.

**CHAIR**—Mr Cosgrave, it seems to me that some of these debates are a bit theoretical. The practical situation we have had is that competition policy has not operated well in the telecommunications industry for many years, has it?

**Mr Cosgrave**—The commission's position in successive annual reports made to the Commonwealth on the operation of the access regime is that competition has developed unevenly in this sector. We have seen some successes in the competitive environment largely either where there has been infrastructure investment by mobile operators or where the commission has intervened, say, to promote investment by ultimate providers in DSLAMs using the unconditioned local loop. In our view that has led in some markets, mainly metropolitan markets, to some advances for consumers in the service provision of broadband, but we have consistently expressed concerns about other factors that have impeded competition in this sector.

**CHAIR**—'Developed unevenly' is an ACCC technical term for basically saying that competition has not worked out well in a whole range of areas.

**Mr Cosgrave**—In some areas it clearly has not worked well. We are on record expressing concerns around the operation of the access regime that we had for 12 or 13 years and that is currently being amended. We have been on record incessantly about that. We have been on record consistently expressing concerns around structural issues within the sector. I am trying to simply balance that by saying that we do not think it is entirely a one-way street, that we have seen some competitive benefits accrue, partially at least, we believe, through regulation of the unconditioned local loop service in particular. We have seen some successes in DSL markets that we do not think would have been there without that intervention. I am simply trying to balance it up a bit there. Certainly, we are not saying—and we have not said—that this sector is a competitive panacea by any manner of means.

**CHAIR**—Isn't there a long history in both Australia and many—if not most—other countries that where there is a market failure and government moves in to do something about that market failure that obviously means a monopoly in terms of service provision? That is the history of building utilities and government services for as long as I have been able to read about it.

**Mr Cosgrave**—I am not going to particularly debate with you appropriate policy mechanisms for market failures but clearly there has long been, I think, a bipartisan view that this is a sector where there has been market failures and I do not think—here it is tripartite, and my apologies to Senator Ludlam—I do not think there is any dispute that this is a sector where there has been a continuing requirement for intervention at either a structural or an access level.

**CHAIR**—I refer to this uneven development that you spoke about earlier. That uneven development included the vertically integrated Telstra, didn't it?

**Mr Cosgrave**—Indeed. We are on record for many years expressing concerns around both Telstra's vertical integration and level of market power within the sector.

**CHAIR**—If that vertical integration is dealt with in the coming period and we are left with a dominant wholesale supplier providing a very competitive retail sector, surely that is a better proposition than having a vertically integrated dominant player who cannot or will not supply the requirements of the nation?

**Mr Cosgrave**—I do not want to get into a qualitative assessment of the policy. I do not think that is appropriate for a regulator. I would simply say that the ACCC does perceive circumstances under the current policy where you have not only different and potentially more vibrant retail markets but also emerging downstream wholesale markets; in other words, markets downstream from the layer 2 service that is the service NBN Co. are principally going to provide. We are interested in promoting competition at both of those layers.

**CHAIR**—You did say earlier, in response to a question from Senator Birmingham, that you could balance competition with the efficient use of infrastructure.

**Mr Cosgrave**—That is the current statutory test. It is still the statutory test.

**CHAIR**—If that statutory test were applied to NBN Co., wouldn't that be a balance of competition with the efficient use of the infrastructure that NBN Co. is rolling out?

**Mr Cosgrave**—Again, I do not want to go too far with this at the present time because one of the factors, depending on Telstra ultimately bringing forward a structural separation undertaking and depending on what guidance we give in relation to that undertaking, that we may have to judge concerns issues around efficient use and investment in infrastructure. So I would prefer to leave that for the present time.

**CHAIR**—I want to try to clarify this. I think there still is some confusion by the questioning that you have had today in relation to NBN Co. and its activities in the retail area. Obviously, you have looked at the legislation.

**Mr Cosgrave**—Yes.

**CHAIR**—And, obviously, you are well aware of the powers of the ACCC. Given the ministerial direction, given this issue of exemptions and given the ACCC position, is there not a fairly robust set of checks and balances against NBN creeping into the retail area?

**Mr Cosgrave**—There is certainly a significant policy intent, as I understand it, that NBN Co. act as a wholesale-only operator. The ACCC perspective, as I have indicated in advice we have given to the government, is that that is appropriate; that it should be a wholesale-only operator.

**CHAIR**—Yes. And you spoke earlier about fundamental regulatory orthodoxy. Is that what still applies to NBN Co.? It is not anything different from a fundamental—

**Mr Cosgrave**—As I said, if your view is that the fixed-access network is an enduring bottleneck—and the commission has expressed some views that would support that—then a policy response that seeks to address that access bottleneck would be consistent with what the commission has put.

**CHAIR**—Yes. Thank you very much Mr Cosgrave—I note it is ‘Cosgrave’ not ‘Cosgrove’.

**Mr Cosgrave**—Thank you—I appreciate that! That makes you one of about 10 per cent who get that right.

**CHAIR**—And thank you Mr Home for you contribution.

[3.41 pm]

**MASON, Mr Philip, Assistant Secretary, Department of Broadband, Communications and the Digital Economy**

**QUINLIVAN, Mr Daryl, Deputy Secretary, Department of Broadband, Communications and the Digital Economy**

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

**CHAIR**—I welcome Mr Daryl Quinlivan, Ms Pip Spence and Mr Philip Mason of the Department of Broadband, Communications and the Digital Economy—thanks for being here today. Do you wish to make a brief opening statement before we go to questions?

**Mr Quinlivan**—I have got a few comments I would like to make about the main issues that appear to have been raised with the committee. I will not take too long over those, if you are happy for me to read those?

**CHAIR**—Yes.

**Mr Quinlivan**—The bills add to the general obligations on NBN Co. as a carrier under the Telecommunications Act and the Competition and Consumer Act, so it needs to be seen as part of a broader regulatory framework that applies to the company. It adds to the policy framework the government has provided through the statement of expectations and a variety of other documents which are familiar to the committee, and which are reflected in the company's corporate plan which has been discussed here over the last hour or so. I just want to go over a few of the main things that we think have been contentious and to provide some of our perspectives on those.

The first one is that some submissions have raised concerns about possible mission creep and NBN Co.'s temptation to move upstream into retail services. The concern is that some companies may become carriers and not provide services to the public, but that they nonetheless will be able to purchase services from NBN Co. because they hold a carrier licence for their own internal consumption. It is worth noting that this outcome is dependent on decisions of would-be customers, not those of NBN Co., and are therefore likely to reflect those customers' views of the services that are on offer from the retail market at that time. Since 1997 the Telecommunications Act has not sought to restrict any person from becoming a carrier, nor has it sought to require a carrier to supply to the public. On the contrary, it has encouraged entry to the market with the wider benefits that this can bring.

However, the costs and inconvenience to an organisation of becoming a carrier should not be underestimated. In this case, it would include purchasing equipment to transform NBN Co.'s basic connectivity services into services that it could use for its own telephony, internet and other services. They would also include regulatory obligations, such as requirements to provide the security and law enforcement agencies with plans and assistance, paying the universal service levy and annual carrier charges and providing access to facilities and services for other end users—retailers. If a company finds it more efficient to take on these costs than to purchase from existing retail service providers then the law, as it has stood since 1997, does not stand in its way, and the government has not sought to change this.

There have also been comments on the provisions in the NBN Companies Bill that would allow NBN Co. to supply services directly to specified utilities. Telstra, in its submission to the committee, says that this compromises the government's policy that the NBN will be a wholesale only network. The exemption in the NBN Companies Bill addresses the fact that utilities are currently exempt from classification as carriers and carriage service providers under the Telecommunications Act, even though they may in fact be acting as such. The bill simply seeks to allow NBN Co. to treat them as carriers and carriage service providers when it comes to the supply of services. These provisions support arrangements that promote economically efficient outcomes.

The Energy Networks Association and Competitive Carriers Coalition have made it clear that the types of services that utilities want are not currently provided by retail providers. Access to the NBN in this context is attractive to utilities because of the ubiquitous nature of the network and the fact that it could help to reduce their own infrastructure costs. The submissions from Smart Grid Australia and the Energy Networks Association note that direct access to the NBN will deliver synergies between the rollouts of the NBN and

utility infrastructure and promote the growth of smart metering and other remote information management technologies.

The proposed legislation makes it clear that the sole use of a service supplied by NBN Co. is to carry the communications necessary or desirable for the utility's internal services. Utilities cannot use these services to provide retail services to end users and they will still need to purchase normal communications services from retail providers. Some submissions have raised concerns about NBN Co. supplying services higher than layer 2. NBN Co.'s corporate plan and the government's statement of expectations set out that NBN Co. is to operate at layer 2 of the network stack. NBN Co. has indicated, however, that some limited layer 3 awareness of functionality—for example, for multicasting—will be necessary. I think NBN Co. took questions on that earlier this afternoon. Telstra acknowledges this in its submission. So there are technical exceptions to a general policy and company rule.

The government recognises that powers are needed to ensure that NBN Co. does not engage in mission creep. To this end, the proposed section 41 of the NBN Companies Bill makes it clear that the minister may, by disallowable instrument, impose a condition on NBN's carrier licence restricting it from supplying a particular service or requiring it to supply a service.

Turning to the NBN access bill, the proposed level playing field requirements have attracted attention. The provisions are complex but the policy objective is simple: to allow a complete network to be created, covering urban and rural areas and profitable and unprofitable markets with no breaks of gauge. The requirements are to simplify the making of industry codes and standards in relation to fibre infrastructure and services and to ensure that once the codes and standards are made new fibre networks are consistent with the technical specifications of the NBN. They provide that where a new fixed line telecommunications network is built, altered or upgraded after 25 November 2010 so that it is capable of supplying superfast carriage services—that is, download speeds of normally more than 25 megabits a second—it must supply a layer 2 bit stream service. They apply access rules to the layer 2 bit stream service based on those applying to NBN Co., particularly the discrimination requirements relating to volume discounting in accordance with a special access undertaking and variations from a special access undertaking or access determination needing to be lodged with the ACCC for publication. Again, that was discussed with the commission recently. The minister can also exempt specified carriers or network units from these obligations.

The government announced on 20 December 2010 that it would amend the NBN access bill to require new optical fibre networks for residential and small business users to be wholesale only. These requirements do not prevent other companies from rolling out fibre networks. They do require competitors to mirror NBN Co.'s operations or match its terms and conditions. They do not require them to operate within a comparable regulatory framework so that end users have access to the same quality services regardless of the network provider.

The provisions also mean that companies cannot target lucrative markets while leaving the challenging, high-cost and low-revenue segments to NBN Co. without facing comparable regulatory requirements. This will ensure that NBN Co. can deliver its objectives, particularly uniform national wholesale pricing and a rural network. The wholesale only requirement addresses the current bottlenecks which plague last mile customer access networks where vertically integrated service providers can exploit their market position to hinder market entry and competition. For example, some providers of fibre networks in new developments have locked end users into a single retail provider and do not offer wholesale services.

More generally questions have been asked about whether the drafting of provisions is fully aligned with the policy intention set out in the bill's explanatory memorandum, which makes clear that the focus is on mass market networks. The government has been consulting industry and is considering whether amendments are required to clarify the operation of the provision.

Finally, there are concerns that the non-discrimination provisions in the NBN access bill could advantage the largest retail providers. Some have suggested that volume discounts should be prohibited or that any form of discrimination that aids efficiency should be prohibited. Discrimination based on efficiency grounds has long been recognised to promote efficiency and innovation. Price discrimination that aids efficiency is permitted under the general access regime of the Competition and Consumer Act as well as the telecommunications specific access regime in Part XIC. However, it is also recognised that regulatory oversight is required because price discrimination can enable a firm to exercise market power. The tension between these two considerations has been a perennial issue in telecommunications, as you have noted this



afternoon, and the government has sought to achieve an appropriate balance in the interests of all stakeholders in the NBN access bill and the process envisaged in that bill.

The default position in the legislation is that NBN Co. must offer the same terms and conditions for all access seekers. However, it would be permitted to discriminate on limited and generally accepted grounds such as credit worthiness or discrimination that aids efficiency. Any discrimination based on efficiency can only be offered by NBN Co. if all access seekers with like circumstances have an equal opportunity to benefit from the varied terms and conditions. The bill provides for strong ACCC scrutiny and a very high level of transparency. Under the rules, all access agreements NBN Co. signs with its customers must be lodged with the ACCC. If NBN Co. signs an agreement with different terms from the standard terms it must advise the ACCC and the ACCC must publish the agreement on its website. This transparency will help other access seekers know whether they are in like circumstances. NBN Co. cannot offer a volume discount unless it is in accordance with arrangements set out in a special access undertaking which has been approved with the ACCC. This will ensure that all of industry will have an opportunity to comment on any volume discount proposals and ensure that any volume discounts determined up front by the ACCC do not have an adverse impact on competition and aid efficiency. NBN Co. will need to decide whether to include volume discount arrangements in its SAU and I presume it is doing that at present. The ACCC has a long history of making decisions about price discrimination in other wholesale access regimes. ACCC inquiries have been conducted in the railways, energy and airport sectors.

**Senator FISHER**—Chair, could we asked Mr Quinlivan to table his opening statement? I think it would help with the efficiency of questions.

**Mr Quinlivan**—I am happy to do that.

**CHAIR**—Only if it is in a condition you feel comfortable with should you table it. Senator Fisher, I am sure you will be able to start without the statement in front of you.

**Senator FISHER**—Mr Quinlivan, in your opening statement you talked about the utilities and the basis of the exemption. I heard you refer to a number of the grounds supporting the retention of that exemption, effectively, for example by energy networks and others. Are there any reasons beyond those putting the submissions to this inquiry thus far that you would nominate in support of continuing the exemption, or is that the full gamut?

**Mr Quinlivan**—I am not aware that we have had full exposure to all the submissions, but they were the main points that we wanted to make and the main points that we understood that particular group of stakeholders had made.

**Senator FISHER**—So they are already exempt, and you talked about a utility not being able to on-provide or acquire the services from NBN and then provide them to the public. That is what I thought I heard you say.

**Mr Quinlivan**—The utilities, as I understand it, are prohibited from acquiring a carrier licence, which means they are in a different situation to the Woolworths example we were using earlier.

**Senator FISHER**—Yes, but how does that prohibit them from on-providing to the public?

**Mr Mason**—Basically the provisions in the legislation limit the utilities to use those services for the administration monitoring of their networks.

**Senator FISHER**—The services they get via the exemption provisions.

**Mr Mason**—The services they would acquire from NBN Co. if they did acquire services from NBN Co, yes. They are limited in the purposes for which they can use them. They can only use them in relation to the administration, operation and monitoring of their networks. It is fairly consistent with the language in the Telecommunications Act at the moment as to why utilities get exemptions from being carriers. Can I clarify that the issue with the existing legislation is that utilities for historical reasons are generally exempt from carrier licensing requirements because basically they pre-existed the current framework. So when the legislation was put in place in 1997 those kinds of exemptions were grandfathered over so they can operate those kinds of facilities without having carrier licences or having to be carriage service providers.

**Senator FISHER**—So you are adding a historical justification.

**Mr Mason**—No, I am simply explaining the way the legislation works. We have reflected that in these exemptions. An electricity operator could actually seek a licence if it had to or it wanted to, but that is a separate exercise. In terms of additional justifications—

**Senator FISHER**—Let me take that point. If it were to, what is your view beyond what Mr Quinlivan has said of Optus's suggestion amendments that say that a carrier licence should stipulate that the licence can only be given effectively if the services provided are then on-sold to the public.

**Mr Mason**—Those Optus provisions are not consistent with the policy framework which the bill seeks to implement. We have looked at them carefully, we understand how they work, but it is not really consistent with the policy framework.

**Senator FISHER**—So what would be the operational implications of those amendments?

**Mr Mason**—The operational implications of those amendments would basically change the way the Telecommunications Act works in relation to the definition of a carrier, because at the moment a carrier is somebody who seeks that authorisation, takes on those responsibilities and can use the services it acquires to supply to the public or to itself—or to another person in the industry even, so not necessarily to the public as it would be generally understood.

**Senator FISHER**—So you take issue with those who make the contention that it is kind of implied that the licence is provided for on-selling to the public even though it is not expressly so provided.

**Mr Mason**—I think the legislation in the Telecommunications Act is fairly clear that you can get a carrier licence and not have to on-supply to the public. I am happy to be corrected but that is my understanding. Could I add that, in relation to the benefits that utilities could derive from having access to NBN Co., there were additional arguments put by Energy Networks Australia which we thought had a fair strength behind them, particularly in relation to the synergies that could be derived from making use of NBN Co. facilities and the scope for retailers to add value in the margin that that would entail for them.

**Senator FISHER**—What are some examples, in your view, of services that the utilities could acquire directly from NBN Co. that either are not available or would not be able to be made available by retail service providers?

**Mr Mason**—Those questions are probably better addressed to the utilities. Basically, for NBN Co., it is in the public domain that it will provide a basic layer 2 service. That would be the service that utilities would acquire from it and make use of as they need to. It is a basic connectivity service. People downstream can transform it and make use of it as required. I am not quite sure. It is a fairly basic service.

**CHAIR**—Just so you understand, Energy Networks Association have made substantive submissions on this issue. As to what you are saying about it, they have already made substantive submissions on this.

**Mr Mason**—I was just indicating that they seem to be valid arguments from our perspective.

**Senator FISHER**—Is the policy underpinning the exemption for utilities to allow them access to the services they need at a cheaper price or is it to ensure that they have access to the services they need?

**Mr Mason**—The rationale for it is that they have access to the services.

**Senator FISHER**—So it is driven by the nature of the services they say they need and not by money?

**Mr Mason**—Fundamentally, yes.

**Senator FISHER**—Right.

**Mr Mason**—Mr Quinlivan has pointed out that it is both, but there is the question of getting access to the service prima facie as opposed to what price is paid for it. I was going to say that there is nothing in the legislation that precludes—in fact the legislation provides for it—intermediaries acquiring the services from NBN Co. and resupplying them to utilities as well. I think that was the point that ENA was making last week.

**Senator FISHER**—Therefore you are suggesting that you are obviously contemplating a scenario where retail service providers might well be able to provide the services required by utilities were they given the opportunity.

**Mr Mason**—They would have the opportunity because NBN Co. is to operate on an open-access, non-discriminatory basis.

**Senator FISHER**—In theory, yes. But, in practice, once the exemptions are provided it gives the utilities, arguably, a leg-up by directly having access to NBN Co. Therefore, even whilst a retail service provider would be a competitor if they could be, in theory and in practice how could they be? In practice, how would that happen, given the leg-up to the utilities by the exemption—or the leg-up given to NBN Co., really?

**Ms Spence**—One observation is that NBN Co. is limited in what it is the utilities are actually purchasing from NBN Co. So you can envisage a situation where the RSP can come up with a more innovative bundle of products so that they are providing the basic connectivity service that the utility could purchase directly from NBN Co. along with something to provide the internet and telephony services the utility wants. In some ways this is creating scope for RSPs to be more innovative in the nature of the services that they are offering to the utilities, giving the utilities a choice to buy the direct basic service from NBN Co. plus another product from an RSP or going to the RSP and getting an interesting new service which meets their needs.

**Senator FISHER**—But, Ms Spence, didn't your answer just concede that the RSPs would be, in principle, in competition with NBN Co. in respect of the provision of the basic service to utilities?

**Ms Spence**—Not in competition with the NBN Co., because NBN Co. has to provide the same price and same product to the utility.

**Senator FISHER**—I guess it is dancing around the semantics really, isn't it? I think we can probably agree to disagree in that respect. Can you confirm something. I understood Mr Mason's answer about the Telecommunications Act earlier to be saying that, for example, if a bank or a retailer could not get a licence as a provider they could then use a carrier licence to obtain the services directly from NBN Co. for internal use and so basically there is an indirect route to exemption by getting a carrier service provider licence. That is at odds with evidence we heard from other witnesses today.

**Mr Mason**—Any entities such as you describe, like a large bank, retailer or any other enterprise, could apply for a carrier licence. If they meet all the requirements they could obtain a carrier licence and, yes, NBN Co. could supply to them. But, as Mr Quinlivan pointed out in the statement, while that process in itself seems simple enough, there are significant obligations that follow with it.

**Senator FISHER**—What could they then do with the services acquired? That is my question.

**Mr Mason**—They could use them for internal consumption, as they can now.

**Mr Quinlivan**—Or on sell.

**Mr Mason**—Or supply to other people in the industry as a wholesaler.

**Senator FISHER**—Why does a smart grid require the NBN?

**Ms Spence**—That is probably a question better directed at utilities than broadband.

**Mr Mason**—I was going to say that, in the opening statement, Mr Quinlivan pointed to the ubiquity of the NBN. Obviously those premises have electricity as well, so the NBN potentially provides a platform that utilities could use for that kind of functionality. I think the important thing to say is that what the legislation is doing is providing that option for the utilities. It is not actually saying utilities need to use the NBN or will use the NBN, but it provides that option.

**Senator FISHER**—How big do you consider the market is for the provision of network services to utilities? How big has it been, how big is it today and how big could it be in five years time? And why shouldn't Telstra and Optus, for example, have access to that market?

**Ms Spence**—I just make the observation that Telstra and Optus still can have access to that market by selling on products based on an NBN Co. one. There is nothing precluding them from entering into that market.

**Senator FISHER**—Except NBN Co. get the leg-up to get in their first, arguably.

**Mr Quinlivan**—I think we are looking at this from the wrong angle.

**Senator FISHER**—That is what I am saying. We might have to agree to differ because it depends—

**Mr Quinlivan**—We are really talking here about judgments that in this case utilities make or, in a different context, that companies make about the best way of acquiring their services and operating—

**Senator FISHER**—So that is why you said in your opening statement something about it not being an NBN Co.—

**Mr Quinlivan**—That is right. All that NBN Co. is doing is offering a basic network. We are talking here about the choices people make—whether to do things themselves or to do them via specialised intermediaries or responsibilities—to best serve their needs. The exemption for utilities is designed to leave that option open and to enable them to make judgments themselves about the best way to meet their needs. It does not provide NBN Co. with any leg-up or preferences at all.

**Senator FISHER**—I guess that is if you accept at face value your contention that the exemption is driven by the nature of the services required and not the price at which they are acquired, because it is the latter of which you can argue has given NBN Co. a leg-up.

**CHAIR**—Senator Fisher, that is not what was said.

**Mr Quinlivan**—Taking the point that Ms Spence made earlier, if a retail service provider is able to provide a service at a competitive price that has lots of features that are not otherwise available through an internally sourced product then obviously the utilities would be very attracted to it. It is not just price; it is the quality of service and what is the most useful product for the utility company. That is the question they will be seeking to answer.

**Senator FISHER**—And at what price. I do not have any more questions on this particular area. I have got other questions, though.

**CHAIR**—Senator Ludlam.

**Senator LUDLAM**—I will be brief because I think most of my questions have been asked. We took some evidence earlier in the day from the Internet Society that was quite critical about embedding Ethernet, for example, in the legislation because that is going to be a legacy technology sooner or later. I am not sure whether you were here, but have you read their submission and would you take that on board?

**Mr Quinlivan**—We have seen a reference to the evidence given. I do not know that we have got a view just yet.

**Mr Mason**—It is an issue that we are looking at more closely. There is reason to provide some specificity so that there is certainty in the sector, but there are also arguments for flexibility.

**Senator FISHER**—Is it programmatic? I didn't say that!

**Senator LUDLAM**—You did say it; *Hansard* will show that you did!

Okay, so you are not necessarily wedded to the language that is there at the moment that nails us down to having to amend this thing every couple of years as the technology turns over, which I thought was a point that they made quite well.

The cherry-picking provisions are the only issue of mine that has not been addressed so far in other questions. We have heard a couple of very different views on this today. Telstra proposed to just abolish them all together. NBN Co. have said it is going to cripple their business model, according to the numbers they provided. How do you respond to somebody like TransACT? They still seem to be a bit stranded and a bit uncertain as to how this issue is going to affect them.

**Mr Quinlivan**—I guess the general policy principle, as I mentioned at the outset, is that the government sees NBN Co. building a complete national network, which means covering everybody in one form or other, including the unprofitable parts of the network, and therefore it needs some protection so that anybody who is wanting to build out the lucrative parts of the network first has to operate under exactly the same terms and conditions. It also is important, from a rollout point of view, that NBN Co. has confidence that those arrangements are in place from the outset, otherwise naturally its rollout will start with the most lucrative parts of the network and build out, rather than in a more—

**Senator LUDLAM**—I am comfortable with that.

**Mr Quinlivan**—That is the overall policy principle. So it is designed to achieve an outcome, not to punish anybody. That is important to acknowledge. It is not targeted at TransACT or any one party. We are aware of TransACT's concerns and we are having a look at them.

**Senator LUDLAM**—This could all be upon us very quickly. I am not sure that they were feeling targeted; it was more that they were feeling like they were in the path of something that was moving very quickly.

**Mr Quinlivan**—Yes. We understand that.

The **Senator LUDLAM**—All right. I will come back later, Chair, if there is time.

**CHAIR**—Mr Quinlivan, the submission from the Energy Networks Association said that they saw the utilities exemption as extremely important. Just so we get the record straight, what they actually said was:

Maintenance of this exemption is very important to the ability of electricity and gas network businesses to meet 21st century expectations around affordability, reliability and quality of energy supplies.

From the department's point of view, is that a reasonable proposition from the ENA?

**Mr Quinlivan**—I think the general principle we are looking to follow here is that we are allowing them choices in how they best meet their needs. The mechanism that we have in the bill is designed to achieve that, and it sounds, from that quote and the evidence they have given, as though they believe it does provide them with opportunities to achieve efficiencies in their business, and that is a good thing. That is what the NBN is all about.

**CHAIR**—They also argued that amendments 5 and 6 to the bill would have the effect of deterring energy network businesses from using the NBN. Are you aware of that?

**Mr Quinlivan**—I assume you are referring to the opposition amendments.

**CHAIR**—Proposed opposition amendments 5 and 6. They say:

The Federal Opposition's proposed amendments 5 and 6 to the Bill may have the effect of:

- deterring energy network businesses from using the national broadband network (NBN) ...
- Would you have that view?

**Mr Quinlivan**—That is our understanding of what those amendments would achieve, yes.

**CHAIR**—They also argue that the opposition's amendments would be:

- encouraging socially inefficient duplication of communications infrastructure ...

**Mr Quinlivan**—I do not know about the latter part, but certainly the government has indicated that it does not support those amendments. The reason, as I said, is that it wishes to leave opportunities open for the utilities to make their own choices about how they manage their affairs and how they use the network.

**CHAIR**—We have had long debates here today about scope creep. What do you see as the checks and balances against scope creep by NBN into layer 3 operations?

**Mr Quinlivan**—I probably have not really got anything to add to the evidence that NBN Co. provided earlier about the clarity of the government's policy and instructions to the company, the regime envisaged in the bill and the fact that the company's own policy and operation are designed around the layer 2 product with some very limited uses of layer 3 services for essentially technical and management reasons, not for commercial reasons.

**CHAIR**—I am asking you about the legislative checks and balances against NBN moving to a layer 3 approach.

**Mr Mason**—In the bill at proposed section 41, from memory, there is provision for the minister to make licence conditions to deal with those kinds of things: what services NBN Co. could supply and not supply. So that is a mechanism that can be brought into effect if there is a demonstrated need for it. It is a method that has been used to put requirements on carriers for many years.

**Senator FISHER**—In the view of some, NBN Co. management has hinted at some intention to mission-creep and to pursue a broader role than that encompassed and that you have just reassured Senator Cameron is implicit in the legislation.

**Mr Quinlivan**—I am not sure what you are referring to.

**Senator FISHER**—I am just about to ask it actually. Do you think that the actions and/or strategies of NBN Co. to date in any way hint that the management are inclined to mission-creep?

**Mr Quinlivan**—I think the management is very focused on rolling out the network and solving the problems inherent in that. That is very much a full-time occupation.

**Senator FISHER**—So they are focused on the last mile.

**Mr Quinlivan**—They are focused on the network as a whole: the satellite services, the wireless services, the fibre rollout and all of the commercial instruments and agreements that are necessary to give effect to a business based on that network. It is a very large enterprise, as you know—

**Senator FISHER**—Indeed, large and ambitious in the view of some.

**Mr Quinlivan**—and I think mission-creep is the last thing on their minds.

**Senator FISHER**—I refer to the privatisation provisions. Why would a business entity like NBN Co., which has 100 per cent ownership, bother with innovation or anything to drive change in the future?

**Mr Quinlivan**—I think the government is confident that it has chosen a very good board and has a world-class executive team who are very focused on rolling out the business and the network successfully. They are

having to solve a very large number of novel problems, ones that have not been solved in Australia or elsewhere, in doing that. Innovation and creativity are absolutely essential to that. So we are confident that for the period of the rollout at least there is a huge imperative for innovation and creativity. Once we are in a steady-state situation with the rollout essentially completed—I concede your point—a different set of incentives could begin to influence the company's behaviour and that is why the government envisages a very close look at different ownership arrangements at that time.

**Senator FISHER**—Some think—and we heard from one of them today—that the privatisation provisions should, essentially, be able to be made more prescriptive—for example, by a minister having discretion. But there are plenty of others who think that the privatisation provisions are very restrictive and onerous. To that end, what is your view of the likelihood that the NBN Co. will be privatised? Could it not be argued that the provisions are so onerous as to justify NBN Co. never being privatised?

**Mr Quinlivan**—That would be a policy decision for the government of the day to make at that time. I draw your attention to the central role of a review by the Productivity Commission before a decision is made, which would be designed to make sure that if privatisation were to occur a contemporary and effective set of regulatory arrangements could be put in place so that we were not simply privatising a natural monopoly without making sure that the ongoing public interest was looked after. Basically, it would be a judgment for the government of the day.

**Senator FISHER**—In that scenario—that the Productivity Commission were to ensure greater ability for privatisation—then necessarily their recommendations would have to be towards liberation rather than further restrictions, surely.

**Mr Quinlivan**—A lot of things could happen in the telecommunications market between now and that time. It is interesting speculation, and I am sure it will be a hotly contested question at the time if indeed a government then decides to proceed with privatisation.

**Senator FISHER**—We have attempted to learn from some of the stakeholders what impact the cherry-picking provisions will have on them. What effect do you think the anti-cherry-picking provisions will have on the opportunities for non-NBN players to roll out fast broadband networks?

**Mr Quinlivan**—It is clear that the arrival of the NBN, and both the very large new investment that will be going into fibre networks now and the provisions in this bill, will change the commercial environment in which these companies are operating. Clearly, there will be a lot more construction work but fewer options for companies in the way in which they invest in the future. That is an explicit part of the policy arrangements to achieve a national, uniform network.

**Senator FISHER**—So there will be less incentive and less ability for non-NBN companies to compete, basically, in the provision of that part of the infrastructure.

**Mr Quinlivan**—I think the company particularly is looking for vigorous competition in rolling out networks on its behalf, under its specifications—

**Senator FISHER**—Neat answer!

**Mr Quinlivan**—and in accordance with the uniform regulatory requirements. If people can meet those, that is terrific.

**Senator FISHER**—Why will the requirement for technology used by non-NBN networks to be technologically similar to NBN's not tend to stifle technological investment? Is it not essentially a policy decision to pick a winner—not pick winners but just pick the NBN as the winner?

**Mr Quinlivan**—I used to work in railway policy, Senator—

**Senator FISHER**—Was that as good as what you are doing now? Surely it was not as much fun?

**Mr Quinlivan**—The break-of-gauge problems—and it is the same in the road transport sector where there are different rules in different states and so on—are a huge problem. That is an overriding objective in the arrangements that have been crafted here.

**Mr Mason**—I think this is an area where there have been some misunderstandings. The legislation actually provides for the ability for codes and standards under part 6 of the Telecommunications Act to be expanded so we can more readily have codes and standards made in relation to matters dealing with fibre rollout—for example, the installation of pit and pipe and the configuration of customer access networks. In that framework, NBN Co. could put forward its specifications for general acceptance across the industry, that could be adopted

and there could be flexibility within that framework. That is actually what the legislation provides for. I note that there have been comments that everything will have to meet NBN Co.'s specifications. I think the language we actually use is that everything would have to be consistent with NBN specifications—there is a subtle but important difference.

**Senator FISHER**—In respect of the requirement for non-NBN networks to provide access to retailers on the same terms as the NBN, what impact do you expect that to have on those would-be investments by non-NBN players? Why would they do it? What is it going to do to their return on investment?

**Mr Mason**—Can I clarify something? You said 'on the same terms and conditions as NBN Co.'; there is nothing in this bill that requires that. As Mr Quinlivan said, the arrangements are that the people who operate those facilities would need to operate within the same kind of regulatory framework—for example, they would have to put in an SAU and not discriminate.

**Senator FISHER**—So it is the access that is the same terms and conditions is it?

**Mr Mason**—It is the regulatory requirements. They can still set their own prices, subject to ACCC oversight. I think this came up in the House debate. There were some statements to the effect that everyone would have to do the same thing as NBN Co., but that is not the case. It is not to create a totally uniform system; it is to ensure that if there are competing networks—or there are networks in those localities; I qualify 'competing' because, as you know, in that local access network it is fairly much a monopoly in a practical sense—there are comparable outcomes on those networks.

**Senator FISHER**—All right, I will think about that clarification. Do you think there is any prospect that those aspects of the bills can delay rollout?

**Mr Mason**—Delay rollout by other providers?

**Senator FISHER**—Of the NBN—in terms of there being a contest to provide services or access. I take your point that there is not a requirement for mirror. Maybe not; maybe it is jumping at shadows?

**Mr Mason**—I think, as Mr Quinlivan has pointed out, those provisions have been put in place to ensure, amongst other things, that NBN Co. operates on a level playing field, so people will take that consideration into account. The bar set for NBN Co. is quite high—it is to be a wholesale only, open access, non-discriminatory company, and that is what the legislation provides for in relation to other people who may enter those markets.

**Senator FISHER**—So that is a no?

**Mr Mason**—No, that is my answer—sorry.

**Senator FISHER**—My final area of questioning is around freedom of information and public works. Why should NBN Co. be exempt from FOI requests that other agencies have to deal with? If it is commercial-in-confidence, how is NBN Co. in competition to justify that ground?

**Mr Quinlivan**—I think the first point is that NBN Co. is not another agency. It is an incorporated company and other incorporated companies are not subject to the FOI act.

**Senator FISHER**—Mr Quigley said it is a GBE. Are other GBEs subject too?

**Mr Quinlivan**—My understanding is that there is only one incorporated company which is subject to the FOI Act and that is Aboriginal Hostels but it is not a GBE. My understanding is the answer is no. That is the circumstance in which NBN Co. was not subject to the FOI Act. Obviously there have been other developments in the parliament which look as though they will change that but the origins of it were not a matter of deliberate policy by the government, just simply the historical operation of the FOI Act, but it does not apply to incorporated companies.

**Senator FISHER**—So commercial-in-confidence is not part of the justification?

**Mr Quinlivan**—The point I am making is that there was in a sense no explicit justification. It is just that the operation of the FOI Act was limited and did not extend to incorporated companies and so did not extend to NBN Co.

**Senator FISHER**—So you see it as not extending to NBN Co. rather than it being excluded?

**Mr Quinlivan**—The government did not make the decision—to exclude NBN Co.; it made a decision to establish it as an incorporated company and under the law that applies now it is, therefore, not subject to the FOI Act.

**Senator FISHER**—Correct me if I am wrong: has the minister not justified NBN Co. keeping its activities secret in terms of FOI on the basis that they are commercial-in-confidence? How can it be, given that competing networks and technologies will be prevented from competing with NBN Co. and surely after the Telstra deal, for example, is hammered out?

**Mr Quinlivan**—That is a different issue. You are now asking about the policy logic behind acceptance of an amendment to the FOI Act or some other legislation which creates coverage of the FOI Act over NBN Co. and the way in which that might be limited, the logic behind it and so on. That is an issue the government and the Greens have been discussing in the context of amendments to the FOI Act. That is not the origin of NBN Co. exemption from the FOI Act; that is an argument about extending the reach of the FOI Act over NBN Co. and the form in which that extension happens.

**Senator FISHER**—What do you think of that argument, given that other would-be competitors will not be able to compete, particularly, I presume, once the Telstra deal is hammered out. And it is also consequent upon an agreement being reached between NBN Co. and Optus.

**Mr Quinlivan**—I cannot really comment on the logic of the agreement which has been discussed and the amendment which has been produced. I think the basic proposition that NBN Co. is operating in secret sits pretty oddly with the amount of scrutiny the company has and the fact that most of what it does is going to be subject to ACCC scrutiny of one kind or another which will involve public exposure of documents in the context of special access undertakings and so on.

**Senator FISHER**—Mr Quigley says he does not want to be subject to scrutiny from every man and his dog in the context of parliamentary scrutiny. In his view it does something like hamper business.

**Mr Quinlivan**—He may have expressed concerns about the amount of reserves involved in meeting the accountability requirements currently applying to the company and you can understand that in the context of the mission the company has which we were talking about earlier. The company itself is subject to historically high levels of scrutiny and public transparency.

**Senator FISHER**—My final question—and it may go into two questions—is about the exemption from the Public Works Committee. Why should NBN Co. be exempt from scrutiny by the Public Works Committee, given that the \$15 million threshold gives the committee investigatory powers into public outlays in excess of that amount? Why should NBN Co. be exempt? And to what extent is the claim made by the minister, if I recall correctly—

**CHAIR**—Point of order. Mr Quinlivan has actually explained that it is not an exemption. I know it is getting late—

**Senator FISHER**—No, no. He was talking about freedom of information, not the Public Works Committee. I am asking now about the Public Works Committee.

**CHAIR**—It is the same process.

**Senator FISHER**—Maybe, maybe not.

**CHAIR**—Okay. Ask the question.

**Senator FISHER**—I do not have the minister's letter in front of me and I am going from recollection, but I think I recollect that the minister's letter to the Governor-General seeking her exemption from the Public Works Committee process relied on NBN Co. being in competition with others. That is of course a relevant question, given that the government could have chosen to debate the exemption through parliament and instead they went running to the Governor-General with this basis.

**Mr Quinlivan**—We also do not have the letter at the table, but the proposition that NBN Co. be exempt from the Public Works Committee Act is consistent with the treatment of Australia Post, Telstra and other publicly owned telecommunications carriers. The primary logic is that the need to have individual projects above \$15 million reviewed and approved by the Public Works Committee would be a significant commercial disadvantage to them because they are doing a very large number of those projects, replicated over and over again across the nation. I think it is not so much that it is in competition as that it would be commercially disadvantaged by the need for that kind of scrutiny on an ongoing basis, as opposed to scrutiny of the overall project, which it is getting plenty of. That logic has been previously accepted with Australia Post and other telecommunications carriers which have similar networks.



The **Senator FISHER**—As I understand it, the logic—to use your words—which the Governor-General can accept as applicable is legislatively defined. There are two or three grounds upon which it can be requested and she, in this case, can exempt. Is that one of those grounds?

**Mr Mason**—I do not know the precise grounds off top of my head, but I would think that difficulties in rolling out a network and it being delayed by that consideration in a commercial context would be a legitimate consideration.

**Senator FISHER**—That may be so, but the government, as I said, could have chosen to debate this through the House, if not the parliament. Instead they did not; they chose the route of going to the Governor-General. As I understand it, the bases for that route are legislatively proscribed and prescribed. I want to know whether the number of projects to be rolled out nationwide is one of those legislative proscriptions and, if not, how is the exemption sought of and granted by the Governor-General valid?

**Mr Quinlivan**—I think that is a technical and legal question.

**Senator FISHER**—Can you answer it?

**Mr Quinlivan**—I am confident it was properly explored at the time when that mechanism was chosen as providing an urgent access to an approval facility.

**Senator FISHER**—On what basis are you expressing that confidence?

**Mr Quinlivan**—Because I am familiar with the people who would have done the research and provided the advice. But I do not have it here at the moment.

**Senator FISHER**—Who are they and can you get it to me?

**Mr Quinlivan**—Can we take the question on notice and get back to you on that?

**Senator FISHER**—Please. Thank you.

**CHAIR**—Thanks, Mr Quinlivan, Mr Mason and Ms Spence. That concludes the questioning for today and the business of the committee for today. I thank Hansard, the secretariat and the senators. Questions on notice have to be back by 10 March, so you do not have long.

**Mr Quinlivan**—We will do our best.

**Senator FISHER**—Also known as tomorrow! Thank you very much.

**Committee adjourned at 4.39 pm**