

RODD STAPLES, Secretary, Transport for NSW, sworn and examined

MARGARET PRENDERGAST, Coordinator General, Transport Coordination Office, Transport for NSW, on former oath

The CHAIR: I now welcome our next witnesses. I remind Ms Prendergast she does not have to be sworn because she was sworn previously. Does either of you wish to make an opening statement?

Mr STAPLES: Yes, please. I have a fairly lengthy statement. I might read about half of it and I am happy to table the rest for you, if that is okay.

The Hon. TREVOR KHAN: Chair, I do not disagree with that but—

Mr STAPLES: I am happy to read through it all, if you like.

The Hon. TREVOR KHAN: The only concern I have is that we have seen in another committee the tabling of a statement and the statement was not to be included in the transcript. My concern would be that if it is to be tabled—which, again, I do not object to—that it be included in the Committee transcript.

The CHAIR: No. It will have to be incorporated. You should move that it be incorporated in the transcript.

Mr STAPLES: Yes, incorporate it.

The Hon. MATTHEW MASON-COX: Incorporate it rather than table it.

The CHAIR: Not tabled, incorporated.

Mr STAPLES: Yes. I am sorry.

Leave granted.

The Hon. MATTHEW MASON-COX: Will copies be distributed for the Committee?

Mr STAPLES: Yes, we can do that. I will need to get them from someone seated behind me. Can I start by thanking the Committee for providing the opportunity for Transport for NSW to appear before the Committee today and to respond to further questions. Today I would like to set the record straight on a number of incorrect statements being made through this inquiry, including this morning.

The ALTRAC Consortium, which includes Acciona, has always been aware of the risks associated with utilities on the CBD and South East Light Rail [CSELR] project. In fact, utilities, including the treatment of Ausgrid's assets, were a key issue for both Transport for NSW and ALTRAC and Acciona during the tender phase, which is why a risk-sharing regime was negotiated, including the Sydney light rail [SLR] project deed, which was signed in December 2014.

All tenderers for the project had access to detailed utilities information from Ausgrid pits and the utilities and Ausgrid's network standards also were readily available on the Ausgrid website. Tenderers were not prevented from communicating with Ausgrid. For probity reasons, tenderers were required to seek written consent from Transport for NSW and communicate with Ausgrid through or in the presence of Transport for NSW. This is a standard tender process and ensures any request for information or information provided from third parties is made available to all tenderers to avoid any unfair competitive advantage.

The Ausgrid report stating that the cost of removing and replacing power in Sydney's George Street would be \$600 million to \$700 million is irrelevant because it involved moving all utilities out of George Street, which is not what was planned or has occurred. As we heard from Ausgrid last month, they developed guidelines to assist the contractor on the light rail project in interpreting Ausgrid's network standards when developing proposed plans for treatment of Ausgrid's assets.

The guidelines are not contractual documents and, as Ausgrid has explained, the hierarchy of their documents is that it begins with (a) network standards, (b) the guidelines, which provide an interpretation to assist designers of works near Ausgrid's assets but the guidelines do not change those standards, (c) development of treatment plans, subject to (d) Ausgrid approval.

Transport did not receive the Ausgrid guidelines until 3 February 2015. The Ausgrid guidelines, irrespective of date of issue, did not change Acciona's contractual obligations to comply with the network standards, included in the definition of Ausgrid's requirements in the deed, and to engage with Ausgrid in a

collaborative process post contract during design phase to develop treatment plans and to obtain Ausgrid's approval of those plans.

In addition to this, despite receiving the guidelines on 27 February 2015, as Mr Noonan acknowledged this morning, Acciona agreed to amend their contract with ALTRAC in March 2015, incorporating the final deed signed by Transport for NSW and Ausgrid, which sets out Ausgrid's requirements regarding its assets. That is, that the network standards are required to be complied with and that Ausgrid had final approval of the treatment plans. Notwithstanding this, more than three years after Acciona made this amendment, and at that time they ought to finish their civil construction works for this project and are exposed to significant liquidated damages under their contract with ALTRAC, Acciona commenced its court proceedings against Transport for NSW claiming they were misled into entering into their contract with ALTRAC for the very same risks that we had¹ mitigated for that contract.

This matter is now before the court. While Transport has denied the allegations and will continue to defend its position in the interest of protecting the taxpayers, it is best left to the court to make a determination about Acciona's claim. However, we are committed to continuing to work with ALTRAC to deliver this project in a timely manner in the same way we are delivering Metro and other significant projects across New South Wales. I might stop reading the statement there.

The NSW Government is currently investing \$51.2 billion in public transport and the road network over the next four years.

Transport expects all of its contractors to deliver their project in accordance with the contract that they've agreed to and in a manner that achieves the best outcome for the project and the residents, businesses and community members affected by the project.

ALTRAC and its subcontractors are contractually obliged to complete the Sydney Light Rail project by the date for completion, which remains 16 March 2019.

While they have continued to forecast a later completion date publicly, ALTRAC is not entitled to receive any Service Payments until it achieves Completion and commences operations, and is financially liable to Transport for NSW under the contract, for uncapped general damages for late completion.

As is common practice in large infrastructure projects, ALTRAC has submitted claims for additional costs as you've heard over the course of this inquiry.

Acciona made applications under the Building and Construction Industry Security of Payment Act 1999 (NSW) for certain Modifications and Claims under the D&C Contract; conducted between ALTRAC and D&C.

The Act is aimed at ensuring the flow of progress payments down the contractual chain, providing cash flow pending final resolution of contractual disputes.

A successful adjudication should not be considered to be a vindication of the claim. The process is interim, non-binding and as described by the High Court "brutally fast".

Payments made pursuant to the SOPA process are progress payments and are made on account. This leaves any disputes over the amount finally due to be decided separately.

The Adjudication Determinations do not make any finding against TfNSW with respect to the construction work or costs claimed by the D&C Contractor.

We have heard many different dates for the completion of works, particularly in the past few months, and ALTRAC currently propose a delivery date of May 2020, which Transport for NSW has rejected.

We want to assure the people of NSW that Transport continues to work with ALTRAC to deliver the project earlier than this forecasted date.

I will make one final comment. I have been the Secretary of Transport since January this year when I was formally appointed. I have worked within the Transport cluster for a number of years, including the period that this extends over. Obviously I have examined a fair amount of the detail on this project prior, but I also point out that Mr Noonan has not been a part of this project for the entire period either. When both of us sit here and represent issues that occurred in 2014 and 2015, it is important for the Committee to be reminded that neither of us was

¹ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

...Acciona commenced its court proceedings against Transport for NSW claiming they were misled into entering into their contract with ALTRAC for the very same risks that they had mitigated for that contract.

party to the conversations at the time. We are offering views and perspectives, and I expect those views will differ. It is a challenge for the Committee to reflect on those different views but, from where I sit, it is ultimately the court that will determine some of the differences at this point in time and you will have to wrestle with the differences that we are presenting today versus what you would have seen from Mr Noonan.

The CHAIR: We will commence questions from the Opposition, the Labor Party.

The Hon. COURTNEY HOUSSOS: Thank you, Mr Chair. Good afternoon, Mr Staples and Ms Prendergast, welcome back. Mr Staples, are you saying that Acciona cannot be trusted?

The Hon. TREVOR KHAN: That is an interesting one.

Mr STAPLES: I would say that we have a very unusual circumstance in this particular project and the delivery of the contract. Transport's capital program spend, over the sort of period of this project, is in the order of \$50 billion. We have got more than 1,000 contracts in delivery at the moment. Of course, we have disputes with clients with a number of those contracts, but there is nothing, nothing at all, that compares with these circumstances. I am aware of only one other claim in the terms of a misrepresentation claim that Transport has ever had, and that was on a minor contract of about \$7 million that I am aware of. There may be others, but it is an extremely unusual circumstance that we have. I sit here trying to reconcile to get this project finished for the taxpayers, for the community and for the businesses, to get the light rail service running because I am absolutely clear that it will deliver a fantastic benefit for the State. But we are in extraordinarily unusual circumstances here.

The Hon. COURTNEY HOUSSOS: We want to see the project underway as well. Can you explain what you mean by "unusual"?

Mr STAPLES: The fact that we have received a misrepresentation claim at all, given that we are involved in pre-procurement processes with contractors on a regular basis. We have a lot of expertise and experience across Roads and Maritime Services, Transport for NSW, Sydney Trains and Sydney Metro. We do that on a regular basis with the market and with industry. We go through industry briefings, we go through expression of interest processes, we go through tender processes, we have interactives with tenderers, we bring utilities authorities such as Ausgrid to the table to interact on a regular basis and we enter into contracts all the time. Our contracts are worth tens of millions and hundreds of millions and billions of dollars. We do not get misrepresentation claims. This is extremely unusual, and that is what I mean by that.

The Hon. COURTNEY HOUSSOS: You said that you enter into all kinds of contracts all the time. If you had your time again, would you do it this way?

Mr STAPLES: Hindsight is a wonderful thing. I think that Transport would definitely do some things differently in the process.

The Hon. COURTNEY HOUSSOS: What would you do differently?

Mr STAPLES: We would have endeavoured to have some of the outstanding issues resolved a bit earlier, but did not end up doing it from where we sit pertinent to the issue at hand. But it is always good to be as organised as you possibly can.

The Hon. GREG DONNELLY: Which issues were they, Mr Staples?

Mr STAPLES: In having some of the details of the enterprise agreements and so forth sorted out in a more timely manner. But, as I said, they do not really affect the outcome. Beyond that, there is a question mark to be made around how we have managed the contractor through the course and whether or not we should have been more aggressive in our dealings with the contractor early on. They would be a couple of reflections I would make, but they are only theories.

The Hon. COURTNEY HOUSSOS: The people of New South Wales want to know who was responsible for it not happening.

Mr STAPLES: I have come to the inquiry today to take questions on the details of the project. I mean, you are asking for an opinion there. I am ultimately the Secretary of Transport for NSW; I am ultimately responsible for making sure that this project gets completed. I take that responsibility really seriously. Since I have been in the role, I have invested personally, as has the leadership team in Transport. It has invested a lot of time in trying to progress this project. We have seen some good progress on the ground but it has been a sort of lengthy process.

The Hon. COURTNEY HOUSSOS: You are saying that if you had your time again you would do things differently. Does that mean that when Ausgrid emailed the first iteration of the new draft guidelines on 3 February, that should have been communicated to Acciona?

Mr STAPLES: I do not think that really matters.

The Hon. COURTNEY HOUSSOS: It does matter because the testimony we received this morning was that if they had received those documents prior to signing the final contract, then they would not have signed on.

Mr STAPLES: I think that is where there is a real confusion about the status of the Ausgrid guidelines and also the undertakings that were given by both ALTRAC and Acciona following the receipt of those Ausgrid guidelines. I think you also need to remember that the basis of the misrepresentation claim over the period since we received it earlier this year has changed. The original premise was that we had somehow misled Acciona in 2014 because we had access to Ausgrid guidelines, which we clearly did not.

It was not until they went on a fishing expedition through the legal process that they subsequently found out when we did receive them and they have sought to turn that into a claim. The premise of their misrepresentation claim has changed over the period of time. Coming back to the point, yes, we did receive it in early February. Now, I cannot speak for what went to the minds of people but I can see the correspondence that went on. It seems incredibly reasonable that our people looked at the Ausgrid guidelines and chose to have some interaction with Ausgrid to clarify and see whether any changes needed to be made before we handed those to Ausgrid and subsequently—

The Hon. COURTNEY HOUSSOS: But Acciona was the preferred—

Mr STAPLES: Sorry, can I keep going? I think it is pretty important.

The Hon. COURTNEY HOUSSOS: No, let me just ask you because we have got limited time. Acciona was the preferred tenderer at that point.

Mr STAPLES: Yes.

The Hon. COURTNEY HOUSSOS: Transport for NSW did not go back once, they did not go back twice, they went back three times with feedback and then waited for the financial close of the project before they actually told Acciona or ALTRAC that there were going to be significant changes.

Mr STAPLES: And the bit that you are completely missing is that subsequent to that, with the Ausgrid guidelines in their possession, Acciona and ALTRAC signed up to an amendment deed with Ausgrid.

The Hon. TREVOR KHAN: On 25 March.

Mr STAPLES: Yes. So they had full knowledge at the time. If they had any issue with the Ausgrid guidelines then they should not have signed that deed. They should have raised that issue at that time. If they felt they had been misrepresented, that was the time to put a misrepresentation claim in.

The Hon. COURTNEY HOUSSOS: The testimony that they gave to us was that they saw those guidelines and they said it is an 865-day delay, a \$426 million extra cost. Did they say that to you at the time?

Mr STAPLES: No. Let me go through—

The Hon. COURTNEY HOUSSOS: Sorry—no?

Mr STAPLES: No, not on 25 March they did not. They signed the deed.

The Hon. COURTNEY HOUSSOS: The testimony that this Committee has received is that once they received those new guidelines it was an 865-day delay, a \$426 million extra cost, and they told Transport for NSW.

Mr STAPLES: The chain of events are we received the Ausgrid guidelines in early February. We had interactions with Ausgrid. We subsequently shared the Ausgrid guidelines with Acciona and ALTRAC.² We

² In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

Subsequently, Ausgrid shared the guidelines with Acciona.

subsequently jointly signed an amended Ausgrid deed that included Acciona signing in the knowledge that they had the Ausgrid guidelines in their hands. Subsequently we received correspondence from ALTRAC. I can check the date for that—I think 20 April. I cannot imagine any circumstance where this letter from ALTRAC would not have had the input and been party to Acciona, knowing the way contractual correspondence flows through a public-private partnership [PPP] contract. I am happy to table this letter.

The Hon. TREVOR KHAN: Please do.

Mr STAPLES: It talks about and acknowledges the Ausgrid guidelines and it acknowledges that a mechanism in the contract exists to deal with the differences between the schedule that was there at the time of contract signing and the existence of the Ausgrid guidelines and any difference that may occur, in particular, anything that may arise through the interpretation of the network standards for the site. So we have actually got—

The Hon. COURTNEY HOUSSOS: Can you produce that particular document?

Mr STAPLES: I can.

The Hon. COURTNEY HOUSSOS: And any other documents—

Mr STAPLES: We have actually got correspondence from the contractor acknowledging that there is a change and acknowledging that there is a mechanism in the contract to manage that change. That will remain our assertion all the way through. Therein lies the issue.

The Hon. GREG DONNELLY: In evidence by Mr Troughton when he gave evidence on behalf of the department, his testimony is that they, Transport for NSW, said to Acciona: "Don't worry about these guidelines. We don't recognise these guidelines; don't worry about these guidelines." Are you putting a position different to what Mr Troughton did?

Mr STAPLES: No, I am not.

The CHAIR: Can we have a copy of that letter so we can be reading it while you are talking?

Mr STAPLES: Yes.

Document tabled.

The CHAIR: Thank you.

The Hon. GREG DONNELLY: What is your response to Mr Troughton's comments in which he said, "We, Transport for NSW, said to Acciona, 'Don't worry about the Ausgrid guidelines. We don't recognise the Ausgrid guidelines.'"

Mr STAPLES: Firstly, they are guidelines. They are not standards. The overarching requirement from Ausgrid is their network standards. Those network standards were available in 2014. They are clearly the reference point within the draft deed for Ausgrid that was in the contract when Acciona signed it. They were also referenced in the amendment deed as well. The guidelines were actually presented as something to be helpful by Ausgrid to Acciona in having to present their detailed designs in interpreting the Ausgrid standards.

The Hon. GREG DONNELLY: So to answer my question, what is your response to the testimony thus far from Transport for NSW by Mr Troughton that the position of Transport for NSW was to Acciona, "Don't worry about the Ausgrid guidelines. Just forget them. We don't recognise them." That is the testimony of Transport for NSW.

Mr STAPLES: I am comfortable with what Stephen Troughton said in the previous hearing.

The Hon. GREG DONNELLY: You are?

Mr STAPLES: Yes.

The Hon. GREG DONNELLY: Okay.

The Hon. COURTNEY HOUSSOS: Mr Staples, we might come back to that, but I would like to move on to the Auditor-General's report into Transport released yesterday, specifically around the contingency fund. Is that correct that the contingency fund has now been exhausted?

Mr STAPLES: Yes, it has been fully committed.

The Hon. COURTNEY HOUSSOS: Was that part of the original \$2.1 billion?

Mr STAPLES: Yes.

The Hon. COURTNEY HOUSSOS: Is there a revised contingency fund?

Mr STAPLES: Not at this point in time. We will obviously keep the budget under constant review. At this stage our approved budget remains \$2.1 billion. We will need to go through the contractual process and finalise the claims that we have with Acciona.³ Once we have a clear financial position on those and a forecast is complete on the job, then we are in a position to update the budget at that time. Anything other than that would be speculative at this stage.

The Hon. COURTNEY HOUSSOS: It is not speculative because the Auditor-General has said:

... additional costs to the project are expected.

TfNSW are in the process of preparing a revised forecasted final cost.

When will that be completed?

Mr STAPLES: To be realistic about getting a revised credible forecast, we need to try to finalise these claims.

The Hon. COURTNEY HOUSSOS: When will that be done?

Mr STAPLES: It is an ongoing interaction. As I think Mr Noonan indicated this morning, we have ongoing dialogue with Acciona and ALTRAC in relation to trying to resolve the claims.

The Hon. GREG DONNELLY: So you do not have a date then.

Mr STAPLES: No, not at this stage.

The Hon. COURTNEY HOUSSOS: So you are saying you do not know how much it is going to cost and you do not know when you are going to know.

Mr STAPLES: That is right.

The Hon. COURTNEY HOUSSOS: This is a significant infrastructure project which you just told us you were very personally invested in and you cannot tell the people of New South Wales how much it is going to cost.

Mr STAPLES: So you want me to speculate on a legal outcome?

The Hon. COURTNEY HOUSSOS: No—

Mr STAPLES: You are because—

The Hon. COURTNEY HOUSSOS: I am asking you what is the budget for this project?

Mr STAPLES: I have indicated the budget. Currently it is \$2.1 billion. I have indicated that it is likely to change but it will be subject to the outcome of a legal process. I take the obligation of updating the budget extremely seriously and I will give an update when I believe we are in a position to do so.

The Hon. GREG DONNELLY: Can you give us a possible range?

Mr STAPLES: Not at this stage because I think that would prejudice any outcome in terms of a court process or a negotiation with Acciona.

The Hon. COURTNEY HOUSSOS: Are we waiting for the outcome of the court process or the outcome of the complaints?

Mr STAPLES: Ideally, and the way Transport approaches these things when we receive a claim from a contractor is that we sit down with them, we understand their position around their claim. If we believe additional information is required to help us assess the claim, we ask them to provide that additional information. There is a mechanism in the contract to correspond between each other in relation to that. Then we go through an assessment

³ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

We will need to go through the contractual process and finalise the claims that we have with ALTRAC.

process and ideally what we do is that we determine a claim which they are satisfied with. If we are not, we then go into negotiation processes to try to resolve. We have this every day. We have these types of things happen. Given the scale of the capital program we have, you would expect that we have that on an ongoing basis. Largely we resolve those things well before they go to court.

The Hon. COURTNEY HOUSSOS: How many complaints are currently outstanding?

Mr STAPLES: Complaints?

The Hon. COURTNEY HOUSSOS: Claims, sorry.

Mr STAPLES: I would have to take the question on notice for the exact number. I think Mr Troughton gave some figures at the last hearing and I do not believe that that has changed, but I am happy to take that on notice to check.

The Hon. COURTNEY HOUSSOS: Will you be stopping your payments to contractors until those claims are resolved?

Mr STAPLES: You have to understand under the PPP arrangement the financing for the design and construction [D and C] contractor goes from the equity and debt investors, not from the Government directly. Our commitment is that once the project is completed we provide an availability payment that pays a repayment to that debt and equity and also the cost for the operation. So the costs that we have incurred to date that we have reported are in relation to our own costs around land acquisition, project development and an early works contract that was undertaken in the early parts of the project. We have not made direct payments—

The Hon. COURTNEY HOUSSOS: Why then did Transport for NSW—and again I am quoting from the Auditor-General's report—advance \$100 million payment on account to the contractor in October 2017, if you are not supposed to pay until you get the project?

Mr STAPLES: No. That is actually a really important question. I talked about Transport for NSW's approach to receiving and assessing claims. One of the really difficult things that we have had when you look at the journey of 2015, 2016 and 2017 on this project is that Acciona⁴ have provided claims but we have always struggled to assess the claims because we do not believe we have had the information available to us to be able to adequately assess and then determine the claim. This has been an ongoing issue. We really need to make sure that we have got the evidence that says that there was an additional cost relative to what they assumed a contractor would, that there was an additional time. We cannot determine these things in good faith without having that information. Through the course of 2015 and 2016 we received a number of claims but they were never of the quality that we were able to assess and determine. That became a real point of frustration. It was not until we got into a dispute resolution process through 2017 that we started to receive some information that was helpful for us in relation—

The Hon. COURTNEY HOUSSOS: Is this under the Building and Construction Industry Security of Payment Act?

Mr STAPLES: No.

The Hon. COURTNEY HOUSSOS: Or is this within the contract?

Mr STAPLES: We attempted to escalate and resolve it through a structured dispute resolution process because we saw the ongoing need and we were firmly committed to trying to get resolution so that we could see the project proceed and be completed on time. At that stage, we did receive additional information. Also, while we did not agree with the proposition in terms of the dollars and the time being sought, we recognised and we will continue to recognise that there is some valid claims, we just do not have the evidence to determine exactly the amount and the exact time contribution to that. On the basis of goodwill to try to give some additional cash flow to the contractor, we essentially advanced a prepayment of \$100 million in recognition that there will be some claims determined with that value. We think that is an incredibly reasonable thing to have done in the

⁴ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

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circumstances to keep some cash flowing into the project. Even though we did not have the full determination, we had enough information that they would probably end up being valid claims.

The Hon. COURTNEY HOUSSOS: You paid \$100 million on goodwill, you gave them a liquidity guarantee totalling \$500 million, and yet in your opening statement you said that it is a very unusual situation and that you are not happy with the way the project has been delivered? That is my characterisation.

Mr STAPLES: I am certainly not happy with the way the contractor has performed on delivery of this project. There is absolutely not doubt about that.

The Hon. COURTNEY HOUSSOS: So why did you pay them 100 million bucks?

Mr STAPLES: Because there is no doubt in our mind that they will have some entitlement. Therefore, as a good model client, we have sought to provide the resource that we felt they needed to keep the project moving. I think the contracting industry would expect us to do that. Even though we did not have the full information, the amount of tension and difficulty there clearly was in the relationship. We saw that as a necessary part of keeping it going and the taxpayer was going to be liable for that amount of money, so that is why we advanced it. In relation to—

The Hon. COURTNEY HOUSSOS: I want to come back to—

Mr STAPLES: I need to clarify because you referenced a liquidity facility of \$500 million. We have not advanced any cash in the order of \$500 million. The equity and debt investors have provided additional funds injected to Acciona. It is in excess of \$100 million to date.

The Hon. GREG DONNELLY: Sorry, \$100 million of the \$500 million?

Mr STAPLES: Yes, and it is capped at no more than \$200 million at the moment in terms of funds that could be invested, and that is invested by the PPP financiers, not by Government. Our only undertaking in relation to that is if at the end of the day when all the claims are settled the Government is liable for some of the money, then we will pay the investors for that. That is only once we have determined the claims.

The Hon. COURTNEY HOUSSOS: I want to return to the total cost of the project. The Auditor-General said you were in the process of preparing the revised forecasted final cost. Who is preparing that?

Mr STAPLES: Transport for NSW will prepare that.

The Hon. COURTNEY HOUSSOS: Can you guarantee that that will be released publicly?

Mr STAPLES: At the time that we are in a position to give a confident forecast, we will certainly give an update, yes.

The Hon. GREG DONNELLY: But you do not know when it will be?

Mr STAPLES: No. I think you have seen the difficulty because of the differences of view that exist around this project and the fact that I indicated in the opening statement that it is likely that at least some of these matters will need to be determined by the court. It will be the court that will determine the costs and that will be the time when we can update the project budget.

The Hon. COURTNEY HOUSSOS: Can you guarantee that that will not lead to further delays of the project?

Mr STAPLES: Delivering that project on time requires the contractor to honour what it is supposed to do in respect of keeping a level of resource on this job right through to the end. The way contracts are set up—and this is not new; this is the way contracts have operated in this State and across this country for some time—is that Government commits to a funding profile, and in this instance it is more complicated through a PPP but we get on and deliver the job. If there is a dispute, ideally you settle that dispute quickly so the funds can flow from whichever party it needs to. In certain circumstances those disputes—

The Hon. COURTNEY HOUSSOS: The disputes have not been resolved, the funds are flowing and we do not know when the project is going to finish and we do not know how much it is going to cost.

Mr STAPLES: The \$100 million is on account; it is not a guaranteed payment. If the claims turn out not to be that amount, then that money will come back to us and we have guarantees to be able to that money back through financial instruments. What I was going on to say was that at the times when we are not able to settle a dispute, the contract requires the contractor to use its best endeavours to keep moving forward and to get the job

finished. That is our expectation of Acciona and ALTRAC, that they keep doing that, but they are the ones who will have to do that.

The Hon. COURTNEY HOUSSOS: You are saying they are not using their best endeavours to finish the project?

Mr STAPLES: I am saying to have certainty on the time that it will require to do that.

Ms CATE FAEHRMANN: I want to move to a slightly different issue and talk about the damage to the houses in Parkham Street. Are you both aware of that issue?

Ms PRENDERGAST: Yes, I am aware.

Ms CATE FAEHRMANN: Transport for NSW is currently doing something about that damage. Do you know where that is up to?

Ms PRENDERGAST: With Parkham Street residents, Olivia Gardens is starting to be reinstated as the compound reduces. Firstly, we are aware of some damage. The first thing we have done with those residents is address everyday issues such as cleaning, fixing doors, et cetera. We are now going through a process to resolve claims. Obviously Acciona are the first ones to go through that resolution process. But as I outlined last time, we have a very strong escalation process. So if Acciona cannot resolve the claim with ALTRAC⁵, it is then referred to Transport for NSW who will review it and now we have an independent mediator in play. We have already commenced independent mediation for noise and vibration treatments and that will be available also for property damage. As we outlined previously, the property damage component cannot be completed until heavy city construction is done.

Ms CATE FAEHRMANN: How do you work out whether the damage was Acciona's fault?

Ms PRENDERGAST: At the commencement there are dilapidation surveys, which are almost like a pre-construction survey that is undertaken. They are baselined against that. If there is a safety issue, we go in and do a fix, which has happened in a few different residences. But, if not, it is reconciled once the heavy construction is complete.

Ms CATE FAEHRMANN: There are 10 houses along Parkham Street that apparently suffered some kind of damage around the time that the Olivia Gardens compaction work began. You are aware that Acciona has done an independent assessment of all of these houses. I understand that engineers or some people had a look at these 10 houses and somehow came to the decision that it was not a result of their work. Are you relying on that or is Transport for NSW undertaking its own independent engineering to assess whether this damage was in fact a result of Acciona's work?

Ms PRENDERGAST: The first stage of the review relies on the dilapidation survey.

Ms CATE FAEHRMANN: The dilapidation survey was undertaken by—

Ms PRENDERGAST: Acciona.

Ms CATE FAEHRMANN: It commissioned that?

Ms PRENDERGAST: Correct. That is part of it but then we bring in specialists to assist with that review.

Ms CATE FAEHRMANN: Does Transport for NSW undertake an independent engineering assessment? The damage has occurred, Acciona has done its own assessment. To any reasonable person, when you have compaction of a scale that residents have said occurred at Olivia Gardens for months on end—I understand that one of the residents did a letterbox drop around this entire block to see which residents were affected. Nobody was affected but 10 houses along Parkham Street pretty much at the same time that the compaction occurred. To any reasonable person, you would think that it was the result of Acciona's work. It had

⁵ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

So if Acciona cannot resolve the claim with the property owner, it is then referred to Transport for NSW who will review it and now we have an independent mediator in play.

its own manager assess, who said it was not their fault. Of course, we are hearing today we have a private company that is fast running out of money and is probably not wanting to compensate these residents. It has gone to Transport for NSW. Would not the first thing you would do is to undertake your own assessment or get independent engineers to do that?

Ms PRENDERGAST: Let me clarify, the initial early works and compaction work that occurred at Olivia Gardens was undertaken as part of the early works contract by Laing O'Rourke and not Acciona. There are two stages that need to be assessed. Laing O'Rourke would have gone through exactly the same process as per planning conditions to ascertain the baseline effectively. Our mediation process, both our review and going to an independent mediator, will involve technical specialists to assess.

Ms CATE FAEHRMANN: Does "technical specialists" mean getting an independent engineer to assess whether the works that were undertaken caused damage? I have seen the letter from ALTRAC to the residents that talks about cyclical events, subsidence and in this particular resident's situation the house that he has renovated, although I understand he renovated the entire thing. I am assuming all 10 residents have a different excuse or reason. They are calling out for an independent engineering assessment. They cannot afford it. They have come to Transport for NSW because they are not getting answers. Would not the first thing Transport for NSW would do would be to undertake its own independent engineering assessment and work out whether the damage was caused by the compaction work?

Ms PRENDERGAST: The first layer is the contractor, be it Laing O'Rourke or indeed Acciona, to do the assessment.

Ms CATE FAEHRMANN: Which has not worked.

Ms PRENDERGAST: Therefore it gets referred to Transport, and we will engage technical specialists to resolve the cases.

Ms CATE FAEHRMANN: What does "technical specialists" mean?

Ms PRENDERGAST: Whatever needs to be done, if it is engineering expertise, whatever capability is required.

Ms CATE FAEHRMANN: You will commit today that the residents of Parkham Street will get an independent engineer come and assess all of their houses?

Ms PRENDERGAST: We will commit to further review the cases, which is what we have said is the escalation process.

Ms CATE FAEHRMANN: That sounds like they will not get their engineer.

Ms PRENDERGAST: There is an escalation process where if they are not happy with the contractor's resolution or outcome or finding they refer it to Transport, who will then do a review and refer it to an independent mediator if we cannot work it through.

Ms CATE FAEHRMANN: Ms Prendergast, if you are not committing to an independent engineer I am unsure what outcome these residents can expect. They have little faith? In fact, they have zero faith in the report that was undertaken because they believe it is a huge conflict of interest for the company itself that is responsible for compensation to do the engineering. They have written to Transport for NSW. They did not want their houses cleaned. They actually want damages. There are thousands of dollars involved. Every single house cannot get damages.

Ms PRENDERGAST: A condition of our contract with our contractors is that they do a dilapidation survey, otherwise there is no baseline. So that is the basis. We have committed to review, and if that requires independent engineering expertise we will commit to that review. There is a process, so that is what we are working through with many of these issues. But the property damage issue cannot be reconciled until all civil construction is complete.

Ms CATE FAEHRMANN: You can understand why residents are frustrated. They continue to write to members of this Committee. They continue to write and talk to us about the ongoing noise. They continue to write and tell us that they have not actually heard from Transport for NSW. At the end of last year Transport for NSW came to have a look at these houses. They are continuing to ask questions and they are not getting any response from Transport for NSW. The number one thing they are after, of course, is an independent assessment by an engineer.

Ms PRENDERGAST: We are committed to review, using whatever expertise we need to undertake that review but acknowledging that we rely—

Ms CATE FAEHRMANN: What is the delay?

Ms PRENDERGAST: —on the dilapidation survey.

Ms CATE FAEHRMANN: Do you know?

Ms PRENDERGAST: It has not formally been referred for review. But I need to really check that with the project. At this point I will take it on notice, but we are committed to further review, and we have said that with our escalation process. But you have to understand, you cannot do the final assessment of damages until the major civil construction is complete.

Ms CATE FAEHRMANN: How did Acciona do the final assessment of damages then?

Ms PRENDERGAST: They assessed it against their dilapidation survey.

Ms CATE FAEHRMANN: The letter that they wrote—which one would think would be the final line in the sand—said it was pretty unequivocal, pretty clear that the damages were not the result of the compaction, and that is the end of the story. But you cannot do that?

Ms PRENDERGAST: What I can do is offer a further review process by Transport, then an independent mediator. I can refer this to the project, who we can get to commit to do that review—

Ms CATE FAEHRMANN: Thank you. I will move on quickly. Dealing with compensation for businesses, further to a question on notice taken from this inquiry in relation to businesses on Devonshire Street, Transport for NSW stated payments to 13 businesses were approved, yet only 11 payments were made because one business had closed and another had changed ownership. Why did a business closure prevent payment being received? What is the justification for that?

Ms PRENDERGAST: Because our criteria includes the business has to be actually in operation to receive the payment.

Ms CATE FAEHRMANN: Did that business close because of the light rail?

Ms PRENDERGAST: The business you would be referring to would be the business that we have discussed here previously, which closed six weeks after we commenced construction.

Ms CATE FAEHRMANN: It was approved to receive compensation but never received it because it closed before it was given the compensation, is that what you are saying?

Ms PRENDERGAST: Unless that is another case.

The Hon. TREVOR KHAN: That is not the case.

Ms PRENDERGAST: Can I take it on notice? I do not know the details, because that was not approved. There must be another one.

Ms CATE FAEHRMANN: Right, that is a different one?

Ms PRENDERGAST: Yes.

Ms CATE FAEHRMANN: When was the first time either of you saw a benefit-cost ratio for the light rail project?

Mr STAPLES: It would be when it was published with the original project because, as I said to you at the start, I was not lead in Transport at that stage so I was not particularly focussed on that. So it would only be at the time it was published, that would have been when I first saw it.

Ms PRENDERGAST: We re-published based on the revised cost of \$2.1 billion and we published that on our website and included it in all of our public communications.

Ms CATE FAEHRMANN: When you say "published", Mr Staples, does that mean made publicly available?

Mr STAPLES: I would say published in terms of my visibility as a leader of Transport. I would have to check what the public status of that document was.

Ms PRENDERGAST: I can assist there, Mr Staples. Originally there was a benefits fact sheet published on the website but that was the previous BCR of the \$1.6 billion. When the additional cost of \$2.1 billion post the tender phase came into being there was a revised BCR, which was subsequently published.

The CHAIR: Thank you for your attendance. During the evidence the Committee heard today from Acciona that it was anticipating a loss of \$1 billion on the light rail project. Are you aware of that and what is your response to that possibility?

Mr STAPLES: It is a significant amount of money. We do not have direct access to their absolute direct costs, so I accept at face value that may well be the costs that they have incurred on the project or will incur on the project by the time that they are completed. The issue is not so much how much the project has cost Acciona to build, the issue that we will continue to focus on is what is their entitlement in relation to the contract for payment. And there is often sometimes a big difference between those two things.

The CHAIR: Obviously, their view that they will suffer that loss, or could, must be affecting their relationship with Transport for NSW.

Mr STAPLES: Certainly it does. It is a significant amount of money that they are talking about. But, as you would understand, we have signed a contract. That allocates risks to both parties and our job as the client and representative of Government is to make sure that we pay the amount of money that is due through that, through the initial contract and any variations or claims that are awarded through that, not a reflection necessarily of the costs of the contractor. Because one thing that contributes to a contractor's change in cost is things that the client may change. Another thing that contributes is things that may arise that are unknown that the Government said it would pay for if those issues arose. Beyond that, it largely sits with the contractor's risk to manage its workforce, to manage its design process, to manage its construction program, and all of those things are very, very critical to what the final costs of the contractor are. It is not all at the hands of what government does.

If you were to characterise this job and its program and its delivery, there have been a number of issues on the ground in relation to getting a design process finished and then getting to site on time, and once they are on site how organised they are, how they project manage. Have they got the right strength of leadership team to deliver? Can they manage day to day their job? Can they manage their subcontractors appropriately? All of those things contribute to the cost that is incurred. All of those things are completely the responsibility of the contractor. So when we hear speculation of \$1 billion, it is obviously a very significant amount of money. But that is not really the focus for us here and it should not be the focus for the Government. The focus for the Government should be: what is their entitlement?

The CHAIR: Acciona indicated in its evidence today that one of the major problems from its point of view was the Ausgrid guidelines. It stated in evidence that the withholding of these guidelines was a fundamental mistake by Transport for NSW: "I had no idea why they decided to withhold such an important piece of information". Do you agree with that? Was that a mistake and was it intentional?

Mr STAPLES: No, I do not agree with that at all. And I think that this will be a matter that will ultimately require a resolution through the court. I would always be happy to try to mediate and resolve with them but I suspect it will take a court process. But we will remain committed to try to resolve it. I go back to the letter that I tabled before and the preamble I gave before in relation to the undertakings that they gave after they received those Ausgrid guidelines. On 28 February they signed a document that confirmed Transport for NSW, Ausgrid and Acciona were all clear about the rules of engagement for managing changes to the Ausgrid assets. It is called an amended deed. It is a party to the contract between ourselves, ALTRAC and Acciona. If there was an issue with the Ausgrid guidelines they should not have signed that document.

The Hon. TREVOR KHAN: You said 28 February. That was 25 March, was it not? About a month after receipt of the Ausgrid—

Mr STAPLES: That is correct. Thank you for clarifying that. I have just got my dates round the wrong way. At which time they had had the Ausgrid guidelines for essentially a month when they signed that amended deed.

The CHAIR: They made a big point of that in their evidence to us today, saying that Transport for NSW made a very, very significant mistake by not providing the Ausgrid guidelines to them prior to the final contract signing. They implied that if they had had them they would not have signed the contract.

Mr STAPLES: I am well aware of the commentary and the story and the position put forward by Acciona in terms of the way they interpret the events. There are many different ways to interpret what unfolded

between 2014 and now. In 2014 Acciona chose to participate in a tender process. At that point in time they were clearly hungry for work because they were still looking for another major job in Australia. They will have bid a price that they thought they needed to do to win that particular job. I have no view on what the price was relative to what the risks were that they were taking on.

The Hon. GREG DONNELLY: How do you know they were hungry? How can you make that statement?

Mr STAPLES: Because they were in the market and they did not have any major jobs at that point in time.

The Hon. COURTNEY HOUSSOS: That is your assessment.

The Hon. GREG DONNELLY: That is your interpretation.

Mr STAPLES: It is. Thank you for clarifying that. I am giving you an interpretation, in the way I think you should receive anything you heard this morning as an interpretation as well. When I opened today I said you will hear a perspective in the same way that you should regard what you heard this morning as a perspective. Neither of us are in a court at the moment. The court will determine the facts of the matter in due course. They entered into the contract in 2014. They went into delivery. They signed the amended deed. They had opportunities to interact with us if they had concerns about the Ausgrid guidelines in relation to a misrepresentation through 2015, through 2016 and through 2017. It was not until 2018 when their costs were clearly becoming apparently way beyond what the contract values were that we received a misrepresentation claim. Realistically, if there was a major concern in 2015, you have to ask the question why that misrepresentation claim was not put forward in the early period.

The CHAIR: You would have a copy of the letter from ALTRAC to Transport for NSW dated 25 April.

Mr STAPLES: I think I might have given you all of them, actually. I gave away my own copy. I am familiar with the letter.

The Hon. TREVOR KHAN: We will provide you with a copy.

The CHAIR: The third paragraph says that we note that the deed makes reference to certain Ausgrid adjustment guidelines and the draft set of those guidelines was the subject of discussion during the proposal period. Who was involved in that discussion?

Mr STAPLES: I would have to take that on notice.

The CHAIR: Just from your experience, who do you think was involved in the discussion? Who should have been involved in the discussion?

Mr STAPLES: I would have thought certainly Transport, ALTRAC and Acciona and, depending on the specifics, it may well have involved Ausgrid as well.

The CHAIR: But you do not know of any meetings or minutes of those meetings?

Mr STAPLES: I am not aware of minutes but I am certainly aware that from the time that we⁶ provided the guidelines on 28 February there was interaction involving Ausgrid, Transport for NSW, ALTRAC and Acciona in advance of everyone signing the amended deed.

The Hon. TREVOR KHAN: I do not want to correct you, but it is 27 February.

Mr STAPLES: Thank you. You are much better on dates than I am.

The Hon. TREVOR KHAN: That is dealt with in about the fifth or sixth paragraph of the letter.

⁶ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

I am not aware of minutes but I am certainly aware that from the time that Ausgrid provided the guidelines on 28 February there was interaction involving Ausgrid, Transport for NSW, ALTRAC and Acciona in advance of everyone signing the amended deed.

Mr STAPLES: That is right. The point of the letter here is that there is actually an acknowledgement in here that there is a mechanism in the contract to deal with any difference between the schedule and the assumptions of the changes required that were done at the contract signing in December and then anything that would arise through the process of the design. The guidelines were there to guide the design process, to help the designers understand what Ausgrid are likely to expect, but they are by no means a definitive black and white. That is why we clarified the status of those documents when you asked me about Stephen Troughton and his comments. I think the importance of this letter is to indicate that the contractors at that stage were saying, "Yes, we understand that there are differences but there is a mechanism in the contract." How could we have misrepresented if there is a mechanism in the contract to deal with this?

The CHAIR: Obviously Transport for NSW was in a difficult relationship with Acciona. Could you summarise what you believe were the main problems—the one main problem or 20?

Mr STAPLES: I think it is always worth being pretty considered in starting to point fingers in an environment like this. This is a really complicated contract. There are a number of parties involved. I think anyone that sits here and says that it was everyone else's fault has got their head in the wrong space. I think all parties will have contributed in some form to this. The relationship with Acciona has clearly, from the time that issues started to arise in 2015, been a very difficult one, been very adversarial. It is an unusual contract relative to all the others as I referred to before—a lot of the others that we undertake.

The Hon. TREVOR KHAN: Can I go to your letter of 20 April 2015, particularly that paragraph that you have referred to about there being a mechanism in the deed to deal with the Ausgrid guidelines? That mechanism, do I take it, has been available at all times to deal with issues relating to both the guidelines and the original requirements?

Mr STAPLES: Yes, just to be clear. It is not just about the guidelines. It is about the time of the contract signing. I am actually entirely comfortable with this, it was appropriate at the time. Acciona had a series of assumptions listed out in the schedule about how they would deal with utilities including Ausgrid utilities. Those were listed out and their pricing was based on that. What we undertook was that if there are differences through the design process that are required to be changed to that, then there was a mechanism, and that is what this mechanism refers to, to make adjustments for costs and time in and around that.

The Hon. TREVOR KHAN: I do not want to interrupt because it is helpful, but do I take it that this was in a sense a provision that allowed for Acciona not to bear the risk of changes that arose because of changes in the design of the project? Is that a simple way of describing it?

Mr STAPLES: And it recognised this is George Street, a very busy street, lots of utilities that were there, and that only so much could be known at the time of contract award. It is not unusual for big contracts to know that through the design process a number of other issues will be resolved or will emerge.

The Hon. MATTHEW MASON-COX: I think it is standard, is it not?

Mr STAPLES: Yes. In some instances the contractor is comfortable to take the risk if they feel that they can control that enough. In other instances the contractor is not. We have essentially got a balance of this here where there is some risk the contractor is left with and then there is some that we undertook. The issue we have had is that in implementing the use of the adjustment clause we have not been able to get the type of information that we expected to get to be able to assess these claims adequately and then determine what we think is the appropriate cost and time. We started to get a little bit of that information in 2017 but we are yet to be able to absolutely get all that. That has been a significant difference of view between ourselves and the contractor about what we need.

The Hon. TREVOR KHAN: I take it that Acciona has been involved in civil contracts overseas dealing with similar style projects. Is that right?

Mr STAPLES: They are a global firm. No doubt they have done big projects, bigger projects than this, more complex projects than this. This is their first major project in Sydney, particularly in an urban area. They have done some work in regional New South Wales. It is a complicated project. It always requires a combination of their global expertise but also some on-the-ground local expertise as well to manage a job like this.

The Hon. TREVOR KHAN: But there is nothing particularly inherently different about George Street in terms of bunging a light rail project down than has happened in Europe, I take it?

Mr STAPLES: They are what we call a tier one contractor. We expect them to have a high-calibre management team and high-calibre project management systems to manage the changes. You expect them to be

able to manage the relationships with the likes of an Ausgrid utility organisation; that is the bread-and-butter work of contractors, to manage those relationships and make sure they get things done together.

The Hon. MATTHEW MASON-COX: I have been having a look at the gateway review report, which is dated 24 November 2016 and reviewing the findings. I wanted to run through a few of those with you because there are certainly some issues that come out of that. If you go to the summary of the review findings on page 5, the reference there in relation to service delivery, affordability and value for money, governance, and risk management, the rating by the independent review team was weak against all those measures. I wanted to specifically take you to the first one and just work through a few of these because there are a couple of comments here that I would like to get your response to. If we go to service delivery on page 12, at paragraph 3 it refers to the previous health check in February 2016 and says that there are a range of matters being unresolved mostly but not entirely attributable to the stalling behaviour on the part of the D and C contractor, Acciona, within Transport for NSW PPP partner ALTRAC. Can you comment about that, as you were aware of that at the time, and what steps were taken by Transport for NSW to remedy that issue?

Mr STAPLES: An overall theme, as I read this report post it obviously being produced, because I was not involved in the project at the time, is that the review determined that there was some significant aggressive behaviour on the part of the contractor in the way they were approaching issues and claims in the relationship with Transport and that Transport for NSW were clearly being helpful and, compared to standard practice, were probably being more helpful than usual.

The Hon. MATTHEW MASON-COX: I will come to that because there is an issue there about contract management.

Mr STAPLES: I think there is some caution in the review about being careful and how helpful we are because what happens then is that the contractor can, in certain circumstances, become reliant on that overly helpful behaviour and then expect the contractor to keep doing it. So there is a caution offered in here about it looks like we are doing too much and we were prepared to start being very careful here about whether we keep doing it. That says to me at that point in time that the contractor was having difficulty in its delivery, that there was an adversarial relationship but there was an attempt on the part of Transport to see whether or not we could help them get through what was obviously a difficult time.

The Hon. MATTHEW MASON-COX: Were these issues identified in February 2016 as well?

Mr STAPLES: I would have to take that on notice, but clearly this sort of thing would not come out overnight; these are the sorts of things that emerge over time, so I would be comfortable to think that they would have been talked about in a previous review.

The Hon. MATTHEW MASON-COX: Would you provide us with that review from February 2016? I think that would be useful for the committee's deliberation.

Mr STAPLES: Can I take that on notice in terms of the status because we just have to go through an internal review of the status of the document and its appropriateness to release before we did that. But certainly the extent to which it has the same status of the document then, yes, of course we would.

The Hon. MATTHEW MASON-COX: By all means. I think, by references in this gateway review report, it is clear that one of the major issues is about determining the scope and in that regard there are issues in relation to the number of modifications and the claims and perhaps the behaviour of the D and C contractor through that process. Would you like to comment on that and Transport for NSW's action, particularly in light of the recommendations of this gateway report to actually remedy these issues as soon as possible?

Mr STAPLES: My general response when I read that in the report and with experience on managing a number of large-scale contracts is that clearly the contractor, because it is a design and construction contract, not just a construction only contract, is clearly struggling to get its design program finalised. The pathway to a successful project is to get the design process completed in a timely manner, and that relies heavily on a competent designer that can navigate the uncertainties and resolve the issues in a constructive and proactive way, whether it be within Ausgrid or whether it be within Transport, depending on the nature. So there is clearly, from what I read of this, an issue in relation to the way the design management is functioning within the project.

The Hon. MATTHEW MASON-COX: Which brings us to governance. If I can take you to page 16 of the gateway review report, towards the bottom of the page—and I think this reflects your earlier comment that as a result of the previous report and a clear disconnect between Transport for NSW and ALTRAC and each party's responsibility in terms of, if you like, managing stakeholders, that in the spirit of trying to move the project

on, Transport for NSW has inserted themselves between ALTRAC and Acciona in trying to move the project more quickly to try and deal with these design issues. Is that a fair comment?

Mr STAPLES: In my experience, when contracts go really well and contractors perform very well they take great ownership and responsibility in the management of the third party because they know the difficulties that they will confront if they do not. There is a lot of work put in to developing a positive, constructive relationship, not just the technical process but the focus on the relationship and managing that. In jobs that I have worked on where that has been done up-front through the design process, it serves really well moving on. When I read this cold, without having been involved at the time, this suggests to me that that approach has not been adopted.

The Hon. MATTHEW MASON-COX: The alarm bells are ringing, are they not?

Mr STAPLES: That is right.

The Hon. MATTHEW MASON-COX: And once you are in that position, the contract itself starts to be undermined. Would that be a fair comment?

Mr STAPLES: Yes, and I can understand why Transport were concerned and they would have invested resources and time in there to try and bring that together. If I was leading the project I would imagine I would have done that, although I would have attempted to do it for the short term rather than make it become the permanent way of operating, because it opens up another narrative for potential claims that the Government would not want to enter into.

The CHAIR: You took over ALTRAC's role?

Mr STAPLES: It would appear, based on the review at the time, that there was concern from the reviewers that we were stepping into places that ALTRAC and Acciona should have been doing this.

The Hon. MATTHEW MASON-COX: It appears, and you might like to take this on notice, that that was the position in February 2016 as well.

Mr STAPLES: Certainly from the words here and the referencing, you would expect that that is referenced in the report, but we can confirm it.

The Hon. MATTHEW MASON-COX: If you could. I suppose the obvious question is: why was action not taken earlier to enforce the contract to ensure that the relationships were clear, that the scope was defined between the parties as quickly as possible, and that the issue of outstanding claims was dealt with expeditiously?

Mr STAPLES: I think that, importantly, as I can see, the general progress of the project and the interaction after this report was produced, there was obviously some consideration within Transport on what to do next and we were able to reach an agreement with ALTRAC and Acciona to enter into a dispute resolution process at the end of December—

The Hon. MATTHEW MASON-COX: December 2016?

Mr STAPLES: Yes, because these were things that clearly were not going to be resolved in one or two conversations. The complexity of what was there required a structured, engaged process. That process ran from December 2016 through until about, as I understand it, September 2017 where we sought to try and close the gap in the differences of view on the claims. During that process we started towards the end of that to get a little bit more information around the claims and that provided the basis of why we did the cash on account payment of \$100 million, to help keep things moving. But at September, as I understand it, Acciona withdrew from that process.

The Hon. MATTHEW MASON-COX: If we turn to page 17, the second paragraph, the gateway review report states that Transport for NSW must determine all outstanding claims, serve its role and the role of ALTRAC in progressing the project and notes that it is highly likely this strategy will raise a dispute between the parties and this scenario should be anticipated. It goes on to put some recommendations. Clearly, the situation had, if you like, got out of control in terms of contract management from Transport for NSW's side.

Mr STAPLES: It clearly was and I think this paragraph reflects what I have just said. I think that this was wise counsel at the time to say that if you have a number of disputes on foot the usual constructive way to deal with it is to say, "We haven't got enough information. Can you give me more information?" and have a conversational approach, but it just kept going on and on and on. So the way to bring it to a head and show that

we are serious about this is to determine the claims, and when you do not have sufficient information, then you determine the claims at either very low values or zero, depending on the nature.

The Hon. MATTHEW MASON-COX: Is that when the security of payments process started, in that context?

Mr STAPLES: No. I will come back to that. That was the catalyst. As I understand it, once we decided to essentially determine the claims with little or zero value, that produced the dispute resolution process. I think it actually served its purpose and we followed the recommendation of this report and that provided a path forward for a number of months. It did not deliver the outcome, but I think at that point in time it set the right direction.

The Hon. MATTHEW MASON-COX: There needed to be a line drawn in the sand.

Mr STAPLES: Yes. Security of payments arose after the dispute process that started in December 2016 and went through until September 2017. When that collapsed, with Acciona withdrawing, we were back into a situation where we were arguing through the contract quite openly. At that point in time, I think as you moved into the new year, Acciona would have had cash flow issues in terms of knowing that they talked around. They would, as a contractor, have been under pressure to source funds from the European parent company to support the work. Generally speaking, the overseas companies would prefer that not to happen because that puts pressure on their balance sheet, so they will look to the client to see whether or not they can get cash support around that.

They have instigated the security of payment Act [SOPA] process. I think we really need to be clear about what the security of payments Act is about. It is not a determination. It is not a determination of entitlement of claim as it was characterised today. It is a process and it is a valid process which has been established by government when there is a dispute at hand to make sure that the contractor has cash flow and resource available. I do not want to speak for the adjudicator, but I think the way it was characterised today misrepresents what the status of that claim is. It is not a determination of entitlement. It is essentially a recognition that a significant dispute is on foot and that there is a need for cash flow to be provided to the contractor so that they can keep the project moving. That is the process that was followed in that way, but it is not a final determination of claim. In fact the SOPA requires that once a final determination is required, if the amount adjudicated exceeds what the final claim was, then the contractor is required to repay the money, which I think highlights that it is not a final determination in anyway.

The Hon. MATTHEW MASON-COX: In terms of the role of Acciona in all of this, were they recalcitrant in trying to determine claims, finalise the scope and actually clarify the situation so far is the relationship between them as the design and construct [D and C] contractor, ALTRAC and, indeed, Transport for NSW were concerned?

Mr STAPLES: I am just being cautious here because I read reports and I look at evidence from 2015-16-17 and I give you an interpretation of what I believe was going on. Personally, in terms of my advice, I can only talk to what I have experienced face to face in 2018. It has clearly been a very tense environment. I do think over the last six months there has been some good engagement about trying to resolve the contractual disputes, but we have still not reached a resolution. However, we remain focused at the table to do that at senior levels. But performance on the ground could always be better.

The Hon. MATTHEW MASON-COX: Did you bring further resources into the contract management side of things in response to these reports from Infrastructure NSW?

Mr STAPLES: I do not know what was done in 2016. I would imagine, given what was happening at the time, there would have been more resource put in. When you have significant difficulties on a project, then Transport moves its resources to the areas that are most under pressure.

The Hon. MATTHEW MASON-COX: Can you clarify that for us, just in terms of response.

The Hon. ADAM SEARLE: I would not bet on it.

Mr STAPLES: I am happy to do that.

The Hon. MATTHEW MASON-COX: It is a very serious report and pretty much in the majority of key areas the prognosis is a weak situation. I would be very interested in understanding what actions were taken by Transport for NSW to improve in each of those areas, and you may have something in that respect.

Mr STAPLES: The report was prepared by Infrastructure NSW, so it is the assurance process, which I think is really positive.

The Hon. MATTHEW MASON-COX: It is an excellent process.

Mr STAPLES: It is a process of someone outside of Transport, so I as secretary place great weight on these coming in being independent—someone looking from outside the organisation or group looking from outside the organisation reporting. Obviously, there is advice to Government as well, but I place great value on the production of reports generally.

The Hon. MATTHEW MASON-COX: What I want to know is what was done in relation to each of the areas identified as being weak in the report by Transport for NSW.

Mr STAPLES: I am just trying to make sure I get the page number right.

The Hon. MATTHEW MASON-COX: Mr Staples, why I ask is that this has been a significant contributor to the delay in this process, which is led to businesses and residents being affected dramatically by those delays. At the heart of this is an assurance program, done independently by Infrastructure NSW, to hold Transport to account to assist with the management of that project. The response of Transport for NSW in that regard is critical. I would like those details.

Mr STAPLES: If I could draw your attention to page 26—and this is part of the process we go through—everything up to page 26 is purely at the authorship of Infrastructure NSW. But then, as part of the process, we receive the report. We are given an opportunity to identify whether there are any factual errors in the report, but that is about as far as I would go. Then, as part of the process, we take each of the recommendations and the rating that is put against that recommendation and we produce a response, who within the agency is accountable for it, and then we put a target completion around that. You will see through there that we have gone through each of the recommendations and that there is an action identified in there in the time frame.

The Hon. MATTHEW MASON-COX: Yes. It is fairly high level, if you see what I mean, and some of it is redacted.

Mr STAPLES: Yes; and the only reason for the redaction—I think we would have summarised in a letter the reasons behind it, which we think are important.

The Hon. MATTHEW MASON-COX: Yes.

Mr STAPLES: But we have tried to keep it as limited as possible.

The Hon. MATTHEW MASON-COX: Would you be prepared to provide a bit more detail in relation to each of those recommendations?

Mr STAPLES: We can have a look at that. This was done at the time of the report being produced. We can see whether we can provide some further information. I can take on notice what information we can provide.

The Hon. MATTHEW MASON-COX: That would be excellent. I think it is important to clarify and it is important that this Committee understands the steps taken by Transport for NSW to risk manage this and to action the recommendations to give us confidence.

Mr STAPLES: Okay.

The Hon. COURTNEY HOUSSOS: Mr Staples, I want to come to the question of when this project will be completed. Acciona this morning told us there was absolutely no way it will be completed in the first quarter of next year. In fact they said it would be at risk of later than May 2020. When do you think the date is?

The Hon. TREVOR KHAN: I think that is not quite an accurate description of what was said, but anyway Mr Staples was watching.

Mr STAPLES: Yes. We have obviously been constantly monitoring this project's progress and program. I want to get to the answer but it is important that you understand—

The Hon. COURTNEY HOUSSOS: What is the latest information that you have been provided by Transport for NSW about the project?

Mr STAPLES: Our last assessment, our last own assessment of the program is we certainly think the project should be completed by March 2020.

The Hon. COURTNEY HOUSSOS: It should be completed by March 2020.

Mr STAPLES: We believe it is possible for it to be completed by March 2020. In fact, with the right alignment between ourselves and the contractor, we still believe there are prospects of part of the project being opened earlier than March 2020.

The Hon. COURTNEY HOUSSOS: You would have heard the testimony this morning from Mr Noonan who said that even up to two nights ago delays from Ausgrid and delays from other projects are actually putting that May 2020 deadline in jeopardy.

Mr STAPLES: I think it is really important at this point to balance the characterisation that was made today about the impact that Ausgrid is having on Acciona's program. There are many, many contributors to the contractor's program, including their own resourcing, their own level of organisation. Interaction with Ausgrid is no doubt a critical one and that happens on a regular basis. But in relation to the particular incident that was referred to by Mr Noonan today, certainly Ausgrid did have resources. They actually attempted about a month before that date to agree on appropriate time lines for early November. The combination of Acciona not having resources available and Ausgrid not having resources available where they could align them was due to happen in early November. It did not occur—so both sides. This is where I go to the point that we need to be very balanced in our consideration. Both sides contributed to not being able to do the work in early November when it was then—

The Hon. COURTNEY HOUSSOS: I am glad you made that point about being balanced.

Mr STAPLES: —agreed to do that in late November. Yes, Ausgrid in that particular circumstance had an emergency call-out for that group due to another incident and they had to redistribute their resources for that. As you would expect for Ausgrid, they cannot have resources just sitting around. They do have to manage their resource pool as well. This is not uncommon for any tier one contractor to have to deal with. On that particular event, yes, Ausgrid did put different resourcing there and they were not able to conduct the work on that night. But then I can cite many examples where, on the other side, Acciona had said that they were ready to work on a given night, Ausgrid turn up with their resources ready to go and Acciona are not ready. So there are both sides to this and we could characterise this ping-pong, back and forth, that the—

The Hon. GREG DONNELLY: Ausgrid did not raise any of these issues in the opportunity they had to give evidence to this inquiry.

Mr STAPLES: No, because I think you have been very respectful. But at that stage no-one had criticised them around their particular conduct around an issue like this. I am just showing that there is a balance and there are two sides to it. A big job of a tier one contractor is to manage that relationship with Ausgrid so that they get their resources aligned on the ground well in advance.

The Hon. COURTNEY HOUSSOS: Sorry, Mr Staples, I am just going to stop you there because we have very limited time. You are asking us to take your testimony over Acciona's. Let me put to you, in answers to questions on notice, when asked specifically about when you received the new guidelines Transport for NSW's response was "on 27 February 2015". It is only through subsequent testimony of others that we have found that you were being deliberately tricky then. Why should we take your testimony over Acciona's or over anyone else's that has come before this Committee?

Mr STAPLES: Two things there: there is no evidence that we were being tricky, there is no evidence. There is a difference—

The Hon. COURTNEY HOUSSOS: I am putting to you that you are being tricky because—

Mr STAPLES: I am sorry but you characterised it as "evidence", I am sorry.

The Hon. COURTNEY HOUSSOS: —Ausgrid have come to us and said that Transport for NSW were told about these new guidelines on 3 February and you, under a direct question from this Committee, said 27 February, at the same time as Acciona. You cannot say that that was not being deliberately tricky.

Mr STAPLES: No, I do not agree with that. What I said to you is that we received the guidelines in early February and from what I can see in terms of the interaction that happened—

The Hon. COURTNEY HOUSSOS: I am going to stop you there, Mr Staples, because the original—

Mr STAPLES: No, I am sorry, this—

The Hon. TREVOR KHAN: Let him answer. I will take a point of order if you keep it up.

The Hon. SHAYNE MALLARD: That is a serious allegation.

The CHAIR: Let the witness finish a sentence.

Mr STAPLES: We received the guidelines in early February. We had an interaction with Ausgrid to clarify a number of matters. Then at the end of February we provided those to Ausgrid.⁷ There was nothing tricky; there is no evidence that we have been tricky in any way whatsoever. The second thing is that you characterised that I asked you to believe us over Acciona. I was very clear in my opening statement that I will give you a view today and you have received a view from Acciona. It is for the Committee to determine and ultimately it will be for the court to determine the outcome of this. I am not telling you to believe one party more than the other; I am giving you a perspective.

The Hon. COURTNEY HOUSSOS: Mr Staples, let me put this question to you again because the last time Transport for NSW answered this question they said it was on 27 February and it is only through subsequent testimony from Ausgrid that we have been told the truth. When did Transport for NSW become aware that Ausgrid had new guidelines that were different to those set out in schedule F8?

Mr STAPLES: That is in early February, as—

The Hon. COURTNEY HOUSSOS: That is different to what you provided to us under previous answers.

Mr STAPLES: When I spoke earlier?

The Hon. COURTNEY HOUSSOS: No, that is different to Transport for NSW and that might have been Mr Troughton. But Transport for NSW told us "27 February".

Mr STAPLES: I think it might be a technicality in the form of what was provided.

The Hon. COURTNEY HOUSSOS: That is why I am saying that you are being deliberately tricky.

Mr STAPLES: Yes, I still do not accept that we were being tricky.

The Hon. ADAM SEARLE: Mr Staples, I will ask you some questions about the gateway review report. Page 12 of the report says that the review team's rating for service delivery in connection with the project is weak. That is correct, isn't it?

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: On page 14, it says the review team's rating for affordability and value for money on the project is weak. That is correct, isn't it?

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: On page 17, the review team's rating for governance is also weak. Do you accept that?

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: On page 19, the review team's rating for risk management in connection with the project was also weak. Is that correct?

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: That is a pretty damning picture of Transport for NSW's overall handling of the contract, isn't it?

Mr STAPLES: This is the governance process working, by having an independent assurance come in and review a project to identify where problems are so that actions can be taken. The fact that this report exists shows that we have opened our doors to having the review done.

The Hon. ADAM SEARLE: Okay, but just—

⁷ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

Then at the end of February Ausgrid provided those to Acciona.

Mr STAPLES: We have then subsequently taken those actions, those recommendations, very seriously. We have identified actions to address them. I have outlined in questions to one of the other members the actions that were taken around our dispute process to try to address this. What you are seeing here is—notwithstanding it does identify a number of weaknesses—the process that has been established by Government in terms of independent assurance working effectively.

The Hon. ADAM SEARLE: On page 3, it also says the external review panel finds that in the absence of immediate remediation measures the completion of project is highly unlikely to be achieved either to time or budget. That was in November 2016. Despite all of your fine words two years later, it is still not on time or on budget. It does not sound like you have actually achieved very much for all of the activity that has been allegedly going on?

Mr STAPLES: It talks about "in the absence of immediate remediation measures". So the critical remediation measure that was put in place at that time was the establishment of a dispute resolution process, which all parties agreed to step into.

The Hon. ADAM SEARLE: But we are talking two years later, Mr Staples. Two years later, you are further over time, you are further over budget, you are now in litigation. It is not a very successful management of the contract by Transport for NSW, is it?

Mr STAPLES: I think you are characterising it—

The CHAIR: Have you written a response to this report?

Mr STAPLES: The attachment to this report is our response. There is a set of recommendations and then we provide a response in terms of how we will action the response around each of those recommendations.

The CHAIR: That is up to date? Is that response up to date?

Mr STAPLES: Yes, and there are subsequent reviews done, which look back and make sure and check on the status of what we have done around those actions. But my point is that—

The Hon. GREG DONNELLY: That is from page 26. Is that correct, Mr Staples?

Mr STAPLES: Yes, but you drew out page 3 in relation to "in the absence of immediate remediation measures". What I can say is immediate remediation measures were put in place and agreed with the contractor.

The Hon. ADAM SEARLE: They did not work, did they, Mr Staples?

Mr STAPLES: No, I would not characterise in that way.

The Hon. ADAM SEARLE: You are in litigation.

The Hon. TREVOR KHAN: Let him answer, Adam.

Mr STAPLES: "In the absence", then the project may be in a worse state than it is now. We work closely with Acciona for eight to nine months. They continued to progress works over that period from December 2016 to September 2017. We continued to get project updates, program updates from them which indicated that the project was on program to that stage. They continued to progress the works. When that dispute process collapsed in September, we were going into a period of not being able to have as much confidence in the program. We continued to monitor that very closely for a number of months and at the time we concluded that it would no longer be possible to complete the project on time. We made it aware in April 2018 that the project would not be completed on time and it was more likely to be in March 2019. There has been a journey from this report where we have focused on trying to keep the project on time for as long as possible until such time that we concluded that that would no longer be the case, and that was in April this year.

The Hon. ADAM SEARLE: Mr Staples, at page 10 the report says, "Successful delivery of the project is in doubt with major restoration in apparently a number of key areas. Urgent additional action is needed." Despite all of the activity you have described, none of it was successful, was it? The project is still not on time or on budget.

Mr STAPLES: I think that is not a characterisation of where we are at because if we had not taken a number of the actions we have taken we would not have a situation where we have only got 88⁸ metres of track to lay, where we have completed 18 of the 19 stops, that the drainage works are 90 per cent complete, that the paving works are 40 per cent complete, that five of the 10 substations have got power in now, that we have got testing going out on a track, because—

The Hon. ADAM SEARLE: And you are still not going to be done on time.

Mr STAPLES: The alternate scenarios may have been far worse than what we have today. To say that this was not successful and the actions were not successful, I think, misunderstands what might have unfolded without that. I think a lot of the mitigations have done very well in the circumstance to deliver a good outcome. In terms of the overall program—

The Hon. ADAM SEARLE: "A good outcome"?

Mr STAPLES: —you also need to remember that the overall program is not purely in the hands of Acciona. From the months going forward we will be very much dependent on Alstom, who are their joint venture partner, and subsequently the operator, Transdev. There are some months of civil works left, but the bulk of the time now required to complete this project will actually be more to do with systems and power, rolling stock testing and operation. That is why when you step out of the ground, you go out to Randwick, and you go out around the racecourse, there are substantial civil works completed and we have got trams being tested around that area. You go down George Street and every day there is more paving and more area available.

Those things, in the circumstance of where this project has been, are our successes. Is it as early as we would have liked? Absolutely not. We stand here acknowledging that this has not met the time frame that we set out for but to characterise that we have not taken action in relation to this would be incorrect. We have done substantial remediation actions to try to keep this project moving. I acknowledge that Acciona have done that as well. This is on both sides.

The Hon. ADAM SEARLE: This report is very damning about Transport for NSW's conduct of the project. Is that why your agency tried to block my Government Information (Public Access) [GIPA] access for these documents, because you were embarrassed by the content of this material?

Mr STAPLES: I do not have any knowledge of that particular process.

The Hon. ADAM SEARLE: Can I ask you to take it on notice and to provide the Committee with a full response as to why you successfully blocked the access application?

Mr STAPLES: I am certainly aware that at one point these documents were considered as Cabinet-in-confidence. It was not until we went through a process and found that the way in which Infrastructure NSW, who is the author, was presenting these items to Cabinet that therefore they did not have the Cabinet status that we expected and that is why we have provided that. I am certainly aware at that level that that is a change and it has resulted in us reviewing the process of Infrastructure NSW.

The Hon. ADAM SEARLE: You would be aware that your agency lost that fight in the NSW Civil and Administrative Tribunal [NCAT].

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: You took a further appeal on other grounds on which you succeeded.

Mr STAPLES: Yes.

The Hon. ADAM SEARLE: But the question remains, leaving aside the Cabinet-in-confidence aspect which you lost and did not challenge, I am putting to you the real reason your agency tried to withhold this from public scrutiny is because it shows a damning report as damning of your agency's handling of this project. You were just trying to cover up, were you not?

⁸ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

I think that is not a characterisation of where we are at because if we had not taken a number of the actions we have taken we would not have a situation where we have only got 99 metres of track to lay...

Mr STAPLES: No. To me it is the process working and we have provided the documents to the Committee as you have requested.

The CHAIR: We will move on to Ms Cate Faehrmann.

Ms CATE FAEHRMANN: I am interested in what the report is prepared by Ausgrid for Transport for NSW which costed the impact on Ausgrid's assets at approximately \$700 million that Mr Noonan is referring to when he said that Acciona has not seen that report.

Mr STAPLES: As I understand it, and I have to acknowledge that this well and truly predates a lot of knowledge on this project, the costs that were referred to in that correspondence related to a proposal to move all of the Ausgrid assets out of George Street and to get them out of the way. That was not really a good value-for-money proposition but that was a position that Ausgrid said, "If you want to get us completely out of the way, then this is the sort of cost that we will be talking about." That is Ausgrid saying that they would go and do that. So I think from a Transport point of view, if I was leading at the time what I would have done is say, "Interesting. There's got to be a better way of doing this. How about we get in and work up a process to manage this going forward?" And I think that is what has unfolded.

Ms CATE FAEHRMANN: That report was not given to tenderers for them to judge whether that would be part of that—

Mr STAPLES: No, because it was not the scope of work we were asking the tenderers to deliver.

Ms CATE FAEHRMANN: Why then did Ausgrid give you that report? Why did they report on moving all the assets?

Mr STAPLES: Because this goes back much earlier in the project development phase. You start out with a wide view of what you might need to do and you progressively narrow down to what your proposal is that you put to tenderers. I expect that that will have been resolved before we looked at all the contracts, that we were not going to be moving all of the Ausgrid assets.

Ms CATE FAEHRMANN: Going back to those meetings in February 2015 that took place between Transport for NSW and Ausgrid, is it correct that they were the two agencies that were—

Mr STAPLES: Yes. I characterise that we received them in early February and then we would have had some interaction. I do not know what meetings there were. I would have to take on notice the specifics of meetings.

Ms CATE FAEHRMANN: I think the Committee has received the dates of those already, being 9, 19, 20 and 23 February.

Mr STAPLES: Yes, that sounds correct.

Ms CATE FAEHRMANN: I understand at those meetings there were several iterations of the adjustment guidelines, is that correct?

Mr STAPLES: I would need to clarify exactly what changes were made along the way there, but I go back to my point that I think there is an over-emphasis on the importance of these guidelines at this point in time because there was a mechanism in the contract to adjust for any differences that might emerge out of the design process anyway.

Ms CATE FAEHRMANN: You are saying that, but we have heard Acciona this morning suggest that when they received the guidelines it was "like dropping a bomb". I think those were Mr Noonan's words. That hardly sounds like they are not that important.

Mr STAPLES: If that is the case, I have little understanding as to why the amendment deed for Ausgrid was signed by Acciona and ALTRAC.

Ms CATE FAEHRMANN: After you have had these several iterations in terms of the meetings and the draft adjustment guidelines, was it Transport for NSW's expectation to endorse or accept those guidelines?

Mr STAPLES: No, it is not really a case of endorsing or accepting. It is really a case of looking at the guidelines, seeing what the implications might be when they are provided to the contractor and interaction around that to clarify matters. That all seems quite plausible that that would have been what was going on in those weeks leading up, and then those guidelines being provided. Afterwards I cannot—

Ms CATE FAEHRMANN: Did Transport for NSW express any concerns to Ausgrid at the time about those adjustment guidelines at any stage?

Mr STAPLES: I am not aware of that but, as you know, I was not involved in the meetings so I have to take on notice whether there were concerns.

Ms CATE FAEHRMANN: If you could take it on notice. I think it would be particularly helpful for the Committee to know what the iterative stages were. If you had four meetings between Transport for NSW and Ausgrid working on these guidelines, going backwards and forwards on various drafts, and then, as we understand it, obviously Acciona were not brought into those discussions but also the adjustment guidelines were not endorsed or accepted by Transport for NSW, we have heard in evidence here.

Mr STAPLES: Yes.

Ms CATE FAEHRMANN: Given Acciona's testimony, could you take on notice to provide the Committee with any concerns at all that Transport for NSW had and could the Committee also receive copies of the guidelines and the process during those meetings in terms of the draft guidelines and what the issues were?

Mr STAPLES: I am happy to take that on notice and have a look at what records we have around the interaction in relation to that. But I need to reiterate the point that once Acciona had received the guidelines we had a number of interactions with them and Ausgrid and then they subsequently signed the amendment deed. So it does not fit that there was a major issue in the way we interact with Ausgrid, given the way Acciona behaved in the month immediately after that. Now it is years later.

Ms CATE FAEHRMANN: What was the date of the signing of the amendment deed?

The Hon. TREVOR KHAN: It was 25 March.

Mr STAPLES: It was 25 March.

Ms CATE FAEHRMANN: There is the contract and then there is the contract—

The Hon. TREVOR KHAN: The amendment deed is 25 March.

Mr STAPLES: Yes.

The Hon. TREVOR KHAN: I remember Mr Noonan was wondering at the relevance of that.

Ms CATE FAEHRMANN: Mr Noonan in his first opening statement to us spoke of receiving the Ausgrid guidelines after contract signing. Are you talking about the amendment deed on 25 March? When he says "contract signing", that is the contract?

Mr STAPLES: No, the original contract was signed in December 2014. That was actually attached to that contract and—this is not unusual when sometimes certain deeds are not finalised—a draft of the deed was available in the contract and referenced. That referred to the need to use Ausgrid's network standards.

Ms CATE FAEHRMANN: Is this the F8?

Mr STAPLES: And the schedule F8 was in there, so that laid down the baseline against which Acciona would put forward any—

Ms CATE FAEHRMANN: Mr Noonan seems to suggest that what was in F8 in the final adjustment guidelines that they saw, regardless of what was in F8, was substantially different.

Mr STAPLES: And therein lies a heart of the dispute. But even if that is the case, there is an adjustment mechanism in the contract for that. So why would we need to misrepresent?

The Hon. SHAYNE MALLARD: Acknowledged in their letter.

Mr STAPLES: And acknowledged by ALTRAC and Acciona in subsequent correspondence on 20 April.

The CHAIR: Acciona in their evidence today said:

Transport for NSW did not provide those Ausgrid guidelines to our consortium until 27 February, which was after final contract signing.

Is there a possibility that Transport for NSW withheld the guidelines until they had signed the contract?

Mr STAPLES: I have no evidence that there was any deliberate intent to withhold guidelines until after financial close was achieved. We need to be clear this is a PPP contract, so the contract was actually signed in December 2014. Under a PPP, that actually locks in the scope for the design and construction contract. That is the time when they decide what they are committed to and that they are comfortable with their price, with their scope, with their program and with the mechanism in the contract to manage risk and reassignment. That is the time when that is done in a PPP. What happens, and it is like a normal design and construct contract, is that if there was no finance, that would have been it. But because there is financing, there is a process for the financiers to go through and do their final due diligence, tick off some conditions precedent in relation to this, and that ran through until late February. So that is finance, being equity and debt. That is not unusual. Sometimes they are done a couple of days apart and sometimes they are done a couple of months apart depending on the nature of the contract. It is actually relatively academic that it was the financial close around the time that the Ausgrid guidelines were provided, because Acciona signed up to its contract obligations in December 2014.

The CHAIR: There must be some confusion between you and them, because they say the "final contract signing in February". What did they sign in February?

Mr STAPLES: You will find that that is the financing documents, that they have already committed to their contractual position in December 2014. That is the PPP process. So design and construction contractor—Acciona signed their obligations to deliver these works in December 2014.

The Hon. COURTNEY HOUSSOS: Why did you not give it to them on 3 February when you got them?

Mr STAPLES: I have given you an answer to that in that we went through some interaction with Ausgrid. Then we⁹ have provided them and then we have had a month of interaction with Acciona and then they have signed up to a deed at the time knowing that those Ausgrid guidelines were there.

The CHAIR: What would have happened on 25 February if it was the final contract and they said, "We will not sign"?

Mr STAPLES: We would have sat down and had a conversation about what the issue was.

The CHAIR: You are giving the impression with your December date that everything was locked in and finished?

Mr STAPLES: That certainly would have been our position at that time. It remains today the same that the scope of the work—the price for the D and C contractor, their program, and the adjustment mechanisms, and the schedule of assumptions for the utilities were all agreed in December 2014. That has always been our position. There has been no change on that. That is a traditional approach for the development and award of the PPP contract that the contract award occurs first. The financial close, which brings the financing into effect, occurred some time after. That is the date that is being referred to by Mr Noonan. That is not the contract award. Acciona committed itself in December.

The Hon. MATTHEW MASON-COX: Subject to finance.

Mr STAPLES: Subject to finance. There is a process to go through for that, so I am not trying to be cute around that. I respect that is—

The Hon. MATTHEW MASON-COX: Subject to finance. If finance is not provided there is no contract.

Mr STAPLES: Yes, that is right.

The Hon. MATTHEW MASON-COX: Let us just put that in context.

Mr STAPLES: Yes.

⁹ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

Then Ausgrid have provided them and then we have had a month of interaction with Acciona and then they have signed up to a deed at the time knowing that those Ausgrid guidelines were there.

The CHAIR: You are saying it is not correct for them to talk about final contract signing in February?

Mr STAPLES: That is certainly not the correct language.

The CHAIR: You are saying they did not understand what they were doing?

The Hon. TREVOR KHAN: They might understand, whether they—sorry.

Mr STAPLES: I cannot comment on why it was characterised in that way. I am just being clear about—this is the PPP guidelines that the State operates to. I have been through a number of PPP contracts, including Sydney Metro Northwest where we went through a similar process. I lived and breathed it minute by minute. There is a contract award. Everyone knows at the point of the contract award that everyone has sorted out their risk allocations for delivery and then there is a process to go through to finalise the financing.

The CHAIR: We are all hoping the project will be completed, as has been advertised, in May 2020. But this report is very clear and says that the completion of the project, the program schedule and cost is unlikely to be achievable under current behaviours and processes.

Mr STAPLES: I think we need to remember that that report was produced in 2016. That would have been talking about a date of March 2019 at that stage.

The CHAIR: They are not referring to May?

Mr STAPLES: It is not referring to March 2020 or any other date. It is the original target date of March 2019. In that respect, we have moved on from that.

The CHAIR: You feel that the May 2020 date is still achievable?

Mr STAPLES: Our position is that March 2020 is still achievable. We have received programs for May. We have rejected those because we believe that with the right order, approach, level of resource from the contractor involving Acciona finishing its civil works, Alstom coming in and finalising the systems works, powering up, all the finishing on the stations being done, the testing and commissioning, we believe that this project can be finished in March 2020.

The Hon. TREVOR KHAN: Some of that is going on now.

Mr STAPLES: Yes, it is. But obviously there are a number of moving parts on this project and we will continue to monitor that. At the end of the day, we want to make sure this project is finished and is ready to operate safely and that it is integrated with the rest of our transport network so that we get a long-term outcome for the customers.

The CHAIR: The recommendation was that immediate action be taken to determine all claims, noting and anticipating that this will generate a dispute. Are you enthusiastically doing all you can to determine all those claims?

Mr STAPLES: We did determine those claims. As I indicated before, the problem we had in determining those claims is that we did not have available to us the information and evidence that we needed from the contractor to appropriately determine the dollar and time amount. So we were left with no other choice but to determine them at essentially zero time and cost. In doing that, the positive of that was that it then generated a dispute resolution process that ran from December 2016 to September 2017. I think, in terms of the critical recommendation out of this was that we would get on and try to resolve the claims. We have a very clear path where there was an attempt to do that.

The CHAIR: They have cooperated in providing that information to you?

Mr STAPLES: We have some information. I would not want to characterise it as being sufficient. We have been able to agree the claims. Through the dispute resolution process we received a little more information. To be frank, it is not the quality or the content we were expecting from a tier one contractor in a circumstance like this.

The CHAIR: It is not up to standard?

Mr STAPLES: That is right.

The Hon. SHAYNE MALLARD: Mr Staples, I want to bring you forward to more recent times. On 29 October 2018 a media report in the *Sydney Morning Herald* stated:

Bones were uncovered on Monday by construction contractors excavating in Chalmers Street, Surry Hills, for the light rail project...

The article goes on to state:

The bones were "respectfully removed by heritage experts and analysis by a forensic anthropologist [at] the University of Sydney confirmed the bones to be human ...

We discussed this with Mr Noonan today. He claims that they were respectfully removed. We are aware of the video footage shown on television which was taken by a contractor and revealed some days later. What is the position of Transport for NSW in regard to that incident?

Mr STAPLES: We were completely disgusted by what we saw in the video. I remain completely disgusted and appalled that anything like that would be done by any contractor and nothing that anyone can say to me, having seen that video, can change that. I can tell you that as a leadership group in Transport, we saw that as a reflection of us. They are our contractor. When I think across Transport for NSW and the work we do with Indigenous communities around their heritage, things we do elsewhere across Sydney with other heritage items, I think that that was not reflective of the intent that we have. I am not saying we get it perfect every other time either, by the way, but this was a complete outlier. I cannot think of my time in transport where I have been more disappointed in the behaviour of the contractor.

I have spent a lot of time on site. I want to recognise that having interacted with a lot of the construction workforce on the ground, I do not think it is reflective of them as a group. I think it was unusual behaviour, but I think it reflects an overall attitude and focus on the quality of the work that is going on with this job in respect of the leadership and culture that has been demonstrated, but not necessarily a reflection of the individual construction workers that turn up day in and day out doing the hard work on the ground. We were absolutely appalled. We have an investigation report. There is a clear time line. I think the statement was completely incorrect in respect of what was done. The evidence speaks for itself.

The Hon. TREVOR KHAN: Mr Noonan says the statement came from ALTRAC.

Mr STAPLES: If that is the case, the only way that ALTRAC would make that statement is to rely on the information provided by the design and construction contractor. I have worked on dozens of contracts. When we have a media issue, there is a very clear protocol and everyone sticks to it really tightly because we want to get this stuff right. If we as Transport receive a media inquiry, we pass it to our head contractor. If there is a subcontractor—in this instance ALTRAC being head contractor—if it relates to their work, they pass that request down. Now the advice that we—

The Hon. TREVOR KHAN: When you say "down", that is from ALTRAC to Acciona?

Mr STAPLES: To Acciona. The advice we have back from ALTRAC is that ALTRAC has been advised. The wording in the advice back to us is that ALTRAC had been advised.

The Hon. TREVOR KHAN: By Acciona?

Mr STAPLES: It does not say by Acciona, but who else could they have been advised by?

The Hon. SHAYNE MALLARD: Mr Noonan is claiming they had nothing to do with that statement.

Mr STAPLES: I think that is a matter for ALTRAC and Acciona to advise you where the source of that information was. Clearly, someone has said something that is not correct. Can I also call out the individual who took the video. I think we should recognise and congratulate him on that. As appalling as it was and it is difficult, I feel for him because the mateship on construction sites is very important to workers. For him to decide to do that has essentially put his job in jeopardy. I do not know what has happened to him, but that is a very brave thing to have done in the circumstances and he is to be congratulated for having put his hand up and done that. If I see something like that again—I picked up the phone to Mr Noonan the day that I saw that and made it very clear how disappointed we were, and we remain incredibly disappointed. I am not convinced that they followed through and put enough action in place at this point of time, and we will continue to discuss that with them.

The Hon. SHAYNE MALLARD: Has Acciona made a claim against the delay caused by finding human remains?

Mr STAPLES: Yes, they have.

The Hon. SHAYNE MALLARD: That is not what Mr Noonan told us.

The Hon. TREVOR KHAN: To be fair, I think he walked back.

The Hon. SHAYNE MALLARD: Walked back. He eventually took it on notice. I correct that.

Mr STAPLES: The site where it has occurred, it is at Chalmers Street. Although I do not have the technical advice around exactly the status of the bones and why they were likely to be there, but it was obviously close to what was an original cemetery at Central station, so you could theorise possibly that it is related to the cemetery or people being buried very near the cemetery.

The Hon. SHAYNE MALLARD: Could have been a murder scene.

Mr STAPLES: Bear in mind this was at a time when not everyone was buried in the way—

The Hon. SHAYNE MALLARD: It could have been a crime scene. The police need to be involved in it.

Mr STAPLES: It could have been a crime scene and there is a process to follow there to get police to help assist and determine that as well.

The Hon. SHAYNE MALLARD: To be clear, the contractors found the remains dumped down the pit, dug them up and threw them out on plastic in front of the public and someone filmed it. And now they are claiming money, compensation for that outrageous activity?

Mr STAPLES: Yes, they are claiming for time and costs in relation to that.

The Hon. SHAYNE MALLARD: Are you in a position to tell us the figure?

Mr STAPLES: All we have got at the moment is a notice of claim. What they will do is follow through with time and cost implications later. The problem that they have created for themselves is that by not following the protocol, they now have to go through with Department of Planning and Environment to go through assessment processes about when they can start back on site. That has gone on for some weeks already, so they will claim that they have not been able to work on that site for those weeks, and they will look to push that back to Government and say that is Government's fault.

Therein lies a really good example about where we say, "Actually, it is your behaviour. If you dealt with the process from the start and dealt with the remains appropriately, you would have been able to move those remains on in an appropriate way and got back on the site within a short period of time." And we may have, depending on the specifics of the contract, granted a claim for the days that they may have been disrupted around that. We are now in a situation where it has gone on for weeks and there will be an argument about who is responsible for that.

The Hon. TREVOR KHAN: I asked Mr Noonan about the involvement of the Department of Planning and Environment and he seemed to have no knowledge of their involvement. Would you be able to explain why Mr Noonan would not be alive to that?

Mr STAPLES: I cannot speak for Mr Noonan.

The Hon. TREVOR KHAN: He has come here to give evidence on a whole variety of things, apparently as an expert.

Mr STAPLES: I would expect someone who is heavily involved in a project of this nature to understand the obligations around safety and heritage management and so forth. Ms Prendergast can give you a bit more in terms of the process and the protocol that is required, if you would like us to explain that.

Ms PRENDERGAST: There is a very firm protocol set out in the heritage management plan for construction. It is conditions B53 and B54. I am quite happy to provide this, but it is very firm, "Ensure that no further disturbance occurs. Do not handle any of the findings so as to prevent further misplacement. Inform the project site manager, who will inform the project archaeologist. Report the finding immediately to the NSW Police and the New South Wales Coroner's office. A special forensic anthropologist will be consulted to determine the nature of the remains. If the remains are suspected to be Aboriginal, OEH, or from a community group, they are also to be advised. An investigation will be undertaken in consultation with the Department of Planning and Environment and in accordance with the appropriate guideline"—which in this case is Skeletal Remains-Guidelines for Management of Human Skeletal Remains—"Works will not recommence in the area unless authorised by the Department of Planning and Environment and/or NSW Police."

The Hon. TREVOR KHAN: So there is no caveat on that "notify police after 9 o'clock in the morning"?

Ms PRENDERGAST: Correct. You actually should not move them. You should bring police to the site.

The Hon. SHAYNE MALLARD: Certainly not jump down the pit, make jokes and throw them out on the road in front of the public.

The CHAIR: Who contacted the Department of Planning and Environment? You did?

Ms PRENDERGAST: We definitely did the next day. We did not hear about it until later in the morning.

The Hon. SHAYNE MALLARD: I use the term whistleblower, and I know that applies to government, but he is like a whistleblower if it is a contractor filming it because he was so disgusted.

Mr STAPLES: We suspect it was a worker on the site. I do not have direct evidence of that.

The Hon. SHAYNE MALLARD: Mr Noonan indicated that person has disappeared overseas. He implied that the right process would have been for that person to take the video to Acciona and enable it to be investigated and not go to the media. That is like shooting the messenger.

Mr STAPLES: I would like to think that in an organisation where the culture is right the worker would feel comfortable in reporting that directly to their managers or have a process within the organisation to do that.

The Hon. TREVOR KHAN: Of course, the report had already appeared in the *Sydney Morning Herald*

The Hon. SHAYNE MALLARD: "Respectfully removed".

The Hon. TREVOR KHAN: That they had been respectfully removed. The order of events seems to be that there is a media release that indicates this has been done properly. The worker, whoever it is, the subbie, knows that does not appear to be in any way close to the truth.

Mr STAPLES: There is no doubt that the statement that was made compounded the issue. Obviously, the most dreadful part of the whole process was what happened on the night in the way that the remains were treated. The fact that they were misrepresented I think just compounded how everyone felt about the matter.

The Hon. SHAYNE MALLARD: I see the Minister has been involved in testing the light rail in Newcastle.

Mr STAPLES: Yes, he has.

The Hon. SHAYNE MALLARD: Congratulations on that project. How long did it take for that light rail project to be built?

Mr STAPLES: It has been about a two-year project. I think that illustrates the success we have been able to have working with a contractor in another main street. Admittedly not as busy as George Street but nonetheless—

The Hon. SHAYNE MALLARD: Which contractor was that?

Mr STAPLES: Downer. It is a combination but the main civil works and track work were done by Downer. They have gone in and dug up the main street of Newcastle and put the track down. We are now in a situation where we have been doing some months of night-time testing. I think as of this week we have announced some daytime testing, so the Minister was on site for that daytime testing. We are aiming to open to service early next year. It does illustrate an example of where we have been able to successfully work with a contractor in a difficult environment to get the job completed on time and on budget.

The Hon. SHAYNE MALLARD: It might be slightly smaller in scale—

The Hon. GREG DONNELLY: Slightly smaller?

The Hon. SHAYNE MALLARD: But clearly the same sort of challenges in terms of retrofitting a city, particularly in the shopping strip area, with rail. You are putting to the Committee that the relationship with the contractor was fundamental to the way that was able to be achieved?

Mr STAPLES: Certainly.

The Hon. TREVOR KHAN: Do I take it that what is now occurring with the project that is before this Committee is that what you are attempting to do is work around Acciona in terms of, for instance, the electrical work being done, to try to move parts of the project forward, rather than awaiting their completion?

Mr STAPLES: As critical as we will come across today with Acciona, I will also credit that on the ground there has been a fair amount of activity progressed in the last months while we have been going through

the negotiation on the claims, and we have achieved a lot in the last six months from where we were. A lot of advance has been made and Acciona are to be credited for the progress they have made in that period. We have got issues that obviously emerged much earlier in the contract, of course. But Mr Noonan referred to in the last six months having had some positive interaction. I would agree with him on that in terms of what we have been able to do over the last six months, and that is why we have got a lot of the civil works done.

We have still got work to do with them, a lot of paving work still to be done to get the works completed, and just finishing works that have to be done around things like stops and that as well. We remain committed day in, day out working with them. We have also got the Kingsford section, which was referred to as part of the Ausgrid thing. For example, we meet every week with Ausgrid and Acciona and ALTRAC together to look at the program ahead, the resource availabilities across the various parts of the project and how we will manage those interfaces and get things completed as quickly as possible.

The Hon. TREVOR KHAN: I put to Mr Noonan this morning that there was something in the order of 100 metres or thereabouts of track to be laid in the area of Chinatown, and 100 metres or thereabouts of track down near the Quay. I think they were the two areas identified.

Mr STAPLES: The advice I have got today is that there is a total of 88 metres.¹⁰

The Hon. TREVOR KHAN: I heard that earlier. I am wondering why—again, I am just a traffic court lawyer who happens to be here—do you know that it is 88 metres¹¹ and Mr Noonan apparently has to take the issue on notice? What is your intelligence source?

Mr STAPLES: All I can say is we track progress very closely. We track all our projects very closely. The ones that are performing more poorly we track incredibly closely. This one has had my interest focused very closely on it for some time.

The Hon. SHAYNE MALLARD: We have the media release from ALTRAC about the timetable for the pull back of the barriers. I put it to Mr Noonan today. I listed the dates and he said that they expect to be able to meet those or just about meet those. Are you confident that all of those barriers will be pulled out by February next year?

Mr STAPLES: We are working closely and I think on the basis that if things continue in the way that they have gone on the ground in the last months then I would expect that in February the bulk of the barriers are back and the civil works in the city are done.

Ms PRENDERGAST: Over the next few weeks you are going to see a massive difference from zone one through Circular Quay right through to Town Hall. There will still be parts across the little viaduct culvert that is at Town Hall. Circular Quay has come back. We have opened up from Martin Place to King Street. We are actually getting ready to progress Martin Place right back to Hunter. Zone two is virtually open. Circular Quay we will pull back much more, except for Tank Stream. Devonshire Street we will also start pulling back or reducing. We just want to get them reduced as much as possible.

The CHAIR: Thank you very much for attending our hearing and for the information you have given. You are probably relieved that this is the last time you will be appearing before us. You have up to seven days to reply to any questions on notice from the time you get the question from our secretariat.

¹⁰ In correspondence to the committee received on 12 December 2018, Mr Rodd Staples, Secretary, Transport for New South Wales, clarified the following:

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I am wondering why—again, I am just a traffic court lawyer who happens to be here—do you know that it is 99 metres

Ms PRENDERGAST: I just have one clarification from Ms Fachrmann's question before where I can give you some more information. Where we talked about that there was one payment that was approved but did not follow through because a business closed, that was a second payment for that business and they closed before the second payment could be made. Another business has moved into that location. But it was because we have now paid \$15.7 million to 113 businesses. It is keeping them afloat during construction. We have always said from the beginning that the businesses who are impacted by this are the ones we want to see at the end, and we are getting close. Thank you.

(The witnesses withdrew)

(The Committee adjourned at 15:01)