



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION
TECHNOLOGY AND THE ARTS LEGISLATION COMMITTEE

Reference: Telstra (Transition to Full Private Ownership) Bill 2005

FRIDAY, 9 SEPTEMBER 2005

CANBERRA

BY AUTHORITY OF THE SENATE

INTERNET

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **<http://www.aph.gov.au/hansard>**

To search the parliamentary database, go to:
<http://parlinfoweb.aph.gov.au>

SENATE
ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY
AND THE ARTS LEGISLATION COMMITTEE

Friday, 9 September 2005

Members: Senator Eggleston (*Chair*), Senator Lundy (*Deputy Chair*), Senators Bob Brown, Ronaldson, Santoro and Wortley

Substitute members: Senator Conroy to replace Senator Wortley and Senator Adams to replace Senator Santoro

Participating members: Senators Abetz, Adams, Allison, Bartlett, Boswell, Brandis, George Campbell, Carr, Chapman, Colbeck, Coonan, Crossin, Evans, Faulkner, Ferguson, Ferris, Fielding, Forshaw, Heffernan, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Mason, McGauran, McLucas, Milne, Moore, Nettle, O'Brien, Robert Ray, Santoro, Siewert, Watson, Webber, Wong and Wortley

Senators in attendance: Senator Eggleston (*Chair*), Senator Lundy (*Deputy Chair*), Senators Adams, Allison, Boswell, Brandis, Conroy, Joyce, McGauran, Ronaldson and Wortley

Terms of reference for the inquiry:

Telstra (Transition to Full Private Ownership) Bill 2005.

WITNESSES

AMOS, Mr Thomas Robert, Member, Australian Telecommunications Users Group	35
BRYANT, Mr Simon, Acting Chief General Manager, Department of Communications, Information Technology and the Arts.....	127
CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission.....	1
CHEAH, Mr Chris, Acting Deputy Chair, Australian Communications and Media Authority	20
COOPER, Mr Colin, Divisional President, Communications Division, Communications, Electrical and Plumbing Union.....	35
CORBIN, Ms Teresa Margaret, Executive Director, Consumers Telecommunications Network	35
CORISH, Mr Peter, President, National Farmers Federation	88
COSGRAVE, Mr Michael, General Manager, Telecommunications, Australian Competition and Consumer Commission.....	1
CURRIE, Mr Brian Howard, Member, Competitive Carriers Coalition.....	35
DIMASI, Mr Joe, Executive General Manager, Regulatory Affairs, Australian Competition and Consumer Commission.....	1
EASON, Ms Rosalind, Senior National Industrial Research Officer, Communications Division, Communications, Electrical and Plumbing Union.....	35
FARGHER, Mr Ben, Chief Executive Officer, National Farmers Federation.....	88
FLETCHER, Mr Paul, Director, Corporate and Regulatory Affairs, Optus	35
FORMAN, Mr David, Executive Director, Competitive Carriers Coalition.....	35
FUNSTON, Dr Kris, Regulatory Economist, AAPT Ltd	35
GRATION, Mr Douglas, Company Secretary, Telstra.....	100
HAVYATT, Mr David Stephen, Head, Regulatory Affairs, AAPT Ltd.....	35
HOLTHUYZEN, Mrs Fay, Deputy Secretary, Department of Communications, Information Technology and the Arts.....	127
HURLEY, Ms Anne, Chief Executive Officer, Australian Communications Industry Forum.....	35
JOHNSTON, Mr Paul Anthony, Manager, Economic Policy, Vodafone Australia Ltd	35
MARKUS, Mr Don, General Counsel, Department of Communications, Information Technology and the Arts	127

McKENZIE, Ms Kate, Managing Director, Regulatory, Telstra	100
McNALLY, Mrs Carolyn, General Manager, Department of Communications, Information Technology and the Arts.....	127
NEIL, Mr John Brian, Acting General Manager, Telecommunications, Australian Communications and Media Authority	20
SAMUEL, Mr Graeme, Chairman, Australian Competition and Consumer Commission	1
SMITH, Mr Dean, General Manager, Government Affairs, Optus.....	35
STIFFE, Mr Peter John, General Manager, Public Policy, Vodafone Australia Ltd.....	35
WHITE, Mr Paul, Executive Manager, Telecommunications Analysis, Australian Communications and Media Authority	20
WILLETT, Mr Ed, Commissioner, Australian Competition and Consumer Commission	1

Committee met at 8.04 am**CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission****COSGRAVE, Mr Michael, General Manager, Telecommunications, Australian Competition and Consumer Commission****DIMASI, Mr Joe, Executive General Manager, Regulatory Affairs, Australian Competition and Consumer Commission****SAMUEL, Mr Graeme, Chairman, Australian Competition and Consumer Commission****WILLETT, Mr Ed, Commissioner, Australian Competition and Consumer Commission**

CHAIR (Senator Eggleston)—I declare open this public hearing of the Senate Environment, Communications, Information Technology and the Arts Legislation Committee in relation to its inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills. This inquiry is not a general inquiry into the privatisation of Telstra or broader telecommunications issues. In examining the bills, the Senate has directed the committee to consider only the following issues:

- a. the operational separation of Telstra;
- b. the role of the Australian Competition and Consumer Commission (ACCC), including:
 - i. the requirement that it consider the costs and risks of new infrastructure investment when making access decisions, and
 - ii. streamlining the decision-making processes, including the capacity for the ACCC to make procedural rules;
- c. the role of the Australian Communications and Media Authority, including:
 - i. the provision of additional enforcement powers,
 - ii. improvement of the effectiveness of the telecommunications self-regulatory processes by encouraging greater consumer representation and participation in the development of industry codes; and
- d. the establishment of a perpetual \$2 billion Communications Fund.

Witnesses are reminded that, accordingly, evidence should be directed to consideration of these matters alone. The reporting date of this inquiry is Monday, 12 September 2005.

I welcome everyone here today and I thank them for attending at short notice. For the benefit of all of our witnesses, I point out that the committee prefers all evidence to be given in public, but should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private, you may ask to do so and the committee will consider your request. As a general arrangement today, because time is short and we have a lot of ground to cover, we are going to divide the questioning time roughly equally between the government and the opposition with time left over for the Democrats and perhaps other questions from the major parties.

Senator RONALDSON—Will Senator Brown be attending the hearing?

CHAIR—Senator Brown is not attending.

Senator CONROY—What about Senator Joyce?

CHAIR—Senator Joyce is scheduled to attend. I am sure he will be here in due course.

Senator CONROY—I think Ron Boswell has already found him.

CHAIR—Who knows.

Senator RONALDSON—I am surprised Senator Brown is not here.

CHAIR—It is surprising, but he had other engagements in the city.

Senator CONROY—Are you using the terrorism laws on Barnaby already?

CHAIR—That is a possible scenario, but I think you will find Senator Joyce will be here reasonably soon. I welcome the witnesses representing the Australian Competition and Consumer Commission. Thank you all for giving us your time today. It is much appreciated. You are reminded that the evidence given to committees is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. Mr Samuel, I now invite you to make an opening statement.

Senator CONROY—Before we start, Chair—I am sorry, Mr Samuel—I was wondering if I could say something on behalf of the opposition?

CHAIR—Yes.

Senator CONROY—I want to indicate from the outset the opposition's complete frustration with the process that the government has enforced on the committee. You mentioned a moment ago the abuses and contempt of the Senate. This process is an abuse and a contempt of the Senate, starting from the timetable that was enforced by the government parties where the bills were only available at lunchtime yesterday. Witnesses have not had a chance to read them. Witnesses have not had a chance to put written submissions in. The committee has only one day. It is being forced to deal with major witnesses in a period of less than 45 minutes with over 10 senators potentially attending. That means, at best, you get to ask two questions individually.

The restriction on the actual material that can be considered by the inquiry is quite an extraordinary process. A legislation committee has been told, 'You are not allowed to look at these parts of legislation.' I draw your attention to the words 'only deal with the following issues' and 'witnesses are not allowed to speak about some matters', which is rounded up when you said 'these matters alone'. You have a process where senators are not allowed to ask questions about the legislation, and witnesses are not allowed to speak about aspects of the legislation. The whole process is a farce, and the government should be condemned in the strongest terms for this abuse of process.

Senator BRANDIS—I have a point of order.

CHAIR—Senator Brandis, we note Senator Conroy's comments. I would just say that the time limit of 45 minutes for these first two witnesses was suggested by Senator Conroy himself. Yesterday there was a suggestion that it should be an hour, and he persisted with the 45 minutes. In respect of the reference points of this inquiry, I do point out that this committee has conducted general inquiries into the sale of Telstra twice before. Everybody knows their

position on the sale of Telstra. It is true that the time frame is short, and that is why the government has focused this inquiry on the points in these bills that are different from those in previous legislation. This is a short, focused inquiry into that limited range of topics.

Senator BRANDIS—On my point of order, can I say two things. I think Senator Conroy's remarks were inappropriate in this forum and therefore out of order. It is the most common thing in the world, as Senator Conroy well knows, for Senate hearings into legislation to be in relation to defined subject matters, not general inquiries.

Senator CONROY—This is a legislation committee that is inquiring into aspects of legislation.

Senator BRANDIS—May I also point out that the principal bill, the Telstra (Transition to Full Private Ownership) Bill 2005, which Senator Conroy complains he has not had sufficient time to consider, is only 37 pages long.

Senator CONROY—There is the operational separation bill also, Senator Brandis. I know you do not know what that means but you might have found out today if we had had a proper inquiry.

CHAIR—Instead of having this interaction across the table, I just point out that we are now coming up to 8.15, so we have lost almost 15 minutes of the 45 minutes allocated to this.

Senator RONALDSON—Nothing is predictable. When I was here late last night I thought I would put some notes together about the Senate oversight into telecommunications, which might be useful for Senator Conroy. There has been extraordinary scrutiny by the Senate of telecommunications and Telstra over the last couple of years. The Senate Environment, Communications, Information Technology and the Arts References Committee has, over the course of a year, handed down reports into the telecommunications regulatory regime, the powers of the industry regulators, the Australian telecommunications network and competition in Australian broadband services. The most recent of these inquiries, the performance of the Australian telecommunications regulatory regime, completed its report only last month.

The Senate Environment, Communications, Information Technology and the Arts Legislation Committee has already inquired into the provisions of the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005. In the last four years there have been a total of four telecommunications inquiries by the references committee. Since 1998, 11 bills reports into telecommunications legislation have been produced by the Senate legislation committee, including two separate bills reports into previous sale bills.

Just out of interest, and for the enlightenment of Senator Conroy, I note that the Commonwealth Bank Sale Bill was not referred to a Senate committee; the Qantas Sale Bill was not referred to a Senate committee; and the CSL Sale Bill was not referred to a committee. If we are going to have a serious debate today, let us do it. If we are going to carry on about this all day, let us get the debate over and done with and we will move on.

Otherwise, let these people who have taken time to come here to report to this committee have the opportunity to report accordingly.

Senator BRANDIS—Mr Chairman, just to complete the record arising from Senator Conroy's interjection on me, the operational separation provisions encompassed another 19 pages. You have not had too short notice to consider relatively brief bills on a complex area which, Senator Conroy, presumably as the communications spokesman you are across. How long does it take to read 19 pages?

Senator CONROY—Having never seen them before, other than the leaks, the amount of time needed to question the witnesses on this matter is well beyond one day.

Senator BRANDIS—That is a different issue. You said you have not had sufficient notice of the legislation. I am pointing out to you that the legislation is relatively brief.

Senator CONROY—I was talking about me and the other witnesses.

CHAIR—Senators, I do not think that this is a very productive path to go down.

Senator RONALDSON—Even further than that, this has gone to nearly four elections. The Commonwealth Bank was not taken by the Labor Party to an election. Indeed, they put out a prospectus promising the Australian people that they would not sell the other half and they went ahead and did it. So let us get on and let us hear these witnesses who have taken the time to come here.

CHAIR—Thank you very much. That is what we will do. I welcome Senator Joyce. A little earlier there was some discussion about whether you might or might not be here, and we are pleased to see you here. I now invite Mr Samuel to make an opening statement. We have now taken 15 minutes of the allotted time, so we will extend this until five to 10.

Mr Samuel—The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 is designed to address some deficiencies in the current administration of the telecommunications specific provisions of the Trade Practices Act and in particular part XIB, relating to the enforcement by the ACCC of the competition rule and dealing with allegations of anticompetitive conduct on the part of those that have significant market power in telecommunications, and part XIC, dealing with access issues. I will deal with each of the elements of the bill in turn—that is, if I can summarise them like this, I will deal with the operational separation element as a significant part and then, subsequently, I will deal with the other elements of amendment to part XIB and then part XIC.

Firstly, I will turn to operational separation. It is perhaps appropriate to very quickly provide background as to the reasons why the issue of operational separation has come onto the agenda and why it is being addressed in the draft legislation. Back in July 2005 Commissioner Willett summarised the issue very effectively at the Australian Telecommunications Summit when he said:

Internal separation between a 'retail business' supplying services to end-users, and a 'network business' that would supply wholesale services to all third party access seekers, would enable third parties to obtain prices and service levels that are effectively equivalent to those that are provided to the Telstra retail business.

A month later Mr Willett said at the National Infrastructure Summit, and this gets to the heart of operational separation, that the government's proposed model for operational separation of Telstra—this is after the announcement by the minister of the broad details of the proposed model:

... maintained the balanced approach of the existing regulatory regime while recognising that Telstra is in a unique position through its local access network monopoly of being able to stifle innovation by frustrating its competitors' investment plans.

For this reason, the ACCC welcomes changes which should increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors. Most importantly, these changes should complement the checks and balances of the well-established and thoroughly reviewed regulatory regime.

... ..

If the final operational separation model reflects the Government's intentions for increased transparency and equivalence, Telstra's competitors will be in a better position to see the terms and conditions for network access that Telstra offers to its own retail units and compare these to the terms and conditions they themselves face

Subsequent to those comments, or at the time, I made several comments in interviews on *Business Sunday* and other television and radio programs. It is worth just very quickly summarising those because I think they summarise what we are seeking to achieve in the context of the operational separation elements of this legislation.

On 21 August in an interview with Alan Kohler on *Inside Business* I said this:

Operational separation is simply designed to produce some transparency in the dealings between Telstra's wholesale division and its retail businesses, and then to ensure that there is some equivalence of dealing in those dealings between its wholesale and retail businesses and Telstra's other wholesale customers. Now, that process is very important to us—

that is, the ACCC—

in being able to determine whether or not Telstra is engaging in anti-competitive conduct.

On the same day, on *Business Sunday* I said this:

... the law has always said to Telstra you shall not behave anti competitively, it is recognised that Telstra has a dominant position in telecommunications and a monopoly over the fixed line network All that this operational separation is designed to do is to make it easier for Telstra and for the ACCC to determine whether or not Telstra is behaving anti-competitively.

And just to conclude, I said on ABC's *PM* program:

The new transparent and equivalent process that has been put in place by the government in its announcement will make it a lot easier for us to be able to establish whether or not Telstra is engaging in anti-competitive conduct.

The government's proposed model for the operational separation of Telstra maintains the balanced approach of the existing regulatory regime. The proposal recognises that Telstra is in the unique position, through its monopoly over the local access network, of being able to stifle competition and innovation by frustrating its competitors' investment plans. For this

reason, the ACCC welcomes changes which would increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors. If Telstra's final operational separation plan, which is to be developed under the legislation, reflects the government's intentions for increased transparency and equivalence, Telstra's competitors will be in a far better position to see the terms and conditions for network access that Telstra offers to its own retail units and compare these to the terms and conditions they themselves face.

Our reading of the legislation leads us to understand that the process is as follows. The legislation requires Telstra to prepare a draft operational separation plan. The draft plan will be published for public consultation. If the draft is accepted by the minister it becomes the final plan. In the event that Telstra contravenes the final plan, the minister may give Telstra a written direction requiring it to submit a draft rectification plan. Again, if this is approved by the minister, it becomes a final rectification plan. The legislation specifies that Telstra comply with the rectification plan. If it does not comply, the ACCC can issue remedial directions.

There are some process issues which may merit further examination by the government so as to ensure that the model reflects the government's intentions to have a robust set of equivalence obligations. Issues for further examination as the operational separation plan is developed by Telstra and the government include the following: first, the precise details of the operational separation plan and Telstra's obligations in relation to that plan; second, the scope of services that will be subject to the operational separation plan; third, the enforcement regime associated with compliance or, more importantly, noncompliance with the operational separation plan; fourth, the powers to investigate whether or not compliance has occurred; and, fifth, the development by the working party proposed—that is, the working party of Telstra, the ACCC and the department—of the internal wholesale pricing and the pricing equivalence regime.

These would appear to the ACCC to be the principal issues that will need to be resolved to determine if the operational separation provisions will deliver increased transparency and equivalence and thus make it easier for Telstra, its competitors and the ACCC to determine whether or not Telstra is engaging in anticompetitive conduct, which might then lead to the ACCC applying the telecommunications specific provisions of part XIB of the Trade Practices Act.

It is difficult to determine how an allegation similar to last year's broadband competition notice would play out under these provisions as we now have them in the legislation. If Telstra had in place an appropriate internal wholesale price pursuant to an operational separation plan and was pricing at the retail level consistent with the wholesale starting point, then the prospect of it engaging in anticompetitive conduct would be considerably reduced. This is dependent, of course, on the ACCC having access to material on Telstra's internal wholesale pricing for that service and satisfying itself that Telstra has complied with the operational separation plan. It would need access to such material to determine whether Telstra has engaged in conduct in order to comply with the final operational separation plan so as to determine the relevance of that conduct to the function it was performing and have regard to that conduct.

I will now move to the other changes to part XIB and XIC and what they involve. The changes to part XIB involve increased penalties for breaches of the competition rules where a telecommunication provider with substantial market power engages in anticompetitive conduct. Part XIC does not currently stipulate that the ACCC must have regard to the risks and issues associated with potential investments in new infrastructure. The objects clause in part XIC will be amended accordingly. I should note, however, that the ACCC considers that it already takes account of such issues in the long-term interests of end users test. Part XIC will also give the ACCC a general power to make procedural rules in relation to its consideration of access undertakings and arbitration of access disputes.

The procedural rules will cover the detail of how the ACCC carries out its functions under part XIC and will clarify matters including public consultation processes, the ACCC's discretion in considering access undertakings and resolving access disputes, time frames and confidentiality issues. This will increase industry certainty about the processes followed by the ACCC for dealing with access issues but also reduce the scope for parties to game the existing processes. These parties involve a range of telecommunications network owners, not just Telstra.

We welcome the increased penalties under part XIB. The ACCC has previously publicly hinted at support of removal of the consultation notice requirement and extension of its tariff powers. The ACCC is generally satisfied with the introduction of the procedural rules for the operation of part XIC of the Trade Practices Act as they address some concerns about the interplay between the processes for assessing access undertakings and disputes. It also recognised the potential for these processes to be gamed, as I mentioned before, by all access providers. At that point, Mr Chair, I cease my introductory comments and open up to questions.

CHAIR—Thank you, Mr Samuel. We have got about half an hour left, so we will give the major parties 10 or 12 minutes each and then we will go to the other parties for the last six minutes. We will begin with Senator Conroy.

Senator CONROY—Can I just clarify: the opposition gets to ask the ACCC questions for 12 minutes?

CHAIR—Senator Conroy, we know the time frame is short. We have discussed this already. We have said we would give each party equal timing. You know that that is how it is, so please proceed with questions.

Senator CONROY—I would like to talk about the way in which breaches of the operational separation regime are dealt with under the proposed legislation. Is it correct that the sole first instance responsibility for the enforcement of the operational separation regime rests with the minister?

Mr Samuel—That is what I understand it to be.

Senator CONROY—Is it the case that the ACCC is precluded from taking enforcement action with respect to breaches of the operational separation regime?

Mr Samuel—Not once it reaches the stage of a final rectification plan. That is where the ACCC becomes involved.

Senator CONROY—I am just trying to go through things—that is a much later process.

Mr Samuel—By the way, because this legislation is fairly fresh, I have to ask, if I give the wrong answer—

Senator CONROY—I am sure you have not had a chance to read all of the details behind this, Mr Samuel, and that is in no way being derogatory.

Mr Samuel—And my colleagues can intervene.

Senator CONROY—If Mr Willett, who I know has spent many more years than probably you and I combined on this, wants to jump in, he can feel free. Isn't it the case that the ACCC may only take action if Telstra is in breach of a rectification plan negotiated between Telstra and the minister?

Mr Samuel—As I understand it, that is correct.

Senator CONROY—So the ACCC will be prevented from taking enforcement action until the minister has first intervened?

Mr Samuel—No. We should make it clear. The ACCC retains its powers under part XIB in respect of circumstances where it has reason to believe that there is anticompetitive conduct being engaged in. The ACCC will have the same powers that it had before to issue a competition notice. In respect of the operational separation plan elements—

Senator CONROY—I am talking about the operational separation.

Mr Samuel—Yes, you are correct.

Senator CONROY—Okay. So is it correct that after the minister first intervenes with respect to a breach of the operational separation regime the bill gives Telstra three months in which to develop a rectification plan for consideration by the minister?

Mr Samuel—Yes, I think that is correct.

Senator CONROY—So isn't it correct that Telstra would face absolutely no prospect of enforcement action with respect to a breach of the operational separation regime for at least this three-month period?

Mr Samuel—I think that is correct—yes.

Senator BRANDIS—Is that the big point?

Senator CONROY—Does the ACCC have a view about this arrangement? Is this an arrangement you have seen in any other legislation?

Mr Samuel—Of course, we have not seen operational separation in other legislation, so this is a fairly new process. As I think I tried to indicate in my opening comments, there are elements of the process, including the development of the operational separation plan, which have to be developed pursuant to this legislation. The manner in which it operates and the effectiveness of its operation remain to be seen. We will see that as time passes.

Senator CONROY—Could I get you to just list again all the areas that need to be actually sorted out still and that are not part of this bill—that are set aside and we will not know for the next three or four months? Could you just list all of those areas again, please?

Mr Samuel—The issues that I indicated require further examination as the OSP is developed by Telstra and government are as follows: (1) the precise details of the operational separation plan and Telstra's obligations in relation to it, (2) the scope—

Senator CONROY—So the entire operational separation plan is still under negotiation?

Mr Samuel—The legislation contemplates that a draft plan will be submitted by Telstra to the government, and the minister will then determine whether or not it is an acceptable plan. It may go through some iterations, but once it is accepted it becomes a final operational separation plan. The second issue is the scope of the services that will be subject to the operational separation plan. The third is the enforcement regime associated with noncompliance with the plan. The next is the powers to investigate whether or not compliance has occurred. The next is the development by the working party of Telstra, the ACCC and the department of the internal wholesale pricing and the pricing equivalence regime, which of course is an integral part of the operational separation regime, given that the operational separation is focusing as much on transparency. The other integral part of it is the pricing equivalence regime.

Senator CONROY—So, in actual fact, we are dealing with a bill about operational separation but the entire contents of the bill are yet to be negotiated, debated and approved.

Senator LUNDY—Is that between Telstra and the minister, not the ACCC? Is that correct?

Senator CONROY—No, that is not quite right.

Mr Willett—There is a public process involved. The initial draft will be considered by the minister and then put out for public consultation. The ACCC would expect to be involved in that process.

Senator LUNDY—This bill provides for the minister ultimately to approve that plan, doesn't it?

Mr Willett—Yes.

Senator RONALDSON—I did not hear Mr Willett's comment. Did you say that the ACCC would be involved?

Mr Willett—It certainly would be involved in any public process for considering the draft plan, yes.

Senator CONROY—This seems to be an extraordinary politicisation of the operational separation regime—

CHAIR—There is public consultation.

Senator CONROY—where the minister ultimately has to give approval by themselves. Are you aware of any other process where the minister is the final arbiter?

Mr Samuel—As I said, this is a relatively novel process in the context of regulation in Australia. It is difficult to point to any precedent. Mr Cosgrave, do you know of any?

Mr Cosgrave—The one that springs to mind is the price control regime, which is clearly approved by government.

Senator CONROY—The model for operational separation that is being proposed by the government is very different to the model that had been publicly advocated by the ACCC in the past. Is that the case?

Mr Samuel—Yes. Although, to put it in context, as the thinking developed on this and work developed on the operational separation plan, we considered various alternative proposals. The proposal announced by the minister back in the middle of August was one that we considered would provide an acceptable outcome in terms of the objectives as we saw them being achieved.

Senator CONROY—I want to talk about your previous position. Didn't the ACCC's model for operational separation essentially provide for the amalgamation of Telstra's current wholesale and network business divisions?

Mr Samuel—Amalgamation? I think that it was separation.

Senator CONROY—Yes, sorry; it was separation.

CHAIR—They are different.

Senator CONROY—Is that correct?

Mr Samuel—That is correct, yes.

Senator CONROY—The legislation proposed by the government embeds in legislation the delineation of Telstra's wholesale and network business divisions?

Mr Samuel—That is as I understand it, yes.

Senator CONROY—Under the government's legislation, wholesale customers are required to acquire services from Telstra Wholesale, while Telstra Retail acquires services from the Telstra network. Is that what is being proposed, as opposed to what you proposed previously?

Mr Samuel—That is right.

Senator CONROY—What impact do you think this delineation will have on the principle of equivalence?

Mr Willett—The principle of equivalence applies in terms of the provision of services both by Telstra networks to Telstra Retail and Telstra Wholesale and by Telstra Wholesale to Telstra's downstream competitors. The difference with this approach is that you have an entity within Telstra that is focused exclusively on the provision of services to Telstra's competitors. There is an argument that, by having that separate unit of Telstra doing nothing else, they will be incentivised to do that job effectively. Against that, you have two entities providing services and you have an extra element in the chain, and there needs to be monitoring to ensure that that extra element does not impose substantial extra costs and that the principle of

equivalence is applied. So, while there is a difference of approach in the current regime compared to what the ACCC advocated, there are arguments both in favour of and against this approach compared to what we advocated.

Senator CONROY—I want to jump away from your previous model—I have only got 12 minutes, so I need to jump around a bit. In the regulatory impact statement included with the explanatory memorandum of this bill, the ACCC states that the cost of overseeing the government's operational separation regime would be \$4 million to \$5 million annually. However, the ACCC suggests that the cost of overseeing the ACCC's operational separation model would be only \$1 million to \$2 million annually. Is that correct?

Mr Cosgrave—That is correct.

Senator CONROY—Why does the ACCC anticipate that it would cost less than half as much to oversee its own model as it would to oversee the government's?

Mr Cosgrave—Because the level of potential intervention was less.

Senator CONROY—So the government's model for operational separation involves a much more interventionist role for the ACCC than the government's does?

Mr Cosgrave—Potentially.

Senator CONROY—To come back to your operational separation model, the ACCC's original minimum position on operational separation also suggested that separate profit and loss accounts and balance sheets should be created for Telstra's retail and wholesale business divisions, doesn't it?

Mr Willett—Yes, that is right.

Senator CONROY—Under the government's model there is no such requirement?

Mr Willett—That is right. Again, it is a question of swings and roundabouts, I think. We advocated that there be full separation in accounts—operational separations in accounting and in price matters. What we have in this regime is not those full separate accounting and separate pricing arrangements, but we have some arrangements for the determining of appropriate prices for the purposes of operational separation up-front. Again, there is an argument that that leads to certainty about pricing more quickly, but against that there is an argument that you can rely more on information that is based on full separate accounts than you can on prices that are constructed through that sort of model.

Senator CONROY—So you have got to be engaged in a process of creating these prices with Telstra?

Mr Willett—Determining what they are, yes.

Senator CONROY—Yes, under the current legislation. You are currently engaged in a number of discussions with Telstra about pricing, aren't you? And you have been engaged for about two years, I believe, on a couple of areas?

Mr Willett—There are ongoing processes under part XIC—

Senator CONROY—About two years?

Senator LUNDY—How long ago—

Mr Willett—These processes started with the implementation of part XIC. If you are talking about a particular service, then there might be a particular time attached to that. The unconditional local loop service, which is topical today—I think that has been going for about two years.

Mr Cosgrave—That is right.

Mr Willett—Yes, about two.

Senator CONROY—So you have been engaged in discussions with Telstra about a particular price of the product for two years and we still do not have a settlement. Is that right?

Mr Willett—That is true.

Mr Cosgrave—I would not consider it discussion. What we are talking about is—

Senator CONROY—No, I read your last press release.

Mr Cosgrave—What we are talking about is access undertakings under the act, which we either have to approve or otherwise in relation to the service Commissioner Willett has talked about.

Senator CONROY—But you have been engaged with Telstra for nearly two years trying to establish a particular price, currently?

Mr Cosgrave—Telstra has submitted a range of undertakings which the ACCC have not accepted to date.

Mr Willett—I might add that while that process has been going on, two things have obtained. One is that the demand for that service in the past has been relatively low, so there is an argument that that time frame has not really bitten. The second is that there are prices—

Senator CONROY—That is just a bit cheeky, Mr Willett. How could people ask for a service when you have not been able to determine the price?

Mr Willett—The second point I was going to make is that while that process has been going on and Telstra has been submitting undertakings, there are prices being negotiated in the market and being applied. So we can delineate something from those negotiations and determine what the current pricing in the market is.

Senator CONROY—Just going back to the government's model,—

CHAIR—Senator Conroy, you are very close to the end of your time.

Senator CONROY—I will finish on this question, thank you, Mr Chair. In fact, there is nothing in the government's legislation that would delineate the costs of Telstra's wholesale and network businesses, is there?

Mr Willett—That is right.

Mr Samuel—No.

Senator CONROY—I wish to indicate that I do have a whole string of further questions on a whole range of other issues, but my 12 minutes are up.

CHAIR—Senator Conroy, you can put your questions on notice; they have to be in to the secretariat by 6 pm tomorrow.

Senator CONROY—Are you busy tomorrow, Mr Willett?

Mr Willett—I am sorry?

Senator CONROY—Are you busy tomorrow?

Mr Willett—I was going home tomorrow.

CHAIR—Thank you, Senator Conroy. We will now go to Senator Brandis, again for 12 minutes.

Senator BRANDIS—Mr Samuel, to draw this together, may this committee take it that the ACCC's position and advice to this committee is that it is satisfied with the government's operational separation model?

Mr Samuel—I have indicated that there are about five outstanding issues that need to be developed. It would depend on the satisfactory development of those issues, which are quite significant issues, including compliance, investigatory powers and the like, before I could give an opinion on that.

Senator BRANDIS—Allowing for the fact that in a business model as complex as this there will be issues that cannot be covered by the statute and must be developed beyond the statute, from what you understand do you see any difficulties in the government's announced model in meeting those outstanding issues to the ACCC's satisfaction?

Mr Samuel—I am not trying to be difficult or evasive on this, but it is really difficult to forecast the process that will occur if this legislation is passed. As we read it, it involves a substantial degree of consultation, negotiation and iteration with Telstra and that will in large part depend upon Telstra's approach to dealing with the minister in resolving some of those outstanding issues.

Mr Willett—It might be desirable that some of those matters be dealt with by changes to the legislation being proposed.

Senator BRANDIS—Mr Samuel, I take it that the twin objectives of transparency and equivalence are, in your view, satisfied by the government's announced model?

Mr Samuel—It would depend on those five principal issues. If legislation says 'There shall be developed an operational separation plan, full stop,' that does not provide transparency. Transparency flows from the nature and the details of the operational separation plan that is developed. If the legislation talks of equivalence, that of itself does not provide for equivalence; equivalence will be the result of the development of internal wholesale pricing, which is a matter of negotiation between the ACCC, Telstra and the department, and then the administration of an equivalence pricing regime into the future. I cannot give you those answers just at the moment because it will depend on the iterative process that needs follow in relation to those five principal matters that I have outlined.

Senator BRANDIS—I understand that. Dealing with this issue of what should and should not be in the legislation, you would not expect, would you, that the precise details of the draft plan would be embodied in the legislation?

Mr Willett—No. That is right.

Mr Samuel—That is correct.

Senator BRANDIS—In the broad outlines of schedule 11 of the competition bill you see, may I take it, a sufficient legislative framework within which that detailed plan can be successfully developed so as to serve those twin objectives?

Mr Samuel—Certainly, there is a framework there and, as you have stated, there is a framework within which an appropriate operational separation plan can be developed. Whether it is developed will then depend on the processes that will flow from that.

Senator BRANDIS—I am sure everybody understands that. I want to satisfy myself that there is nothing in the bill that in your view inhibits the development of that plan in a satisfactory manner.

Mr Willett—The bottom line is that, subject to the resolution of the issues that Mr Samuel referred to, the ACCC believes this model can lead to an appropriate set of operational separation rules.

Senator BRANDIS—And the ACCC, as part of the working party, will be a player.

Mr Samuel—Just to clarify, the working party relates specifically to the issue of the internal wholesale pricings and parts of the pricing equivalents regime. It does not relate to the development of the operational separation plan. That is a matter of negotiation between Telstra and the government.

Senator BRANDIS—Does the ACCC believe that operational separation could have benefits for Telstra itself?

Mr Willett—Yes, it believes it does because the commission considers that part of the good management of an organisation as large and as complex as Telstra is understanding the cost and appropriate terms and conditions for the supply of network services. If it has a good understanding of those issues, then it is in a better position to make decisions about future investments—whether to invest further in the copper network, for example, or to replace it with a cable network. Without that sort of knowledge, the commission cannot see how an appropriate decision on that sort of massive investment could be made.

Mr Cassidy—I have to add that some commentators have seen operational separation as an entirely novel notion that perhaps we or someone else have come up. There are a number of private corporations that have undertaken exactly the same process. They include corporations like BHP Billiton, Qantas and Shell. It is not something which has just been dreamt up as being good for Telstra.

Senator BRANDIS—So far as you are aware of the operation of equivalent or similar operational separation models in another businesses, has the adoption of such a model in a large corporation generally been a success?

Mr Willett—It is hard to comment on that. The fact that—

Senator BRANDIS—Mr Cassidy's point that there is nothing unique about this, that this is a principle for the structuring of a large business that has been commonly adopted in Australian commerce elsewhere, is interesting.

Mr Willett—I think you glean from the implementation of those approaches by those firms that the expectation was that it would provide some benefits to those firms. They tend to be pretty well managed.

Senator BRANDIS—Pretty economically rational, I dare say.

Mr Willett—You would expect they would make pretty good decisions about that.

Senator BRANDIS—I want to move onto another matter. Does the ACCC have a view—and, if it does, what is it—of claims that the model will prevent Telstra investing in new networks or offering new innovative services to its customers?

Senator CONROY—Who made that claim?

Mr Willett—We just do not think there is any substance to those claims.

Senator BRANDIS—There is no reason to apprehend that that would be so.

Mr Willett—No.

Senator BRANDIS—Does the ACCC think that the provisions of part XIC of the TPA allow potential investors in telecommunications services to get regulatory certainty?

Mr Samuel—Yes, they do at present, through the process of special access undertakings which enables Telstra, for example, to submit undertakings to us prior to undertaking the investment, to have those undertakings dealt with and approved and to provide regulatory certainty.

Senator BRANDIS—Can the ACCC explain how the industry as a whole benefits from finalising access decisions as quickly as possible?

Mr Samuel—One word: certainty.

Senator BRANDIS—An issue not unique to the telecommunications sector.

Mr Samuel—That is right. And the empowerment of the ACCC to make procedural rules in relation to access disputes should enhance the process and efficiency of dealing with those matters and provide for greater certainty. As I indicated in my opening comments, it will also minimise the ability by those involved in those disputes to game the process.

Mr Willett—That question also underlines or raises another important point about the investment environment: the investment environment is not just about the investment environment for Telstra; it is also about the investment environment for other communications service providers. Getting certainty in the terms and conditions that Telstra provides services to its competitors is a critical component of getting that certainty for that investment, which is at least as important as any investment decision by Telstra.

Senator BRANDIS—I was going to go on to that, Mr Willett, because it strikes me that if the government's announced model has the likely outcome that you have anticipated, it is not just going to be good for Telstra; it is going to be good for the entire industry.

Mr Willett—And the economy as a whole.

Senator BRANDIS—And consumers?

Mr Willett—And consumers

Mr Samuel—And consumers.

Senator BRANDIS—On one last issue, in terms of the enforcement regime, which, Mr Samuel, you have identified as one of the five outstanding matters to be developed through the iterative process, would you expect that the enforcement regime would be particularly different from existing enforcement regimes or enforceable undertakings and so on that exist under the Trade Practices Act at the moment?

Mr Samuel—It depends on how it is developed. There are different processes under the act at the moment involving administration by the ACCC, administration by the minister and in other areas interaction between the minister and the ACCC in dealing with the issue of enforcement. So it really does depend on how the enforcement regime is developed. At the level of the detail that is provided in legislation, it is too early to be able to give an opinion on that.

Senator BRANDIS—Thank you very much.

CHAIR—Thank you, Senator Brandis. Senator Allison, we have six minutes.

Senator ALLISON—Can I just pursue that point about implementation and enforcement. There is a time frame, is there not, for establishing the draft plan, but is there a time by which the implementation has to be dealt with?

Mr Samuel—There are time frames provided under the legislation. Let me make it clear that the time frames that are there relate specifically to the operational separation plan and compliance with that plan, including the provision of an audit as to compliance, which are matters that are within the control of the minister. The role of the ACCC, of course, will be to administer part XIB and particularly the application of a competition notice in the event that the ACCC forms the view or has reason to believe that Telstra has engaged in anticompetitive conduct in any particular set of circumstances. The operational separation plan is designed to facilitate the ability of the ACCC to determine whether or not anticompetitive conduct has been engaged in. But, as I think I indicated in my opening statement, in the event that we are faced with circumstances such as occurred in February-March last year, we would contemplate that we would take the same steps. The question of whether or not the operational separation plan and its implementation would facilitate our ability to take those steps is a matter that time will tell as we see the process of dealing with those five issues that I have described developed.

Senator ALLISON—So Telstra could agree the plan with the minister and then take as long as it chose to implement it? What is to stop—

Mr Cosgrave—One would imagine that the issue of the timing of implementation of the plan would be a matter dealt with in the plan itself.

Senator ALLISON—You would imagine that?

Mr Cosgrave—That appears to be contemplated by the legislative framework.

Senator ALLISON—Is the length of time it will take to implement part of the criteria that the government will judge this plan on? Was the ACCC involved in the development of the criteria that the government will judge this plan on?

Mr Willett—No, we were not involved. Reading of the legislation would suggest that it would be necessary that the plan would include an implementation approach; otherwise, it would not be much of a plan.

Senator ALLISON—Indeed. It is probably not going to be much of a plan anyway.

Senator BRANDIS—It goes without saying that—

Mr Willett—I think that is right.

Senator ALLISON—So the plan comes out and it is open for public input, and the ACCC is just like any other Joe Blow in terms of process—you have your public input. Is that right?

Mr Samuel—You would expect as part of a public consultation process that we would be putting information before government.

Senator ALLISON—Does the ACCC think that divestiture powers would be useful as a backup in case the operational plan fails? Indeed, should it be there as an incentive so that it does not fail?

Mr Samuel—That is a matter of policy for government. We need to keep divestiture powers in their context: they are very drastic powers and the extent to which powers of that nature operate as a real threat depends very much on an acceptance by Telstra that we would use them. Sometimes powers can be so drastic that, realistically, the party against which they might be exercised will take the view that they will never be used. So they are not much use.

Senator ALLISON—In your report *Emerging market structures in the communications sector* you said that Telstra ought to divest its interest in Foxtel and HFC cable. Does that recommendation still apply?

Mr Samuel—If I might say so, Senator, that is probably outside the terms of reference of this particular inquiry and is really a matter of policy for government.

Senator ALLISON—So in principle that is not still your position?

Mr Samuel—The *Emerging market structure* report is on the record. It has not been removed or varied by us. I think we have gone past that process. It has been overtaken, if I might say so, by the process that we are now dealing with, of operational separation.

Senator ALLISON—Presumably you put a model for operational separation to the government. As far as we know, in which way does the government's plan, as outlined in the legislation, differ from what you proposed?

Mr Samuel—In answer to some fairly detailed questioning from Senator Conroy, I indicated that some alternative models were considered. The process of discussion between government, the minister and the ACCC has led to the development of the model that was announced by the minister in the middle of August. We now have before us some legislation. That legislation requires, as I think we have indicated, five principal issues which are yet to be developed. Clearly this operational separation plan, in the nature of the details provided in the legislation, is not the same as that which was put by the ACCC to government, but the ACCC has subsequently acknowledged—this is important—that the proposals announced by the minister in the middle of August were, in our view, workable proposals to bring about an appropriate operational separation regime. In particular we noted that, in pricing operational separation, the development of the alternative model, which involves a pricing equivalence regime and the establishment of internal wholesale pricing benchmarks, was an effective means for dealing with the issue of wholesale pricing to Telstra's competitors.

CHAIR—Senator Allison, we have to leave it there because we have run out of time.

Senator ALLISON—Chair, I have a number of other questions.

CHAIR—You can put them on notice but they have to be in to the secretariat by 6 pm today.

Senator ALLISON—A question on process: are any other members of the coalition or the ALP allowed to ask further questions?

CHAIR—We have time limits on the basis of parties. The opposition has had 12 minutes—

Senator BOSWELL—There is another party.

CHAIR—Government parties had 12 minutes, Senator Boswell. You should have attended the preceding private meeting; you would have known this. At this point we have concluded this segment.

Senator BRANDIS—This was agreed to by Senator McGauran, Senator Boswell.

Senator McGAURAN—At that time, neither Barnaby nor you were here, so I accepted a government position.

Senator BOSWELL—I hope that you will be a little tolerant in future.

CHAIR—We have a very tight schedule. We have reached the end of this segment. You may like to put your questions on notice, Senator Allison, to the secretariat by 6 pm. I thank the ACCC for their appearance this morning. I acknowledge that it is a very tight segment. We thank you for your very useful contribution.

Mr Samuel—Thank you, Chair.

Senator JOYCE—Chair, through the day do we get the chance to ask a question?

CHAIR—We had a private meeting before this meeting under which we divided the time between the government and the opposition, so you can ask questions within the government time. We are not dividing this on a personal basis. It is a very tight time frame so we are

giving equal time to the government, equal time to the opposition and half of that time to the Democrats. If there is time left over we can come back to individual senators. But I think these are matters for a private meeting rather than matters to be discussed on the record, on *Hansard*, in public.

Senator ALLISON—Chair, I thought the subject of our agreement was not to do with how the time would be shared within those parties but rather the overall time for the parties. I think it is a legitimate question for Senator Joyce to ask: does he get to have a go?

Senator BRANDIS—Mr Chairman, if this is to be pursued it should be pursued at a private meeting.

CHAIR—As I said, that is a private matter between the government parties.

Senator ALLISON—Let us have a private meeting.

CHAIR—We are the government parties. I do not think that you are, Senator Allison, and this is a matter for the government parties. We will proceed to the Australian Communications and Media Authority.

[9.00 am]

CHEAH, Mr Chris, Acting Deputy Chair, Australian Communications and Media Authority

NEIL, Mr John Brian, Acting General Manager, Telecommunications, Australian Communications and Media Authority

WHITE, Mr Paul, Executive Manager, Telecommunications Analysis, Australian Communications and Media Authority

CHAIR—Welcome. Thank you for giving us your time today; it is much appreciated. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you that should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and we will consider your request. Mr Cheah, I now ask you to make an opening statement.

Mr Cheah—The Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 explicitly recognises a role for the ACMA in information provision and advice to the independent review committee assessing the adequacy of telecommunications services and provides the ACMA with increased regulatory flexibility through the ability to accept enforceable undertakings. The ACMA also has an administrative role in accepting applications from industry bodies for the reimbursement of funds relating to consumer code development. The ACMA welcomes the inclusion of the enforceable undertakings power as an efficient enforcement tool that avoids the costs and delays that may occur where court action is the only other available mechanism. In implementing elements of the package that may require the ACMA to develop guidelines—for example, the use of CSG exemptions and conditions for the reimbursement of consumer code costs—the ACMA will be seeking to apply the principles of clear objective criteria for decision making.

It might be worth while for the committee for me to explain some of the ways that the ACMA functions are divided up. There are three areas of new work for the ACMA outlined in the bill. Firstly, there is our involvement, as I said before, with independent reviews of telecommunications services. We now have two defined roles: firstly, to assist the Regional Telecommunications Independent Review Committee—the RTIRC—which may include information, advice or resources and facilities, including making secretariat services and clerical assistance available, and, secondly, to provide advice to the government about the recommendations of the RTIRC which must be considered by the government in its response to the RTIRC's recommendations. Another new function is to reimburse the costs of the development of the consumer related industry codes in schedule 3 and the ability for the ACMA to accept enforceable undertakings, which I have discussed.

We also have some other involvement in future-proofing measures, which include an increased monitoring and enforcement role in relation to the circumstances where a service provider seeks an exemption from the CSG for circumstances beyond their control; the development of a voice-quality strategy; the provision of advice from the ACMA to the minister about Telstra's compliance with the local presence plan licence condition and annual

reporting requirements; and a review of the existing industry obligations to provide information to consumers, including a review of compliance.

CHAIR—We have 40 minutes, so we will begin with the government.

Senator RONALDSON—Can you provide us with some examples of how you might propose to use these important new powers that you have been given?

Mr Cheah—The major new power is the enforceable undertakings power. That would be used in a circumstance where we considered there was some evidence that a breach of the act had occurred. One of ACMA's philosophical positions is that broadly speaking we are interested in outcomes that are clearly envisaged by the act and in achieving compliance with the act. If we see evidence of a breach occurring, one of the things we would do is investigate it and raise the issues with the relevant carrier. We may get rectification of that breach, which sometimes happens. Sometimes it is a systemic issue, and we are interested in getting systemic issues solved. If the carrier is willing to give certain undertakings to do certain things to rectify the breach then one of the things we would be envisaging using this enforceable undertakings power for is to say to the carrier, 'Instead of us taking you to court, are you willing to give certain undertakings to do certain things? Please give us an enforceable undertaking to do them.' That will probably be better all round.

If the carrier does not fulfil its enforceable undertaking we have a range of options. We can go straight to court on the basis of the fact they have not complied with their undertaking and that is really all we then need to prove. It becomes an evidentiary kind of issue around whether they have actually complied with their undertaking. It is a very flexible power that could involve reducing the costs and uncertainties associated with litigation and potentially get a good result for users, consumers and people who are affected by the relevant breach.

Senator RONALDSON—I presume you welcome that flexibility.

Mr Cheah—We do. We think it will be a very useful addition to our regulatory tool kit.

Senator RONALDSON—In general, how effectively does industry comply with its legislative obligation?

Mr Cheah—We have a very wide range of regulatory functions but broadly speaking there is a relatively high level of compliance across the board. One of the more topical areas, I suppose, is compliance with things like the customer service guarantee. That has been one of the topical areas in the press over the last week. We have a basic principle which was drawn from some of the reasoning in the telecommunications services inquiry, which is now a few years old, which tends to look for a 90 per cent benchmark for CSG compliance. We take the view that while service compliance is above 90 per cent we are relatively comfortable. Obviously, we like to see performance as high as possible. If it starts to dip below that level we start to get very interested and we will investigate if we start to see any kind of evidence of a systemic decline. We will then move very quickly to try to get rectification of that.

Senator RONALDSON—I turn now to the consumer aspects of your new powers. Are you aware of any situations where the lack of financial resources has been a constraint to groups participating in the self-regulatory process?

Mr Cheah—Historically it has not been but in the last couple of years there has been a very significant increase in consumer code related work within the Australian Communications Industry Forum. This is the kind of question which might better be directed to the department because this is a policy measure which has come from the government. It is certainly true that the Australian Communications Industry Forum has now been spending considerable extra resources in developing codes to support consumer related concerns. That resourcing has been putting a significant extra burden on ACIF. Our understanding is that the new provisions that have come into play in relation to supporting that kind of consumer code related work are basically due to that major increase in work. As an example, I think ACIF's budget is in the order of \$3 million, and some of the new codes that they did last year cost \$400,000 to do just one code. So I do not think some of these things were in ACIF's normal budgeting, and there are some issues around how they raise the extra money.

ACIF is not the only the organisation that does consumer codes. There are others around as well, like the Internet Industry Association. The provisions of the bill allow for organisations that are involved in code work to come to us to seek approval for a particular code to be classified as consumer related, and we then have to develop some criteria for how we are going to do that assessment.

Senator RONALDSON—Do you think your proposed new powers will result in more successful codes, like the consumer contract code?

Mr Cheah—That would be the hope. It will depend on the quality of the codes and the code making processes. Hopefully one of the things extra resourcing will do is contribute to better quality inputs by everybody, including the consumer groups. A lot of work had been done by ACIF. In fact, we understand that ACIF is now doing an internal review about consumer participation in code-making processes. That has been partly directed to figuring out ways of improving the overall quality of inputs by consumer groups and by the industry, to make sure the interaction works well. Hopefully the extra resourcing will contribute to a better quality of code making.

Senator RONALDSON—That is terrific news. I will come back to that. My colleague Senator Joyce has a question.

Senator JOYCE—At ACMA, you are responsible for the monitoring of the customer service guarantee—is that correct?

Mr Cheah—That is correct.

Senator JOYCE—And you are currently aware of what the customer service guarantee is going to demand—is that correct?

Mr Cheah—Yes.

Senator JOYCE—You might say you cannot answer this question. Do you feel Telstra currently has the capacity in its capital expenditure budget, even with the problems that are coming to light, to comply with its customer service guarantee?

Mr Cheah—Monitoring Telstra's capital expenditure budget is probably not something that we would get too heavily into. The philosophical approach we take is that it is not the role

of the regulator to micromanage Telstra's capex program. What we do expect from them, though, is outcomes. We get quarterly reporting on the customer service guarantee performance. As I explained before, while that performance level is above 90 per cent we are relatively comfortable. If we see any evidence of it starting to decline, we start to get interested. If it dips below 90 per cent we start to get more concerned and if there is any evidence of a systemic decline we will investigate and find out the reasons. In that situation, we would really want to know what is going on.

From our point of view, it is up to Telstra to manage its business but it has to do so in a way that produces the right outcomes for consumers. We have some pretty broad-ranging powers to go in and direct that problems be fixed if we see evidence that that is not happening, and if we find evidence of systemic problems.

Senator JOYCE—The powers of the customer service guarantee have been expanded. Given the foreshadowed increase in the customer service guarantee and the problems Telstra has envisaged in its network, do you see the capacity for the guarantee to be fulfilled?

Mr Cheah—The main area where our powers have been changed is in the area of mass service disruption notice exemptions.

Mr Neil—There are also increases in compensation.

Mr Cheah—Yes, but the increases in compensation are not a power as such. Okay; there are two changes. Another one was announced yesterday by the minister, and that was that the CSG penalties were going to increase by 21 per cent. That will not specifically affect our enforcement regime as such, other than to provide Telstra with an added incentive to get in there and fix up problems itself, because obviously it will be paying customers more compensation if it does not fix the problems.

Our new specific power is in relation to mass service disruption notices. When an extraordinary event occurs, Telstra or any carrier that is subject to the CSG can issue a notice claiming a mass service disruption. It has to be under extraordinary circumstances, and we have been given some powers to clarify exactly what is meant by an extraordinary event. We are going to have to do some work on that over the next few months.

Senator RONALDSON—I note that you were very happy with the consumer contracts code. How pivotal was the involvement of the consumer groups to that?

Mr Cheah—I think everyone involved in the process would say that they have been pivotal. I think everyone regarded that as being a very good process, generally speaking, and there was high-quality input from the consumer side of the movement. With these consumer codes, ACIF has a process of looking for equal participation from both the consumer and the industry side of the equation. Certainly, I think in the past some of the consumer groups have had concerns about the level of resourcing and support and the level and quality of interaction on both sides of the fence. The extra resourcing presumably will be helpful in making sure that the quality input can actually be included.

Senator RONALDSON—I take it that one of the outcomes of these changes will be increased involvement from consumer groups and the ability to have further input into the process?

Mr Cheah—I presume so. In a sense, it is up to ACIF to decide how it wants to run those processes. You should probably address that question to the department, but our understanding is that the policy reason for making these changes is to ensure that there will be good, high-quality input from consumer groups into the development of these consumer codes and that they are properly supported.

Senator RONALDSON—I would assume that the greater the resourcing, the greater the ability for the consumer groups to have input?

Mr Cheah—Exactly, yes.

Senator BRANDIS—Do consumer groups themselves express satisfaction about the level of their involvement in the process?

Mr Cheah—Once again, I think that is probably a question you might want to direct to the department.

Senator BRANDIS—While I have you here, I want to ask you about one issue that I am a little bit interested in—that is, the enforcement regime. I think you heard Mr Samuel's and Mr Willett's evidence that they have identified five outstanding issues which need to be developed within the model that the legislation will underwrite. Do you anticipate that the use of enforceable undertakings as a method of securing the enforcement regime would be any different from the use of enforceable undertakings under part XIC of the Trade Practices Act?

Mr Cheah—Actually, that is a very good issue. The ACCC has for some time had the power to take enforceable undertakings under section 87B of the Trade Practices Act.

Senator BRANDIS—That is exactly my point. I used to know all of this stuff, but, as I understand it, section 87B undertakings are not different, at least in legal form, from specific undertakings made under part XIC, are they?

Mr Cheah—No, I think they are a bit different because the undertakings which a carrier makes under part XIC tend to be about providing access on certain terms and conditions.

Senator BRANDIS—Yes, but that is only topic related. The nature of the enforcement powers is the same, isn't it?

Mr Cheah—In terms of enforcing an undertaking, I think they are a little bit different. What I suggest you do if you are interested in that issue is, once again, take it up with DCITA and then you can get some direct legal advice on how that works. I am not a lawyer. But certainly section 87B undertakings are very general in their nature. My understanding is that they allow the ACCC to take undertakings on a wide range of issues relating to the enforcement of competition law.

Senator BRANDIS—I think the section 87B undertakings are generic undertakings under the act. Then, under part XIC, specific provision is made in support of the enforcement regime specific to the telecommunications industry for undertakings to be given. The question

I am asking you—and you may or may not be in a position to tell me—is whether they are in substance the same procedure and enforceable in the same manner as section 87B undertakings.

Mr Cheah—I think section 87B might be a bit broader in the sense that I think the ACCC has a very broad range of scope to deal with issues there.

Senator BRANDIS—Of course, part XIC provides for arbitrations, too, doesn't it, and the enforcement of determinations?

Mr Cheah—Part XIC sets out the terms and conditions under which access will be provided by carriers and carriage service providers. It sets out some generic terms and conditions which another carriage service provider is entitled to rely on. So, if a carrier made an XIC undertaking and then did not comply with it, I think another carriage service provider would be entitled to go straight to court to say, 'They have to give us access on at least these terms and conditions.'

Senator BRANDIS—I want to avoid a false issue being created. Mr Samuels said there are five things outstanding. The first of them was the precise detail of the plan. There was always bound to be the development to an increasingly high level of sophistication of the detailed plan. That could hardly be expected to be legislated for in the statute with specificity. The scope of services, which was the second issue he identified, is essentially a definitional issue. The third, the enforcement regime—and this is the point of my questions—is that we would not expect that to be radically different from what is already provided for in different circumstances in the existing act. The same, I suspect, could be said about his fourth issue—that is, investigative powers. The fifth issue, which is specific to the operational separation model—that is, the development of wholesale pricing and a pricing equivalence regime—is provided for by the working party between Telstra, the ACCC and the department.

CHAIR—That has to be the last question, because the government's time is up.

Mr Cheah—I think I now understand where your question is coming from. It relates to the enforcement. I think Mr Samuel's question was about the enforcement regime for operational separation. Once again, it is a question I suggest you direct to the department. But my understanding is that the minister makes some decisions about who will do some of the enforcement work. There are some choices that can be made. I am not an expert on those provisions, but in terms of the role for the ACCC or ACMA, I think the minister can make decisions about enforcement. So I would suggest that you direct those questions to the department. I think that might be where he is coming from.

CHAIR—We now conclude the government's questions, so we now turn to the opposition.

Senator CONROY—I am a little confused about the provisions of the future proofing and other measures bill. What is ACMA's role in conducting regular reviews of the adequacy of telecommunications services in regional, rural and remote Australia?

Mr Cheah—Our understanding of the provision is that the RTIRC, the Regional Telecommunications Independent Review Committee, would do the review. ACMA is one of the organisations listed under the bill that can support the review's work. Given that we tend

to be one of the agencies that collect a lot of data around industry performance, particularly in relation to customer experience matters, I would envisage that in practice we will probably have a significant role, but it will be up to the RTIRC at the time to determine what level of support they want from us.

Senator CONROY—In the legislation has a separate body been established under ACMA to monitor and report annually on the adequacy of telecommunications services in regional and rural Australia?

Mr Cheah—We already produce a significant report, the section 105 report.

Senator CONROY—Has a separate body been established in this legislation?

Mr Cheah—No, a separate body has not been established.

Senator CONROY—Has a separate body been established under ACMA to review every three years the adequacy of regional telecommunications services?

Mr Cheah—Not within ACMA. Once again, the RTIRC has been established to do that.

Senator CONROY—So there is no separate body in ACMA with the power to investigate any service inadequacies and remedy any identified problems?

Mr Cheah—No. But I would say that we are almost certainly going to be given some extra resources to support our analytical and data collection functions in that area.

Senator CONROY—So if I supported a position that called for the establishment of a separate body under ACMA with responsibility to monitor, report on annually and review every three years the adequacy of telecommunications services in regional, rural and remote Australia and with the authority to investigate and remedy any inadequacies in mobile telephone and broadband services in urban areas, that is not what happens under this bill.

Mr Cheah—It does not happen under the bill, but it is the kind of thing which can happen now. Broadly speaking, it is one of the things we do now. We do report annually on performance in terms of services in our section 105 report.

Senator CONROY—I was asking about a separate body to do those things specifically, if I supported that proposition.

Mr Cheah—Mr Neil has just reminded me that another relevant consideration in all of this is that the ACA, a few months ago, reported to the minister on a new monitoring and reporting framework. Under that new monitoring and reporting framework we are looking at the ways in which we are going to report on data and customer experiences and so on. Certainly that will be a new issue which the new authority will want to look at anyway. It is obviously a key interest and an important priority.

Senator CONROY—You cannot allocate any money to service issues though, can you?

Mr Cheah—We have some very broad-ranging directions powers, at the end of the day, if we see there is a systemic problem—if we actually find that there is a problem.

Senator CONROY—I said allocate money.

Mr Cheah—Do you mean internally, within ACMA? Obviously ACMA have got a pretty significant budget and we have got some scope within our relevant outputs and outcomes to decide how we move resources around. If there was an important shift in priority, we could move them.

Senator CONROY—If there are issues about fixing services on the ground, you have got no money to do that, and it is not within your mandate to do that.

Mr Cheah—If you mean program kind of money to give a carrier some money to fix a problem, no, we do not.

Senator CONROY—You have got no money to do that.

Mr Cheah—No, and that is not our role.

Senator RONALDSON—That is not your role.

Mr Cheah—No. We are the industry regulator.

Senator CONROY—Thanks for your help over there!

Senator RONALDSON—Stick to your own questions, Steve.

Senator CONROY—Thanks. The ACA has said in the past that there have been systemic breaches of a number of industry codes, one in particular, the IPNO—

Mr Cheah—IPND, I think.

Senator CONROY—sorry—IPND code, consumer contracts code et cetera. Is there anything in the legislation that might actually result in ACMA taking enforcement action in response to a breach of the law by a carrier?

Mr Cheah—ACMA's main power in relation to codes, if we see there is a breach, is to direct a carrier to comply with the code. We can give formal warnings and we can direct a carrier to comply. If a carrier does not then comply with our direction to comply, it is in breach of its licence condition and we can then take the normal enforcement action for breach of a licence condition.

Senator CONROY—Are you aware if the ACA has ever engaged in enforcement action?

Mr Cheah—On a number of occasions, carriers and carriage service providers have been given directions to comply with codes, yes. I might refer that to Mr Neil and Mr White to talk about the numbers, to the extent that they have got them to hand.

Mr Neil—The ACA published, and it had it on its web site, a stated regulatory philosophy, which was based on encouraging maximum compliance with codes and with all regulation and fundamentally applying an enforcement regime which was graduated according to our assessment of the scale of the issues.

Senator CONROY—Have you ever taken anybody to court?

Mr Neil—It depends on what area you want to talk about. In a range of areas we have. We have got a current court action going in relation to a major spammer in WA. We have taken specific regulatory action to enforce membership of the TIO in the past.

Senator CONROY—Membership of the TIO?

Mr Neil—Yes. It is a requirement of the act to be a member of the TIO scheme, and we have forced a number of carriers to do it and, from time to time, ISPs. In relation to codes, we have certainly taken legal action against one ISP for noncompliance with the prices, terms and conditions code and we have taken regulatory action in relation to the IPND code.

Senator CONROY—In previous hearings the ACA told us they had only given one direction, which was to Vodafone over number portability. That was the only time they have ever given direction, never mind enforcement. That was previous evidence given to a previous committee.

Mr Neil—By use of a formal direction?

Senator CONROY—Yes. That would be your enforcement powers. I know you are not unfamiliar with your enforcement powers, but that is what I am talking about.

Mr Neil—But the enforcement power is not limited to giving formal directions. The enforcement power, as Chris indicated, does include a range of measures which will now include enforceable undertakings which, as we indicated, will provide us with another useful tool.

Senator CONROY—I just wanted to ascertain whether—I think Mr Cheah indicated this—your existing powers are the powers that are there now under the new act. There are no extra new powers?

Mr Cheah—We have the ability to take enforceable undertakings. That is actually an important new power, as I said in my opening statement. We regard that as being a very, very useful new tool.

Senator CONROY—I heard you say that.

Mr Neil—In dealing with the industry on a range of these matters, our experience has been that the fact that we have the powers is actually an inducement for them to cooperate. If we raise issues of concern with them, by and large they have complied.

Senator CONROY—Have you met Telstra?

Mr Neil—Including Telstra.

Senator CONROY—Have you met Telstra's legal department? They have got 180 lawyers.

Mr Neil—Fortunately we have not had to deal with the legal department to any great extent, because, in dealing with Telstra's regulatory system—

Senator CONROY—They are the biggest non-legal firm in the country.

Mr Neil—I am aware of that.

Senator CONROY—I have finished; I think Senator Lundy has some questions.

Senator LUNDY—I want to go to the issue of your role in assessing the adequacy of telecommunications services. You mentioned monitoring voice quality. Can you expand on that role?

Mr Cheah—Prior to April or May, the Department of Communications, Information Technology and the Arts wrote to the Australian Communications Authority and asked it to investigate concerns about voice quality over phone services. The ACA provided a preliminary response to that. The department subsequently wrote to us again to ask for some work to be done in that area. The government has now made significant announcements around that, and we think we will be given some resources to investigate concerns about voice quality issues over phone services and, if there are, to come up with a strategy for dealing with them.

Senator LUNDY—Is there anything in the bills we are considering that relate specifically to your role in monitoring voice quality?

Mr Cheah—Not specifically in the bills. If you remember, in my opening statement I split the new measures into two categories: one covered those in the bill, and the other was related to some supporting measures that the minister had announced. I was doing that for completeness—to describe the range of things ACMA would be doing. ACMA already has role in standards related work. We are not saying we will necessarily go down the standards route for voice quality, but that is certainly one of the options.

Senator LUNDY—Currently it is a licence requirement of carriers to provide a data service of 19.2 kilobits per second. Is that still a licence requirement?

Mr Cheah—Yes, it is.

Senator LUNDY—Does anything in these bills improve that minimum data speed?

Mr Cheah—I do not think there is anything specific in the legislation. My understanding is that the government's announcements on that basically said that its strategy is more related to funding on the data side. The augmentations to HiBiS will address concerns around data. In a sense, the 19.2 kilobits per second requirements are, broadly speaking, seen as a safety net. The main strategy for improving data quality and minimum data rates is around the use of HiBiS.

Senator LUNDY—Just to clarify: there is nothing in this legislation which lifts the minimum data standard under the Howard government from 19.2 kilobits per second to something higher.

Mr Cheah—Nothing that I am aware of.

Senator LUNDY—I would like to go back to the issue of the customer service guarantee. You mentioned previously that the mass service disruption definition has now changed and that you will have some powers to clarify what constitutes a mass service disruption. We have heard at previous committees and from many constituents that mass service disruptions and the claimed 'extraordinary event'—hence, leaving Telstra not liable to pay the compensation—happen frequently. Is the aim of this new power of ACMA designed to

prevent Telstra and other carriers from avoiding their obligations under the consumer service guarantee?

Mr Cheah—My impression is that the minister's announcement said that the government was looking to tighten up the MSDN.

Senator LUNDY—I do not understand what 'tighten up' means. Is that specifically to prevent?

Mr Cheah—I think it is to reduce the ability of carriers to use mass service disruption notice exemptions and to try to restrict them to areas that are regarded as, for want of a better word, legitimate. It is obviously a complex issue, because you are dealing with weather.

Senator LUNDY—The direct imputation being that it was not previously legitimate.

Mr Cheah—As you said in your introduction, there have been concerns about whether or not it is legitimate. They have always been legitimate. It is one of those things when you face weather issues—there will always be issues of judgment. One of the more interesting issues for us is how we in practice operationalise some guidelines around that. We do not think it will be an easy task. How do you decide that a particular kind of storm is—or is not—totally abnormal and extraordinary versus something which a carrier could reasonably expect? There are some real issues of judgment there. As I said, we are not anticipating it being a particularly easy task but the government clearly has sent us a signal that it wants us to operationalise it. We will probably get some extra resources to do that because it is going to be a 'trickyish' task.

Senator LUNDY—So does this bill contain specific measures to provide this additional power to you?

Mr Cheah—The bill does not need to, because the whole CSG framework is basically done by means of a ministerial determination, so the minister can basically sort out that issue within a determination. Once the determination has been made, we then operationalise it.

CHAIR—That will have to be the last question, Senator, because we are out of time for the opposition. Senator Allison, you have six minutes.

Senator ALLISON—As I understand it, the bills include the removal of the necessity for carriers to prepare development plans. Is that your understanding?

Mr Cheah—Industry development plans? That is not really one of our functions. That is probably a question I would suggest you might want to direct to the department.

Senator ALLISON—So this will not impact at all on your capacity to monitor or review CSG?

Mr Cheah—Not with the CSG, no. It was always about industry development plans. To the extent that it does, it will probably be very mildly beneficial to our functions, because industry development plans were one of the requirements a carrier had to fulfil before they could be issued with a carrier licence. We issue carrier licences, so in a sense it streamlines the issuing of carrier licences.

Senator ALLISON—So, if that is a provision in the licence, you cannot see any downsides in not having it there, apart from the streamlining approach in licensing?

Mr Cheah—That is a policy question. I am just commenting in terms of our functions and the impact on our functions.

Senator ALLISON—I will ask the department.

Mr Cheah—The extent to which it will have upsides or downsides is probably a policy question for the department.

Senator ALLISON—Was it your advice to the government that led to the increase of—did you say—21 per cent in the penalties for CSG?

Mr Cheah—No, it was not.

Senator ALLISON—So the government did not ask you?

Mr Cheah—We had some discussions around the issue of CSG penalties. We were consulted a bit, but the 21 per cent penalty issue was not one of the issues which we particularly canvassed.

Senator ALLISON—Is it your view that you are more likely to get compliance as a result of a higher penalty?

Mr Cheah—Probably any increase in the penalties on a carrier will obviously improve their incentives to comply.

Senator ALLISON—But it was not your recommendation?

Mr Cheah—That was not a particular recommendation, no.

Senator ALLISON—Is there anything to prevent the ACMA from reviewing the question of broadband services for future CSG obligations?

Mr Cheah—There would be nothing specifically which would stop us from going and examining anything that was relevant to our functions. We can initiate inquiries on anything we like, really, as long as it is relevant to our functions. Certainly the quality of services issue is there. I think, though, that it is unlikely in practice that we would do something like the broad kind of policy question you were just describing off our own bat, to be perfectly honest, simply because there are a whole lot of other economic questions that would be linked in with that in terms of the costs, the effects on competition. It would inevitably spill over to areas which were outside our direct purview. It would have to involve the ACCC and would raise broadband.

The other thing is that some of the strategies that are in place now to promote broadband coverage are actually financial ones, as I said before. The government's announced strategy to improve broadband services in regional Australia is very heavily premised on things like HiBIS, so the government has clearly indicated its strategy for improving services in that area. We do not manage government programs; our job is to regulate. So it is unlikely in practice that we would initiate that kind of inquiry off our own bat.

Senator ALLISON—So who will monitor HiBIS?

Mr Cheah—In terms of the program?

Senator ALLISON—Yes.

Mr Cheah—Once again, it is probably appropriate to direct that question to the department. My understanding would be that normally the programs are partly internally reviewed. At the end of the day, the Auditor-General tends to have a look at the way all programs go. We would have some visibility on broadband services and the quality of them. The ACCC also measures broadband take-up. In fact, my understanding is that the ACCC is currently doing a consultation exercise which is looking at trying to get better data on disaggregated regional take-up of broadband coverage under division 12A of part XIB of the Trade Practices Act.

Senator ALLISON—When will that document be available?

Mr Cheah—There is a consultation draft about their proposed approach which is already public, but that is a question, once again, probably better addressed to the ACCC or the department.

Senator ALLISON—They have already gone. We have missed them.

Mr Cheah—Sorry. I was just trying to helpful—

Senator ALLISON—Yes, I understand. Thank you.

Mr Cheah—just to say that I am aware that this other process is in the background. But I do not think it is appropriate for me to talk about other agencies.

Senator ALLISON—No. But you would not rule out the possibility down the track of considering broadband? Presumably, as it has become more and more available—and we hope it is—you would not rule out a review at some stage with a recommendation to government that the CSG ought to be expanded into this area?

Mr Cheah—CSG is more in purview. Once again, I think I explained before that I do not think there is anything which legally stops us doing it, but it would be very unlikely that we would, because of the number of other agencies and strategies that happen to be floating around on that issue.

Mr Neil—I add on that point that we have in the last 12 months published a study of the quality of service of broadband as experienced by customers throughout the country. We are redoing that study and we will be publishing that in the not too distant future. The report from the last study is available on our web site and we will make the second report available.

Senator ALLISON—And the point of this to my question is?

Mr Neil—It is that we are looking at broadband and we are getting an appreciation of what the quality of service is. The last report broadly indicated that the quality of service for those people who have got access to broadband via the various means is actually quite good. We are repeating the study to see what the extent of the issue is. The point of that would be that it is an input to any policy making that we or the department, for example, might want to make about whether there is a need to take some regulatory activity in relation to broadband quality of service. So it is really general information gathering.

Mr Cheah—Our role has tended to be in the area of quality of service monitoring. In terms of the availability of broadband, that tends to be—

Senator ALLISON—No, that is not what I am referring to.

Mr Cheah—In terms of data rates for broadband, though, and once again that is related to the availability question, my understanding is that the HiBIS scheme, for example, has been structured in a way that allows for data rates to rise over time as carriers get better and better at this because of the kinds of subsidies that are being offered. The market will hopefully have incentive to improve their data rates as time goes by.

Senator ALLISON—I can see why CSG is focused on the telephone copper line, because that is where all the problems are. Fibre optics and satellite systems are more reliable, generally speaking, because it is new technology. But given the huge public investment that we are looking at in this package of \$3 billion over periods of time I would have thought that there ought to be some mechanism either through the CSG or some other whereby a regulator such as yours has an overview and an interest in how well it is being delivered.

Mr Cheah—I think one reason this Regional Telecommunications Independent Review Committee has been established is to make sure there are in fact regular reviews of the strategies that are around for improving services. Obviously ACMA have been given the potential role of supporting those reviews and we would be expecting to have a significant input to that. If your question is, ‘Will there be a regular look at this issue and what the strategies look like?’ I think the answer is yes. I would be very surprised if the RTIRC in the future does not look at broadband availability and whether the data rates are reasonable or if that issue does not arise in the RTIRC’s consideration. We will have a role in supporting that review to the extent that that is relevant to us. The legislation makes clear that there is us, there is the ACCC, there is the department and there are any other agencies that need to be involved. It quite explicitly says: ‘Here is a list of the agencies we think will be needed to help support that review committee’s work.’

Senator ALLISON—Did the government invite your input into the proposal—

CHAIR—I think we will have to leave it there, Senator Allison, because your time is up.

Senator ALLISON—Just one other question, Mr Chair.

CHAIR—Be very quick.

Senator ALLISON—Did the government invite your input into the proposal that Telstra made—the \$5.7 billion upgrade of services for broadband?

Mr Cheah—We have only just seen that. It has only just come in.

Senator ALLISON—So you were not consulted.

Mr Cheah—And in any event, most of the things in there—

Senator RONALDSON—I do not think it is relevant anyway.

Mr Cheah—are not directly relevant to our functions.

Senator ALLISON—You have answered the question. Thank you.

CHAIR—Yes, so we have to leave it at that, Senator Allison. If you have other questions then you know the procedure. I thank the witnesses for appearing this morning. The time frame has been short, but we appreciate the evidence you have given. What we propose to do now is have a 10-minute break while we set up for the next section of the hearing, which is an open forum with eight groups of witnesses.

Proceedings suspended from 9.44 am to 9.56 am

AMOS, Mr Thomas Robert, Member, Australian Telecommunications Users Group
COOPER, Mr Colin, Divisional President, Communications Division, Communications, Electrical and Plumbing Union
CORBIN, Ms Teresa Margaret, Executive Director, Consumers Telecommunications Network
CURRIE, Mr Brian Howard, Member, Competitive Carriers Coalition
EASON, Ms Rosalind, Senior National Industrial Research Officer, Communications Division, Communications, Electrical and Plumbing Union
FLETCHER, Mr Paul, Director, Corporate and Regulatory Affairs, Optus
FORMAN, Mr David, Executive Director, Competitive Carriers Coalition
FUNSTON, Dr Kris, Regulatory Economist, AAPT Ltd
HAVYATT, Mr David Stephen, Head, Regulatory Affairs, AAPT Ltd
HURLEY, Ms Anne, Chief Executive Officer, Australian Communications Industry Forum
JOHNSTON, Mr Paul Anthony, Manager, Economic Policy, Vodafone Australia Ltd
SMITH, Mr Dean, General Manager, Government Affairs, Optus
STIFFE, Mr Peter John, General Manager, Public Policy, Vodafone Australia Ltd

CHAIR—This section of these hearings is being held as a roundtable discussion. We are doing this because time is so short and there are so many different groups providing evidence to this inquiry. We will hear a five-minute opening statement from each group and then we will proceed through the four topics which have been referred to the committee.

Senator LUNDY—Mr Chair, before we start I would like to place on the record, as I normally do at the start of these inquiries, the fact that I am married to Mr David Forman.

CHAIR—I welcome the witnesses. We thank you for giving us your time today. It is much appreciated. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you, as I stated at the commencement of this hearing, that this inquiry is not a general inquiry into the privatisation of Telstra or broader telecommunications issues. The discussion today will be structured around the issues set out in the terms of reference for this inquiry, copies of which are before you. These terms of reference are: the operational separation of Telstra; the role of the Australian Competition and Consumer Commission including the two specific issues listed; the role of the Australian Communications and Media Authority including the two specific issues listed; and the establishment of a \$2 billion perpetual communications fund. We will be proceeding sequentially through these issues so that the proceedings are focused on each issue in turn. I ask that all committee members and witnesses focus on the questions and comments on the

scheduled issues and I further ask that all questions and comments be directed through the chair.

Ms Hurley—ACIF is a member-funded organisation which was specifically established in 1997 to implement the policy of industry self-regulation in the Telecommunications Act 1997. Since 1997, ACIF has developed a body of work which aims to deliver the benefits of competition to end users. It has developed a number of interoperator arrangements such as mobile number portability, technical standards, network specifications and, importantly for today's purposes, a number of consumer protection codes.

A lot of the work that ACIF does is reflected in the industry codes and technical standards it has developed, but it also has significant outcomes in other areas, including forums that it holds, fact sheets and the bringing together of all interested and necessary stakeholders in the industry. The central premise upon which ACIF operates is that the best outcomes are produced through collaboration and consensus with all stakeholders rather than imposed solutions.

ACIF supports the measures in the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 and the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005. It sees that these measures are an affirmation of the success which industry self-regulation has had to date and that they allow ACIF to harness opportunities to do it even better in the future.

ACIF's approach in relation to consumer involvement in the development of codes has always been an inclusive one. ACIF has consumer representation at all levels of its processes. It has consumers on its board and on its standing advisory groups, and it includes consumers in the development process on the working committees for the consumer codes.

ACIF is aware that its track record in the experience of consumer involvement has not always been regarded as optimal. Some recommendations and comments were made about this in a paper called the 'Consumer driven communications paper', which was delivered by consumers at the end of last year. In response to that paper, ACIF confirmed its commitment to enhancing consumer participation within ACIF and undertook the engagement of consultants by the name of Morgan Disney and Associates to review its consumer participation model and to recommend the way in which it could be enhanced to ensure that it was an effective consumer participation model, underpinning effective self-regulation. The development of that work is on track and is expected to be delivered in November of this year.

In respect of the measures in the bills, ACIF sees that they will contribute to a more effective development of codes—in particular, by providing a revenue stream for the development of the codes in ACIF. The code development is a costly process not only because of the labour of the volunteers around the table but because of the support mechanisms which need to be put in place to get a high-quality and timely outcome. The benchmark often referred to as the model for effective code development is the consumer contracts code. It was developed last year in ACIF; it has a model of equal sides—demand side and supply side—representation. It particularly utilises the experience of an independent chair; it utilises a law firm to do the drafting to enable the working committee to concentrate on matters of

principle; and it makes facilitation services available in the event that issues within the working committee get bogged down. All of those measures are expensive in the context of the consumer code. ACIF expended around \$250,000 to support the development of that code.

ACIF sees that a lot of work has to be done in consumer related work as new technologies such as voice over the internet and convergence issues begin to bite. The work that we have been doing to date in ACIF indicates that the preliminary issues to be addressed as these new technologies roll out are very much in the area of customer expectations about the service and the need to be informed about that service. So there is certainly a large body of consumer related work which is looming for the industry to deal with, and we see that these measures will very much support good quality and timely outcomes.

Mr Amos—Better and sustainable communications are of relevance to all users of telecommunications—consumers, businesses, small and large, and government agencies—because of the importance of telecommunications to economic growth, productivity and efficiency and regional sustainability and development. In particular, the issues of competition in telecommunications, consumer safeguards, support for regional and rural end users and regulatory effectiveness are of paramount importance.

ATUG is a self-funded not-for-profit organisation which has been representing the interests of end users in telecommunications in Australia since 1980. It has participated in all of the major policy debates and developments in telecommunications and related areas. Our prime focus is medium to large organisations, but our interests also extend to home based users, whether they be customers, clients or teleworkers.

As part of this statement, we note the bills were released yesterday. The bills we are considering in this review are the Telstra (Transition to Full Private Ownership) Bill, the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill, the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill and the Appropriation (Regional Telecommunications Services) Bill.

Given the time, we will not provide an exhaustive review from our perspective, but we do note the objectives: first, to facilitate a more ex-ante and transparent regulatory regime; second, to improve obligations to interconnect competing networks; third, greater certainty for investment in future networks; fourth, greater regulatory certainty and more timely access to bottleneck services; fifth, greater incentives to not breach the competition rule; sixth, minor changes to the telecommunications regime; and, seventh, improved compliance with the telecommunications regulatory regime. We support these amendments.

ATUG supports the introduction of operational separation of Telstra. Operational separation in telecommunications has significant benefits for the industry and end users. ATUG believes operational separation is a positive step for better end-user services when it forms part of the further sale process of Telstra and when combined with the appropriate telecommunications policy and regulatory framework.

Australia has long been at the leading edge of developments in telecommunications policy and regulation and must remain there if we are to achieve the favourable long-term consequences of effective competition in Australia's telecommunications services market. The

alternative—failed competition in telecommunications—will have serious consequences over the next 10 years or so because communications capability will play an even more important role than ever before in economic growth, social development, efficient and effective delivery of government services.

Whilst supporting operational separation, ATUG notes the following matters need review or correction to ensure that the framework that is developed delivers the desired outcomes for the industry and users: in particular, schedule 11 amends schedule 1, and there are some issues there. We support the operational and organisation separation of the wholesale business unit and key network functions from the retail business units, including separate staff and premises and staff incentive programs. We have an issue with equivalence between the internal wholesale price faced by Telstra's retail business units and the wholesale prices paid by Telstra's competitors for designated services. We ask: how would we ensure during the period that this is the case when it is post event reporting? Annual reporting, we believe, may be too late.

We support equivalent standards of service for designated services provided by Telstra; we support improved responsiveness to wholesale customer requirements; and we support procedure and processes. We support an annual compliance report to government, but we would like to see a rolling disclosure arrangement.

The model that would be introduced through a licence condition requires Telstra to produce, implement and adhere to an operational separation plan. If Telstra contravenes a final operational separation plan the minister may require it to prepare a rectification plan. Breach of that rectification plan would be a breach of Telstra's carrier licence and would enable enforcement action by the ACCC. We note that, the way the legislation is currently worded, the licence condition is only to produce the plan. It is like having a market plan for the USO—and we all know about that. We believe the contents of the operational separation plan should be a licence condition. How long can they spend producing the plan? That also needs to be defined. And would they ever get to a point of having something to implement and adhere to?

ATUG is worried that the ACCC does not come into the picture until the very end, after the event, and only to pursue breach of licence action. How will we know if there has been a breach? We believe that continuous in-confidence disclosure should be part of this. An annual report to the government is not enough. We believe that the existing ACCC and ACA reports are effectively reports tabled post event and do not achieve this. The minister as enforcer is not a particularly good concept. The complexity of the issue and the time constraints of the minister are unprecedented at this time in other industries.

We also believe, in the case of schedule 11, where a declaration after five years is made by the minister, a sunset clause is a worry. It should be reworded that 'the minister may make the declaration', not 'the minister will make the declaration'. It is not clear that the decision to make the declaration is in any way informed by the report as it is at the moment. In particular, operational separation plans and relationships to parts XIB and XIC are a big problem to us at

this moment. Why are we are letting privately developed operational separation plans overtake, as we see it, XIC and XIB to this extent?

A group that includes the ACCC, DCITA and Telstra, with an expert facilitator, has been set to develop the principles for the establishment of an internal wholesale price. This group will also seek to establish formal understandings about the use of internal wholesale prices in assessing whether any competitive behaviour exists. This process will provide internal wholesale pricing that the ACCC has identified as important to the role of enforcing compliance under XIB of the TPA. To us, this provision seems to override existing ACCC powers to determine any competitive conduct, and I know this morning the ACCC spoke of this.

Senator RONALDSON—Mr Chair, Mr Amos does not need to go at a million miles an hour; we do have sufficient time. I am finding it a bit hard to hear everything he is saying.

Mr Amos—I am sorry; I am just trying to get my five minutes in.

CHAIR—Please speak more clearly. It is very important for everyone to hear.

Mr Amos—I was talking about XIB of the TPA. This provision seems to override the existing ACCC powers to determine any competitive conduct. Since the plan is going to be developed by Telstra alone, as we see it at the moment, it seems ludicrous to us at ATUG that such a plan might be allowed to override the ACCC access pricing principles and the price squeeze determinations. From our end, that is a very important point at this moment.

Schedule 11 would also amend parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either XIB or XIC, to have regard to the conduct that Telstra engages in in order to comply with the final operational separation plan. To that extent, that conduct is relevant to the functions being performed or the power being exercised. These amendments will provide linkages between the operational separation plan of parts XIB and XIC where relevant. Again, there seems to ATUG to be a possibility for delay, obfuscation or gaming, which is something that we have been quite concerned about in the past. Giving such a central role to the operational separation plan developed by Telstra alone is too broad and the implications still remain unclear and worrying.

Moving on to the role of the ACCC, including its two components, ATUG supports in general the thrust of the new legislation to improve and empower the ACCC. ATUG supports, in particular, schedule 4, which increases the penalties; schedule 5, which amends part XIC of the TPA to allow the Federal Court to enforce; schedule 6, which inserts drafting notes for XIC; and schedule 7. Central to the options that are being put forward in relation to the TPA to enable a range of matters to be addressed through procedural rules, a power has to be established by which the ACCC can determine and amend, in consultation with industry, these procedural rules. ATUG is concerned, given the recent statements by Telstra with regard to exercising a more legally based approach to regulation, that any ACCC attempts to develop procedural rules will lead to court action rather than speedy regulatory action and outcomes which the industry presented and supported from the very beginning, with ACIF and self-

regulation. We support schedule 9 that amends the object of part XIC of the TPA and schedule 7.

Moving to the last part, which is ACMA, ATUG support the ACMA package and we support schedule 10 and schedule 11. But we note that, with regard to regional and rural experience, ACMA should have access to an associate director with regional experience to add value to the ACMA decision-making process. In addition, ACMA should be required to report at least annually with regard to regional and rural matters to provide feedback on the process. The last matter is in regard to the resale area, and telecommunications deregulation in Australia has been based on resale. Of the proposed new clauses, clause 50(b) essentially recognises that resale should be there, and we believe that should be clarified and actually brought out.

CHAIR—Thank you, Mr Amos. We now go to AAPT. Who is speaking today?

Mr Havyatt—I will. Dr Funston will probably only speak if we get into the wonders of real options theory. Thank you for your general welcome to us all, but I feel that I should be welcoming the senators to this inquiry. I have been present at most of those inquiries that Senator Brandis referred to earlier—as have a number of senators, including you, Chair, and Senator Allison. One thing I learnt about telco regulation in that period of time is that it is not a trivial matter. We have already made a written submission. I have included in that submission two boxes that refer to specific instances of the regulatory regime where we have got it very wrong through the process of review.

On page 3 of the submission, the first box refers to an issue that related to backdating of determinations and the processes that occurred with the amendments that accompanied the 1999 changes, which were the T2 amendments. An amendment was moved at that time to clarify the power of the ACCC to backdate a decision. Everyone interpreted it as being a clarification of an existing power. As the box indicates, it became a matter of significant import in a dispute between AAPT and Telstra. The ACCC interpreted that the clarification amendment meant that in fact they could only backdate to the date of the amendment, even though everybody thought, prior to moving the amendment, that they actually had the power to backdate. That matter wound up in the Federal Court. We never got a decision on it, because we settled that dispute after our long-running Australian Competition Tribunal hearing that you have all shared the blow by blow descriptions of at various times and at Senate committee hearings where we went in camera.

That was an unintended consequence of a very minor change to the telecommunications legislation. For anybody to say that changes to this legislation are easy to understand, based upon the number of pages, is patently misleading and not in the interests of Australians. I am speaking not only on behalf of an industry that represents \$33 billion of revenue but also on behalf of my firm, which is a firm with \$1.3 billion in revenue, all of which is directly affected by all the legislation before us.

The second example I have included is the example of accounting separation, where we had a process that looked very similar to the process in relation to operational separation, with recognition that something new needed to be done in the regime. No-one could quite agree on

how it would be done. The end point was to agree that we would resolve it via ministerial direction. The minister is on record as saying that accounting separation has been inadequate. But all the requirements of accounting separation were introduced by a ministerial determination. So reliance upon operational separation regime that is introduced by ministerial determination is clearly inadequate, based upon our experience. So my plea to all senators is to focus on the fact that the decisions that are not the subject of this inquiry—whether or not T3 will proceed—are not things that should be delaying issues. All senators should agree that that is now probably a matter of history and implore the government to allow more time for the consideration of this legislation in a transparent process. Going again to the question of transparent processes, the last inquiry which the Senate Environment, Communications, Information Technology and the Arts References Committee undertook on the regulatory regime included the following report by government senators:

As discussed previously, the Minister is currently undertaking a review of the telecommunications regulatory regime. As part of this process the Minister released an issues paper to which all interested parties were able to make submissions. Government Senators note that the issues paper, and the regulatory review that the Government has underway, explores the same broad issues that are the subject of many of the recommendations made in the majority report...

... ..

Government Senators consider that until this review has been finalised it would be premature to make specific recommendations about amendments to the TPA Act and accordingly do not support the following recommendations ...

That was on page 223 of that report. The consequence was that the review of this committee wound up with a very voluminous report with many valuable recommendations in it. The consequence of the government's review was a short ministerial statement about what had been decided, drafting of legislation that has only seen the light of day yesterday and a process of scrutiny that goes for one day. The processes we follow in ACIF on consumer codes include open public consultation, including consumers at the heart of our consultation, and we do not publish those codes until we have that agreement. Yet the overarching legislation that determines an industry which is of fundamental importance to our economy is being treated in this scant and inadequate manner. I welcome Senator Brandis's earlier comments, but I do not believe that you can count pages of legislation.

There are two things that I want to draw the committee's attention. Firstly, the schedule 9 amendment that ATUG have, unfortunately, said they support is another one of these minor amendments that are referred to as being a clarification of the LTIE test. It is not a minor clarification; it is fundamentally changing the basis on which that test will apply. It brings into play the consideration of what extra risk factors you would include in interconnection pricing. That amendment would mean that every interconnection agreement—every regulated service that is in place in the regulatory regime—would immediately be recontested by Telstra. They would take the issues to the Australian Competition Tribunal and they would be arguing for prices that are as much as twice the existing interconnection prices. It would take us back to all the issues that we were discussing in 2002 before the Australian Competition Tribunal. It is

not a minor amendment; it has had no public consultation; there has been no advice from the ACCC about what they think the impact of that amendment would be.

I move on to operational separation. Operational separation as currently outlined in this legislation may never happen. The minister gets the power to approve or reject a plan. The minister does have more power than the ACCC has with undertakings—they can at least direct Telstra on how to amend the plan—but there is nothing stopping Telstra making other changes, as it does with its undertakings processes. Telstra is a master of the art of gaming this kind of process. Under the legislation as drafted, there would be no operational separation plan. If there ever were an operational separation plan, it is actually not enforceable. Clause 55(3) of the schedule 1 amendments makes it clear that the plan itself is not enforceable and it only becomes enforceable if the minister has formed a view that they have breached the plan—I do not know you breach something that is not enforceable—and directs Telstra to rectify it. So the plan itself, even if it comes into being, is not enforceable.

It is unworkable because, at page 46 of the bill, the inclusion of 151CP and 152EQ in the Trade Practices Act means that all the rest of the regulatory regime has to stop and pay heed to what occurs in the operational separation plan—a plan that itself is not subject to scrutiny and will result in endless appeals under judicial review about whether the ACCC has exercised its powers appropriately.

Finally, the real question is: what is the role of the ACCC in all this? The minister gets to approve the operational separation plan only considering the ACCC as one of the unwashed public. There is no requirement that the ACCC be specifically asked for an opinion and that the minister be required to pay attention to that opinion. That is at paragraphs 54 and 61 of the proposals. I do not know if everyone else in this room understands regulatory language in the way I do, but I heard Graeme Samuel today in this room say, 'The ACCC does not support these amendments.' For him to have answered those questions in the way that he did makes it abundantly clear, to me at least, that the ACCC does not support these amendments.

Senator BRANDIS—That is certainly not what he said, because he was answering my questions. You have totally misrepresented what Mr Samuel said.

CHAIR—Let us let Mr Havyatt finish and then we will come back to this under the relevant heading.

Senator BRANDIS—Do not tell us what we have been told in answer to our own questions, Mr Havyatt—what a cheek!

CHAIR—Please proceed, Mr Havyatt. We have a lot of people to make opening statements.

Mr Havyatt—There are other issues in relation to the operational separation plan, but those are the three key ones. This is not legislation that is in any shape to be approved by any parliament in Australia.

CHAIR—Thank you very much. I invite an opening statement from the Competitive Carriers Coalition.

Mr Forman—I start by saying that the CCC supports the aim of the legislation, but my remarks are qualified by the fact that we are still going through the detail of the bill. As we go through that, there become apparent more and more issues of grave concern to us. We provided a written submission yesterday. Subsequent to that we have identified a few other issues, some of which have already been touched on by other speakers, particularly in relation to operational separation and the role of the ACCC. I would like to go to those issues first because they are not in the written submission and I think they are perhaps some of the most important issues that need to be resolved here.

The first issue is the enforceability of the operational separation plan. As far as we can see, and I think this is the point that Mr Havyatt was making, compliance with the plan itself is not a licence condition. There is a licence condition to comply with a rectification plan. We also cannot see that there is any power for the ACCC to investigate a breach of the plan, so how a breach is established is open to question. The second issue is the interrelationship with, or what the explanatory memorandum refers to as the linkage between, the operational separation plan and parts XIB and XIC requiring the ACCC, in investigation of an XIB or XIC matter, to have regard to any conduct that may be relevant in the context of the operational separation plan. We are also well versed in the gaming that goes on in this industry, and that is the kind of change we fear that Telstra and the team of 180 lawyers that were referred to earlier will drive a truck through to the extent that the XIB and XIC processes may be fundamentally and profoundly altered to the point where they are no longer functioning.

The third of the new issues that we have identified relates to the processes of the working group and the development of the plan. We do not see a legislative link in relation to the working group that develops pricing. We do not see a linkage between the output of that group and the ministerial decision process, which ultimately will be the mechanism by which the prices are set. In the absence of that, it is hard to see what regard the minister has to have to those deliberations or what is the basis upon which those decisions are made. More broadly, and this goes to the role of the ACCC, there seems to be an absence of a formal advisory role for the ACCC in a number of places where we would expect it to be in relation to the planning and in relation to the pricing issue that I just mentioned.

Some of the issues that we raised in our brief and quickly knocked together submission yesterday—and I apologise if there are typographical errors in that; it was done in a hurry, as you would imagine—included drawing attention to the premise upon which the department, in the explanatory memorandum, explains why this model of operational separation was chosen and the ACCC's preferred model was rejected. It seemed that the premise was that this model was one which contained a lower level of implementation risk because it was one that related to the existing business arrangements inside Telstra and one that Telstra had been involved in the development of as opposed to the ACCC model, which it said was one that was going to be imposed upon Telstra.

We are concerned that there has been a fundamental change in the environment since that decision was made—that is, that Telstra have clearly indicated on a number of occasions that they intend to reorganise themselves internally. So the internal arrangements of Telstra upon

which this model is based—which really is an attempt, as I understand it, to codify things that are already in place—are no longer supported by Telstra’s management. In fact, Telstra’s management have clearly indicated in a number of forums that they intend to significantly wind back, for example, their wholesale operation. That seems to me to suggest that the implementation risk around this model has become enormous over the course of the last month. There is a need for the thinking that sits behind this to be reconsidered before we get too far down the track and to understand what the choices are that are being made and the bases upon which those choices have been made.

We have issues, which again are mentioned in this document, around the way new services become designated for the purposes of operational separation and pricing equivalence. It seems that that relies on either Telstra agreeing that the minister designate new services subject to these arrangements, or the ACCC conducting an XIC process—a declaration process—which process, even today, takes years.

In the context of the point I raised earlier about the linkage between the operational separation plan and XIB, we have no confidence that XIB would be workable. Certainly the opportunity for gaming, as I think Mr Amos indicated, is enormous. The absence of formal roles for the ACCC we think leads to a whole new realm of regulatory uncertainty. Regulatory uncertainty is something you hear a lot of in this industry, both from incumbents and from competitors. The absence of clear public consultation processes for some of the decisions that are ultimately made by the minister here we think leads to a higher level of uncertainty, and potentially to a great deal more regulation than we have today. We always understood that one of the intentions of the government was to reduce regulation over time, due to a great fear that we could see an escalation of regulation over the next few years and an escalation of court actions.

Lastly I would just like to touch on the long-term interests of end-users test that Mr Havyatt mentioned. We are of the same mind, that that is not a minor clarification—that is a profound change, and it will have an impact upon the pricing of services already in the market that are being regulated today under XIC pricing principles and arrangements that are delivered over the existing copper network. It creates the opportunity for Telstra to require the commission to go back and re-price all of those services that we have been arguing about for the last eight years or so.

CHAIR—We turn now to the Communications, Electrical and Plumbing Union.

Mr Cooper—I am the National Vice President of the Communications, Electrical and Plumbing Union. I appear with Rosalind Eason, who is the National Industrial Research Officer with the union. We would like to make some comments jointly. Firstly, I will read an opening statement and then we will comment very briefly on the points made in the statement.

CHAIR—Will come back to those points, so perhaps you could deal with them then. Please just make your opening statement—or perhaps you could do it your way, as long as it is brief.

Ms Eason—Given the length of time that other people have spent going through the detail of their views on operational separation and so on—which I take it reflects their anxiety that

they may not get a chance otherwise—with your indulgence we would like to just make a short opening statement and then to briefly address the specific terms of reference.

Mr Cooper—We are a trade union that covers telecommunications and IT workers, right across both public and private sectors of communications. We have been commenting on this issue I think since the mid-seventies, since the establishment of Telecom and the break-up of the PMG. The CEPU welcomes the opportunity to comment on the above bills, the chief purpose of which is to prepare the ground for the full privatisation of Telstra. Given the short available to respond to this legislation, it is not our intention to examine the bills in detail. Rather, the union will focus on what it sees as the two key issues at the heart of the legislative package: the funding of rural and regional telecommunication needs in a fully privatised environment, and the proposed operational separation of Telstra.

In putting forward this package, the government claims that it is future proofing regional and rural Australian communications services, presumably against those commercial forces which it itself unleashed through its own privatisation policies. The CEPU considers these claims ill-founded. While the specific measures proposed here may confer modest benefits on those who live in those areas, they cannot, in our view, provide the answers to the long-term investment needs of the community. Nor will the operational separation of Telstra do anything to help the bush. The chief beneficiaries of this measure will be the companies whose prime targets are high-spending commercial customers in the metropolitan mass market. Thin rural and regional markets will continue to hold few attractions for profit-driven firms, irrespective of the structural experiments of policy makers.

In the meantime, to the extent that Telstra is constrained from realising the efficiencies of vertical integration, all consumers, including those in rural areas, will carry the burden of unnecessary high prices. The government in putting forward these bills is of course attempting to satisfy both the National Party and Telstra's competitors while reassuring a community overwhelmingly hostile to the Telstra privatisation that they have nothing to fear from the full sale. It is a pragmatic package cobbled together in indecent haste to meet a political timetable. It is not a serious policy response to the issues facing the industry and the community. The uncomfortable fact is that there is no easy solution to the conflict between the traditional social objectives of telecommunication policy—equitable access to services for all Australians—and the logic of the market. Majority public ownership of Telstra, however, at least offers a means of mediating those tensions while preserving a form of accountability appropriate to a company that performs critical social functions. Rosalind will comment briefly on these issues and on the terms of reference.

Ms Eason—I would like to briefly outline some of our specific thoughts about the operational separation regime and some of the other provisions here. When we wrote the executive summary of our written submission, which we will table now, we still had not had access to the details of the bills. In fact, we had not seen the bills at all. Unlike probably a few people around the table, we were not at any kind of roundtable, thrashing out the details.

CHAIR—Would you like to proceed with your comments. That would be more helpful, I think.

Ms Eason—These are I think relevant comments and they pick up AAPT's comments. On the question of the operational separation of Telstra, we remain sceptical about the benefits that this will confer but regard this model as obviously less intrusive than the ones that have been canvassed elsewhere. If it does manage to improve the transparency of pricing of Telstra's wholesale products and if that leads to more speedy resolution of the kinds of disputes we have seen in the industry then that will be a positive. We will welcome that, and we see that there is an opportunity for a review of this by 2009.

We are pleased to see that it is not the intent of the legislation, according to the explanatory memorandum, to still protect the efficiencies—or the economies of scope and scale—that Telstra has available to it. We assume that when the actual working party gets down to the pricing principles that that principle and the explanatory memorandum will be embodied in any decisions that come out of that. We are pleased to see that the minister has no new pricing powers. The minister, under the Telecommunications Act 1997, has all too many powers in our view and new powers would only confuse further the kind of possibility for overlap, which is already here and other speakers have talked about, between the Trade Practices Act's telecommunications specific sections and the new operational separation regime. We agree with what other people have said about the fact that there has not really been time for the industry to consider in detail how this new operational separation regime is going to tie in with XIB and XIC in the Trade Practices Act. Our position on operational separation is that we do not have any great attachment to it. I think it is a legitimate concern of the industry and anyone interested in policy to see how this is going to work and how these things are going to dovetail or potentially conflict.

That said, as we said in our opening statement, we do not think that these measures in themselves are necessarily going to do one thing to speed greater investment in regional and rural markets, which has to some extent been the political focus of the whole debate over the privatisation of Telstra. I think it is notable—and I do not disparage the other contributions for this—that clearly for most people around this table the key thing is the competitive framework. In our view these measures to change the competitive framework will not in themselves deliver investment into areas which are unprofitable now or only have very slim pickings. The \$2 billion fund is a tacit admission of that, but—and we will address this question more extensively later—not only is it not enough but it is the wrong way of going about trying to deal with the problem of investment in these areas. It is not only an inadequate sum but an inadequate strategy.

On the question of giving other powers to the ACCC or changing the Trade Practices Act, we would support the requirement of the ACCC to consider the risks of new infrastructure investment when considering access decisions. This seems fundamental given the forward-looking investment needs that this industry is facing. Perhaps the wording can be finessed in some way to deal with the questions that have been raised by others, but I cannot see how there could be a reasonable objection to that risk being assessed when you are looking at access into the future. Frankly, why would people invest in future networks if they do not have a degree of certainty about the pricing approach that will be taken and if the risks that they are taking will not be built into those prices in some way?

On the role of ACMA and its new powers, we support them. We are pleased to see that the mass service disruption notice process will be tightened up. We have been a critic of that. We also support the extra funding that is going to ACMA for developments of codes, which we presume will in part flow back to ACIF. There is a problem there with the whole self-regulatory model. I guess we cannot open that up now, but this measure points to a longer term problem about the funding of regulations and the sustainability and realism of the self-regulatory model that is currently used by the industry, particularly in relation to cabling regulation. Frankly, it is not working. I would prefer to talk about the \$2 billion fund in more detail. We see that as a cornerstone of this package, and the main game, from a political point of view.

CHAIR—We will now go to the Consumers Telecommunications Network.

Ms Corbin—Thank you for providing the opportunity to present to this important Senate inquiry for consumers. The Consumers Telecommunications Network offers these comments as a national peak body of consumer and community organisations and of individuals who represent community interests and participate in national policy relating to telecommunications. Our members include rural and regional consumer organisations, including the Country Women's Association, the Isolated Children and Parents Association, peak bodies representing people with disabilities, Indigenous organisations, young people, older consumers, tenancy groups and general consumer organisations and associations across Australia.

CTN advocates policies for better access, quality of service and affordability of telecommunications facilities for all residential consumers. Whilst we welcome many of the consumer protection and future proofing measures proposed by the amended bills and new bills under consideration, we are not convinced that the regulations go far enough. CTN strongly encourages the government to strengthen consumer protection regulations before privatisation proceeds. It is CTN's view that the telephone can no longer be considered a luxury; it is essential not only for contacting emergency services but also for participating fully in society.

Consumers believe that, in addition to the rights already afforded to Australians by the universal service obligation, there must be a declaration that the telephone is an essential service. CTN members believe that it is imperative that, in the government's reaffirmation of the universal service, telecommunications are declared as an essential service so that there is no question that every Australian has a right to a telephone.

CTN has just completed a survey to gauge consumer opinion about consumer safeguards and the proposed full privatisation of Telstra. Consumer safeguards were listed in order of importance. This is on page 2 of our submission. Notably the survey revealed that consumers regard the provision of high quality emergency services as the most important safeguard, which must be guaranteed despite the full privatisation of Telstra. To date there has been no mention in the proposed bills which addresses this public concern.

When considering what regulations need to be put in place, please consider and take note of the list of priorities that consumers have identified in our submission. These go from (1)

through to (13). I will not list them all now. On this basis, we would also ask that the government reaffirm its commitment to the provision of high-quality emergency services and ensure that this is preserved regardless of the ownership of Telstra.

We offer the following additional comments in relation to the terms of reference. In relation to the operational separation of Telstra, CTN endorses moves towards operational separation as an important step towards achieving greater transparency, particularly with regard to how much it actually costs Telstra to provide services to end users. Whilst not as stringent as structural separation, which CTN has advocated previously, organisational separation is better than what we believe the current status quo is with accounting separation. CTN is aware of complaints that the lack of transparency of Telstra's structure has hampered the efforts of regulators, particularly the ACCC, in obtaining information that they require. Clearly, we also reserve our judgment on the effectiveness of the organisational separation based on the actual plan that would be submitted by Telstra to the ACCC and also the reporting requirements which have already been identified by ATUG.

In relation to the ACCC's role, CTN supports the need to ensure the ACCC has the appropriate powers to regulate a fully privatised Telstra, especially to ensure that the proposed organisational separation is effective. Competition can only benefit consumers if the marketplace operates effectively to ensure that prices are pushed downwards and choices are optimal. We have a grave concern that once Telstra is fully privatised there will be a strong imperative for Telstra to use its size and market share to dominate the Australian telecommunications marketplace. In our opinion, the ACCC must have the powers to be an effective regulator, otherwise consumers will lose out through increasing, not decreasing, prices and fewer choices as competitors are pushed out of business by predatory practices.

In relation to the role of the ACMA, firstly, on the provision of additional enforcement powers, CTN is pleased that our support for a stronger and better resourced regulator is reflected in the current bills, even if there remains too much emphasis on self-regulatory instruments to provide all consumer protection. As highlighted in the consumer driven communications report of 2004, consumers seek workable regulation and effective enforcement in the telecommunications industry to ensure that they get the products and services they need in an environment with adequate safeguards. Enforcement is a key element.

CTN acknowledges the work that ACIF have done to considerably progress consumer participation. We believe there has been some improvement since the publishing of the consumer driven communications report. CTN also acknowledges the work that ACIF have commenced on code compliance monitoring by implementing a compliance strategy. Ultimately, however, consumer protection requires more than statistical research and industry seminars aimed at implementing better practices. Only a strong regulator with adequate enforcement powers and resources for compliance auditing will ensure that there are more signatories to codes and greater compliance with codes in the marketplace. Consumers need to be shown that they can have more confidence in self-regulation. This will only occur through more widespread visible compliance with industry codes. ACIF have a role to play. However, in order to achieve this goal, ACIF need to be a partner with the regulator.

Consumer protection is squarely the responsibility of governments and regulators. At present we see consumers exposed to excessive risk as a direct result of the industry's unwillingness to address consumer concerns. Further to this, CTN does not believe that satisfactory outcomes for consumers can be achieved through self-regulatory approaches in all instances. We firmly believe there is still a place for direct regulation. One example of this is the customer service guarantee, and CTN welcomes the announcement this week that the network reliability framework guarantee and the customer service guarantee will be improved. The customer service guarantee must be simplified so that more consumers benefit from it. The customer service guarantee must also be better publicised, and the question of exemptions and how they are now being applied to voice over internet providers also needs to be clarified.

We believe that widespread noncompliance with codes and regulations, such as those to do with the customer service guarantee, is simply not being detected at present. In fact, CTN has major concerns regarding compliance with the ACIF complaints-handling code and lack of apparent referrals of customer complaints to the TIO. This is just one very serious example of the nexus between the obligations in the codes of practice, which we do not see as effectively too bad, and their implementation in practice. In light of this week's revelations about the high level of faults being reported—namely, over 40 million faults reported relating to 14 per cent of phone lines—this must be addressed before the full privatisation of Telstra.

CHAIR—Is there anything you can cover in subsequent sections? We are running out of time a bit now.

Ms Corbin—I will shorten my comments. CTN applauds the inclusion of the mechanism to fund the development of the industry codes. In particular, we welcome criteria for such funding which stipulate that consumers are adequately represented in the process for the development of such codes. Whilst it is acknowledged as important, adequate consumer representation has not always been the case. We endorse the approach to generate these funds through carrier licence fees. However, we are very concerned that the current amendment does not allow for and specifically excludes an organisation like CTN from redeeming costs incurred by participating in code working groups due to our current funding arrangements with the department of communications.

A large proportion of CTN's current work is its ACIF committee workload. The workload is ever-increasing and at times becomes burdensome to our community organisation, which is only staffed by two full-time and two part-time staff members. In the period from 1 October last year to 31 March this year—six months—CTN attended over 50 meetings at ACIF and participated in 26 different ACIF councils, working committees et cetera. This period of CTN work was dominated by the development of the consumer contracts code, of course. CTN wrote off nearly 500 hours of unpaid staff time. There were also considerable contributions made by volunteers. We think that the legislation has to include CTN's ability to be declared as an association that can be reimbursed for costs, particularly those costs that cannot be properly estimated before a code of practice.

CHAIR—I think we will have to wind it up there. You can raise these points as we go through. We now turn to Optus.

Mr Fletcher—My name is Paul Fletcher and I am Director of Corporate and Regulatory Affairs at Optus. I also introduce my colleague Mr Dean Smith, General Manager of Government Relations at Optus. Optus is pleased to offer these comments based upon the review of the legislation we have been able to conduct in the brief time available. We consider that there is a lot of potential in the operational separation measures in this legislation, but the government, we believe, needs to do some more work to ensure that its policy intentions are realised.

We consider that there are two key problems. Firstly, Telstra gets to prepare the operational separation plan, which gives it a huge opportunity to white-ant and undermine what is intended in the legislation. Secondly, the measures to ensure that Telstra complies with the plan are too weak. It might write a beautiful plan and then not live up to it. On the first issue, it obviously makes sense for Telstra to prepare the first draft of the plan, but there must be a much more thorough process for Telstra's wholesale customers, as well as the ACCC, to give their input. There should be a capacity for the government to be able to rewrite the plan and impose its own requirements based on that feedback process. We understand that is similar to what occurs in some other industries, such as the gas and electricity industries.

On the second issue, which is the very weak measures to enforce the plan, nowhere in the new provisions does it say that Telstra must comply with the operational separation plan. If it fails to comply, the sanction is for the minister to require a rectification plan. Only if Telstra fails to comply with the rectification plan can the ACCC and ACMA take enforcement action. The action they can take is to seek the imposition of a civil penalty for Telstra's breach of its licence condition. The maximum civil penalty is \$10 million. There may well be circumstances where Telstra considers that it is rational to simply accept that penalty.

Senator BRANDIS—It is \$10 million per breach, Mr Fletcher. If there is a multiplicity of breaches, it is not going to be capped at \$10 million.

Mr Fletcher—The penalty per breach is \$10 million—that is right. It may well be that there is a breach that Telstra engages in which is of sufficient value to it that it becomes rational for Telstra to engage in that breach. That is the point I am making.

Senator BRANDIS—I understand your point, but my point is that, if there is such misbehaviour—

CHAIR—Let us finish the opening statements and we will cover this as we come back through these issues.

Senator BRANDIS—it is not really capped at \$10 million if there is a multiplicity of instances.

CHAIR—Can you continue with your opening statement, Mr Fletcher.

Mr Fletcher—We consider that there are some simple changes which could be made to ensure that the government achieves its policy intentions. Firstly, it should require consultation with the ACCC and Telstra's wholesale customers on Telstra's first draft plan.

Secondly, it should give the minister power to vary the plan as he or she thinks fit. Thirdly, it should put a legal requirement on Telstra to comply with its operational separation plan. Fourthly, it should remove the unnecessary and time-consuming step of the rectification plan. Fifthly, it should give a private right of action to sue Telstra to enforce its compliance with the plan so that Telstra's competitors can choose to take private legal action against Telstra to enforce a breach.

We need to assume that Telstra will resist and delay at every opportunity, not because its management are bad people but simply because that is the rational course of action for them to take. Hence, the regime needs to work in a way that will allow a quick and effective response when Telstra fails to treat a wholesale customer in an equivalent way to how it treats its own retail division. The regime as drafted right now gives Telstra many opportunities to white-ant the government's intentions, and it will be a painfully slow process to achieve enforcement of Telstra's compliance with the plan.

I have some brief comments on measures other than operational separation. In relation to the changes to the ACCC's powers, we are concerned that the ACCC will potentially be able to change the rules of the game in midstream on undertakings which are currently being considered by the ACCC. Optus have an undertaking before the ACCC on mobile termination and we would want clarification that the changes are not intended to have retrospective effect. We have some concerns about the measures requiring the industry to fund consumer bodies to the extent that they potentially involve yet another increase in the financial burden on the industry. We would like to see a greater focus on cost saving and efficiency—for example, looking for opportunities for efficiencies in the establishment of ACMA.

Finally, on the rural funding packages, we believe these do offer a once-in-a-lifetime opportunity to achieve a fundamental change towards a more competitive market structure both in rural Australia and in metropolitan Australia. To achieve that potential, some key principles need to be followed. There must be limits on how much Telstra can get out of the fund, and we think the HiBIS model of a 60 per cent cap is a very good one. We think it makes sense to focus on a small number of large projects; we think that is more likely to achieve bang for the taxpayer's buck. And we think that the government should follow a formal process of calling for submissions that is deliberately designed to elicit big ideas to determine whether there are in fact ways that the money can be used effectively and leverage taxpayers' money with private investment.

CHAIR—Thank you very much. Now we will hear from Mr Peter Stiffe and Mr Paul Johnston from Vodafone.

Mr Stiffe—Thank you for the opportunity to be here today. In the short time that has been available, we have confined our analysis of the bills to a specific area, the procedural rules, so our comments are focused on those. It seems to us that many of the procedural rule provisions are to prevent gaming, and that has been mentioned already this morning. While we certainly support clarity and certainty in the regime, it seems to us that the balance has swung too far away from preserving the rights of parties, both access seekers and access providers, to argue their legitimate interests.

We are concerned that the continual incremental changes to the regime that we have seen over the years are continuing now and that they have removed important checks and balances. They have fundamentally undermined parties' rights to natural justice and the ability to robustly argue their case. In a perfect world, these powers, particularly those that have been given to the ACCC, would be wielded by an entity that was completely informed, had unlimited resources and was infinitely wise. Unfortunately, such an entity does not exist anywhere in the world that we are aware of.

There are four specific areas in the bill that we have really focused on. The first one is the ability of the ACCC to reject an access undertaking simply because it asked for information within a specified time frame which was not furnished on time. This is especially concerning, given that the commission believes that at the moment it can acquire information and analysis that is very broad and that may not actually currently exist. We do not understand why it needs this new power when it can already request such information and can already make its own judgments about how to treat an access undertaking in the event that the information cannot be supplied or is not supplied by an access provider.

The second issue for us seems to be a relatively small part of the bill but it appears now that the ACCC can defer consideration of an access undertaking. It is not exactly clear under what circumstances it can defer that consideration but we consider it to be quite concerning if it is able to do so because it moves the regime further away from the idea of being able to establish access undertakings as a means to set prices in the industry.

The third concern that we have relates to any-to-any connectivity. This seems to be quite a new idea and quite a novel concept in that it can require a party to have to purchase a service rather than supply a service. It seems to us on our reading that any telecommunications service could be regulated in this way. The threshold for intervention is very low; it is simply on the basis of any-to-any connectivity rather than economic efficiency or market power. There is certainly no public benefit test involved in any consideration. We do not know how that will work or why it is in there. We are also very concerned that it may actually not serve any particular purpose because, although you are required to purchase a wholesale service, there does not seem to be anything to require you to provide a retail service associated with that.

The final main area of concern for us is around interim determinations. In the interim determination part of the bill in schedule 12 it specifically states that procedural fairness no longer applies. We are concerned to see any situation or legislation in Australia where procedural fairness is specifically excluded. This is particularly the case for interim determinations. In our view, interim determinations for services that are provided by access providers should only be made where there is a danger that the service will not be provided at all or where an access seeker has its financial integrity threatened because of the terms of supply. What we have seen in practice is that interim determinations are being used quite broadly simply to, in our view, entrench a pre-held view of what prices in the industry should be.

This is especially concerning since the price related terms and conditions in a declaration can be up to five years old before they are used in an interim determination, and an interim determination can last for two years and probably longer if the interim determination is repeated. For us it seems that this is quite a fundamental shift away from the negotiate-arbitrate regime that we expected to apply in Australia to one where the ACCC has the powers to essentially indefinitely set prices. In our view, it does not add to any certainty in the market, as final determinations can be backdated over the top of interim determinations anyway. Finally, on that point, it does not do anything to ensure that the benefit of an interim determination, should there be one, is actually passed on to consumers. There is a great opportunity for windfall gains between suppliers in the industry.

In our view these issues that I have just raised are separable from the main thrust of the bills. They affect not only Telstra but also any other serious investor in infrastructure such as Vodafone, and we have invested billions of dollars in this market in building a national mobile network. Consequently, they can have a large negative impact on competition and future investment. We would recommend that the committee consider recommending that, if these issues cannot be rectified in the short time that is available to it, they be carved out and dealt with separately. We believe there is little or anything that can be lost from such a consideration and we believe that there is very much to gain.

CHAIR—That concludes the opening statements. We intend to go through each of the four topics: operational separation, the role of the ACCC, the role of the Australian Communications and Media Authority and the establishment of a perpetual \$2 billion communications fund. We are scheduled to finish this at half past 12, so we might allocate something like 25 to 30 minutes for each of these sections and divide the time up between the parties as we have before, with, say, 12, 12 and six as the time allocated—12 to the government, 12 to the opposition and six to the minor parties.

So, firstly, dealing with operational separation, I just have a quick introduction, which is that one of the key changes introduced into this package of business is that Telstra will be required to introduce operational separation between its retail and wholesale businesses under schedule 11 of the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill. In her second reading speech the minister for communications noted:

Operational separation is designed to ensure that Telstra, as the dominant carrier, treats all other carriers on a fair and transparent basis ... The model provides a sound approach to achieve transparency without risks of forced structural separation.

The bill provides for the minister to specify the contents of an operational separation plan. The operation of these conditions is to be reviewed on 1 July 2009 with a report tabled in parliament.

Senator LUNDY—The first question I would like to ask on operational separation goes to the issue of designated services. I think one of the bills refers to designated services as opposed to declared services and that was touched on in a number of the submissions. Can the witnesses elaborate on the implications of having services designated by the minister and what that will do to the current access regime and related matters, including pricing?

Mr Havyatt—The provision for designated services appears in paragraph 50A of the new addition to schedule one of the Telecommunications Act. A designated service is a new category of service. It is a subset of eligible service, and eligible service basically means a telecommunication service. The way it has been drafted is that the minister gets to write a first list of designated services—and it is only designated services for which the equivalence in pricing principles provisions have to be met. Today Telstra wholesales a lot of services that are not declared services. The subject matter of the competition notice for the wholesale ADSL is not a declared service but is provided in the wholesale market. One would anticipate that would be a designated service, though it is not clear what the designated services would be. One of the suggestions we have made is that it would actually be beneficial if the minister were to provide the draft list of designated services with the bill.

But the real concern is what happens after the first list, because after the first time the minister lists the designated services the provisions of the bill are that only active declared services can be designated by the minister, unless Telstra agrees. So, if Telstra were to introduce a new service—such as a higher speed ADSL service that they actually were even going to provide in the wholesale market but did not want to have the regulatory regime applied to—they could just say to the minister, ‘No, it is not going to be a designated service.’ So it is a regime that, a bit like the USO, is addressing the way the world is today but has no capacity to deal with the way the world may be in the future.

Senator LUNDY—So are you saying that if new services are introduced after that designated service list is prepared then XIC of the Trade Practices Act will not be able to be applied at all?

Mr Havyatt—No, XIC would be able to be applied but the perverse outcome would be that we would actually need to start more declaration inquiries because we would need to get everything declared so that we could get it all into the designated services list. So, if we think this was about an operational separation regime designed to encourage Telstra to be providing equivalent access to all service providers, then if you were Telstra and you were looking at the way this designated services list is written, you would be consciously keeping services out of the wholesale market, which is not what I thought the intention was.

Senator LUNDY—So, rather than improve the capacity to sort out the access regime, it takes it back a number of big steps—even worse than the current arrangement.

Mr Havyatt—It certainly seems to have that potential. Once again, the issue for us remains that so much of this—as the Chairman of the ACCC said, there are five major issues—depends upon actions after the bill. We cannot be certain. It looks to us as though it is probably going to be harder to run the access regime, rather than easier.

Mr Forman—Can I add to that. By way of example, I think what we are saying is that, while there are some elements of the bill around procedural rules that are designed to deal with gaming opportunities that are being utilised at the moment to try to deal with some of those, our concern, when we talk about gaming, is the number of new opportunities for Telstra in particular to delay, defer or confuse access arguments. To take Mr Havyatt’s point, for example, in relation to wholesale ADSL, which is not a declared service but which has been

the subject of two competition notices in the last four years and therefore in effect falls squarely within the regulatory realm, we have no doubt that the minister intends to try to deal with that issue by putting this on the designated list.

To then take the ADSL2+ example that he gave, the first opportunity for gaming an argument will be that Telstra will say that ADSL2 is not an extension of the existing product; it is a new product. Hence that new product does not fall within the present regime and does not fall within the designated list. The commission have always been chary, even though they have had two competition notices in relation to ADSL2, about opening a declaration inquiry in relation to ADSL because it takes so long and is so complicated. The commission would be forced to go down the path of the XIB declaration process in order to get this ADSL2 service included in the designated services list.

Then we get into the problem that we have identified of the linkage between the operational separation plan and the operation of XIB and XIC. That is murky water. We cannot even speculate about exactly how that is going to happen, other than to say that we can be assured that Telstra will employ any opportunity for gaming there that they can identify. For the reasons that Mr Fletcher identified, it is simply rational behaviour for an access provider to do that.

Mr Fletcher—I would like to comment on behalf of Optus. One page 87 of the explanatory memorandum, the government has laid down the list of services that it would imagine being included. We would not disagree with any of those. We think there are some business related services such as data access, radial and business grade DSL which probably ought to be added to the list.

CHAIR—Thank you. Are there any other comments?

Ms Eason—I would like add a very brief comment. While I understand the concerns of the unions being expressed here, the counterproposition which would allow the minister to nominate designated services which were not already declared would obviously have some rather far-reaching consequences too in terms of its relationship between the ACCC's powers and the declaration process. So there do have to be some safeguards here, unless we are going to empower the minister to run the access regime.

Mr Havyatt—Can I make a small observation? In the New Zealand regime, they have two categories of service. They have what they call designated services, which are what we in Australia call declared services. They have another category called specified services. A specified service is one that the incumbent operator has to provide but the regulator does not wind up with all the arbitration requirements and the setting of the price. My interpretation is that our version of 'designated' is meant to look very similar to that. It is just saying: 'These are services we expect you to provide in the wholesale market. We are not extending any further regulation to it, apart from the fact that you deal with it on an equivalent basis.'

Senator CONROY—I ask Optus: what is your view regarding the way in which breaches of the operational separation regime are dealt with under the proposed legislation?

Mr Fletcher—Our view is that the policy intention behind operational separation is a good one. The process for enforcement of a breach by Telstra appears to be a lengthy process that involves, firstly, the minister requiring Telstra to produce a rectification plan and, secondly, if there is a breach of the rectification plan then that is a breach of a licence condition and that can found enforcement action by the ACCC or the ACMA. Our view is that it is therefore a fairly lengthy process which will involve considerable exercise of discretion along the way, in particular by the minister, presumably advised by his or her department. So it is certainly not as speedy as one might hope for.

Senator CONROY—Does this create a more certain environment for your business to operate in?

Mr Fletcher—We are probably going to need to see more of the detail to be able to make a final view on that. I emphasise that we see considerable potential in the framework, but we do think there are some additional changes that would be desirable to achieve that potential.

Senator CONROY—What is your view of having any politician, but in this case the minister, having sole first-instance responsibility for the enforcement of the operational separation regime?

Mr Fletcher—There are obviously arguments that are made back and forth, for and against enforcement being in the hands of a minister as opposed to a regulatory agency. I do not think we have a black-and-white view one way or the other, but we would have a concern about wanting to be able to get quick and decisive action. We think that is a priority.

Senator CONROY—Do you have a view on whether or not having a politician, a minister, in charge of regulatory enforcement gives you business certainty or increases business risk?

Mr Fletcher—Again, one can argue that both ways.

Senator CONROY—What is a positive for it? I appreciate you can argue the earth is flat both ways too, but I do not hear many people arguing that.

Mr Fletcher—I would simply say that one of the issues here is whether we are spreading the expertise and capability between the minister and her department and the ACCC. Another issue is the speed with which the process will work. But I am sure there are some arguments in favour of the minister having those powers as well.

Senator CONROY—In the very short time available, if you can find any of those can you put them on paper for us?

Mr Fletcher—We would be happy to do that.

Senator CONROY—Can I put to you that the downside of this very process is actually happening right now. How would a company feel about publicly criticising a process created by a minister and then having to submit to the same minister a business dispute that affected their bottom line?

Mr Fletcher—I am not sure I would agree that there is any fundamental difference in the issues that will arise under the new arrangements as compared to the issues that arise today. A

company that wishes to put a view to government always needs to consider the way that it puts it and make sure it puts arguments on the merits and does not get caught up in—

Senator CONROY—You have not put an argument. You said there are arguments for and against. That is not actually putting an argument.

Mr Fletcher—About the question of—

Senator CONROY—About the question I asked you.

Mr Fletcher—I think you can take it from that that it is not something that Optus has a strong view on.

CHAIR—It is a very tight time frame, so we should move on.

Senator CONROY—I appreciate that the opposition only had 12 minutes to ask questions of all of the witnesses about operational separation. If I have used up all of the 12 minutes for the opposition, I cede the floor.

CHAIR—It is a bit difficult. We will try and be a bit flexible about this.

Senator BRANDIS—I will not take long, but I want to follow the same issue with you, Mr Fletcher, that Senator Conroy has been pursuing. Correct me if I am wrong, but my understanding of the thrust of your submission is you have a level of concern that the enforcement regime is not strong enough. Is that what it amounts to?

Mr Fletcher—Our view is that you would need to start with the assumption that Telstra will take every opportunity to delay.

Senator BRANDIS—I understand. I give you that assumption that they will do the wrong thing; let us assume that that is the case.

Mr Fletcher—The process that has been laid out appears to us to involve a number of steps, including preparation of a draft plan and preparation of a final plan. If there is a failure to comply, the minister requires a draft rectification plan and then there is a final rectification plan. Only at the end of that time do you have an obligation on Telstra, as a carrier licence condition, to comply with the rectification plan, and only then can enforcement action be commenced by the ACCC or ACMA. I think we have two issues. The first is the lengthy sequence that needs to be gone through. The second, as I mentioned, is that we think a constructive addition would be to give a private right of action to Telstra's competitors, which would then mean that we would effectively be risking our own money and our own resources to test whether there was compliance with the law or not.

Senator BRANDIS—I can understand why you say that, but I wonder, Mr Fletcher, if you have considered the proposed section 69A of the Telecommunications Act, which is in the competition and consumer issues bill on page 29 and over on page 30. I do not know if you have a copy of the bill, but I draw your attention to the provision. It says:

This section applies if Telstra has contravened, or is contravening, a condition set out in Part 8 of Schedule 1—

—which is the operational separation provision. It provides for the ACCC to give Telstra a direction to comply. By subsection 4 it is provided:

Telstra must not contravene a direction under subsection (2).

I have not had time to consult the enforcement provisions of the Telecommunications Act, but that would seem—

Senator CONROY—Surely you have had more than 12 hours.

Senator BRANDIS—Not the Telecommunications Act, Senator Conroy, because I had not anticipated—

Senator CONROY—Dear, oh dear, Senator Brandis! Did you sleep last night? Did you choose to sleep?

Senator BRANDIS—this witness's evidence, which came to us about half an hour ago. It would seem to me, Mr Fletcher—I may be wrong—that there is that additional power which would enable the ACCC, in the event of a breach of the obligation under proposed section 69A(4), to initiate proceedings.

Mr Fletcher—And then section 69B will give a right of appeal on the merits of that decision to the Australian Competition Tribunal so that what would likely happen, in the practice that we have experienced in the industry, is that, if the ACCC sought to enforce that direction, you would then likely see Telstra appealing that to the Australian Competition Tribunal.

Senator BRANDIS—That is fair enough though, isn't it? Any party against whom a judicial determination is made under our system ordinarily has a right to appeal—even a big gorilla like Telstra. That cannot be the basis of your objection, surely?

Mr Fletcher—It goes to the point that I made about the time and the lengthy sequence of steps that will be taken. The operating assumption we need to have is that Telstra, in its rational self-interest, will seek to pursue all avenues open to it. If one of the avenues open to it is an appeal to the Australian Competition Tribunal, that will add a significant additional period of time to the process. Based upon the industry's experience with the Australian Competition Tribunal to date, that could well be many months, or even a year or more.

Senator BRANDIS—That is a different issue. It seems to me that a complete answer to your concern, Mr Fletcher—if you acknowledge that there is an obligation imposed by section 69A enforceable in the courts by the ACCC—about gaming the system by an adventitious appeal to the ACT would be for the ACCC, as it commonly does under ordinary cases under the Trade Practices Act, to ask for an interlocutory injunction so that the complained of conduct would have to be desisted from on an interim basis, pending any appeals. That is what ordinarily happens when there is a dispute between the regulator and a corporation which is alleged to be engaging in misconduct. The ACCC sues to enforce the act and it holds the status quo by an interlocutory injunction. I do not see why, under these provisions, the same would not happen here.

Mr Fletcher—Let us take an example. Let us imagine that, under the new regime in its operational separation plan, Telstra has given a commitment that it will provide wholesale DSL services on the same basis to its retail business BigPond and to competitors such as Optus. Let us imagine that we then see Telstra retail dropping its prices materially, which founds a suspicion that it is not treating its retail business in the same way as it is treating its wholesale customers. If what are you putting to me is that, in those circumstances, the ACCC would have the power to gain an interlocutory injunction to restrain Telstra BigPond from putting—

Senator BRANDIS—Or to compel the fulfilment of the obligation, if it is a mandatory obligation. Yes, that is what I am putting to you.

Mr Fletcher—If that is true and if we can draw that comfort from the legislation, that would be encouraging. On the basis of the review—

Senator BRANDIS—I will be a bit more generous, Mr Fletcher: if that is true, that would meet your concern, wouldn't it?

Mr Fletcher—In the 20 hours or so we have had available to review this legislation, we have certainly not been able to satisfy ourselves that that would be true.

Senator BRANDIS—I understand that. That is why I qualified it by saying 'if it is the case'. But, if it is the case, that is the answer to that problem, isn't it?

Mr Fletcher—If it is the case, it may be the answer to that, yes.

Senator BRANDIS—I will leave it at that.

Senator RONALDSON—My question is directed to AAPT. I take it from your evidence this morning that you want a stronger version of operational separation. Is that right?

Mr Havyatt—No, that is not actually what have I said. I have said that we have experienced in this industry lots of circumstances where the processes of amending legislation have occurred in such a way that not all the consequences are fully understood. In the case of operational separation, we have a plan that does not have all those consequences laid out; we have addressed a number of those issues. All I am saying is that, for the protection of my business, I am interested in knowing what the regulatory regime will be and then I will be happy to comply with that. I am not making a statement one way or the other in relation to operational separation. I am saying that, if it is the government's policy—that it wishes to introduce that—it is not doing it in an adequate way. I would go to the point of being rude enough to suggest that Senator Brandis has just reflected on the fact that there has been an inadequate time for us to reflect on that situation.

Senator RONALDSON—That was a question elsewhere. I am asking you questions. Do you or do you not agree with the principle of operational separation?

Mr Havyatt—I am more than happy to support the government's decision to introduce operational separation in the Australian marketplace.

Senator RONALDSON—But do you support—

Mr Havyatt—I am more than happy to support the government's decision in this marketplace to support operational separation.

Senator RONALDSON—I want to ask the union a question, despite the quite deplorable attempt by AAPT this morning to misrepresent the ACCC's views in relation to operational separation. The ACCC said this morning that they believed that operational separation could provide benefits for Telstra and it could provide benefits for its competitors. Why would you not support a regime that would support your members?

Ms Eason—If we believed that it was, then we would. But the fact that the—

Senator RONALDSON—So are you saying that the ACCC is wrong?

Ms Eason—The fact that the ACCC has that opinion does not oblige us to share it.

Senator RONALDSON—The AAPT is prepared to support it, so you really are on your own in relation to operational separation.

Ms Eason—I think you may not have heard what we said. In talking to this particular issue, we said that we are sceptical about the actual benefits and we certainly do not think that it will address the kinds of questions—the social issues—that are implicit in this debate, which are getting rather little airspace, about how the benefits of competition, say, or the regulatory regime will be spread throughout the country in an equitable fashion. We do not see operational separation providing any immediate answer to that. However, the proof of the pudding will be in the eating. If it does do something to reduce contention in the industry over access prices or wholesale prices, that will be a benefit, because clearly that absorbs a large amount of energy and resources.

Senator RONALDSON—You did not mention this morning the question of ownership in the context of operational separation. What is your view on ownership?

Ms Eason—We oppose the full privatisation of Telstra; we always have.

Senator RONALDSON—Do you think the majority of Australians care about the ownership structure?

Ms Eason—I do. The polls show they do.

Senator RONALDSON—If someone said that was not so, what would be your view on that?

Ms Eason—My view would be that I disagreed with them.

Senator RONALDSON—Would you be interested to know that on 16 August, on 774 ABC, the shadow minister for communications said:

It makes no difference to the majority of Australians one way or the other about the ownership structure. What would be your response to that?

Senator ALLISON—On a point of order, Chair: it seems to me to be wasting our time asking what shadow ministers said or did not say. It is entirely outside the terms of reference of this section of the session.

Senator RONALDSON—I will withdraw that.

Senator BRANDIS—Mr Fletcher, just quickly—because in the 10 minutes since our conversation finished I have been able to find the relevant section of the Telecommunications Act—can I reassure you that section 564 of the Telecommunications Act gives the ACCC the power to apply in the Federal Court for an injunction to restrain any breach of the act, which would include now a breach of the provisions of section 69A; that section 565 makes it clear that that includes interim injunctions; and that section 567(2) makes it abundantly clear that that extends to the power to compel the performance of an act, not merely to restrain a party from the performance of an act. Are you happy now?

Mr Fletcher—Thank you, Senator. We are genuinely not sure about it. The reference in 69A says:

This section applies if Telstra has contravened, or is contravening, a condition set out in part (o) of schedule 1.

The heading to section 69A says, ‘Breach by Telstra of conditions relating to operational separation’. But the legal advice we have had overnight—and I concede that it has been provided very rapidly—is that compliance with the operational separation plan is not a licence condition.

Senator BRANDIS—I am not in a position to question your legal advice. It is a very good point that you raise—I acknowledge that—but I would have thought that the level of concern that you express about the insufficiency of the power, short of removing a licence condition, to enforce operational separation obligations is plain enough. It is plain enough under the Telecommunications Act that the ACCC could apply for an injunction and the concern that you have about going through appeals could be met by an application under section 65 for an interim injunction.

Mr Fletcher—The issue is: has there been a breach of a condition? I accept that there is a set of enforcement powers which are presently available to the ACCC and to ACMA and that those powers will be enhanced under section 69A once it is established that there is a breach of a condition. It is not clear to Optus, from the drafting, that a breach of the operational separation plan is a breach of a condition. It appears to us—although we may be wrong—that there is only a breach of a condition once the minister has said to Telstra: ‘You are breaching your operational separation plan. You must now produce a rectification plan and then a failure to comply with a rectification plan is a breach of the condition.’ We may be wrong, because we have had limited time, but the concern simply is: if we are right, there are two steps, which will take a considerable period before the enforcement action you have rightly pointed to can commence.

Senator BRANDIS—Thank you; that is a fair point. Would you be prepared to provide to the committee the legal advice, even on a confidential basis?

Mr Fletcher—We will be finalising our submission this afternoon.

Senator BRANDIS—In your final submission could you expand fully enough on that so that we can examine it?

Mr Fletcher—We will. I point to clause 55(3) which says; Compliance with a final operational separation plan is not a condition of Telstra's carrier licence. So the scheme appears to be pretty clear on that point.

Senator ALLISON—I wonder whether it is possible to get some quick, concise recommendations to the committee, firstly on the sorts of powers that you would like to see the ACCC have with respect to operational separation and, secondly, on the comment Ms Eason made about operational separation not being likely to deliver any benefits to rural users. Can we explore those two issues, please?

Mr Amos—ATUG supports the position that Optus has put up regarding operational separation. The requirement, clearly, is just to produce a plan; it is not a licence condition. That was the point we made in our opening address.

Senator ALLISON—So the ACCC should do—

Mr Amos—The ACCC is out of the picture until the whole process gets to the end.

Mr Fletcher—If I could just add to that, the suggestion we have made is simply that the rectification plan is an unnecessary step and should be removed. Compliance with the operational separation plan should be a licence condition, and breach of the licence condition would then attract the normal enforcement mechanisms.

Mr Havyatt—We would argue, not so much in the enforcement piece but in the approval of the plan piece, that paragraphs 54 and 61 of the additions to schedule 1 should be amended so that, before the minister can approve a plan or an amendment to a plan, the ACCC recommends that he or she acts in that way.

Senator ALLISON—There being no further recommendations, can we go to regional services. Are there any opportunities in this operational plan for there to be some provisions there that might encourage better services? Can you make any suggestions to the committee on that score?

Mr Havyatt—I think there is quite a degree of scope, but we have not explored this in any of our submissions. There is an interesting phrase we use in our industry about economies of scale and scope, and we throw it around with gay abandon. Economies of scale and scope, we all understand, operate at a horizontal level. We know that in telecommunications. It is one of the reasons why we tend to think it is about large single networks—there are economies in having one network connect all the customers. Unfortunately people also try to imagine there is some kind of vertical economy of scale and scope and try to justify vertical integration. To the extent that there may even be such a vertical economy of scale and scope, it pales into insignificance compared with the economies of scale and scope that operate at the horizontal level.

One of the weaknesses in the current regime is that we have built an excessive focus on facilities based competition as opposed to services based competition, so we are fragmenting the investment by encouraging everybody to separately invest. The whole regime was structured on the theory of a distinction between carriers and service providers, with the idea

that service providers would share carriage services. Operational separation seems to be designed to improve the incentives for Telstra to understand that as well—so that we can all work in communities and recognise that we should pool the demand and invest in one network, because we are all getting access to it evenly and equally.

Secondly, the point that Telstra have wanted to berate us with at some length over recent days on the difficulty they face having to do average prices at retail and de-average prices at wholesale would in the long run be resolved by an operational separation plan. In that environment, Telstra would be quite free to say that the pricing of the wholesale service will be averaged. None of us would care as long as Telstra Retail saw that the wholesale price was averaged. Where our concern exists today is that, with respect to their internal private incentives, they see de-averaged costs and behave accordingly. Certainly in the residential market prices are uniform around Australia. That is not true in the corporate market, and that is because Telstra itself does not do wholesale price averaging at that level. So there are a lot of benefits to regional communities from operational separation.

Senator ALLISON—There seems to be general consensus around the table that not enough time has been made available for examining the detail—in fact, there might not be the detail there that we all need to look at. In your view, how much time, how much consultation and what sort of process should be undertaken at this point in time.

Ms Corbin—I note that we are the only consumer organisation represented here today. That is a huge concern. I spent most of the day yesterday on the telephone, speaking to all those consumer organisations that will not have a chance to present to this hearing. So there is definitely a need to have more time. Generally speaking, the rule is at least four weeks for consultation when you get a new bill or discussion paper or something like that, and generally speaking we hear cries from industry and consumer organisations that that is inadequate. So a bare minimum at this stage would be to follow previous practice. That is the only comment I would make at this stage.

Mr Havyatt—In relation to the specifics of the operational separation plan, I can see a great deal of benefit in the government authorising the department to engage in a similar hot tub kind of discussion like this for the full exploration of the issues in relation to this piece of legislation. The department could then have the benefits of our observations about the drafting, whereas up until now they have only had the benefits of our observations about the principles. That would be a beneficial process, in my humble view.

Senator ALLISON—Do you think that that might be able to be done in four weeks?

Mr Havyatt—I believe it well and truly could be. There is plenty of time if we were prepared to conduct that kind of inquiry to just say, ‘Can we clarify what these proposals are?’ It may not mean we reach agreement, but it would certainly give a degree of comfort that all the issues that we could actually understand had been explored.

Senator JOYCE—Everybody seems to say they are half happy and half not happy. That leaves everybody watching this in a quandary. Do you prefer where it is at the moment, or do you prefer where the legislation takes you?

CHAIR—Who have you addressed that to?

Senator JOYCE—Whoever wants to answer it.

Mr Forman—I would like to be able to give you a definitive answer, but there are some things in there, such as the linkage between operational separation and parts XIB and XIC, that we do not fully understand yet. We would hope that the legislation would take us forward and hopefully substantially forward, but there are elements in there that need to be explored and understood as to how they would work in practice. If we saw a situation emerge where parts XIB and XIC—that is the competition notice provisions and the declaration notice provisions—were subject to gaming, such as we think may be possible, we could finish up going backwards.

Senator JOYCE—The point being, of course, that you cannot half vote for something—you either vote for it or do not.

Senator CONROY—You can delay it.

CHAIR—Naughty, Stephen.

Senator JOYCE—The case is that if you do not vote for it then that means you would stay with the status quo. Are you happier with the status quo and where you are the moment or happier to go where the legislation takes you?

Mr Havyatt—Can I answer from my point of view. One of the things we often underestimate in this whole telecommunications piece is how big the journey was we set ourselves on. We have tried to create an industry where before there was no industry—there was one provider who had the benefits of 100 years of statutory monopoly in the provision of the service. We have all consistently underestimated how big that job is and thought that it all comes about through little pieces of legislation. To your specific points, I think there is much in the legislation to recommend it. If I was being forced at gunpoint in to say, ‘Do you support this or would you prefer to have the status quo?’ I would say that I prefer to have this, but I would recognise that there is actually a midpoint to that, which alternatively says, ‘Hey guys, let’s spend four weeks just polishing this to look at all the repercussions. Don’t worry; all the other things that hang on that will still occur’—the things we are not actually discussing today—’but let’s analyse this legislation in more detail.’

Senator JOYCE—The answer you have given me is that you are happier voting for the legislation than remaining with the status quo. It is either yes or no.

Mr Havyatt—My answer to that would be yes.

Mr Stiffe—I go back to my opening remarks: from Vodafone’s perspective there are some aspects of the bills that do not seem to be fundamental to the bills themselves that are in our view quite complex matters and could be worthy of some further consideration. We would request that those pieces that are not fundamental to the primary purpose of the bills be taken out for the time being to be given an opportunity for that further consideration, to get them right and then pass them subsequently.

Senator JOYCE—But, if you were in the position where you did not have that further consideration and you had to vote for it or not vote for it, you would vote for it?

Mr Stiffe—I cannot answer that question, because we have not reviewed all of the bills. We have reviewed only those parts of the bills that affect Vodafone most.

Senator JOYCE—You would be happy not to vote for it?

Mr Stiffe—I cannot currently answer that question.

Senator JOYCE—That is not an answer.

CHAIR—It is, in a way.

Mr Amos—The ATUG position, as I said in my opening statement, actually supports the package of bills. Obviously, there are always matters which in fact need to be corrected or reviewed. We would also support a review period, if that were possible, even if it were only for a small amount of time. There are some issues regarding part XIB and part X1C, and the operational separation plan detail in the fact that Telstra, for example, can write its own plan and review its own plan and then implement it. But we would vote for it.

Senator JOYCE—One final question to Optus: can you just run through the operational separation regime that is in place in Singapore?

Mr Fletcher—Let me answer your prior question before I come to that one. Firstly, Optus, as we said at the outset, regards the policy intent behind operational separation to be a good one so, in that sense, we support the package. The comments we have made are designed to assist the government in ensuring that what it passes into law gives effect to its intentions. Secondly, the regulatory regime between Singapore and Australia has some similarities and some differences. On some issues, the regime in one country is more favourable to the incumbent than the regime in the other country is. As you run through issue by issue, you will see that the regime in some countries is more favourable than that in other countries.

Mr Havyatt—Senator Allison asked me a question about New Zealand, and my answer is very similar to Mr Fletcher's answer: that there are significant differences between the regimes in both countries, the most notable of which is that every service that Telecom New Zealand provides over its fixed line service is a declared or designated service under their regime and it is covered by pricing principles. That means that there are 86 wholesale services regulated in the New Zealand market. There is one equivalent service in Australia. If we did not have that circumstance, maybe the answer would be different, but there are more regulation services in New Zealand than there are in Australia.

Senator BRANDIS—In fairness to Mr Fletcher, I wanted to mention to him that Senator Conroy has been good enough to point out to me a reference on page 78 of the EM to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, which gives some comfort to the point of view that he was tentatively expressing about the enforcement powers of the ACCC.

CHAIR—We might move on to the role of the ACCC. We will now go to topic 2. The terms of reference include the requirement that the ACCC:

... consider the costs and risks of new infrastructure investment when making access decisions—
and—

... streamlining the decision-making processes, including the capacity for the ACCC to make procedural rules ...

Other changes under the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 aim to improve the operation of the specific anticompetition and access provisions of the Trade Practices Act relating to telecommunications. In particular, the penalties for a breach of the competition rule will be increased significantly under schedule 4 where the breach exceeds 21 days. After that time, a penalty of \$3 million per day will apply.

We are extending the time a bit, but we still have to stick to the arrangements we had before, which were about 12 minutes for the major parties and about six minutes for the minor parties. Senator Conroy, do you wish to begin with the ACCC? We have moved on to the next topic.

Senator CONROY—After having asked four questions on operational separation, I still have about 20 more questions on operational separation, so I will cede the floor on this section to someone else.

CHAIR—I am sorry, Senator Conroy; we all know that we are working within time limitations.

Senator CONROY—That you voted for.

Senator BRANDIS—I do not have any questions at the moment.

Senator LUNDY—Well, I certainly do.

CHAIR—All right—Senator Lundy. It would help the chair if the parties would indicate if they have questions. Does the National Party have questions?

Senator ALLISON—I suggest that we throw this open to those around the table who would like to make a comment about it. Some refrained from commenting on these areas on the basis that there would be a chance later.

CHAIR—If that is the feeling of the senators, I am quite happy to do that and not have time limitations, and any senator can ask a question. Senator Lundy, however, wishes to ask a question now.

Senator LUNDY—The ACCC have said repeatedly that they think operational separation requires commercial arm's length relationships between the wholesale and retail areas of Telstra. Is it the view of witnesses here that this legislation achieves commercial arm's length relationships between Telstra's wholesale and retail areas, understanding of course that the plan has not been written by Telstra and has not been considered. I understand that, but can you see this legislation—guaranteed—leading to that outcome?

Mr Forman—As far as I can tell from reading page 15 of the explanatory memorandum, it refers to a benchmark pricing schedule for designated services, and it does not imply that those are actual contracted transactions. So my understanding would be that that is a reference price, not an actual contractual relationship, which is what I think the ACCC was talking

about when it was talking about commercial arm's length agreements. But again, I stand to be corrected on the basis of further insights into how it is intended to work.

Senator LUNDY—In relation to the long-term interests of end users, a number of the witnesses mentioned in their opening statements that the changes to these provisions were not minor—that they were likely to have, or could potentially have, a severe negative impact on the current pricing or access arrangements. Can you expand on that point please, and particularly on the ACCC's role in enforcing those tests?

Mr Havyatt—I will endeavour to do so without going into all the intricate detail; there is some work on this in an attachment to our submission. The fundamental issue is that the definition of investment and of what investment needs to be looked at has changed. It is no longer just about the investments that have been made or are likely to be made; there is a specific addition of this thing called 'future investments'. It is not about the returns you are meant to be getting on the investment you are now considering; it actually, by definition, includes consideration of all future investments.

The second issue is the addition of the question talking about risk. Our paper talks about a great deal of theory that is talked about this thing called 'the real option'. That is that, when I make the decision to invest, I suddenly create this new risk, which I have because I now no longer have the ability to delay. That has been quite a large subject in regulatory processes. Telstra has put, in most of its submissions, a point at which they say, 'There is this real option we would like to claim, but set the value to zero.' It is our interpretation of the way this is drafted that they will be setting that number to a higher number.

We do not think it is an appropriate consideration, because the process of establishing what return you are meant to get already factors-in risk. The process that the ACCC uses to work out costs also includes a calculation of your cost of capital. When you calculate the cost of capital, you do real market studies about what investors expect to get from investing in your kind of activity. So that model already compensates you for the risks of investing in telecommunications. So to say that after you have got that investment, through the average weighted cost of capital, you now want to say, 'I have got to also consider this other set of risks about stranding assets or risks that I will make an investment that will not pay off or will get truncated,' is to say, 'I want to get compensated for my risks twice.'

The difficulty we have is that, by introducing a legislative amendment, we are effectively saying, 'We think the ACCC has got pricing wrong; we'—meaning the parliament—'think you should be doing something different.' If that is really what is going on here, where is the analysis that should be supporting that, to say, 'What would the consequences of this change have been for the decisions made over the last eight years?'

For example, everybody is currently acquiring PSDN services under an undertaking made by Telstra under the old rules. Telstra would submit a new undertaking under the new rules, presumably seeking a higher price. Nothing in this legislation makes it clear that that is the consequence of that decision. There seems to be no consultation with the ACCC about whether that would be the consequence or not and one would think that it is consideration that the parliament should have before it when making what looks like a very inconsequential

change to clarify legislation. As I said before, we have got plenty of examples in our industry of how single supposedly clarifying amendments have those real impacts on industry structure and profitability.

Mr Stiffe—From Vodafone's perspective, I do not think that we share Mr Hayatt's great concern about the clarifications that are provided. As an infrastructure investor we actually welcome the clarifications that have been made. The bill is not just about Telstra; there are a lot of other investors' interests at stake as well.

Mr Fletcher—Similarly, Optus do not have any concerns about that provision. It seems to us to be sensible. To take up the point that Mr Hayatt made: we think that the ACCC today has regard to investment risk in making its pricing decisions. We think that this simply makes it a little more explicit in the legislative framework.

Senator LUNDY—Will it be possible for Optus to revisit some of their access prices as result of this legislative change?

Mr Fletcher—For Telstra?

Senator LUNDY—Yes, and yourselves and your own networks.

Mr Fletcher—One would need to work through the ACCC's process to determine whether this is going to make a material change. If you have got an undertaking on foot, for example, that is in place for a period of time—as Telstra does in relation to a number of its services—then that will be in place until it comes to an end. The issue, presumably, would be whether there is scope to argue in future undertakings for a significantly different pricing approach. For the reasons that I have given, from an Optus point of view we do not think that it will make a significant difference, but obviously there are other views around the table.

Mr Forman—Members of the Competitive Carriers Coalition are also all infrastructure owners and investors and they have expressed a concern about this because they are concerned that it will allow Telstra to go back to some of the services that are already made available, such as basic telephony interconnection, and argue that there should be a recalculation of the pricing principles. We have not formed a view that that is necessarily the case; we just think that there is the risk there and we are really looking for some guidance from the ACCC, which obviously we have not had a chance to seek yet, to understand whether they see that as a risk.

Senator LUNDY—Do any of you care to speculate on what the possible motivation was behind this part of the legislative amendments?

Mr Hayatt—Certainly Telstra as the most prominent, though not only, access provider—as Optus and Vodafone pointed out, there are two other access providers—are currently in dispute with many people in the industry and their disputes would be affected by this provision as well. The Telstra position all along has been that they think the ACCC is undercompensating them. In their market guidance on Monday they made reference to \$850 million of supposedly regulatory decisions affecting their revenue. Two of those items were items where Telstra just disagreed with the commission on the calculation of the costs.

Telstra's version of those costs includes items that they would be trying to introduce via this amendment.

Telstra has argued very vigorously for this over a number of years. I think that they have argued on the basis that says that it is just a clarifying amendment and the ACCC should really be clarified. But from where I see it, the implications as it went through especially a competition tribunal hearing, and the fact of passing the legislation, will be interpreted as a change having taken place. So there will be an expectation by a review body that the ACCC should have changed its approach to pricing services as a mere consequence of the fact that you have made the amendment, irrespective of whether or not that was the intention.

Senator LUNDY—So is it a fair observation to say that this amendment reflects Telstra's long lobbying campaign to change these provisions to enable their arguments to be accepted by the ACCC?

Mr Havyatt—The amendment is certainly consistent with arguments that I know that Telstra has put. As to whether there is a causal linkage between the two, I could not speculate.

Senator JOYCE—Do you see the role of the ACCC as being somewhat sidelined?

Mr Havyatt—As a consequence of the whole package of legislation?

Senator JOYCE—Yes.

Mr Havyatt—We touched on that in the operational separation piece. We have some significant concerns about that. There are other potential implications, through the operational separation piece, that it is sidelined. One could also ask the question, as we often do, as to whether the ACCC itself is focused enough on this big task. One of the things that AAPT has put in this submission and our last submission is about greater resourcing of the ACCC, which I must admit I cannot find in the bills anywhere. I could not find that, but I am not that good at reading the bills to see if there is actually more money for the ACCC. We have argued that the ACCC should have a commissioner whose only job is telecommunications, not sharing it between telecommunications and energy, which would reflect how big we think this task is and how fundamentally important it is to the economy. That is no reflection on the individual commissioners who over time have tried to do both jobs. To me there is a sense that the ACCC does not have ownership of the proposition that says: this is an active process of designing an industry and we need to get all the players to work out how their incentives work, rather than just being a piece of standard competition law sitting in the background and we just occasionally intervene.

Mr Fletcher—I would like to add a comment on behalf of Optus. While we are talking today mostly about operational separation, it is important to remember that the ACCC administers the access regime and also the telecom-specific competition regime under parts XIB and XIC of the Trade Practices Act. That is a very significant body of work that the ACCC has and will continue to have. The intention behind the operational separation changes, as we understand it, is to seek to achieve a structure within Telstra that gives it a more natural incentive to produce outcomes in terms of pricing and so on such that it is less likely that Telstra will get drawn into regulatory disputes as to prices that get set by the ACCC. Very

clearly, the ACCC continues to have a very extensive role in both the telco-specific competition regime and in the price-setting process under the Trade Practices Act.

Mr Stiffe—I would like to add some comments from Vodafone. Putting operational separation to one side, because the role of the ACCC has been discussed at length as to that, the ACCC has been given significant increases in its powers through these bills. It can now set procedural rules. There is no further guidance given to the ACCC on how it sets those rules, so it is able to do so, which makes it the rule maker, the prosecutor, the judge, the jury and probably a little bit more besides. So we have some concerns about the additional powers that are being given that go beyond just clarifying the regime. The particular areas where we think that those powers go too far are in the ability for the ACCC to now very easily kick out an access undertaking simply by asking for information and providing an unreasonable time frame, and also the interim determinations—

Senator JOYCE—So your statement is not that the ACCC has been sidelined but that it now what you think are excessive powers?

Mr Stiffe—I think in some areas the powers do go too far, but certainly it has not been sidelined on anything, again setting to one side that question of operational separation.

Senator BRANDIS—Most commercial people always think the ACCC's powers go too far when they might affect their company.

Senator CONROY—I have a question for CCC. If the objective of the operational separation regime is to promote the principle of equivalence of treatment between Telstra's retail business and its wholesale customers, what do you think of the decision taken to create a structural divergence in treatment between those entities through the creation of a separate wholesale business unit?

Mr Forman—We argued for a model that was consistent with what the ACCC argued for—that is, one where there was a wholesale entity that was tasked with dealing with Telstra retail and with competitors so that there was a single point of interface with all of the retail industry. We are still a little bit confused, frankly, about how that three-part model works. We obviously deal with the Telstra wholesale group, which then deals with the Telstra network group. Telstra retail or Telstra proper deals with the network group and not with the wholesale group. So, on its face, it means that, for a customer of a Primus or a PowerTel or an iiNet, there is an extra upstream transaction than there is for a customer of Telstra. We would hope that, over the coming weeks, it will be clarified exactly where the points of equivalence are.

Senator CONROY—Wouldn't it have been simpler to integrate Telstra's wholesale and network businesses and have both Telstra retail and Telstra wholesale customers acquiring services directly from the amalgamated entity?

Mr Forman—That was the model that we argued in favour of. It was not the model that was accepted.

Senator CONROY—Won't the government's proposed arrangement mean that, by necessity, Telstra's wholesale customers will be forced to obtain services through a differential process to Telstra retail?

Mr Forman—We do not know enough detail to answer that question yet. But certainly to the extent that we will be buying from Telstra wholesale, and Telstra wholesale will not be providing services to Telstra retail, there is a difference there. So the role of Telstra wholesale and where the point of equivalence is is still unclear to us.

Senator CONROY—I have some questions for AAPT. With respect to the pricing regime under the government's operational separation model, the EM to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 provides that Telstra would retain its current flexibility to vary its wholesale prices to non-Telstra customers but would be required to rebenchmark its internal prices to actual prices periodically. That is on page 15. Doesn't that anticipate that Telstra would be allowed to offer services to its retail unit at a non-equivalent price to that which it is offering to a retail customer for a period of time?

Mr Havyatt—I think the answer to that is yes. But, if I were to be more fulsome in my answer, I would say that one of the things that continue to trouble me about all of our discussions in this area is the extent to which we use models of the known to try to model what we want to do in the future. The concern I have is that, when we go to things like big new investments, we always think that in making the big new investment we have to come up with a single price that we are going to offer it to people at. That is opposed to the kinds of wide variety of contracts there can be that create incentives for players. I just think we have got all of the metaphors wrong for considering it. I am not sure that anything in the legislation will improve that.

Senator CONROY—Why won't Telstra be required to immediately rebenchmark its internal prices after a variation to its wholesale prices?

Mr Havyatt—I have no idea. You might want to ask the department that this afternoon.

Mr Fletcher—Can I add something in response to that question. One of the important issues that we think needs to be tied down either through the legislation or through the ministerial direction or through the plan itself is that it is very important to require of Telstra that it clearly agrees which wholesale service it maps to a particular retail service. So, for example, the local call resale wholesale service maps to its retail service of home line part monthly line rental plus local calls. The reason that is very important is that routinely today what happens is that we say to Telstra: 'You achieve these particular service standards in the retail market for your local call customers and business data customers et cetera, so we would like to have the same service standards, please, in the analogous wholesale service.' Telstra's response routinely is: 'No, your wholesale service is your wholesale service. There is no correspondence between that and any retail service we may offer.' It is very important therefore that, if the concept of operational separation is to work, it is made quite clear which wholesale service maps to which retail service so that Telstra is not able to play that particular game anymore.

Senator CONROY—Given that many issues here are still a little unclear and that even Senator Brandis, on a further reading of the legislation, clarified his own reading of it, would people prefer the final vote on the bill to be deferred for a few weeks, if the Senate saw fit to

do that, so that the department could nut out these issues in a slightly more transparent process?

Mr Amos—Obviously, given the limited time we have had to review this and that there are four or five matters on the separation that need clarification, we would welcome any additional time if that were made available.

Ms Corbin—We would also welcome more time. We believe that the government needs to move cautiously in this regard, given that there is a large degree of concern in the electorate about this issue. I think rushing through legislation that has far-reaching ramifications would be very short-sighted.

Mr Fletcher—Ours is a fast moving industry—

Senator CONROY—And let me just clarify: the minister is going to be responsible for determining the price at which you will receive services from Telstra.

Mr Fletcher—If I could just move to answering your previous question, I think the issue is that if additional changes need to be made to give effect to the government's policy then it is desirable that that be done. Timing is a second-order issue.

CHAIR—We have a tight time frame. We have another two topics to cover before 1 pm.

Senator CONROY—Does anyone else want to answer that question?

Mr Havyatt—I think I have already specified that I thought four weeks would be a good time.

Mr Forman—We would agree. I have not even had a chance to speak to all of our members, and I do not know whether they have read it.

CHAIR—I would like to move on to the next two topics. We are a long way behind. We are scheduled to finish at 12.30. I am proposing to break for lunch at one, but we have two other topics to cover.

Senator LUNDY—An important role that the ACCC plays is in consumer protection. Ms Corbin, have you observed any lack of changes to enhancements of the ACCC's powers in consumer protection as it relates to telecommunications?

CHAIR—Senator, with respect, does that belong here or in section 3? I think it belongs in the next section.

Senator LUNDY—It relates to the roles and powers of the ACCC as opposed to ACMA. The ACCC does have a role to play in consumer protection.

CHAIR—We are going to do deal specifically with consumer protection under the next section. In the interests of moving on, would you mind if we moved on to that and then Ms Corbin can reply to both?

Senator LUNDY—Fine.

CHAIR—I will move on to section 3, which is ACMA's role, including the provision of additional enforcement powers and encouraging greater consumer representation and participation in the development of industry codes. There are a range of relevant measures in

the package of bills to address this. For example, under section 10 of the telecommunications legislation amendment bill, the ACMA will be able to accept enforceable undertakings to ensure that a person does not contravene the Telecommunications Act or the Telecommunications (Consumer Protection and Service Standards) Act 1999. ACMA's powers in relation to enforcing industry codes will also be clarified by virtue of schedule 2 of that bill, which concerns directions and formal warnings. The ACMA will also be required to reimburse industry bodies for their costs in developing consumer related industry codes as long as certain conditions are met. These costs will be able to be recouped through carrier licence charges. We now throw this open for questions.

Senator ADAMS—My question is to Ms Corbin. Firstly, I was very pleased to hear that you are representing the Country Women's Association and the Isolated Children's Parents Association, which I have had a lot to do with, being a farmer and a rural person. So that is good. I would say that they would be quite delighted about the amendment to the Telstra Corporation Act 1991 which requires Telstra to have at least two of its directors with knowledge of or experience in the communications needs of regional, rural and remote Australia.

Ms Corbin—Yes, definitely. We welcome that, but obviously we are concerned also with the regional telecommunications review committee—the whole title eludes me right now. Obviously, at the moment, it is not defined exactly who will be represented on that review. We would also like to see some representation on there from rural and remote consumers, Indigenous consumers and consumers generally. We would like to see their voices represented in that review, because we see that review process as being extremely important as far as future proofing goes.

Senator ADAMS—Was the CTN pleased that the proposed new powers of ACMA in this legislation improve ACMA's ability to direct industry compliance with industry self-regulatory codes of practice?

Ms Corbin—We are very pleased with the sentiment that is reflected in the legislation. Our comments are similar to those that have been made by the industry about organisational separation. It will come down to the detail in the end. We would really like to see some resources put specifically towards auditing and monitoring with co-compliance, because we do not see that that is anybody else's role. The TIO is a complaint-handling body. It is not appropriate that it collects statistics on this issue. It can monitor the market and see how it is going, but it cannot really be a true compliance measure. And, whilst ACIF can lead and show best practice, in fact they are a self-regulatory agency and it is up to the regulator to do the auditing and checking. So we would like to see some more resources specifically directed to that. The legislation does not preclude that, but I hope that that is the direction in which it will go.

Senator ADAMS—You have probably answered this a little bit. How critical is participation by consumer groups in the preparation of the industry codes of practice—for example, participation in the consumer contracts code?

Ms Corbin—It is absolutely imperative that you have the consumer voice at the table. In the long run, the industry cannot see all the ramifications from the consumer perspective. The thing that has come through time and time again with the ACIF process is that you need a diverse representation from consumers. Because rural and remote consumers have very different concerns to, say, people with disabilities, whilst there might be similarities, they both need to be represented at the table in some way, shape or form. The consumer contracts code is undoubtedly, from our perspective, the best outcome we have had from a self-regulatory process to date. Obviously, once again, it will come down to the compliance, but we are very happy with the words on the paper, the obligations on the paper. Obviously we do not agree with everything. It was a collaboration. It was a compromise position that was reached with industry. It was only possible to reach that because we had equal representation on the committee with industry representatives.

Senator ADAMS—Does CTN believe that the proposed new powers for ACMA will result in more consumer participation in code making?

Ms Corbin—We are particularly pleased with the fact that the resources that will be allocated towards code development specifically state that you have to show that you have had consumer representation in order to recoup any funds for that code development. We have had examples, not with ACIF but with other industry associations, where codes have been developed without consumer representation or consultation, and that, I think, has been ultimately to the detriment of the outcome. So we are very pleased that this will mean that cost is no longer an issue for whether or not you move down the track of developing a code; we can get down to the nuts and bolts and look at the real consumer protection issues rather than the funds.

Senator ADAMS—This question is to the Australian Communications Industry Forum. Ms Hurley, how important are the consumer codes developed under the telecommunications framework?

Ms Hurley—The 1997 act specifically gives industry the mandate to develop specific consumer protections, so it is an obligation imposed by the 1997 act as part of the self-regulatory framework to develop those. That is one piece of it. The second piece of it is that, from the industry's perspective, it is absolutely imperative to have strong consumer protections in there and to listen to the consumer voice, because all of industry knows that if business does not listen to consumers then it is not listening to its customers and it does not have a business.

Senator ADAMS—You mentioned something about the cost but I would like you to expand on it. Has the cost of developing codes been a barrier or a potential barrier to developing high quality codes?

Ms Hurley—I can only talk within the context of the consumer contracts code because the development of the other ones predates my time at ACIF. Certainly, the nature of the issues that were involved in the consumer contracts code were such that it was imperative to get high quality input to ensure a good quality outcome. In particular, the issues that needed to be addressed contained very serious and significant matters of principle for both consumers and

for the supply side as well. To the extent that the drafting of that code could be allocated to professional drafters, to an external law firm, that freed up the committee to be able to focus on the important matters of principle. Things like that are particularly important.

Senator JOYCE—I address this question to the non-Telstra telecommunications providers. Some would say that you do not really have an overwhelming effect out in regional areas. You have a presence in some areas and not in others. Is this legislation going to give you more encouragement to get out there?

Mr Fletcher—I will answer that on behalf of Optus. To give you a quick sense of our existing presence in rural Australia, Optus has over 4,100 base stations in our mobile network, of which one-third are in rural and regional Australia, and we have increased our coverage by around 200,000 square kilometres over the last few years. We believe that the best way to encourage increased competition in rural Australia is to have strong competition and to have competitors who have achieved scale nationally and are able to naturally expand into rural Australia because there are attractive business opportunities there. That has been our history with our mobile network. We started in the cities and we have moved further and further down into smaller and smaller locales because it is commercially sensible for us to do so.

In relation to your question as to whether this package contains incentives to increase that process, as we have said, we believe that the funding package which has been allocated is very substantial and if deployed strategically there is every possibility that that package offers the chance for a real once in a generation change in the competitive structure of telecommunications in rural Australia. We have argued that government should consider very carefully how it allocates those funds and it should be calling for ideas from as many people as have good ideas as to what they might be able to do. It would be very sensible to aim to allocate those funds in a relatively small number of large projects rather than to some extent dribbling them away as has, unfortunately, been the characterisation of some funding to date. We think there is a terrific opportunity there to leverage that money to extract private sector investment to match it and in doing so get a real one-time change in the structure of telco in rural Australia but you could also have a significant pull through effect back into the metro markets as well, we believe.

Senator JOYCE—I would like the others to answer too. Do you think it helps develop a new platform?

Mr Fletcher—I think the scale of the money that has been made available means there is every possibility of that. If the schemes to allocate the money are carefully designed and give proper priority to encouraging competition I think there is a real possibility of that.

Mr Havyatt—AAPT have a slightly different view from Optus. AAPT is a consciously infrastructure light telco. Having said that, we still invest \$100 million a year in core network capability and service platforms and then we spend over \$600 million a year with other providers to access their infrastructure. Our approach to the issues in regional Australia has been the partnership we have formed with Community Telco Australia, which is a subsidiary of the Bendigo Bank, and the franchise model that they have rolled out in the Bendigo Community Telco and around regional Australia. Our belief in that model is about the fact

that it is more than just providing infrastructure; it is providing life back into towns, getting towns and communities vibrant and enabling towns to retain some of that decision making.

For us, that model works really well, especially if it gets to the position where the underlying network is such that we can say to somebody who would be our partner, called Telstra networks, ‘We have an interest in working with this town. We would like to make an investment with you to leverage your investment so that we can actually help this community.’ So we have a slightly different view. We think too many small investments spread around Australia—in fact, duplicated investments—will be a negative for regional Australia. We do think that the operational separation plan, together with the kinds of approaches we take, is the better future for regional Australia.

Ms Eason—May we make a comment on that? We have a different view again. I think it is important that, when you listen to the statement that there is a large amount of money here and if it is used in a concentrated fashion over very few projects—as Optus said, a few projects might give you bang for your buck—it should give you and the other representatives of rural Australia food for thought, because that is not what is being proposed here. There is \$1.1 billion, which has already been allocated in terms of where it is going to go—the HiBIS fund and other kinds of allocations; that has all been specified. Then there is \$2 billion, which is supposed to last forever, to fund rural and regional needs. That is not a large sum if it is spread in perpetuity. It is a relatively small revenue stream, which is already tied under the mechanisms of this legislation—

Senator RONALDSON—A sum of \$4 billion has already been—

Ms Eason—We are talking about the future, aren’t we, not the past?

Senator BRANDIS—You are also not allowing for developments of technology.

Ms Eason—I am still saying that it is a relatively small revenue stream. It is tied to regular reviews. It is not at the discretion of the department or the parliament in a simple way to say how it is going to be spent. The expenditure of that will be tied to the regional telecommunications infrastructure and services review fund—RTIC or whatever. The kind of image that Optus is inviting you to think about is perhaps where there is a very significant amount of investment—and the nature of telecommunications, if you want infrastructure, is lumpy and not small amounts of money dribbled out; it is big sums of money, which take a lot of time to recoup in terms of investment. That image is not what this fund is going to provide.

Mr Forman—Our group has never said, ‘Give us handouts and we’ll go to the bush’—never. From our perspective, the best mechanism to get competitive services out to the people who do not enjoy them at the moment is to get proper operational separation in place so that the infrastructure that is there is available to everybody to take services out to the bush on an equal basis. Our view has been, ‘Put that in place and just watch us go.’ Where the infrastructure proves unable to sustain competition, that is where you put the money so that you improve the quality of that infrastructure such that people can deliver services on it. Eventually, you will see where the markets are too thin to support competitive services. That is where you will be able to identify points of market failure that require ongoing subsidy for particular consumers or particular areas. But the primary mechanism that we have argued for

to get decent services out of the cities is competition, and the platform for competition is effective operational separation.

Senator JOYCE—But the package actually assists in delivering that.

Mr Forman—The package, if it is implemented against the aim, would deliver that. That is why I said at the outset that we support the aim. Our concern is that we have not had time to really go through some of the elements to see where it may be gained and whether it will or will not deliver.

Senator JOYCE—So it reaffirms the overall view that people are generally happy; they just have not had enough time.

Mr Forman—We are happy with the aim; that is right. So we are happy with what the government is trying to achieve.

Mr Stiffe—Vodafone would strongly support the views put forward by Mr Fletcher about the things that should be considered regarding that funding. We believe that it is a very positive thing for Australia and for the industry. We would add though that, in considering how to allocate those funds, we think there should be some preference given to ventures that share network and that avoid what, in some cases in regional areas, has been an inefficient duplication of network. But we strongly support the notion and think that, as long as there are measures in place to ensure that it is spent wisely, it is a very good idea.

Senator JOYCE—It is very important that Australia sees that you are happy with the package; you are just not happy with the time frame. It is a very important point to get out there—

Mr Stiffe—Vodafone is happy with the package.

Senator JOYCE—to all Australian citizens that are watching this today.

Senator RONALDSON—Can I correct the record. In response to a question from Ms Eason, I mentioned what might have sounded like four plus two. It is actually \$4 billion in total. I apologise for that.

CHAIR—Are there other questions on consumer matters?

Senator WORTLEY—Yes.

CHAIR—We are running out of time very rapidly. We still have another section to do, which is the establishment of the perpetual \$2 billion communications fund. We have extended our lunchbreak until 1 pm, so we have to fit it all in in this half hour, unless you are happy to keep on working through lunch.

Senator WORTLEY—My question will be quick. I direct my question to Ms Corbin and to any other body that would like to respond to it. Are you aware, under the current regime, of any discussion in relation to continued access to untimed local calls?

Ms Corbin—Untimed calls is an issue that is very near and dear to the hearts of consumers in Australia. However, I approach this topic with some difficulty because we are moving into a new era with technology. We are not going to be looking at timed calls anymore; we are

going to be looking at length as far as data goes. Timed local calls, whilst they are very important to my members still, are slipping away already, because people are starting to use voiceover IP services. They are also using mobile phones more and more whereby they have already given up the timed call. When we have consulted with our members about how they feel about the timed local call, they still think that it is an extremely important cornerstone of our legislative protections. They do not want to see this undermined in any way, shape or form.

Mr Havyatt—Could I just add that I have heard no discussion in any consideration of future telecommunications regulatory reform that there would be any proposal to change the existing commitment to untimed local calls. I would join with Teresa Corbin is saying that there is a combination of factors—things like VOIP services, which are significantly cheaper on a timed basis, and substitution of mobile phones, where people who are only at home a very limited amount of time are saying: ‘Why would I pay whatever the line rental is these days and then get a few untimed calls? For the same money, I can make a few timed calls on my mobile,’ and they are abandoning the fixed line phone. We could probably see that continuing, but I have heard no-one suggesting in the regulatory reviews any proposals to move away from that legislative commitment under the Telecommunications (Consumer Protection and Service Standards) Act.

Mr Amos—From the ATUG viewpoint there is one matter that has not yet surfaced in this process, which is the charging zone boundaries. They were set in 1960 and do not recognise the changes in technology that have occurred since that time. We have the analogy of people living in the outskirts of cities and towns who are paying timed rates when people across the street are paying untimed rates. That is something which has not been picked up in the process.

Ms Corbin—Could I make some comments about the ACCC question that I was asked earlier?

CHAIR—Yes, please do.

Ms Corbin—Obviously there is a lot of detail yet to be worked out as far as organisational separation is goes. The consumers are more concerned about price controls, so we are less concerned about the relationship between wholesalers and retailers. Whilst we realise that has an impact on price controls, we are very pleased that the minister has decided to continue the price control regime. However, our members feel that it should be an ongoing thing; it should not just be under review every couple of years. We also believe that, with the changes in technologies that have already been mentioned by Senator Wortley, in actual fact we need to look at a broadening of price controls and look at how the new technologies and the use of mobiles are impacting on the price control regime.

Senator LUNDY—Are you of the view that the ACCC should have been given stronger powers in this legislative package to address some of those price control issues rather than have it as an issue for ministerial determination?

Ms Corbin—Absolutely. It would have been a primary opportunity to address those concerns and to bolster up the price controls regime that we have currently.

Senator LUNDY—While the chair is distracted, could you please comment on the longstanding call by your organisation and other consumer groups for an independently funded program for the new disability technology needed in the network and the fact that that has not been provided for in this package?

Ms Corbin—This is something that we felt could be dealt with by the communication fund, so it might lead nicely into the next topic.

CHAIR—All right. We will do it as part of the next topic.

Ms Corbin—CTN have welcomed the announcement by the government that there is going to be a communication fund. Just like everybody at the moment, we are only querying the amount. We are also quite concerned that we need to focus not just on the needs of rural and remote consumers but also on other areas of disadvantage or vulnerability in the consumer area. That includes people with disabilities and, obviously, Indigenous consumers as well. Many Indigenous communities are in rural and remote areas, but they may require some specific additional consumer protection in order to ensure that they get the protections. We recognise that the government has already done some things in this regard.

We are calling on the government to establish an independent disability equipment program that would mean that, regardless of whether you are a Telstra customer, you could get access to equipment that you need so that you could enjoy the benefits of competition as well. There are obviously a number of concerns that disability organisations have, and I understand that TEDICORE is making a submission to this inquiry which will go into that in more detail. The deaf community in particular desperately need some improvements in the availability of text telephony in Australia. At the moment, they cannot use real-time mobile telephony. There is also a huge call for a video relay service. In America, they have had a video relay service for some time now, and there has been a substantial uptake by users of sign language, and the video relay service obviously has benefits for other members of the community as well.

Senator ADAMS—Mr Amos, will ATUG work with ACMA to assist in ensuring that telecommunications users are made aware of the consumer's rights?

Mr Amos—Yes, we would. We have also suggested that there should be regional and rural expertise introduced to ACMA's board if that is possible.

Senator ADAMS—That is good.

Senator ALLISON—I was surprised that the list of priorities that CTN gave us today did not include access to broadband services. I would have thought that, in this day and age, this would be a high priority—particularly for people in rural areas where services are so thin on the ground. Mr Amos, you may wish to comment on this. I would have thought that this is also a key issue, particularly for business in rural areas.

Ms Corbin—I think this is a reflection of the fact that broadband services are not readily available to most residential consumers yet. We welcome the move with HiBIS, but HiBIS is still very expensive for a lot of consumers. Whilst that opens it up for small business, it does not really open it up for your home consumer. We get regular contact from members who are using School of the Air and being forced to go from \$20 dial-up plans to broadband plans that

are costing them \$70 a month, which is really cost-exclusive for many families in rural and remote areas. I am not surprised about the exclusion because of the lack of availability. Once we start to see broadband used, you will see more of a call for it to become one of those icons in Australian communications policy, like the untimed local call but, at this stage, it is something out there that a lot of us have not tried yet. A lot of people in metropolitan areas have tried it, but we are still finding that there are a number of people who are not getting broadband services and, if they are getting them, they are not seeing them in the same sort of context as these other consumer protection safeguards.

Senator ALLISON—I see here that you have supported Telstra's original proposal which came out this week for \$5.7 billion to be spent on the almost universal roll-out of either fibre optics or satellite. Would that be fair to say?

Ms Corbin—Absolutely. CTN have been calling for a universal communications service, not a universal service obligation, for more than 10 years now, and we have obviously included internet in that. More recently at our conference, it was hotly debated whether or not broadband should be included in the universal service obligation. It was concluded that all our members felt that it should be.

Senator ALLISON—And the customer service guarantee, do you think that should slowly move into this area as well?

Ms Corbin—That is right, because we are going to be using the voice over IP services more and more, which will require a broadband service. The customer service guarantee is going to mean less as far as fixed lines go.

Senator ALLISON—We will get onto whether you think the package will adequately deliver that in the next session.

CHAIR—We are getting pressed for that next session, I know.

Senator ALLISON—Mr Amos wants to respond to the same question.

Mr Amos—ATUG has had an active program in performing end-user information programs in the regional areas regarding broadband. By way of an example, in 2004 we worked with some of the gentlemen on my left here and we had wide industry based participation to run 21 regional shows across Australia informing and educating users on broadband. This year we are doing 13. We believe that the technology for regional centres is improving, and will improve much more with the opportunity of this package.

Senator RONALDSON—I have a quick question—

CHAIR—We have got to get onto the communications fund, really.

Senator RONALDSON—for Ms Corbin. I thought it was a pretty balanced submission you put in, and I share your views in relation to access to services for the deaf. That is something that can be taken up at another time, but there are some real challenges there. I take it you would support the \$1.1 billion Connect Australia program with about \$878 million for broadband connection, \$113 million for Clever Networks and an extra \$30 million for Mobile Connect and particularly the Backing Indigenous Ability of \$89 million?

Ms Corbin—Yes, we are very happy with that package. We do welcome it. Obviously we would like the bucket to be bigger. The biggest concern we have with the Connect Australia package is the competitive tendering. We feel it needs to be a process that makes sure it does not overlook national strategic goals. We feel that sometimes, particularly in relation to some of the mobile improvements we have seen that have been subsidised by the government, the lack of interoperability or national roaming has actually, in the end, been a disadvantage to consumers rather than an advantage. I call on the government and the department, when they are looking at how they are going to allocate these funds, to make sure there is some equitable and national strategic approach to this.

Senator RONALDSON—You may or may not be aware, but there have been nearly one million extra broadband subscribers in the 12 months up until March this year, which is nearly double—

Ms Corbin—I realise that it is growing, and I realise that there are some rural consumers that are getting it now that were not getting it before.

CHAIR—Members of the committee, we need to move onto the last issue, which is:

... the establishment of a perpetual \$2 billion Communications Fund.

This term of reference relates to the establishment of this fund, which will be set up from the proceeds of the sale of Telstra. The minister's second reading speech notes:

Revenue ... from the Fund will be spent on implementing the Government's responses to recommendations contained in the reports of the independent review committee to respond to identified market failure in the provision of additional telecommunications services in regional, rural and remote areas.

Senator JOYCE—It really leads on from where we were before. Obviously everybody would like the bucket to be bigger, and I imagine if we had a debate on how big the bucket should get, it would be enormous by the end of it. But the bucket that we have got is better than no bucket, which is the alternative—the status quo. I also take on board your submissions, especially the TEDICORE submission—TEDICORE came around to see me the other day—and I acknowledge what has formally been said here. However, are there any concerns with the way that the \$2 billion trust fund is being put aside, how it is being invested and what is quarantining its erosion of value? I throw that open to anyone.

Ms Corbin—I would like to address those concerns first. We are concerned about the fact that some of it will likely be shares in Telstra and that, in actual fact, leaves the value of the fund open to question. We would like some clarification on the definitive nature of the amount. We are also concerned that in the legislation it does not specifically say that it will be \$2 billion, but rather that it could be up to \$2 billion and that it is up to the discretion of the minister to decide. Clearly that is dependent on when and how things get sold, but at the same time it does not give us a lot of comfort as far as the actual management goes.

The other thing that I am concerned about is the time line. Obviously such a large privatisation is going to take some time, but it will take until 2008 before the review committee can meet to consider how these funds might be allocated. Then, after that, we are

looking at 2009 or 2010 before the community sees the benefits. That \$1.1 billion Connect Australia package has got to last the distance between now and then. Those are my concerns. The bucket is not big enough, but this is why the bucket is not big enough.

Ms Eason—The key thing the union wants to say about this is that, really, the size of the bucket is not the issue; it is the funding strategy. Our argument is that, in the end, you are not going to get progressive upgrades of national infrastructure, which is what this country needs, through doling out money at regular intervals on the margin. You have to have a strategy for a comprehensive investment. Telstra put that in front of the government. They put it in the rubbish bin. Coming back to it, it gives us some sense of the scale of the investment needs. You can argue about whether it is inflated here. Its cost is so politicised in this environment that no-one would want to swear on their accuracy. But, in that package, what Telstra said—which is much more costed and tells the public what they might get for their money—was that for \$5.7 billion you will get 6 megabits in 87 per cent of the country and you will get 1.5 megabits in the remaining 13 per cent, and if other people want to argue, let other people do the figures and say what they might provide. As I say, it gives you a sense of the scale. According to Telstra's estimates, \$2.6 billion of that would have to be provided by government in order to achieve those kinds of broadband rates, and that is the whole of your fund gone in one hit. And that is giving you 1.5 megabits per second; it is not giving you 20.

Senator JOYCE—There are others who are quite willing to go into Telstra, like Baulderstone Hornibrook. I think everybody is aware of that proposal. They were quite prepared to roll out optic fibre—

Ms Eason—Not to 100 per cent of the population, with all due respect, Senator. I think it to the 300 top exchanges or whatever. It is a national plan. I am not putting this forward in support of that particular proposal but just as the funding concept. It is the concept that is the issue, as opposed to having a bucket of money at the edge which gets doled out in bits. It will not meet the nation's needs.

Senator JOYCE—So the concerns that have been brought up are basically the timing between the allocation of the \$1.1 billion and also clarification that that \$2 billion is \$2 billion—not up to \$2 billion but actually \$2 billion. Those are your concerns. Apart from that, you still believe strongly that Telstra are the people that have to do this.

Ms Eason—Let others put forward a national plan. What I am saying is that a plan was put before the government which meets some of the objectives which, in my belief, the National Party and others have dear to their hearts—that is, that there is some—

Senator BRANDIS—And the Liberal Party, I must add.

Ms Eason—It has not been as strongly voiced perhaps, Senator.

Senator BRANDIS—Yes, it has. It was announced by the Prime Minister, the leader of the Liberal Party.

Ms Eason—I thought he was more interested in talking up the share price.

Senator RONALDSON—I thought he was the leader of the coalition.

Senator BRANDIS—Exactly. Both government parties—the National Party and the Liberal Party.

Mr Cooper—We do not want to get involved in that.

Mr Havyatt—In response to the question, there was a call from the CEPU for someone to develop a national plan. We take a slightly different view. It is a similar view to the one which was recently expressed by the Business Council of Australia, which says that there is a very important role for government in development of infrastructure. It does not always mean devising one plan but it does mean taking leadership in such a way that planning can occur and that multiple parties can get together in a room and discuss that planning. The one thing I would certainly join people in saying is that there is a greater role for the policy department, the department of communications, to play in doing some of the analysis. I was fascinated that the department was not asked to review some of the proposals that came forward. I think that is a role we should be looking for the policy department to do because there is no-one else to do it on behalf of all of Australia. It should not be our perception that the role of one of the biggest providers in the marketplace is to do national planning like they did when they were the PMG.

Senator JOYCE—No-one has any concerns about how the trust fund is held or invested or what the quarantines are on it? I take that as no.

Senator LUNDY—I have a question about the way in which previous funds have been expended. We know that over many years and the last two tranches of sale over \$1 billion has been spent. Would witnesses like to offer any observations about the strengths or weaknesses of how that money was spent and what is in this legislation to make the pattern of expenditure any different?

Mr Fletcher—Our observation has been that, as a nation and as a government and as an industry, we have learnt better over the passing years since 1996 how best to use these kinds of funds. I think some of the initial projects involved too many small scale exercises and not enough attention being given to competitive neutrality. I think undoubtedly the design of the schemes has got better as they have gone on. You can point to schemes like the National Communications Fund which have involved a greater attention to competitive neutrality issues—and, indeed, the Higher Bandwidth Incentive Scheme, where there is an explicit cap on the percentage of the fund that Telstra is allowed to get, for a very good reason. So I think we can certainly learn some lessons. From Optus's point of view, we are arguing for some design principles with the current round of funding which draw on those lessons and enshrine the principle of competitive neutrality.

When it comes to the question that was referred to earlier about a national plan, I think it is very important that, if we go for a national plan, we do not throw out competition as a side effect of that. The Telstra plan would have involved their six megabit national network being free of the access regime. In other words, it would have been Telstra saying, 'We will have a national monopoly on the next generation network, thanks very much.'

Senator LUNDY—So their plan re-established a monopoly, basically?

Mr Fletcher—That is what they were seeking to achieve. That is why we have argued that, when the government thinks about how to allocate the funding it has here, it should seek to call for big bang ideas and see if there are people other than Telstra who have ideas that can be put forward and it should use competitive and market disciplines to see the extent to which private sector investment can be leveraged, rather than, as Telstra seems to be proposing, tipping a whole bucket of government money to Telstra, on the basis of a quick conversation in Parliament House.

Ms Eason—I must comment on that: that is a misrepresentation, and you must know it is. The whole proposal for the government part was that it be competitively tendered, on exactly the same basis as HiBIS and all other funds now.

Senator LUNDY—That was not my reading of the document.

Ms Eason—The document is in the public domain. It is on the ASX web site, and that is what that section says: ‘competitively tendered’.

Ms Corbin—I will just make a statement in relation to Senator Lundy’s question. Some of the programs have definitely been better than others. I agree with Mr Fletcher on that. However, what we have found with the programs that have been specifically from a consumer perspective—the programs for Indigenous communities, iConnect for example—is that they have been unsustainable. So there has been an amount of money for a certain period of time and then it has finished and the program has fallen into a heap, even though the program was doing some really excellent work and actually getting people on the network that were not on the network before. That is not just in relation to Indigenous examples; there are countless other examples of rural and remote programs in particular that have been discontinued, even though they were really innovative and took us forward. So I think we need to have something in there about sustainability.

CHAIR—Good point.

Senator JOYCE—I think this is terribly important: with the money that is out there, the \$1.1 billion or the return on the \$2 billion trust fund, you would actually put money in yourself, wouldn’t you? This is a point of contention: that people believe that we are just giving them this money, and that is all there is. But it will not be the total volume of the actual telecommunications infrastructure, will it?

Mr Fletcher—At Optus we have argued for an allocation process that is competitive and calls in the first instance for people to put forward ideas. One of the things that you would ask people to put forward ideas about is the scale of the roll-out they would commit to and the scale of the subsidy they would require. Inherent in that would be a planning process that the individual bidders would put forward which would involve their own cap ex, together with the subsidy component.

Senator JOYCE—I would like David to come in here—give to this meeting an idea of the kind of subsidisation that you would foresee. Would it be \$1 of the government’s money for \$2 of yours or \$1 of your money for possibly \$3 of the government’s? Give me a scope of the type of subsidisation you would see.

Mr Stiffe—Perhaps I could answer that. Vodafone has received some government funding for the mobile phones on highways project. While each project will no doubt be different, I can say that Vodafone spent something like five times the amount of the subsidy that we received.

Senator JOYCE—So for the \$1.1 billion you could potentially have up to \$6 billion, which, plus the \$2 billion, would equal \$8 billion worth of telecommunications infrastructure. I think this is very important, because a lot of people seem to get stuck on the \$3.1 billion, not foreseeing that the package, when you count up the dollars, will be far wider than that. Is that correct, Mr Fletcher?

Mr Fletcher—The central design principle of being able to leverage additional private sector funding is clearly sensible, and the way you have allocated the funds should allow that to occur.

CHAIR—That is what we saw in Western Australia with Wireless West, which put CDMA across the whole of the south-west. Telstra put in a third, the state government put in a third and the federal government put in a third, so it became a multiple of three.

Mr Fletcher—One of the benefits of a competitive process would be that competing parties would know that one of the factors that would be considered in determining whether they won funding was the amount of money they themselves put in.

Senator LUNDY—Perhaps Optus could refresh the committee's memory about what happened to them when they tendered for the extended zones contract.

Mr Fletcher—Optus did tender for the untimed local calls in extended zones project some years ago. We did not win that. It is in the nature of commercial tender processes that you win some and you lose some.

Senator LUNDY—Why didn't you win it?

CHAIR—That is the detail. It is not relevant to the terms of reference.

Mr Fletcher—Without getting into the merits of that, I would simply say that it is important to have a transparent process where the government states up front what its objectives are and what rules it will apply.

Senator LUNDY—From recollection of lobbying, a factor in Optus not winning that contract was that Telstra were able to offer more and leverage their scale and presence in the market, which knocked Optus out.

CHAIR—Are you sure that was the case, or is it just speculation?

Senator LUNDY—It was certainly one of the factors as presented to me by Optus.

CHAIR—It sounds like speculation.

Senator LUNDY—The point being that, with respect to Senator Joyce's question about relative coinvestment by the private sector based on the government's fund, it would depend on specifically what parameters the government put around that fund, as it has in the past.

There are no parameters placed around this fund by the government, so any speculation about coinvestment by the private sector is fanciful at this stage.

Senator BRANDIS—Before Mr Havyatt leaves, in fairness to him, I wanted to point out something to him. Mr Havyatt, as I understood you this morning, you asserted that earlier in the morning Mr Samuel and the ACCC witnesses had indicated their opposition to operational separation. I am going to read to you from page 4 of the proof *Hansard* the relevant answers. Mr Samuel said, quoting himself from his interview with Alan Kohler on *Inside Business* on 21 August:

Operational separation is simply designed to produce some transparency in the dealings between Telstra's wholesale division and its retail businesses, and then to ensure that there is some equivalence of dealing in those dealings between its wholesale and retail businesses and Telstra's other wholesale customers.

Having quoted himself on what it meant, he then went on in his evidence this morning to say:

The government's proposed model for the operational separation of Telstra maintains the balanced approach of the existing regulatory regime. The proposal recognises that Telstra is in the unique position, through its monopoly over the local access network, of being able to stifle competition and innovation by frustrating its competitors' investment plans. For this reason, the ACCC welcomes changes which would increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors.

In answer to a question from Senator Conroy, and this is on page 7, Mr Samuels said:

The proposal announced by the minister back in the middle of August was one that we considered would provide an acceptable outcome in terms of the objectives as we saw them being achieved.

Senator ALLISON—Mr Chair, I raise a point of order. This material is already on the record. It is what we took earlier today. It is on the *Hansard*. I wonder what the purpose is of reading all this into the *Hansard*.

Senator BRANDIS—I am about to ask him a question—

Senator ALLISON—Please get to the question.

Senator BRANDIS—which I cannot ask until I have put to him what is on the *Hansard*.

Mr Havyatt—I am happy to answer the question, if Senator Brandis ever gets to it.

Senator BRANDIS—I have not asked the question yet, Mr Havyatt.

Mr Havyatt—I know.

Senator BRANDIS—Let me finish. I am nearly finished. And then, at the foot of page 9, in response to me, Mr Willett said:

The bottom line is that, subject to the resolution of the issues that Mr Samuel referred to, the ACCC believes this model can lead to an appropriate set of operational separation rules.

I asked:

Does the ACCC believe that operational separation could have benefits for Telstra itself?

Mr Willett—Yes, it believes it does ...

Then I said, on page 11:

... it strikes me that if the government's announced model has the likely outcome that you have anticipated, it is not just going to be good for Telstra; it is going to be good for the entire industry.

Mr Willett—And the economy as a whole.

Senator BRANDIS—And consumers?

Mr Willett—And consumers

Mr Samuel—And consumers.

In the light of that evidence, Mr Havyatt, do you want to withdraw your assertion that the ACCC, in its evidence this morning, said it was opposed to operational separation?

Mr Havyatt—I do not have the benefits of the proof *Hansard*—

Senator BRANDIS—Would you like to get it?

Mr Havyatt—but I do not believe that my comment said that the ACCC opposed operational separation. I have said that the ACCC, when asked a question about whether they supported the government's model of operational separation, came as close as you will find the ACCC to saying no. I was basing that—

Senator BRANDIS—Well, that is not what—

Mr Havyatt—Senator Brandis, may I answer the question?

Senator BRANDIS—That is not what we just went to.

Mr Havyatt—May I answer the question, Senator Brandis?

Senator BRANDIS—The questions were about not just operational separation but the government's model—to quote Mr Samuel: 'acceptable to us'.

Mr Havyatt—May I—

CHAIR—Finish your answer, Mr Havyatt.

Mr Havyatt—May I refer to the comment you made—that is, the answers from Commissioner Willett which said 'subject to the resolution of these issues', which was the point of my statement, which was that the proposal as we see it before us does not have all the issues reconciled. That is the only point I was trying to raise.

Senator BRANDIS—If that is the only point you were trying to make, Mr Havyatt, perhaps you overstated the point. We know that there are unresolved issues. That is not controversial. But Mr Samuel's own words were that the proposal announced 'would provide an acceptable outcome'. There you are. Read it for yourself.

Proceedings suspended from 1.02 pm to 1.34 pm

CORISH, Mr Peter, President, National Farmers Federation

FARGHER, Mr Ben, Chief Executive Officer, National Farmers Federation

CHAIR—I resume this hearing of the committee and welcome the witnesses from the National Farmers Federation. Thank you both very much for giving us your time today. I know that you have had to come from a long way away and we are very grateful for your making the effort to be here. Thank you very much indeed. I remind you that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you that should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and we will consider your request. Would you now like to make an opening statement.

Mr Corish—Thank you for the opportunity to present to this committee on an individual basis. We very much appreciate that opportunity. In the interests of time—and I know you have a lot of work to get through this afternoon—I will make some brief introductory comments only. I will refer to the terms of reference but seek to concentrate on how they do relate to the priorities of the National Farmers Federation and to farmers and rural communities.

Our priority for quite some time has been to ensure quality, affordable telecommunications services, now and into the future, for rural Australia. State-of-the-art telecommunications are absolutely vital for all Australians, but particularly for those who live in more isolated areas. Please note that my comments are conditional, inasmuch as the NFF is still assessing the legislation in detail and, importantly, we will be consulting with our member organisations over the next couple of days.

First of all, under the terms of reference, you have asked us to make comment on operational separation and the role of the ACCC. We seek a guarantee that services and service standards are delivered in a competitive rural telecommunications marketplace. We see that as being absolutely vital and, of course, the ACCC as having a major role in that area. In addition, we want transparency in the wholesale market, to facilitate a competitive rural telecommunications marketplace and again we see the ACCC having a major role there.

Secondly, I turn to the role of the Australian Communications and Media Authority. We believe it needs to be strong and it needs to be independent. The ACMA has an important role in regard to the network reliability framework. A strong network reliability framework is vitally important. We have problems in rural telecommunications: we have copper wire networks that are not up to scratch and we have fault repair times that are way too long and, in fact, getting worse. So a strong and effective NRF is vital. Equally, the customer service guarantee is absolutely crucial. All carriers, including Telstra, must be able to deliver acceptable service and repair times. Mr Estens' Recommendation 7.2 refers to an appropriately disaggregated data collection framework, to ensure meaningful and timely publication of analysed data on regional, rural and remote telecommunications services. We see this as being the role of the ACMA. The NFF will be analysing this legislation again in

detail over the next couple of days, so it is difficult for us to make more detailed comments at this stage.

Thirdly, I would like to touch on the \$2 billion telecommunications fund. We have publicly welcomed the \$2 billion telecommunications fund. Certainly, Estens' series 9 recommendations recommended a regular review process, linked to an appropriate funding mechanism. The review times, of course, are absolutely crucial in this area and, again, we need to analyse the detail not only of the review times but also of the ties between that particular fund and that review process.

In summary, state-of-the-art telecommunications, as I said, are vital for all Australians, particularly those in rural Australia. There are problems out there that must be fixed. The copper network, in particular, is not where it should be; service repair times are not up to scratch in many areas, and we do have to ensure that new technology is made available as it rolls out. So over the next two to three days the NFF will be examining the legislation—some of which we have only had access to in the last 24 hours—in some detail. Until we do that it is difficult for us to make more definitive comments.

Let me just say in closing and in summary that regular reviews, tied to a funding framework, are absolutely crucial. We want to ensure that effective use is made of those funds that are in that particular trust fund. It is fine to have a significant amount of money there—we have welcomed the amount of money—but we want to ensure that it gets delivered where it is needed, and that is on the ground. Secondly, we want to ensure that the network reliability framework and the customer service guarantee are in fact strengthened, that we do get rid of the problems that exist out there and that we do improve services on the ground. Certainly tightening the customer service guarantee is a crucial part of that. I will leave it at that. I am sure the committee would prefer to ask questions, and we appreciate the opportunity to answer them.

CHAIR—This is a 30-minute session and we have 25 minutes left, so we will do it on a 10, 10, five basis. Senator McGauran has asked to lead on this.

Senator McGAURAN—I will ask one question. I know my colleagues senators Joyce and Adams are vitally interested in this area. There is one thing I want to be able to record in the *Hansard*. As you are well aware and we are all well aware, the very origins of the NFF were that they were drivers of reform in competition policy and the ability to have choice, to the benefit of the farm gate. To that end, I want to establish your position with regard to the sale of Telstra and the introduction of competition into telecommunications. I want to know the principle you are working on with regard to the sale of Telstra—or any public asset. Can you tell me whether the introduction of competition into the telecommunications market has in fact benefited the rural and regional areas, down to your representatives at the farm gate—namely T1, T2 and also reflecting in the pricing structures?

Mr Corish—NFF, as I think you have correctly enunciated, certainly is a strong believer in competition and reform in that area, and, of course, we have a history of supporting reforms. We certainly see competition in the telecommunications area as something that is vitally important going forward. We have certainly welcomed the changes that have been made in

that particular area over the last few years. I think it is fair to say that telecommunications generally in rural areas have improved, particularly with the development of Telstra Country Wide. I have said so publicly on a number of occasions. However, we have a situation where there are problems in rural telecommunications and we see areas where service repair time frames are in fact getting worse. We have copper networks that are in fact breaking down. We have very old automatic exchanges that need significant repair. Our focus, ever since the Estens recommendations were accepted by the government, has been to ensure that those recommendations are in fact implemented. Currently, we see around three-quarters of those recommendations implemented, but, very importantly, some of the crucial ones, regarding future proofing and access to long-term state-of-the-art telecommunications at an affordable and competitive price, have not been addressed. So we have been relying on the legislation associated with the government's intended or proposed sale of their interest in Telstra to deliver those outcomes for us, fix the problems that are there now and ensure that we do have access in an affordable way well into the future.

Senator JOYCE—Thank you very much, Mr Corish, for coming today. Everybody always wants politicians to speak plainly—we hear that all the time—so I am going to try and put something as plainly as I can. There are two choices: you accept the package or you accept the status quo. That is the issue I have really got presented to me. I need to know from the NFF which one you want. It is a great debate to say that there are other things and, if we could get them, we would get them and we would change this and amend this and make this bigger and wider. I do not have that option. You cannot go into the chamber and answer with a half-yes and a possible no and three bits on the side. There is a question that is coming up. Are we supporting it and going forward with the package? Does the NFF want it supported and want us to be going forward with the package or do they want the status quo? They are the only two choices I have got.

Mr Corish—Our position is very clear. We want to ensure equitable telecommunication services in rural Australia long term and we want the problems out there fixed up. We want a real commitment on behalf of the government to ensure that those two things happen. We are not taking a position on the sale until we see evidence that those problems are going to be addressed. We have not changed our position on that now for two years. We have continued to say it and we will continue to say it. We now have the opportunity to view the legislation, but we do not have a lot of time to do it. We will do that over the next couple of days. A policy council meeting of the NFF is to be held on Monday night and we will be making some significant decisions then about what our position is.

Senator JOYCE—On Monday or Tuesday, do you want me to vote for the legislation or not?

Mr Corish—I can only suggest that you make your decision based on the best information that you have, but we would recommend that decision be based on a thorough examination of the legislation. I do not know whether you have had access to that legislation for longer than we have. But, with respect, we certainly will be going over it in some significant detail in the next couple of days before being able to advise you, let alone make a decision ourselves.

Senator ADAMS—Mr Corish, I am a farmer from Western Australia. Having lived in rural communities for a long time, I have had a lot of experience with having no phone and having party lines shared between three or four or five families and a fax machine that lived in a huge suitcase. With the telecommunications network having improved, we have finally moved to having a HiBIS satellite connection—because we are too far out to allow our copper line to carry broadband—and our community of 2,000 and a number of other small communities have just got access to ADSL. So things are really moving. I would just like to say that there was the government's communications fund of \$2 billion for rural areas from 1997 to 2009, the Connect Australia package of \$1.1 billion—

Mr Corish—Is this a question?

Senator ADAMS—I am coming to it.

CHAIR—It is leading to a question.

Senator ADAMS—the Estens inquiry response of \$181 million, the Besley response of \$163 million, the social bonus of \$250 million and Networking the Nation—which, as you would be aware, was the first one—of \$247.4 million, making a total of \$4.027 billion. Would the NFF agree that the \$2 billion communications fund, linked to regular reviews of regional communications, fulfils the intent of the recommendations made by the Estens review?

Mr Corish—I have made a comment concerning Senator McGauran's question: that is, certainly, in our view, telecommunications in rural Australia have improved but certainly there are significant problem areas out there—particularly regarding the failure of the copper network, as I have said—and various issues associated with repair times. The government's own data backs me in that answer.

But, in response to your direct question about the effectiveness of the \$2 billion telecommunications fund, it will depend on two things: firstly, that it is tied to effective and regular reviews; and, secondly, that the funding tied to those reviews delivers the outcomes. With respect, we have seen programs initiated by governments of all persuasions over many years that have not delivered the outcomes. Our focus is very much on ensuring that we do get the outcomes. That is why, over the next couple of days, we will be examining the legislation associated with the future proofing. We then will be in a position to make a much more positive and objective comment.

Senator ADAMS—Can I just make a comment? With the new intake of senators, I can assure you that you have many rural, remote and regional supporters to ensure that this is done.

Senator Boswell—I am at a bit of a loss to understand this, because there has been on offer \$1.3 billion, plus \$2 billion that is going into a fund that we will get interest from and we have been told today by various communications deliverers that that could be leveraged up five to one.

Senator LUNDY—We were not.

Senator BOSWELL—Yes, we were. Vodafone said five to one. How do you expect improvement in regional telecommunications if we do not have that money out there? Who

else is going to put \$3 billion into this, if the sale of Telstra does not go through? I say this with someone who was able to achieve \$1 billion in T2, which got us untimed local calls and mobile phones right throughout Australia. The mobile phones were supposed to go to the big centres like Longreach; now they are in every little whistlestop place. We put in connections to the internet, and then we even put women out to teach the people on the stations to use the internet. I think we have done pretty well. I think we can do a lot better, but no magic fairy is going to come down from heaven to present you with another billion dollars. You have the choice—

Senator CONROY—Is this a question?

Senator BOSWELL—Yes. The choice is this: we do not get it unless we sell Telstra, and with that money we can fix up telecommunications.

Mr Corish—We have publicly welcomed the government's commitment to the \$2 billion telecommunications fund and the \$1.1 billion Connect Australia fund. But we have said that it must be tied to regular reviews and it must deliver effective outcomes on the ground—and it may in fact happen. But we need time to evaluate that legislation—we have not had that time as yet—before we can make an objective decision as to whether the legislation will deliver those outcomes or not.

Senator JOYCE—Mr Corish, I am going to put you in my shoes. If you do not have the time, will you support it or not?

Mr Corish—I am not going to put myself in your shoes.

Senator JOYCE—But that is what you put back onto us.

Mr Corish—I am here to represent the farmers of Australia. We have had a very consistent position on this issue for a number of years and we want to ensure that we have time—we have not got a lot of time, but we are going to work flat out over the next couple of days—to make recommendations to our policy council on Monday afternoon.

Senator BOSWELL—I think Barnaby is asking: do you want \$3 billion spent on rural communications or not?

Senator CONROY—You're monsterring the witness!

CHAIR—Senator Lundy has a point of order, so that takes precedence.

Senator LUNDY—I just want to draw the chair's attention to the fact that the witness is being asked to say yes or no when a third option is available—that is, more time—but the National Party senators have made it clear that they are not prepared to give more time, so it is an unreasonable question to put to the witness.

CHAIR—No point of order.

Senator JOYCE—If we were prepared to walk across the floor and not vote for it, that would be the end of the package. We can walk across the floor and have no package. Delivering nothing is a piece of cake.

Senator RONALDSON—Even though you have not seen the legislation, you know roughly what is in the package. Would you accept that \$3.1 billion must lead to improved services?

Mr Corish—As I have said, we have welcomed the commitment. We believe that, if the money is spent effectively, it will deliver very significant outcomes for rural Australia.

Senator RONALDSON—There is the Broadband Connect program, which is included in the \$1.1 billion communications package. By design, you would accept that that has to improve services. If the government were to stick to that program, would you accept that services must improve? You must, surely.

Mr Corish—If the \$878 million allocated to improving the roll-out of broadband is spent in an effective way, it will certainly help rural Australia.

Senator RONALDSON—The government has said—in press releases and in legislation—that this money is going to be spent, and it is hard to believe that the government will not be spending this money. It would be hard to believe that a government would not be spending that money, so, if you assume that it is going to be spent—and I will make that assumption—then, to take up Senator Joyce’s question, the status quo is not an option.

Mr Corish—Our view is that, while the status quo with regard to delivering effective rural telecommunications has improved, it is still not at a level which we think is satisfactory. We continue to say that. There are problems out there and we want to ensure that we do have roll-out of effective new technology as it becomes available—not just in the next one or two years but over the next 20 years. This is an extremely important issue for us.

Senator RONALDSON—I understand, and I respect the fact that you are having a meeting on Monday. I very much respect that.

Senator CONROY—On a point of order, I thought we were working to time limits. We have strictly complied with ours.

Senator RONALDSON—I will finish on this point. If that money is delivered, you accept that services will improve?

Mr Corish—If it is delivered in an effective way, we believe that services will improve—if it is delivered in an effective way.

Senator RONALDSON—Presumably, if \$850 million is being put into broadband, it is going to be—

Senator CONROY—I know that he is the government’s Rottweiler on this committee, but come on!

CHAIR—You have made your point.

Senator RONALDSON—On that basis, I assume that a status quo of a no vote—

Senator CONROY—I thought that you were finishing.

Senator RONALDSON—to this legislation is not an option for the NFF?

Mr Corish—I am sorry, I did not hear the last part of the question.

Senator RONALDSON—I would assume on the basis of what you have said and the fact that we have assumed that this money will be spent—and to take up your point, spent wisely—that a no vote on this legislation—and therefore a vote for the status quo—would not be acceptable to the NFF?

Mr Corish—Can I respectfully suggest that you may be attempting to put words in my mouth there. I am not going to answer that question until we have had the chance to go through the legislation in detail and ensure that it will deliver the outcomes that we want for farmers in rural Australia—and, in fact, for all people in rural and regional Australia. We have not had the opportunity to do that as yet.

Senator ALLISON—How much time do you need?

Mr Corish—We will be working flat out over the weekend to go through the legislation in detail. We will be making a response to the legislation after our meeting on Monday night.

Senator CONROY—Over the last month I have seen a number of your press statements commenting on the state of services in the bush, Mr Corish. To use the colloquial phrase that everyone has been using, are services in the bush ‘up to scratch’ at the moment?

Mr Corish—In our view they are not. We have said so publicly several times over the last few months. We have referred to the government’s own data with regard to declining repair times, and basic telephone repair service times are getting worse. There are many positive things that have come out of the implementation of the Estens recommendations, but there are still areas of rural Australia that are having ongoing problems. Our focus is to ensure that those problem areas are addressed. That is the feedback that we get from our member organisations and our individual members. I am sure that you have seen many comments in the media by our member organisations in recent months along those lines, particularly the New South Wales Farmers Association, AgForce and the Victorian Farmers Federation. So there are still problem areas there. We want to see them addressed and, as I have said before, we want to see access to ongoing new technology in an effective and affordable way, as it becomes available.

Senator CONROY—I know that the figure of \$3 billion—and apparently that was leveraged by five while I was out of the room—

Senator JOYCE—Isn’t it always?

Senator CONROY—I am embarrassed for you. You have been only claiming \$6 billion, but apparently you should have been claiming \$15 billion.

Senator JOYCE—Do not worry, we will.

Senator BOSWELL—We do not want to gild the lily too much.

Senator CONROY—Having said that, I just wanted to take you through the \$3 billion, so that the NFF are quite clear about what the \$3 billion consists of. It consists of \$1.1 billion to be spent over four years—let us say \$250 million per year. After that, it is the interest to be earned on \$2 billion—hopefully from cash, from Senator Joyce’s perspective, but possibly from Telstra shares. You could be loaning them money by the end of it at this rate.

Senator LUNDY—Or hoping that they will get some reserves.

Senator CONROY—That is calculated to be about \$100 million a year. So it is \$250 million times four and then \$100 million ongoing—let's say in perpetuity, just for the purposes for the discussion. The amount of money you have seen spent over the last few years has improved in some areas. I think those figures are well past \$1 billion on the information that Senator Adams had. Did you say it added up to \$4 billion, Senator Joyce?

Senator JOYCE—\$4.4 billion.

Senator CONROY—So \$4.4 billion. Do you think that an extra \$250 million annually is going to solve the problem?

Mr Corish—Since the telecommunications fund was announced we have had the opportunity to do some work on this. As I said earlier, we believe that it will deliver real outcomes and will dramatically improve things in rural Australia if it is effective and if it is tied to reviews on a regular basis. We now have the legislation that is designed to deliver that. We will be going through that in detail. We believe that a total of \$3.1 billion, if spent in an effective way—

Senator CONROY—Sorry, but you are not spending \$3.1 billion.

Mr Corish—Okay. An amount of \$2 billion in a telecommunications trust fund—

Senator CONROY—The interest earned.

Mr Corish—The interest earned from that in perpetuity, and the \$1.1 billion that has been allocated, we believe will dramatically improve rural telecommunications if spent in an effective manner.

Senator CONROY—Again, I know that this is something that has only come out this week, but the Telstra document that made a starring public appearance this week would be more consistent with your perspective on the troubles in the network than the sort of spin that we have traditionally had. Is that a fair comment? It seems to be much closer to the truth from your experience and your members' experience than comments from a range of people.

Senator RONALDSON—On a point of order, Mr Chairman. Mr Corish cannot possibly answer that question; there have been no specifics put to him. It is a generality that is totally inappropriate.

Senator CONROY—Is that a point of order or a debating point?

CHAIR—You are sort of speculating about spin, and I do not think that is fair to Mr Corish.

Mr Corish—Could I attempt to answer the question, please, very briefly?

CHAIR—If you are happy to.

Mr Corish—We have been telling all who will listen to us that there are problems with rural telecommunications for a number of years. Now we are finding that from a number of sources people are starting to agree with us.

Senator CONROY—Like Telstra, finally.

Mr Corish—So we are not backing away from that issue. The actual quantum of what is being claimed by Telstra and other people is something that we would have to evaluate. We have not had the chance to do that yet.

Senator CONROY—One of the great fears from the many people in rural and regional Australia that I have encountered in my travels over the last 10 months, since I took over the portfolio, is the concern about being locked into the current standard level. People understand that there is this huge transformation coming to the industry with voice over the internet, something that will get rid of STD calls—it has virtually abolished ISD calls already; most people do not realise that VoIP is actually used enormously now on ISD. It is that issue of the cutting edge technologies into the future that has really concerned people. They have said, ‘We don’t want to be locked into what we have now; it’s not good enough. We want to be locked into the future technologies.’ Do you think \$100 million a year ongoing is going to be able to provide access to those new technologies? Wouldn’t the roll-out of a fibre network around the country be a far more effective way of achieving that?

Mr Corish—We believe that the \$878 million that has been allocated to the roll-out of broadband and the ongoing approximately \$100 million proceeds from the telecommunications fund should not be spent in any one particular way. It should be spent in the most effective way to deliver the outcomes. In some areas it may be fibre. In some areas it may be satellite. We would not like to see a prescriptive outcome in this regard. We would want to see that the most effective outcome is delivered to ensure roll-out of state-of-the-art and effective telecommunications to all people in rural Australia.

Senator CONROY—I met with the Mayor of Narromine. He came to one of our Senate inquiries. He said, ‘The current satellite service I’m getting is rubbish.’ He said, ‘I actually drive 30 kilometres at night into Dubbo to use my daughter’s internet because she has got decent broadband as opposed to the satellite service I’ve got at the moment.’ While no-one wants to get into a technology-specific debate, do you think it is more preferable for an infrastructure network to come out of a future pot of money, if I can use that phrase, than a bandaid solution that requires ongoing bandaid solutions and top-ups each year from budgetary funds, fighting funds or whatever?

Mr Corish—If I can answer it in this way, building a new road is a lot better alternative than fixing potholes for the next 20 or 30 years. I cannot answer what is the most effective solution in that regard, but certainly a combination of rectification and a commitment to new technology is what is required, in our view.

Senator CONROY—Can we use the opposition’s period to see if the other opposition senators would like to ask any questions?

CHAIR—By all means, but while you are doing that I might ask a question about the role the witnesses see for competition in improving telecommunications in regional areas. You already have Optus, for example, providing satellite based broadband across the country. That, no doubt, has led to Telstra also lifting its game in relation to that. Surely in many ways it will be new technology brought on by competitors that improves regional telecommunication services in the future.

Mr Corish—We certainly believe that competition is a good thing. I think I said that in response to the first question that I was asked. But I think we also have to accept that there will be times when we have market failure, where in very remote locations in particular normal competition will not deliver the outcomes that are required. That of course is where we see the government having a very important role and that is where we see the proceeds of the \$2 billion telecommunications fund being absolutely crucial, as long as it is spent in an effective manner.

CHAIR—Indeed.

Senator CONROY—Thanks for coming back to the opposition time. The way the legislation is structured is that the bill would be voted on next week under the current government position but an overwhelming number of the regulations that will govern the operational structuring mechanism combined with pricing details and plans will be negotiated and approved over the next three or four months. Do you have a view on whether you like legislation to be all up-front at once or you have to vote for it and then see what you have actually voted for in three months time?

Mr Corish—We do not have to vote for it. That is the role of you people on that side of the table, and perhaps I do not envy you in that position sometimes. But I can say that of course we would like as much transparency and clarity as possible with regard to how it is going to occur, and in particular with regard to the issues around operational separation, which I think is where you are headed. We would like to see as much clarity as possible in that regard. But certainly under the proposed time frame of voting on the legislation in this sitting of parliament that is obviously not going to happen.

Senator LUNDY—Going to the issue of quality of service in rural and regional Australia, I know you are very familiar with that. One of the recommendations arising from the Estens review was to remediate pair gain systems that were preventing a quality service. We know now that there are many old pair gain systems that in fact limit dial tone—forget about any dial-up speeds worth trying to download an email on. A number of those systems actually prevent customers from getting dial tone when they want or indeed need it. What can you see in this plan that has been put forward that will get rid of those systems once and for all and make sure that all Australians can get dial tone?

Mr Corish—I will caveat my comments again by saying that we are going through the details of what is planned in that particular area. I suggest that the problem is even broader than that. Some people who have satellite service and rely on satellite service in remote areas also have significant voice quality issues. We have had a lot of feedback with regard to not just some of the older services but even some of the latest services. Again, until we have gone through the legislation in detail—certainly there are comments to that effect in the legislation as to how that will be dealt with—I cannot answer your question in any greater detail than that.

Senator WORTLEY—You have not had the opportunity to look at the bill yet, and you said that you will do that on Monday night. Do you have concern over the perceived urgency and the time frame—given that the minister said that the bill does not set a time for sale but

will allow a sale to proceed at some point in the future—and the fact that you now have a few days in which you are supposed to make some sort of a judgment on it?

Mr Corish—We will not be waiting until Monday night to go through the legislation. We have already started that process and it will continue over the weekend. At our policy council meeting—which is our policy-forming body—we will be assessing what is on the table and making comment after that. I suppose the simplistic comment is that the legislation must go through before the government can proceed with the sale at a time of their choosing and I guess, to some degree, at a time of Telstra's choosing. But that is not an issue for us. Our issue concerns ensuring that the legislation going forward delivers the outcomes that we want for rural Australia. We have been saying for quite some time that that is why the legislation is so important to us.

Senator LUNDY—We heard evidence before that changes which to some witnesses appear minor—for example, relating to the long-term interests of end users test as part of the competition regulation—have the potential to make basic services cost more and remove or change price caps in the way that we know them. In your consideration and assessment of the bills, can you pay particular attention to the evidence that was presented here today, as well as to the technical reading of the bills?

Mr Corish—I can assure you that the issues around the price caps, the whole gambit of ULL issues, which you are referring to—

Senator LUNDY—It could mean that the cost of line rental goes up in ways that previously would be unimaginable.

Mr Corish—That is something that we are certainly cognisant of and, again, something that we will be deliberating very carefully upon over the next few days.

Senator ALLISON—I will be as quick as I can. Mr Corish, we have just had the benefit of a submission from a School of Law. I am not sure what university it is from, but it is from a lawyer at least, so this is the first legal opinion that we have on this bill. It is pointed out that the bill requires that an amount of not more than \$2 billion be put into the fund, but it does not require the minister to in fact transfer that amount. Would you like to see amendments put in the bill that would reverse that and make it obligatory on the part of the minister to put that money in?

Mr Corish—We would have to take some advice on that issue as well. But, from our point of view, an effective and transparent fund is extremely important to give our people confidence that that money is there to deliver the outcomes that we want in rural Australia.

Senator ALLISON—You might want to look at this paper. Another point is made—that is, whilst the Commonwealth may transfer assets to the fund, it is clear that the fund bears the risk of any depreciation or devaluation. For instance, should shares be put into the fund and then they go belly up, as it were—not that that is likely, but they certainly may devalue to some extent—do you think it is fair that that fund cop that devaluation?

Mr Corish—We think that fund needs to be as secure as possible and we see that as being vital. At the same time it needs to deliver a dividend each year to ensure that the proceeds are

available for future proofing, to put it broadly. So we will be making more detailed comment after we have had the chance to assess it and discuss it with our policy council.

Senator ALLISON—It would be useful if you could provide the committee with your deliberations as well, I think. Another point to make, which is pretty obvious to me, is that there is no definition of the adequacy of equitable access, which is part of the bill. Would you like to see that spelled out a bit more clearly so that we know what that means?

Mr Corish—Again, transparency and definition in that regard would be an advantage but until we have had the chance to evaluate it in detail I cannot comment further than that.

Senator ALLISON—You have welcomed the review of the committee which is to be set up, the RTIRC. Would you like to see an obligation on the part of the Commonwealth to implement whatever recommendations that committee makes?

Mr Corish—Most definitely. We will certainly be making more detailed comment on that when we have had the chance to go through it in detail.

Senator ALLISON—It is clear that there is no obligation—they make recommendations to the minister—so I thought you may be interested in those points. There are others in the document that you might want to have a look at as well.

CHAIR—Thank you. I think that we will have to finish there. Thank you very much for appearing today. Again I express my appreciation for the trouble you took to get here.

[2.17 pm]

GRATION, Mr Douglas, Company Secretary, Telstra

McKENZIE, Ms Kate, Managing Director, Regulatory, Telstra

CHAIR—Welcome. We appreciate your coming. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you that should you at any stage wish to give your evidence, part of your evidence, or answers to specific questions in private you may ask to do so and we will consider your request. Would you like to make an opening statement?

Ms McKenzie—Thank you. Thank you very much for the opportunity to be here this afternoon. Much has been said and written this week about the regulatory regime that will permit Telstra and others in the industry to provide advanced services to all Australians no matter where they live. Some of it is correct. Some of it is mistaken. So today, I guess, we look forward to the opportunity to make our position clear.

First, we wish to do no more than offer facts and people can make their own judgments about our case. We can achieve good public policy only through public debate that is informed by the truth. We understand and respect the role of government and the difficulties that the government and all of you on this committee face in trying to balance the competing interests that are at stake here. But we also think that we have the right to advocate what is in the interests of our shareholders and our customers, and we will continue to do that. I would like to dispel one myth: the suggestion that Telstra wants to water down regulations that support services to rural and regional Australia. That myth seems to be propagated every time we talk about reform of the regulatory framework. It is not true and never has been true. Telstra is absolutely committed to serving its customers wherever they live in Australia.

What we are saying though is that something has got to give. The funds that have traditionally subsidised rural and regional services are fast running out. Competitor contributions are being reduced by almost 30 per cent over the next three years. Profits from urban areas are shrinking, under pressure from ever-increasing competition. We are being required by regulators to give access to our network to our competitors at below cost and new technologies and services, such as mobile and broadband, have much lower margins than old technologies. It is because we are committed to serving rural and regional areas that we are bringing these issues to the attention of the Australian public. We are especially concerned about the ACCC's proposed pricing of our network, which if it were to proceed would undermine a long-standing national commitment to equal treatment, including pricing parity, between urban and rural Australia. The ACCC proposes that our wholesale competitors be allowed to buy access in the city for \$7 per line but access in rural areas would cost more than \$140—20 times CBD prices. The ACCC's prices are way below what it really costs Telstra to provide these services in the first place. The only people getting a fair go are the shareholders of Telstra's competitors, who will have no incentive to invest in rural Australia under these circumstances.

Thirdly, Telstra wants to be free to be able to build the best networks and products, provide the highest quality service and offer the most competitive prices too. Unfortunately, the laws that exist today create barriers that often make it hard for us to do that. Telstra must be one of Australia's most regulated companies. We are governed by wide-ranging laws covering the prices we can charge, the investments we can recover, the services we provide and our technical operations. Today's legislation, which expands regulation and increases the reach of ministerial authority, will only make that worse.

At a time when the rest of the world is winding back regulation with growing competition, Australia is increasing the scope and reach of regulators and expanding the power of political involvement in the regulatory process. As far as we are concerned, this is a step backwards which will dull competition, weaken Telstra and further reduce shareholder value. Even without taking into account the new regulation added by the sale bills, the current regulatory regime requires the work of more than 90 full-time Telstra staff and costs at least \$12 million annually. That is just in the regulatory group alone. That is enough to upgrade more than 160 rural exchanges with broadband technology. At a time when the company needs to be fleet of foot to respond to changing market circumstances and to compete effectively on the local, regional and national stages, this legislation forces us to become a superbureaucracy. The operational separation provisions in particular are complex, costly and uncertain—and anything that increases systemic costs decreases shareholder value. Instead of focusing on our customers full time as we would like to do, we will be preparing plans, consulting on them, negotiating amendments, addressing committees, auditing our plans, arguing about compliance as to those plans and writing reports for filing in various offices.

To be more specific, let me identify some examples. Under the competition and consumer bill, the ACCC is being given the right to write its own procedural rules, including in some cases rules with no requirement to provide procedural fairness. This gives the regulator expanded powers to interfere in crucial issues impacting Telstra and the wider industry, leaving us with very few avenues of appeal. The bill appears to require us to give away to our competitors, whenever they ask, value added services in which we have invested. Why would anyone invest in these circumstances? The penalties for certain anticompetitive conduct have increased from \$1 million a day to \$3 million a day. When this is put in the context of a regime that is very discretionary, it is like making the rules of the road vague and then tripling the fines for breaching them. The government retains its power of direction all the way down to a 15 per cent shareholding. This means that the government's inherent conflict of interest remains well after it ceases being the majority shareholder. At a point when the government is not the majority shareholder, it still has the potential to direct the company and potentially usurp the power of ordinary Australians who have invested in Telstra and have rights as shareholders.

Some people have said this week that Telstra should just forget about the regulation debate and focus on management and delivering service. We wish we could; we would like nothing better than to do that. But that does ignore the fact that regulation is central to almost everything that we do and is a central feature of our management environment. Key elements of our responsibilities are to contain costs and increase revenues. The regulations we face here

increase our costs and hamper our ability to expand revenues. In fact, our ability to deliver the next generation of products and services for Australia is severely constrained by regulations that prevent us from earning a commercial return for our 1.6 million shareholders. Around the world, carriers are investing in new services, such as fibre to the home, because governments have let the market operate and have reduced the intervention of regulators.

It is now matter of record that Telstra recently took to the government a plan to build a similar modern, high-speed network. It would have replaced ageing parts of the old copper network and at the same time connected 98 per cent of Australian homes and businesses to super fast broadband within five years. The government has chosen to take another path. We accept that decision—that is their right. Our job is now to consider what we can do using our own money—our shareholders' money—plus any funding made available under the mechanisms established by the sale bills. But we should be clear that we consider that that is a second-best solution. In our opinion it will not guarantee within the same time frame the same breadth of coverage as the solution we proposed. In concluding, I would just like to say that Telstra has always been committed to Australia and continues to be so. Our point simply is that, if we could get the regulatory settings right, we could do a much better job going forward.

Senator CONROY—I was just wondering where Dr Burgess was?

Ms McKenzie—The company made a decision that, given that the conversation here this afternoon was to be primarily focused on operational separation and other provisions of the bill, Mr Gratton and I were best placed to deal with those questions.

Senator CONROY—He is not up to scratch on these issues?

Ms McKenzie—Certainly he is.

Senator CONROY—Do you report directly to Dr Burgess.

Ms McKenzie—I do.

Senator CONROY—We will let him know you said that. Out of general interest, when did Telstra receive the final text of the bills?

Ms McKenzie—Yesterday. I cannot remember the exact time, but some time during the course of yesterday.

Senator CONROY—So you only got them yesterday as well?

Ms McKenzie—Yes.

Senator CONROY—I am glad you are getting the same opportunity to look at them as we are. You raised this in your opening remarks: you have made much over the recent days about the ACCC's de-averaged ULL prices. Have you ever submitted a ULL access undertaking at notionally averaged prices?

Ms McKenzie—Historically we have argued for averaged pricing. The ACCC has made it very clear that they will not accept an undertaking based on averaged pricing. Given that we operate in a commercial environment and that is what the rules say, we have submitted an

undertaking on a de-averaged basis, but clearly making the point that we think that that is not the right way to go and that averaged pricing would produce a better outcome.

Senator CONROY—In a speech you made earlier this year you said that Telstra was ‘being stifled by red tape’.

Ms McKenzie—Yes.

Senator CONROY—Do you think the government’s regulatory package does anything to lessen this burden?

Ms McKenzie—No, in fact we think it will increase the burden.

Senator CONROY—The ACCC has said today that it is estimated that the government’s operational separation model would cost it around \$4 million to \$5 million per year to oversee. Has Telstra done any calculations of how much it will cost you to implement and maintain the operational separation regime?

Ms McKenzie—Given that we only got the bills yesterday, it is difficult to be precise. Clearly, though, looking at what is involved, there would be significant sums of money involved putting together the plans, putting in place compliance procedures and having all of those plans audited. We are unclear about the pricing side of the operational separation proposal, so that is a bit difficult. But I think we could be confident that there would be significant sums of money involved.

Senator CONROY—Far be it from for me to suggest that any bureaucracy would talk down the possible impact of their regulation, but does it worry Telstra that the ACCC believes it will spend \$5 million a year overseeing the operation of the separation regime?

Ms McKenzie—I am not sure what you mean by ‘does it worry’ us?

Senator CONROY—Do you have concerns? You would anticipate that the ACCC would be talking down the actual cost to you—they do not like to scare the horses.

Ms McKenzie—As I understood what you were saying, the ACCC have said that those would be their costs.

Senator CONROY—No, sorry, I meant your costs.

Ms McKenzie—Our costs?

Senator CONROY—Yes.

Ms McKenzie—We have not had an opportunity to do a precise calculation of all of this, but I think that we would think our costs would be significantly higher than that.

Senator CONROY—You have the ACCC with \$4 to \$5 million but you think it will be even higher than that?

Ms McKenzie—Yes.

Senator CONROY—Others have suggested that that would mean the ACCC are going to play a fairly interventionist role under this particular model.

Ms McKenzie—Obviously that is a concern to us. It is very difficult for us to be getting on with running the company and providing good quality services if we are being constantly diverted by requests for information and data and negotiations over what we can and cannot do.

Senator CONROY—The last time Bill Scales, who is no longer with Telstra, was before this committee we discussed proposals for the increased separation of Telstra's activities at some length. During this discussion Mr Scales commented that Telstra did not know how operational separation should look because it did not understand the problem it was trying to solve. A few months down the track, does Telstra now understand what the problem is that the government's operational separation regime is trying to solve?

Ms McKenzie—I think we would stick with that earlier statement, that it does look a bit like a solution looking for a problem. Having said that, we have tried to constructively engage in discussions with the government to see what could be done to address what I understand to be a perceived difficulty with the transparency of the way the current arrangements work.

Senator CONROY—On the topic of the enforcement of the operational separation regime, what is Telstra's view of the fact that the minister holds primary responsibility for enforcement of the operational separation regime?

Ms McKenzie—That is clearly a concern for us and something that I did cover off in my opening comments. We think it is actually a backward step and it is a very difficult position for the minister to be placed in, with powers that broad and pressure then to be making calls on what might be quite detailed arrangements about the internal operations of Telstra. It does seem to be quite extraordinary.

Senator CONROY—I totally share your view. To hand any politician the ability to determine the sorts of outcomes that have been given in this bill is quite an extraordinary business proposition, I would have thought. It would not fill you with much certainty about an outcome of anything.

Ms McKenzie—No.

Senator CONROY—These things could become very politicised. I can imagine I would be having a discussion with the minister on a regular basis about all of these issues on the floor at question time. While I am not part of the committee process or any part of the process, I will certainly be forced to undertake examination of your business propositions on the floor at question time and in the Senate estimates processes. It sounds like it would be a fairly tough regime to live under.

Ms McKenzie—Yes. I would not disagree with that.

Senator CONROY—The explanatory memorandum to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill cites as a reason for the adoption of the government's proposed model over the ACCC's model the fact that the model would minimise costs on Telstra because it reflects Telstra's current structure. I understand that the new management of Telstra is currently undertaking an operational review of the

company. Could this review result in Telstra wanting to restructure itself in a way that is contrary to the government's operational separation model proposed in this bill?

Ms McKenzie—That is a question I am not in a position to answer.

Senator CONROY—If only Dr Burgess was here—he could help us!

Ms McKenzie—I think you would get the same answer from Dr Burgess, which is that those reviews are under way. No results are known from those reviews.

Senator CONROY—But you understand the point I making.

Ms McKenzie—I do understand the point you are making.

Senator CONROY—The government has said: 'Here is your current structure. We will plonk this model down on top of you,' and you are engaged in a shake-up of your structure.

Ms McKenzie—There is no question that we would prefer the freedom to organise ourselves as best suits our commercial arrangements.

Senator CONROY—In a recent proposal put forward by Telstra to the government, it suggested that it would cost more than \$5 billion to bring Australia's telecommunications network up to something approaching international standards. In this light, what is your view of the adequacy of the amount of capital spending made available by the government through these bills?

Ms McKenzie—Obviously, as you are aware, we put up our proposal to the government for a broadband plan. It was quite differently constructed. It would have provided six megabits to 98 per cent of Australia. We put it up on the basis that we would fund \$3.1 billion of that plan and \$2.6 billion would go out to tender. That was our view of the best way of doing it. The government has chosen a different path. That is the government's right.

Senator CONROY—Do you think that \$3 billion over 20 years from the government will be adequate to bring Australia's telecommunications network up to the international standards that you described in your document?

Ms McKenzie—Again, that is a very difficult question to answer, because we have not seen details of how it is proposed—

Senator CONROY—It sounds like a lot less than the \$5 billion you said is needed right now—that is all.

Ms McKenzie—I think what it delivers depends a lot on how it is structured and how it goes out to tender. Obviously, if that is done well, it will produce more. If it is done poorly, it will produce less.

Senator CONROY—But you understand the point that it is \$1.1 billion over four years, which is, let us say, equally, \$250 million a year. So it is \$250 million a year for four years, whereas you were looking at a \$5 billion proposal. They do not quite match, do they?

Ms McKenzie—As I have said, we think our proposal was to be preferred, but that is not a decision for us. It is a decision for the government.

Senator CONROY—Under this regulatory package, the government has given Telstra responsibility for drafting the terms of the local presence plan. What can we expect from Telstra in respect of this plan?

Ms McKenzie—As we do with all regulations that are imposed on us, we will comply with what we have been required to do by the legislation.

Senator CONROY—You are drafting the plan?

Ms McKenzie—That is right, and we will draft it in accordance with what we are required to do by the legislation.

Senator CONROY—Is it too early to get a picture?

Ms McKenzie—I think that process has just commenced, so probably the answer is that it is too early.

Senator CONROY—It started prior to this legislation, I understand.

Ms McKenzie—Yes.

ACTING CHAIR (Senator Lundy)—In relation to the obligations this legislation places on Telstra to draft an operational separation plan, can you provide the committee with an insight as to how Telstra has ascertained that responsibility and the time frame that you envisage it will be delivered in?

Ms McKenzie—Again, I think that is a question of what the legislation provides. We will obviously do whatever the legislation requires us to do in that regard.

ACTING CHAIR—We do know that the bill will require you to produce an operational separation plan. So Telstra will be preparing that plan. Do you have an indicative time frame in which you would do that and do you know what shape it would be in?

Ms McKenzie—As I have said, we will do whatever the legislation requires us to do. If we are required to produce a plan in a particular period, that is what we will endeavour to do.

ACTING CHAIR—With respect to the \$5 billion or so that Telstra nominated in its paper to the government for the costs of the network, are you able to provide the committee with advice on what speeds across the board would be achievable if the \$3 billion over 20 years is spent on the network—or, perhaps more accurately, \$1.1 billion over four years—and what likely impact that is going to have on the quality of service for people in Australia?

Ms McKenzie—Again, that is not a question that can be answered this afternoon, because you need to see the detail of how that is going to be constructed, what the arrangements are, what the rules are going to be, how the package of money is put out there, what requirements are attached to it. It would be pure speculation on my part to try and guess what you might get at the end of that.

ACTING CHAIR—Is Telstra in any position at all to provide guarantees as part of this package about the removal of some of the more archaic elements of your network infrastructure, like some of the pair gain systems used in rural and regional Australia?

Ms McKenzie—I am sorry, can you repeat the question?

ACTING CHAIR—Are you in a position to give some guarantee that some of the more archaic and not well functioning aspects of your network will be removed as a result of this legislation?

Ms McKenzie—No, we are not. As far as we are concerned, additional regulatory imposts will impact on our capacity to be able to do that. In fact, our capacity to do that may well be diminished at the end of this, rather than otherwise.

ACTING CHAIR—So this package might have the opposite effect. It might make your ability to upgrade your network harder, more difficult?

Ms McKenzie—At the end of the day, if decisions proceed in relation to things like ULL, which I referred to, and the company is less prosperous and has less money, there will obviously be less money to invest in networks going forward.

ACTING CHAIR—Can you tell the committee why Telstra made the decision not to continue upgrading, particularly rural and regional and outer metropolitan exchanges, to be ADSL compatible some years ago?

Ms McKenzie—I am sure that was a decision that was taken by the company for good commercial reasons at the time.

ACTING CHAIR—Has Telstra made any other decisions recently that have an adverse impact on the provision of broadband services to rural and regional customers and outer metropolitan customers?

Ms McKenzie—Not that I am aware of.

ACTING CHAIR—Is Telstra able to clarify just how many of its lines are faulty? We have had competing documentation from the government saying it is less than one per cent and Telstra's own document saying it is some one in seven lines. Are you able to tell the committee the truth?

Ms McKenzie—One has to be very careful with those figures—

ACTING CHAIR—Indeed.

Ms McKenzie—because we have a lot of metrics about lines. I think the figure that was quoted was 14 per cent of lines. I can certainly confirm that that refers to 14 faults per 100 lines per annum. That is a different metric to the things that are measured under both the CSG arrangements and the national reliability framework arrangements. It gets very complex very quickly. That statement was made in the context of our broadband plan. I guess I was making the point that we think we do need to invest in future networks, but we have to have in place a set of competition policy arrangements that provide us with an incentive to do that.

ACTING CHAIR—You have just placed on the record the view of the company that it is less likely to invest in upgrading the network if this package proceeds. Doesn't that constitute effective blackmail, as far as Telstra is concerned, in dealing with the government's package?

Ms McKenzie—I do not think so at all. As I said in the beginning, we as senior management have an obligation to look after the interests of our shareholders and our customers, and that is what we will continue to do.

ACTING CHAIR—But ‘looking after your customers’ is not ‘investing in the network’; in fact, the effect appears to be the opposite. You are putting shareholders above the interests of your customers.

Ms McKenzie—No, not at all. What we are saying is we need the right set of arrangements in place to let the company prosper. The best way of making sure that the network is upgraded and improved going forward is to provide the conditions where people are prepared to invest and the company thrives and prospers, and that is what we are asking for.

ACTING CHAIR—To go back to the issue of the line faults: you said that the metrics are very complicated. Can you explain to the committee how Telstra can come up with a figure of 14 per cent and how previously the ACA, and now ACMA, can come up with the figures they have? Do they get the same numbers that you have used to calculate your line faults?

Ms McKenzie—They are measuring different things. I think this issue has been dealt with in some considerable detail previously—

ACTING CHAIR—Indeed, it has.

Ms McKenzie—and perhaps I can refer the senator to the detailed answers that were given in response to those issues when they were raised earlier. I have got a copy of a letter here from the Australian Communications Authority which explains that in some detail and which I would be happy to table for the senator’s benefit.

Senator CONROY—It would be remiss of me, given how much time the committee spent talking about Mr Short, if I did not at least acknowledge that Mr Short is in the room. Do not be shy, Mr Short: stand up and let everyone say hello to you. That is Nick Minchin’s hand-picked Liberal spy that he made Telstra’s hire at a cost of \$400,000 to the shareholders.

Senator BOSWELL—That is not very appropriate, Senator Conroy.

Senator CONROY—Ms McKenzie, is Mr Short here still engaged in spending hundred of thousands of Telstra shareholders’ money doing a media monitoring service for the government?

Ms McKenzie—I am not sure that that is relevant to the terms of reference of this committee. Maybe I could ask the chair for a ruling on that.

Senator CONROY—No, it is just a follow-up to a question I asked at the last estimates, so I am happy to take it up at the next one.

Ms McKenzie—That seems the appropriate course of action.

Senator JOYCE—Ms McKenzie and Mr Gration, thanks very much for turning up today. It is disappointing that Mr Burgess is not here. He manages to pop up in other sorts of places.

Senator CONROY—He gets more publicity than you, Senator Joyce.

Senator JOYCE—In scaring the horses he has managed to shoot half a dozen. Are you in favour of this package that is currently before the parliament? Can we just get a ‘yes’ or ‘no’ on that?

Ms McKenzie—I think, like others before us, we are still going through the details of the legislation. I think the company has made public its position that it supports the privatisation of the company. Obviously, as we have just discussed, we have some concerns about some of the provisions of the other bills.

Senator JOYCE—Everybody seems to have a problem saying whether or not they like it. I gather from that that you are in favour of it.

Ms McKenzie—We support the sale bill. We certainly do not support the operational separation provisions; we think there are some major difficulties with them.

Senator JOYCE—I am being selfish; I am looking at it through my own eyes. Would you want me to vote for it or not?

Ms McKenzie—I understand the position that you are in, but I am not sure that that is a question that it is reasonable to expect me to answer.

Senator JOYCE—This room is a remarkable place. No-one wants to answer that question, but they expect me to! Is it true that Telstra publicly reports monthly on the percentage of services that were fault free?

Ms McKenzie—I think it is quarterly.

Senator JOYCE—Okay. Is it true that statistics published by ACMA show that more than 99 per cent of services were fault free in 2005?

Ms McKenzie—Yes.

Senator JOYCE—Is it true that the regulator, the Australian Communications and Media Authority, publicly releases information every three months on fault repair and reports annually on the actual numbers of faults?

Ms McKenzie—Yes.

Senator JOYCE—Is it true that the latest fault repair time performance figures show that 91 per cent of telephone faults were repaired by the customer service guaranteed time frame in the last quarter?

Ms McKenzie—As far as I am aware, yes, that is right.

Senator JOYCE—Is it true that this is three per cent higher than the same quarter in 2004?

Ms McKenzie—Again, I do not have all those numbers in front of me, so I express some caution about the accuracy of those numbers, but, generally speaking, I think that sounds about right.

Senator JOYCE—We are just trying to show a trend here. Is it true that in 1998, when the Howard-Anderson government introduced the customer service guarantee, Telstra was repairing just 70 per cent of the telephone faults on time?

Mr Gratton—Neither of us have those exact numbers before us, but we certainly have no reason to think they are incorrect.

Senator JOYCE—Therefore, is it true that there has been a 20 per cent improvement since 1998 in the repairing of telephone faults on time?

Ms McKenzie—Again, we do not have those figures in front of us, so it is difficult to give a straight answer.

Senator JOYCE—Is it true that, on average, a phone service will have a fault once in every seven or eight years?

Mr Gration—Again, I recall statistics of that nature, but we do not have the exact figures in front of us.

Senator JOYCE—I know there is a difference in what you have reported. This is why we need Mr Burgess here. I am sorry that you are here, because you have been sent—

Senator BRANDIS—Senator Joyce, I think that perhaps Ms McKenzie might have been in a position to give you some information in relation to the previous question which Mr Gration was unable to.

Senator JOYCE—Is it true that, on average, a phone service will have a fault once in every seven or eight years?

Ms McKenzie—I am advised that that is about right.

Senator JOYCE—As I said, I am sorry that you are here. You are a patsy. The boss has bolted—I wish he would! Is it true that the 14 per cent fault figure listed in your 11 August briefing was a number dreamed up to support a case for trying to get more money from the Commonwealth government?

Ms McKenzie—No, I do not think that is right. As I said in response to the earlier question, it is measuring something different. That is measuring the number of faults per 100 lines per annum, and it is just a different metric based on different characteristics.

Senator JOYCE—The problem in our area is that people believe you. They believe you and, because they believe you, it is causing a lot of problems.

Ms McKenzie—Those figures were given in the overall context of our company saying, ‘If you want the network to grow, you need to provide the conditions for the company to grow and prosper and to be able to have the conditions where it is a rational decision for the company to make to invest in those future improvements to the network.’

Senator JOYCE—What money have you allocated in the long term to build the capital to comply with the universal service obligations and the customer service guarantee?

Senator RONALDSON—Ms McKenzie, I presume you are talking about selling it in order to get the capital injection, expand and grow.

Ms McKenzie—As I have said, the company supports the full privatisation of Telstra.

Senator JOYCE—What money have you allocated in the long term to build the capital infrastructure to comply with your universal service obligation, your customer service guarantee and the network reliability framework, all of which has become apparent is in a state of disrepair, if we believe what you have been saying?

Ms McKenzie—Again, I would say that the company always puts aside sufficient capital to be able to comply with all of those obligations in the regulatory framework, but we are saying that eventually something has to give. If we keep on having extra requirements imposed on us that we are expected to fund and we have to give away access to our network below cost, then the funds that support that will eventually dry up.

Senator JOYCE—I am not querying it; I just need to know what the number is. I want you to flesh that out a bit for everybody in Australia to see. How much is it going to cost to keep the universal service obligation, customer service guarantee and network reliability framework out there and how much are we behind the eight ball? I am asking this because there have been numbers like \$2 billion bandied around, and they have come from Telstra, so I want to know what the truth is.

Ms McKenzie—Again, we came prepared to talk about the provisions of the bill. We understood they were the terms of reference for the committee. Neither Douglas nor I are experts on network investment. I can only repeat that what we are saying is: if you want those services to be improved going forward, then you need to create the environment where the company has the incentive to invest and is allowed to prosper and grow.

Senator JOYCE—That is not the answer, but anyway. The final thing is—I just want to clarify this for others in the room here; it is an easy question—if there were money available to you to invest in your own network, for every dollar that the government subsidised the increase in the network capability, say for broadband or mobile, how much would you generally tip in yourself?

Ms McKenzie—Again, you know, we put—

Senator JOYCE—If we give you a dollar, how much do you put in yourself? You end up with ownership of it and the income stream from it.

Ms McKenzie—In our proposal to the government we said that, to give six megabits to 98 per cent of Australia, we would invest \$3.1 billion. We also said that, to make that work and to make that sustainable going forward, there would have to be a \$2.6 billion investment from the government.

Senator JOYCE—So we put in \$2.6 billion and you tip in \$3.1 billion?

Ms McKenzie—But I should be clear about that: that was on the basis that the \$2.6 billion would be obviously the government's funding for them to go out to tender—

Senator JOYCE—Just for the sake of other people in this room: it is subsidisation; we put in two and you put in three. This \$3.1 billion package that we have got out there actually represents a lot more telecommunications infrastructure than \$3.1 billion, doesn't it?

Ms McKenzie—In a sense I guess the answer to that question depends on what the settings end up looking like. If the settings are right to encourage investment, then investment will happen. If the settings are not right to encourage investment, then it will not happen. How much you get out of those funds will depend on that.

Senator RONALDSON—I think we have covered that. I have got some questions here as well. You say you have concerns with the role that the minister would play in forcing operational separation. Do you remember saying that you had concerns about the minister?

Ms McKenzie—Yes.

Senator RONALDSON—Would you prefer the ACCC doing it?

Ms McKenzie—No. In the end what we would argue is that the provisions are so broadly stated that—

Senator RONALDSON—I think you have answered my question.

Ms McKenzie—either in the hands of the minister or the ACCC there is potential there for an extraordinary amount of interference in the day-to-day operations of the company.

Senator RONALDSON—I think you have answered my question. You have talked about how regulations constrain Telstra's revenue. What was your most recent full year profit and how does that compare to last year?

Mr Gration—From memory, the profit was \$4.4 billion and for the prior year it was \$4.1 billion.

Senator RONALDSON—You said 90 people are tied up with dealing with Telstra's regulatory burden. What percentage of your employees is that?

Mr Gration—We have about 40,000 employees. I must admit I cannot do the figures in my head as to what percentage that would be.

Senator BRANDIS—Less than a quarter of one per cent.

Senator RONALDSON—It is less than a quarter of one per cent, I am advised.

Senator BRANDIS—Ms McKenzie, I do not wish to be too harsh, but all these complaints we hear from Telstra about the regulatory burden are a consequence, ultimately, of the fact that you are a monopolist of the local access network.

Ms McKenzie—We are not a monopolist.

Senator BRANDIS—You are certainly a monopolist of the local access network. That is certainly the view of the ACCC, incidentally. It is not unknown for a company which is the owner of the infrastructure to whinge and carry on about providing access to that infrastructure to potential retail competitors. But the reason Telstra is in the position it is in because it or its predecessors has enjoyed a monopoly for years.

Ms McKenzie—I just disagree with that statement. We are not a monopolist. We have not been a monopolist for a number of years now, and rules that continue to regulate us as though we are a monopolist will eventually put us out of business.

Senator BRANDIS—So when Mr Graeme Samuel told us this morning that Telstra is the monopolist of the local access network, that was wrong?

Ms McKenzie—We have competition in all aspects of the network these days. We still have some market power.

Senator BRANDIS—You own the network.

Ms McKenzie—That is true, but with modern technology people can build—

Senator BRANDIS—Don't you think that is a source of market power?

Ms McKenzie—Yes, it is a source of market power. I do not disagree with that.

Senator BRANDIS—A source of market dominance?

Ms McKenzie—In some aspects of the network we have a dominant position. We are arguing that, with increasing competition, you have to look again at the regulatory framework. You cannot continue to regulate us as though we are a monopolist in an environment where people have the opportunity to build their own new services if they want to. There are a whole lot of new technologies out there, and people selectively compete. If we are required to give away access to our network below cost in circumstances where people compete selectively, then the traditional model of our being able to cross-subsidise starts to break down and you have to look again at how you set things up to make that work properly.

Senator BRANDIS—In the last several years you have gone from the position of being the only player—the pure monopolist—to, on any view, the dominant player in the Australian telecommunications market. You would surely accept that characterisation.

Ms McKenzie—Yes.

Senator BRANDIS—Mr Samuel—who is the competition guru, I guess—and Mr Willett, his specialist telecommunications man, gave us some evidence this morning that operational separation would probably be good for Telstra in the long run, good for the markets, obviously good for competitors and good for consumers. Which of those propositions don't you accept?

Ms McKenzie—I do not accept any of those propositions. They are entitled to their view; we have a different view.

Senator BRANDIS—You do not think that your view—as the monopolist of the infrastructure, I would contend, and on your own evidence the dominant player in the market—might be a self-interested view when it comes to making room for the expansion of minor retail competitors?

Ms McKenzie—That is not what we are arguing for. The company has always accepted that, like every other company, it should be bound by the trade practices law.

Senator BRANDIS—Part IIIA and part XIC.

Ms McKenzie—What we object to is the telco-specific regulation and the intrusiveness of the telco-specific regime, which under these provisions would become even more intrusive. We do not think that is justified anymore.

Senator BRANDIS—Don't you see that, as the monopolist until a few years ago—

Ms McKenzie—I do not accept that we are a monopolist.

CHAIR—Let the senator finish, please.

Senator BRANDIS—As the monopolist of the entire market until a few years ago—I would contend, though you dispute—and to this day the monopolist of the infrastructure and, on your own evidence, the overwhelmingly dominant player, don't you see that any sensible regulation and operational separation has to be telco specific because it is only ever going to be about one telco, namely, you?

Ms McKenzie—I repeat what I said earlier: I am not even sure what the problem is that operational separation is supposed to be solving.

Senator BRANDIS—The problem is that you are the monopolist of the infrastructure.

Ms McKenzie—We are not a monopolist; we have a dominant position. We are in an environment where people can compete. They can build their own infrastructure. They can purchase access from us. There are many more opportunities for people to compete. We are not arguing with that. We are in favour of competition. We are just saying that we should be able to compete on fair terms, just like everybody else.

Senator BRANDIS—It all depends which market you are talking about. What percentage of the local access network does Telstra own? It is 100 per cent, isn't it?

Ms McKenzie—There is a distinction, though, because not everybody has to use our local access network.

Senator BRANDIS—I am talking about the local access network. We are talking as if there is only—

Ms McKenzie—Optus has its own HFC network that runs past more than two million homes in Sydney. That is a competing infrastructure. This myth that that is the only way people can compete with us—

Senator BRANDIS—So when Mr Samuel described you as the monopolist of the local access network, in your view he was misstating the position?

Ms McKenzie—The point we are making is that there are competing infrastructures that people can use to provide those services going forward. The traditional view that that infrastructure is the only infrastructure available is just not right anymore, and it will be increasingly less important in the years ahead.

Senator BRANDIS—Ms McKenzie, you would agree with me, I dare say, that the more competition there is in the retail market, the better for the functioning of that market and the better for consumers. Would you go along with that?

Ms McKenzie—Yes.

Senator BRANDIS—I thought you would. In order to facilitate competition in the retail market, do you concede that other retail competitors of Telstra need access to your infrastructure?

Ms McKenzie—There is a combination of ways in which they can compete with us.

Senator BRANDIS—Yes. Is that one of them?

Ms McKenzie—In relation to the traditional services, the old services provided over the old copper network, we accept that people will, in some circumstances, require access to that network. We have never contested that. We supply that access and we will continue to do that. What we are arguing about, though, is that we are required to give that away below cost. That is not a sustainable proposition going forward, and it also discourages competitors from investing in their own infrastructure.

Senator BRANDIS—The pricing determinations are still to be arrived at, Ms McKenzie. But my point is that if there are going to be efficiencies in the retail market to the benefit of consumers, you, Telstra, are going to have to give them access, and to that extent the regulation of which you complain has to be telco specific.

Ms McKenzie—It is perfectly possible to give access to that infrastructure under the general provisions of the Trade Practices Act, including part IIIA.

Senator BRANDIS—We can argue about that until the cows come home, but the fact is the only telco that is going to be required to yield access under whatever provision—whether it is under the TPA or under the bill that is before the Senate at moment—is Telstra, isn't it?

Ms McKenzie—No. In fact, it may well be that in the future we will want to seek access from other players in the market.

Senator BRANDIS—Have you ever sought access to any of the infrastructure facilities of any other telco in the country?

Ms McKenzie—We are examining those options at the moment.

Senator BRANDIS—Have you ever done so?

Ms McKenzie—We are examining those options at the moment.

Senator BRANDIS—Have you ever done so?

Ms McKenzie—And, yes, we do access mobile terminating access from other providers.

Senator BRANDIS—I see.

Senator RONALDSON—You say that around the world regulation has been wound back. What is happening in the UK at the moment?

Ms McKenzie—In the UK there is—

Senator RONALDSON—In relation to British Telecom.

Ms McKenzie—In relation to British Telecom, certainly the regulator is looking at rolling back regulation at the retail layer.

Senator RONALDSON—You can say the words: 'operational separation', is it not? Yes?

Ms McKenzie—I am sorry?

Senator RONALDSON—Operational separation, I think it is called, isn't it?

Ms McKenzie—Yes.

Senator RONALDSON—What are they doing in the Netherlands, do we know?

Ms McKenzie—I think the Netherlands are in a bit of trouble at the moment.

Senator RONALDSON—Yes, and I suppose that can be said of many fronts. It is simply not right to argue the case that Telstra is arguing, that this country is going against international trends. British Telecom, with the UK imposing operational separation, is hardly a roll-back of regulations, is it?

Ms McKenzie—But it is also being done in a context where there will be a roll-back of retail regulation in that market. In the US we have seen the FCC roll back significantly obligations in relation to investments in new infrastructure, including fibre. There is no unbundled local loop available in New Zealand.

Senator BRANDIS—But in the United States there is not a monopoly dominated market.

Ms McKenzie—There are large telco players in the US market.

CHAIR—There are a couple of monopolies.

Senator BRANDIS—Yes, there are several, and you are the only large telco player in the Australian market and you own the whole infrastructure.

Ms McKenzie—We do not own the whole infrastructure. There are a number of competing infrastructures available, including Optus's HFC cable—

Senator BRANDIS—In a commercial sense, to a trivial degree.

Ms McKenzie—and TransACT in Canberra, who have their own infrastructure, and mobile networks.

Senator RONALDSON—You mentioned earlier that you have been involved in putting together a plan for some form of operational separation—is that right?

Ms McKenzie—I am sorry, I did not hear the beginning of that.

Senator RONALDSON—Have you done any work yourselves—have you put together internal plans?

Ms McKenzie—Yes, as I said in my earlier comments, we have had a number of meetings with the department and a number of discussions with the government about how an operational separation arrangement might be made to work.

Senator RONALDSON—When did that start?

Ms McKenzie—I think that began in about April.

Senator RONALDSON—April?

Ms McKenzie—Yes.

Senator ADAMS—I have a question for Mr Gratton. The composition of your board interests me. At the moment, how many people with experience from rural, remote and regional Australia are members of the board?

Mr Gratton—There are six directors altogether. You would be aware that the Telstra Corporation Act requires that.

Senator ADAMS—I am asking about your current board.

Mr Gration—Donald McGauchie, who is the chairman, is a former president of the NFF and in fact lives in a rural area at the moment. The other director who most obviously fits into that category is John Stocker, who was chairman of the grape and wine research corporation—he will correct me if I have not got the title right—and he is very actively involved in the wine industry in rural areas.

Senator ADAMS—You do not have any active consumer or someone who is not involved with industry and who really is a true community person at the moment?

Mr Gration—I think all the directors would say they are true community people.

Senator ADAMS—To a point, yes, but I mean from rural Australia.

Mr Gration—Mr McGauchie grew up in and, he tells me, was born in the house he currently lives in on his property outside of Bendigo. I think he would very strongly assert that he was a true person from the rural community of Australia.

Senator ALLISON—I would like to go back to the beginning of your presentation where you talked about the proposal which the government knocked back for broadband. We have had a submission that suggests that the current structure is totally unsuitable for true broadband internet to the home as the bandwidth requirements will exceed by 10 times those currently provided and for those already on broadband, including those not yet connected, the network, if not radically changed in structure, will operate in total congestion. The submission goes on to say that the \$2 billion Future Fund should at least be doubled or quadrupled to \$8 billion to cater for this apparent oversimplification of the core backhaul network necessary for true broadband internet. Do you agree with that assessment of the situation? And, now that this has been knocked back, what is Telstra's plan for delivering broadband services?

Ms McKenzie—As I said at the beginning, we think that the plan that we put to the government would have delivered a better outcome. They have knocked that back. It is up to the government now, I think. We will obviously respond. We will have a look at the way that the fund is structured and make some assessment about what we think we can best do with that fund. Again, though, if the regulatory environment is not set up in such a way as to allow us some certainty about investments in the future I am not sure we will be making particular commitments in relation to those future plans.

Senator ALLISON—So when would Telstra expect to have a proposal? When will you know what your forward budget will be for investing in broadband?

Ms McKenzie—That is a thing that is done progressively, depending on the circumstances and the environment that we find ourselves in. The new management team has begun a review of the company. They are obviously going through and having a look at what those future plans will be. I expect when that work is finished there will be some announcements about those future plans.

Senator ALLISON—There must be a budget at the present time that plans capital expenditure. What is it over the next financial year?

Mr Gration—We do not have the exact figures for that broadband cap ex budget. I think the company very much accepts that broadband is the way of the future and I think Kate's submissions are very much directed to saying that we are looking for the ability to compete in that broadband market and in that future of the technology.

Senator ALLISON—So is Telstra saying: 'All bets are off now that we've got this piece of legislation. It is going to be more costly to us, there are going to be tighter regulations and so forth, and we now do not know what we are going to invest in terms of infrastructure into the future'? Is that right?

Ms McKenzie—At the end of the day, the company has to make a judgment based on the rules that it is faced with. As I said earlier, if the current draft declaration in relation to ULL is proceeded with, that will have a significant impact on the company's—

Senator ALLISON—Let me put this to you: it could be that whatever money is coming through to infrastructure from the fund which is being set up with the \$2 billion may be negated by what Telstra decides not to spend in this area. Would that be a fair question?

Ms McKenzie—Telstra is a commercial operation. We have to act in the best interests of our customers and our shareholders. If there is no money and we are not making any money, then it will not be there to invest.

Senator ALLISON—You understand the reason for my question, don't you, Ms McKenzie? We are faced with a decision about whether to support this legislation. It pretty much hinges on \$2 billion. We will sell \$30 billion worth of Telstra in order perhaps to gain \$2 billion. You are saying, as I understand it, that there is a chance that Telstra may withdraw up to that much and maybe beyond it—

Senator BRANDIS—The way the Labor Party wastes the time of—

Senator ALLISON—Chair, it would be useful if I were not interrupted all the time by colleagues on my right.

Ms McKenzie—From our point of view, it has nothing to do with the sale; it has to do with the conditions in the market going forward and whether there is an incentive for the company to invest.

Senator ALLISON—But the sale is conditional on those conditions going forward, if you understand. We would not be dealing with all the package, if it were not so.

Ms McKenzie—I am saying that the company will make its decisions based on what is happening across the board and what the conditions in the market are. If we continue to be required to give away access below cost, if our PSTN revenues continue to decline, if competition only occurs in the city and nowhere else—

Senator ALLISON—Which you expect with this legislation—is that right?

Ms McKenzie—I am sorry?

Senator ALLISON—Which you expect to be the case as a result of this legislation?

Ms McKenzie—We are saying that, at some point, there have to be changes to the competition policy environment, to allow the company to prosper and grow going forward; if that does not happen, we will have some difficulties going forward.

Senator ALLISON—It is hard to get a clear statement from you, but can we say that you do not rule out the possibility that, as a result of this package, Telstra will reduce its investment in infrastructure and therefore in broadband services? That essentially is what you said at the outset, as I understood it.

Ms McKenzie—I guess I was not making the direct connection between this package and that outcome. From our point of view, it is a broader question about the future environment.

Senator BRANDIS—You are not predicting what Senator Allison put to you, are you? It is no part of your evidence that, as a result of this package, Telstra will reduce that investment, is it?

Ms McKenzie—No. We are saying that we will be looking quite closely at the entire picture.

Senator BRANDIS—I just did not want your words to be twisted, that is all.

Senator JOYCE—If this current package goes forward, will rural and regional Australia be worse off—if we privatise Telstra? Please answer yes or no?

Ms McKenzie—I do not think rural and regional Australia will be worse off as a result of privatisation.

Senator JOYCE—You think it will be?

Ms McKenzie—No.

Senator JOYCE—You think it will not be?

Ms McKenzie—I do not think so. I think the real question is: are the rules that are in place sufficient to enable the industry and Telstra to prosper and grow going forward?

Senator JOYCE—I do not have the latitude of that decision. I just need to know clearly that you agree with this current package going forward because it will make people's lives in rural Australia better.

Senator LUNDY—Senator, I asked a question earlier that made it clear that Telstra's view was, if this regulatory package goes forward, they will make less investment.

Senator JOYCE—But we have got two different answers then.

Senator LUNDY—Exactly.

Senator JOYCE—I need to know what the right one is.

Ms McKenzie—The distinction I was trying to make—and it is very difficult in this environment—is that we generally support the sale bill; we do not support increased intervention in the day-to-day operations of the company.

Senator JOYCE—You are talking to Australia; you are not talking to me. The people in rural and regional Australia want to know whether, if this package goes forward, it will be

better for them or worse for them. It can only be one of those two alternatives. It will be either better for them or worse for them. I need to know; it is very important to me that I know. Which one is it?

Ms McKenzie—The answer to that question is that, in our view, the company would be better off fully privatised, but—

Senator JOYCE—That is the answer. So the answer is—

Senator LUNDY—Wait until the witness finishes, please.

Ms McKenzie—the company will not be better off if the regulatory rules are tightened to such an extent that we cannot make money going forward and, therefore, have money to invest in the future.

Senator JOYCE—So you do not want it to go forward; it should be maintained in government hands then.

Ms McKenzie—No, that is not what I am saying.

Senator ALLISON—Chair, Senator Joyce wants witnesses to tell him which way to vote. Could I suggest that we return to my question. I understand that this is my time.

CHAIR—It is your time. Senator Brandis—

Senator BRANDIS—Could I just point out to Senator Joyce that, in fact, your question has been answered: Telstra would be better off with operational separation.

Senator ALLISON—Can I continue, Chair?

Senator JOYCE—I am just trying to get a straight answer out of all of that.

Senator BRANDIS—It is a ‘yes, yes’ answer.

CHAIR—We have 15 minutes left for this session. Would people concentrate their minds on the specific issues they want answered from Telstra, and we will deal with those in the next 15 minutes.

Senator ALLISON—Coming back to your notes, which I took down because I thought they were interesting, you said that if Telstra has to give away value-added services then there would be little reason for you to invest in those circumstances.

Ms McKenzie—That is right.

Senator ALLISON—So you agree with that statement?

Ms McKenzie—Yes.

Senator ALLISON—The government has talked quite a lot about the areas of market failure, which is where the \$2 billion fund would be focused—although, obviously, a committee will be making recommendations. What do you think the government means by those areas of market failure? And are some of those areas of market failure a result of Telstra, through mechanisms that you can use, preventing other businesses setting up?

Ms McKenzie—Telstra has never prevented another business from setting up. And the areas of market failure I assume are a reference to those parts of the country where the

population is so sparse that the costs of rolling out infrastructure in those areas vastly exceed any revenues that can be earned off those investments.

Senator ALLISON—So you would not agree that, for instance, outer metropolitan areas around cities that currently do not have access to broadband are areas of market failure?

Ms McKenzie—It is hard to be specific. At the end of the day, it is a matter of economics whether or not investments are justified and whether a return can be made on those investments in those parts of the country where the population is relatively sparse. In some cases there may be pockets—

Senator ALLISON—It might just be a new area, not sparse; it might be an area where there could be said to be market failure.

Ms McKenzie—Again, from the company's point of view, it is a matter of economics: how much investment has to be made in infrastructure; how many customers are going to be serviced off the end of that infrastructure; and can money be made out of that?

Senator ALLISON—So you are suggesting that market failure is not about competition—as in the failure of competition to deliver services—but rather about the lack of viability of those services?

Ms McKenzie—I guess the two things are connected. You are not very likely to get competition in an area where the services are not viable.

Senator ALLISON—Under the operational separation model that is in this legislation, some submitters have suggested that Telstra will just charge itself and its competitors very high wholesale prices. Would that be a tactic you would adopt?

Ms McKenzie—No. The wholesale prices are regulated in any event.

Senator ALLISON—So you do not see that being a possibility?

Ms McKenzie—No. That is part of our point. In many cases, the wholesale prices are regulated at a price that is below cost.

Senator ALLISON—I am jumping around here a bit. Have you had a chance to look at what the impact of the regulation will be on the annual profits for Telstra?

Ms McKenzie—As I mentioned earlier, we got the bill yesterday; so we certainly have not been able to make those calculations.

Senator ALLISON—How long do you think it would take to do that, and do you intend to?

Ms McKenzie—Not at this stage, no.

Senator ALLISON—You do not intend to do that?

Ms McKenzie—The difficulty with your question is that, when we look at what is involved in the operational separation framework, a lot of work still has to be done. I am not sure that it would be possible at this stage to make an assessment of what the impact of that would be.

Senator ALLISON—Don't you think the shareholders of Telstra are entitled to know the answer to that?

Mr Gration—On Monday, when we made that announcement to the market, I think we gave the shareholders an indication of what we thought the current regulatory environment was doing to the profit outlook of the company. I think we flagged in that announcement on Monday that there was further uncertainty, particularly with the issues of ULL pricing and operational separation that we have discussed today. We have at least seen the ACCC's model of the ULL pricing and have had some chance to model the impact of that. We calculate somewhere around \$7 in urban areas and somewhere around \$140 in rural areas. Even with the legislation in front of us today, we still contemplate that the pricing impacts of the operational separation would be worked out going forward, and it is very hard to model that.

Senator ALLISON—So, Mr Gration, you understand our difficulty in having to deal with this piece of legislation without knowing what that impact will be?

Mr Gration—We share your difficulty.

Senator ALLISON—How long do you think it would take for Telstra to be able to provide that advice?

Mr Gration—I suspect that Kate's team will wind up doing most of the work around negotiating and working out what that pricing model will be, seeking to reach an agreement with government, the ACCC et cetera, and then modelling the impacts of that. If, as a result of modelling the impacts of that, it was brought into place and we needed to make further announcements to the shareholders as to the impact of that, we would certainly do that.

Senator ALLISON—So there would not be an announcement to the effect that it makes no difference? You would only announce it if there were a difference. What would be a difference? At what sort of level would you regard it as important enough to provide advice to the Stock Exchange?

Mr Gration—The ASX listing rules are quite precise. They say that something that would have a material effect on the share price must be announced. The ASX calls that five per cent, although I suspect that we would consider a movement even less than that in the share price sufficient to make an announcement to the market.

Senator ALLISON—I missed in your answer the time frame within which you will do that consideration.

Mr Gration—As I understand the legislation—and, like all of us, we have not had that long to look at it—there is a process envisaged where we, the ACCC and the government would seek to reach an agreement on the pricing model that would apply under an operational separation. I think it is correct to say that the government would then approve that pricing model. Is that right?

Ms McKenzie—Yes.

Mr Gration—Once that was in place and as that was developed, we would be in a position to model the impact of it on the company. If the impact were such that it would have a

material effect on the share price, we would make an announcement to the market accordingly.

Senator ALLISON—Does Telstra anticipate paying dividends in the future, say, over the next budget period, out of reserves?

Mr Gration—You would all have seen a lot of media coverage on that issue in relation to the point that was made in the briefing provided to the government about borrowing to pay dividends. At one level, as a simple matter of company law, you pay the dividends out of either current year profits or retained earnings. The point that we were in fact seeking to make was more a cash flow point. If you look at the cash flow generated by operations and the cash that we plough back into the business in terms of investment, and you see what is left over, the point that we were making is that the dividends we were paying out exceeded that free cash flow being generated by the business so that we were borrowing to pay those dividends.

Senator BRANDIS—But you were borrowing from a fund of your retained prior year profits.

Mr Gration—From an accounting perspective, I think in past years the payout ratio has been under 100 per cent, so it was in fact out of current year profits.

Senator BRANDIS—In fact, you could not have done otherwise without being in breach of section 254T of the Corporations Law.

Mr Gration—Absolutely. So, in terms of the accounting source of those dividends, it was either current year profits or retained earnings. In terms of where we actually found the cash as opposed to the accounting treatment, if you look at the operating cash flow generated by the company and the investment that we ploughed back in, we were in a position where we needed to borrow additional cash in order to fund those dividends.

Senator BRANDIS—So you are in a position to assure this committee, Mr Gration, as the company secretary, that there was no violation of the provisions of section 254T of the Corporations Act?

Mr Gration—Yes.

Senator ALLISON—Going back again to the proposal that you made to the government—it was something that you described as a modern network—you said that what the government is proposing will not have the same coverage or be done within the same time frame as what Telstra had proposed. Did you say that 96 per cent of customers under your proposal would receive broadband?

Ms McKenzie—Ninety-eight per cent would get six megabits.

Senator ALLISON—What is the current availability of six-megabit services? What percentage of customers would not have access but actually be connected to six megabits?

Mr Gration—As I understand it, the fastest speed we offer at Telstra at the moment is 1.5 megabits. Some of our competitors are offering faster speeds, and I guess it illustrates the point in some ways that those faster speeds are being offered in the city areas.

Senator LUNDY—Telstra could offer faster speeds if they chose to.

Mr Gration—That is correct.

Senator ALLISON—Would this be largely fibre optic based, in areas where—

Ms McKenzie—Under our plan it was a mixture of technologies. There were different technologies in different areas. In some cases it would be fibre to the node, in some cases it would be technology that is built over the top of the existing copper network, in some cases it would be satellite and in other cases it would be other forms of wireless provision.

Senator ALLISON—So what is your understanding of what is capable of being built? Even if there were a two to three leverage of private investment—and you said that there was not going to be the same coverage as the government is now proposing—what is going to be the difference?

Ms McKenzie—We do not know the answer to that question, because apart from the general provisions about the fund being established we do not know what the details are of how that is going to be rolled out or what the government is going to ask for.

Senator ALLISON—But you felt confident in saying that it was not going to be the same coverage or within the same time frames, so you must have made some judgments about the government's proposal.

Ms McKenzie—I guess that is because the way that we had constructed it meant that we would be delivering those sorts of speeds much more quickly than we understand the government will do with its scheme.

Senator ALLISON—So what is your understanding of what the government is proposing?

Mr Gration—Again, we have not been in a position to analyse that. I think the point we would make is that we put a proposal which would have delivered six megabits to 98 per cent of the population. I do not think that any of our competitors who were before you this morning were saying that this package will enable them to deliver six megabits to 98 per cent of the population under the alternative package. I think that Telstra would likewise say that in the absence of the investment and regulatory relief that was contemplated in our package we would not be able to provide that speed to that percentage of the population.

Senator ALLISON—Could you spell out the 'regulatory relief' in your package?

Ms McKenzie—Our broadband plan? We had asked for some changes to XIB and XIC of the Trade Practices Act. Under our plan we had proposed to provide wholesale access to a 1.5 megabits service for the parts of network where we have built the infrastructure. After that, people would provide their own.

Senator LUNDY—So you would not provide it to competitors who are already providing a higher bandwidth service, even though Telstra is not providing a bandwidth service higher than 1.5?

Ms McKenzie—Competitors can provide their own higher bandwidth service. There is nothing to stop them doing that.

Senator LUNDY—Yes, I know and they do. But they also do it on your network.

Mr Gration—I think that, as they are doing today, they would have continued to be able to provide that through their own infrastructure. People like OzEmail who might provide those high speeds do it through installing their own infrastructure. The plan really got back to the same points that Kate was making earlier around having that incentive to innovate and invest in these things. You would say that that we accept the regulation of the legacy networks, but where we make that new investment—an investment that any of our competitors is capable of making—

Senator LUNDY—You can provide higher bandwidth services now on your existing network but you choose not to.

Mr Gration—And some of our competitors choose to.

Senator LUNDY—Can you answer the question why you choose not to when other carriers do?

Ms McKenzie—In some cases we cannot guarantee the reliability of those services.

Senator LUNDY—But in some cases you could and yet you make a commercial decision to limit your bandwidth products to 1.5. Why do you do that? Why do you prevent Australians getting a higher bandwidth service when you could provide it on a commercial basis? Other companies do.

Ms McKenzie—There is a parity issue there, anyway.

Senator LUNDY—What is the parity issue?

Ms McKenzie—We cannot provide it everywhere, and—

Senator LUNDY—So you provide it to no-one.

Ms McKenzie—At the end of the day the company has to make rational commercial decisions about its network—

Senator LUNDY—I do not think that that is rational or commercial. I think that there is another reason.

Mr Gration—I think that it illustrates the success of competition though. Customers who choose to want those higher bandwidths are able to access those higher bandwidths whether—

Senator LUNDY—You are holding the country back.

Ms McKenzie—No, we would say that it is the regulatory framework that is holding the country back.

Senator BRANDIS—You would!

Senator LUNDY—You are choosing not to provide a higher bandwidth service—why? Why come to the government with a piece of paper saying, ‘Give us \$2.7 billion and we’ll do it’? Why?

Ms McKenzie—We did not say, ‘Give us \$2.7 billion.’ We said, ‘Go out to tender for \$2.6 billion worth of services and let people compete for that.’

Senator LUNDY—On that point, how much of the money that the government has placed into all of the grants under RTIF, NTN and the social bonus has Telstra received?

Ms McKenzie—I do not have those figures to hand, but in most cases we would have received a reasonable proportion of those funds, often because we are the only ones who are prepared to provide those services in the areas in which they are being asked to be provided.

Senator LUNDY—Rough estimates have it at around 80 per cent. We know you have got a pretty secure cap under HiBIS of 60 per cent. So it is fair to say that with any notional proposition you are pitching up for any money from the government you are going to receive more than half of it anyway, isn't it?

Ms McKenzie—It is open to anybody else to apply for those funds if they want to.

CHAIR—I think, senators, we are going to have to leave it there, because this is the end of our time. We thank Telstra for appearing.

[3.32 pm]

BRYANT, Mr Simon, Acting Chief General Manager, Department of Communications, Information Technology and the Arts

HOLTHUYZEN, Mrs Fay, Deputy Secretary, Department of Communications, Information Technology and the Arts

MARKUS, Mr Don, General Counsel, Department of Communications, Information Technology and the Arts

McNALLY, Mrs Carolyn, General Manager, Department of Communications, Information Technology and the Arts

CHAIR—I welcome representatives of the Department of Communications, Information Technology and the Arts to the hearings. Thank you for making yourselves available at such short notice. It is very much appreciated. As you know, evidence given to the committee is protected by parliamentary privilege and the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I also remind you that should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and we will consider your request. I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to superior officers or to a minister. Do you wish to make an opening statement?

Mrs Holthuyzen—Yes, thank you.

CHAIR—Please proceed.

Mrs Holthuyzen—Firstly, I would like to seek the committee's agreement to table a document which details the government's decisions. These include matters which have been included in the bills as well as a range of matters that have been implemented administratively. The minister tabled this document in the parliament yesterday, but I thought it would be useful for the record to have that document.

Senator CONROY—Is there a copy of the ministerial statement with it?

Mrs Holthuyzen—Yes.

Senator CONROY—Yes, we will take that.

Mrs Holthuyzen—Okay. Thank you.

CHAIR—Is it the wish of the committee that the document be tabled? There being no objection, it is so ordered.

Mrs Holthuyzen—I would like to make a few other brief remarks, having followed some of the discussion this morning. There has obviously been a very detailed discussion in relation to the operational separation arrangements. One of the issues raised, I guess, was: what was the actual problem being tried to be addressed? It is quite clear that operational separation is being introduced to address concerns that Telstra may be favouring its own retail business unit

over its wholesale customers in the provision of key wholesale services. Operational separation will place enforceable obligations on Telstra to deliver equivalent treatment to its wholesale and retail business units and provide greater transparency of Telstra's vertically integrated operations.

There is also—and I think it was discussed this morning—a range of detail to be worked through, and the department will be doing that in consultation with both Telstra and the ACCC. It will be seeking the views of industry. It is certainly not appropriate that all that detail be included in the legislation. While it is the subject of negotiations, the government is aiming to have the arrangements on operational separation in place by June 2006. The regime is about complementing the existing access and anti competitive provisions in the Trade Practices Act. It does not override those provisions or affect the ACCC's powers or functions under those provisions. As I said before, one of the key aims is to provide greater certainty and transparency so that Telstra, the ACCC and the rest of the industry have greater confidence, particularly in the operation of the anti competitive provisions of the TPA.

Comment was also made this morning about a change to the long-term interests of end users test. This provision, from our perspective, is intended to clarify that investment risks, particularly those of new investments, are taken into account. We do not consider this to be a substantive change. It is simply making it clear that, at a time when investment in next generation networks is developing apace, the risks associated with those investments are considered. This is complementary to the existing provisions which enable investors to get certainty from the ACCC about access arrangements prior to making those investments.

Finally, I want to make a comment about regulation more generally. The government's package has been developed very clearly on the basis that the current regulatory environment is not overly burdensome but in fact needed some enhancements, particularly in relation to operational separation, and that it does remain appropriate for telecommunications specific provisions to remain. While Telstra has been putting a case about how burdensome the regulation is, I think it is useful to note that the regulatory environment in Australia is not as stringent in a range of other countries. Examples of these particular aspects relate to other countries in which regulators can order divestment or structurally separate carriers and regulators can, in many instances, set access prices. In fact, in Australia commercial negotiations operate first. In Australia there is also a much greater role for self-regulation.

Senator BRANDIS—I wanted to get your guidance on an issue on which we heard some evidence this morning—that is, the proper interpretation of proposed section 69A of the Telecommunications Act, which is inserted by schedule 7 of the competition and consumer issues bill. That is the source of Telstra's obligation to adhere to the operational separation arrangements and there is a requirement by proposed subsection 69A(4) that Telstra must not contravene a direction given to it under the section by the ACCC for the purpose of instructing it to cease contravening a condition of the operational separation arrangements.

We had a discussion this morning with a couple of witnesses about whether or not, in the event that the ACCC were to give a direction under section 69A(2) which was not complied with by Telstra, the ACCC could then, under section 564 of the Telecommunications Act,

apply to the Federal Court for an injunction, whether it be a mandatory or a prohibitory injunction on either a perpetual or an interim basis, because, by failing to comply with the section 69A(2) direction, Telstra would arguably have engaged in conduct in contravention of the Telecommunications Act.

The gentleman from Optus gave evidence to say that his preliminary legal advice was that perhaps the ACCC was not so empowered under section 530, because section 69A did not relate to the structural separation conditions, albeit that is what the marginal note to the section says. Can you give us some guidance on what you understand to be the position; and, cutting to the chase, is it your understanding that the purpose of this part of the package is to give the ACCC the power it would ordinarily have under section 530 of the Telecommunications Act to seek injunctions against Telstra if it considers Telstra to be in violation of a condition relating to operational separation?

Mr Markus—The scheme of the act—and I believe it was referred to—is that there is a procedure for making an operational separation plan. If that plan is not being complied with, the minister can direct Telstra to create what is called a rectification plan in the act. Compliance with the rectification plan will be a licence condition.

Senator BRANDIS—Can I stop you there. Do you mean that, if there is noncompliance, the only thing at that stage that can be done is for the minister to give a rectification notice? The ACCC cannot at that stage make its own application to the court?

Mr Markus—The ACCC continues to have powers that it has under other parts of the Telecommunications Act and under the Trade Practices Act—in particular, parts XIB and XIC.

Senator BRANDIS—But this new section 69A is a new section of the Telecommunications Act, so there is a specific grant of a power to apply for injunctions. I understand there is also a provision that the minister can give a rectification notice. But, at that stage, could the ACCC also of its own motion bring proceedings under section 530 of the Telecommunications Act?

Mr Markus—In my view, not in relation to the operational separation plan.

Senator BRANDIS—Why do you say that?

Mr Markus—Perhaps I will take you first to section 61 of the Telecommunications Act, which says:

A carrier licence is subject to the conditions specified in Schedule 1.

The scheme we are looking at at the moment will insert new conditions into schedule 1 of the act. There is a provision in the bill which states—

Senator BRANDIS—The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill?

Mr Markus—Yes. New clause 55(3), which is to be inserted into schedule 1—that is on page 39 of the bill—says:

Compliance with a final operational separation plan is not a condition of Telstra's carrier licence.

On the other hand, the rectification plan is—

Senator BRANDIS—Again, I ask you to pause there. I know that, as a public servant, you cannot comment on policy, but why shouldn't compliance with a final operational separation plan not be a condition of Telstra's carrier licence?

Mr Bryant—I think the structure of this framework tries to take into account that this in large part—not entirely, but in large part—is about the internal operations of Telstra. There may well be activities that may be open to interpretation as to whether or not they are a breach of the plan. I think the policy view in reaching the situation was that we would have a process where, if there was a concern by the ACCC reporting to the minister—and therefore the minister issuing a rectification plan—there would be an opportunity for Telstra to rectify that behaviour, whatever it might be, before breaching the actual licence condition. It tries to take into account that this is, in large part, about the internal operations of Telstra, and there will be some complexities in how that interacts with the plan.

Senator BRANDIS—I understand that, but, as well as the level of concern that may exist about whether or not Telstra will default in compliance with the operational separation plan, there is also another variety of concern that has been very pointedly expressed today by the other operators that, while not necessarily or obviously in violation of the plan, Telstra will nevertheless gain the system. I can understand why those who have that concern would wish to see the sanctions against violations of the operational separation plan being as strong as possible, including the capacity for the regulator to go directly to a court—as it can under the Trade Practices Act—and get orders and injunctions. Of course Telstra would hate it—but Telstra is a monopolist, at least in some markets, in my view—but I cannot immediately see why that would not be an appropriate weapon in the suite of enforcement remedies.

Mr Bryant—I guess the package is about a balance. To counter that concern that you have raised, I might raise another set of provisions within the bill that I think Telstra in their evidence to the committee expressed some concern about—that is, that the minister does have considerable power both in requiring the content and the procedures under the operational separation plan but then, if there is a perceived contravention of the plan, to issue a direction for a rectification plan and set the requirements for that rectification plan—

Senator BRANDIS—Then it is only if that directive is violated that there can be an application for a breach of section 69A?

Mr Bryant—Yes. There is a great deal of strength in this from the government's perspective. The philosophy, if you like, is: 'This is about Telstra's internal operation, let's give them a chance to get it right in the first instance. If they don't get it right in the first instance then we can come in and be quite prescriptive about how they should do it, and then that will be a breach of the licence conditions if they do not get it right in that circumstance.'

Senator BRANDIS—I understand that; that makes sense to me. But I cannot help thinking that it is a little bit weak. I do not think that is the case under part XIC of the Trade Practices Act in relation to access regimes? It certainly is not the case under part IIIA if there were to be an access regime in another industry. You just rely on the regulator to apply to the court and you do not have the intermediate step of the minister getting you out of trouble by issuing an

intermediate directive before the ACCC can interest itself in the matter. I want to put the contrary view back to you. Do you have anything further to say?

Mr Bryant—I would make one comment and it is quite an important point to make. There has been some confusion, understandably, in the discussion today with the other carriers about how this framework interacts with parts XIB and XIC and the competition framework.

Senator BRANDIS—In practical terms, it will overtake them, won't it?

Mr Bryant—No, it will not actually. A really important point to understand, I think, is that it is intended to complement—

Senator BRANDIS—I heard people say that, and that is why I said a moment ago, 'In practical terms it is going to overtake them, isn't it?' Because, to the extent—

Mr Bryant—I do not think so, no.

Senator BRANDIS—of any inconsistencies, it is going to prevail.

Mr Bryant—When we go through the details of how the framework is envisaged to work—and we are happy to do that—I think we will see that what it is really trying to do is to provide greater transparency and certainty, for all, really. It will provide that for the ACCC, for the industry—particularly the wholesale competitors—and for Telstra, about how Telstra is delivering service to its wholesale customers, compared with how it is delivering those services to its retail units. It is not about replacing the access regime, which is about declaring wholesale services and setting terms and conditions for those services; nor is it about setting retail prices, which is the role of the price control regime, as you are aware. It is about trying to get transparency and certainty about those retail prices and how Telstra operates at the retail level, and how that interfaces and compares with and is equivalent to what happens for wholesale customers. So in that sense we see that, if we can make this work effectively, it can be a win-win situation for everybody, because there will be much greater certainty and transparency about the whole regime.

Senator BRANDIS—Mr Markus, I interrupted you a little while ago; did you want to add anything to what you said?

Mr Markus—Perhaps the only point I could add is that new clause 65 in schedule 1 does say that Telstra must comply with the plan; that is on page 45 of the bill. By virtue of section 61 of the act, which says that the carrier must comply with the licence conditions specified in schedule 1, a failure to comply with a licence condition would give rise to a right to go straight to the Federal Court. It would not be necessary—

Senator BRANDIS—I see that.

Mr Markus—They can use the new section 69A, but they have the option of going straight to the court if there is a breach of the rectification plan.

Senator BRANDIS—Again, you may not be able to comment on this, Mr Bryant or anyone else, because it may just go to policy, but would it do violence to the package if that intermediate step were removed? So you don't first have a rectification notice from the minister; it would be just like any other regime under the Trade Practices Act?

Mrs Holthuyzen—I think that is a matter for policy; I think that is a matter for the government.

Senator CONROY—That was an extraordinary ‘one question’.

Senator BRANDIS—It was one topic, anyway.

Senator CONROY—But we have known for a while that Senator Brandis can’t count!

CHAIR—Thank you for being here today, Senator Brandis. You have been a very useful contributor.

Senator CONROY—When does the government intend to credit the initial capital to the communications fund account?

Mrs Holthuyzen—The communications fund obviously provides that both ministers can credit the amounts once the legislation has been enacted. I think the government’s—

Senator CONROY—I thought the minister’s second reading speech said it would be established from the proceeds of the sale.

Mrs Holthuyzen—That has been the government’s policy to date, though it—

Senator CONROY—That is not from when the bill is passed?

Mrs Holthuyzen—No. That is correct. The government’s policy statement has been that those funds would be credited post the sale itself—

Senator CONROY—Post the sale.

Mrs Holthuyzen—But the legislation itself does not provide that restriction.

Senator CONROY—So if there is no sale there is no appropriation to the fund?

Mrs Holthuyzen—No; what I am saying is that that has been the government’s policy, but the legislation itself enables the minister for finance and the minister for communications to credit the fund at any point after the passage of the legislation.

Senator CONROY—So is there any indication of when the money will go in?

Mrs Holthuyzen—I do not have any indication of that.

Senator CONROY—But the government’s policy, as announced already, is ‘after the sale’.

Mrs Holthuyzen—That has been the government’s stated policy position.

Senator CONROY—So, as the government’s policy stands at the moment, it is impossible to have the best of both worlds and have no sale and the money in the bank?

Mrs Holthuyzen—The government’s policy has been stated, but this legislation enables the funds to be put in earlier if the government decides to do so.

Senator CONROY—If the government sticks to its stated position, there is no money until after the sale.

Mrs Holthuyzen—That is correct.

Senator CONROY—Has an investment strategy for the fund been developed?

Mrs Holthuyzen—No, it has not been.

Senator CONROY—Do you have any idea on the projected mix of investments, cash, bank deposits and shares?

Mrs Holthuyzen—No, there has been no development of the investment strategy. The bill provides for the ministers to work out what the investment strategy is.

Senator CONROY—What is the projected income from the investment of the communications fund?

Mrs Holthuyzen—I think all we can say is that the projections are based on—

Senator CONROY—I am asking the questions.

Mrs Holthuyzen—The investment would be based on whatever returns those sorts of investment funds get now. I think some numbers have been mooted.

Senator CONROY—What assumptions are behind those numbers?

Mrs Holthuyzen—I think the long-term bond is about five per cent. If you assume the long-term bond rate then you could apply that to those funds. If you assume some different rates you could apply those rates.

Senator CONROY—Sorry, did you say it was a long-term bond rate plus something?

Mrs Holthuyzen—No, I was just saying there are different sorts of investments. The returns that you were likely to get would depend on the investment strategy that was decided upon.

Senator CONROY—The so-called future-proofing bill says that the communications fund may hold Telstra shares and effectively helped underwrite the Telstra sale. Has this been factored into the projections of the fund earnings?

Mrs Holthuyzen—As I said, there has been no—

Senator RONALDSON—I am sorry, I did not hear the last bit of the question.

Senator CONROY—The witness heard it but I am happy to repeat it. Has this been factored into the projections of the fund earnings?

Mrs Holthuyzen—As I said, the investment strategy for the fund has not yet been determined, but the bill does allow for shares to go into the fund.

Senator CONROY—But you understand that if the fund is stacked with unsold Telstra shares there are implications for the fund's earning rate?

Mrs Holthuyzen—Whatever is in the fund has implications for its earning rate.

Senator CONROY—This is Senator Barnaby Joyce. I am not sure whether you have met him but you seem to be talking to him all the time. Okay, you have met him. How was the \$2 billion figure arrived at as the initial capital for the communications fund?

Mrs Holthuyzen—That was a decision by the government.

Senator CONROY—Was a committee of technical experts formed to work out what level of initial funding was required?

Mrs Holthuyzen—No.

Senator CONROY—It was just a unilateral figure, as far as you know?

Mrs Holthuyzen—The government made a decision about what went into the fund. It was a government decision.

Senator CONROY—Was any independent, needs based modelling done to help establish that?

Mrs Holthuyzen—Not that I am aware of.

Senator CONROY—So there is no science at all to the figure?

CHAIR—I am sure it was carefully considered.

Senator CONROY—So it was just whatever Barnaby wanted?

Mrs Holthuyzen—No. The government considered the matter and made a decision about what it wished to do.

Senator CONROY—Was it always intended by the government that Telstra shares could be used to fill up the fund or was the decision made late in the drafting process?

Mrs Holthuyzen—I think there was always an intention that a number of assets could be put into the fund.

Senator CONROY—Section 158ZJ provides for the responsible ministers to make a determination—presumably a joint determination—for an amount to be credited to the fund account, up to \$2 billion. These determinations are not subject to the Legislative Instruments Act 2003. I also understand that the ministerial determinations referred to in the provision are not to be subject to the Legislative Instruments Act; is that correct?

Mrs Holthuyzen—Yes. That means it is not disallowable.

Senator CONROY—I am referring to section 158ZJ. Does this mean that the administrative determinations are not to be tabled in the Senate as disallowable instruments and cannot be reviewed by any senator?

Mrs Holthuyzen—It means that the instruments are not disallowable, that is correct.

Senator CONROY—So they will not be tabled in the Senate?

Mrs Holthuyzen—I am not sure whether they would be tabled.

Mr Markus—There would be no obligation under the Legislative Instruments Act to table them.

Senator CONROY—But, even if there were, they are not subject to a vote of approval or affirmation.

Mrs Holthuyzen—They are not disallowable, that is correct.

Mr Markus—No, that is correct.

Senator CONROY—Let me just make sure that I understand this. Upon crediting an amount to the fund account from the main body of the CRF it renders amounts up to \$2 billion capable of being spent pursuant to the special appropriations without further involvement of the parliament?

Mr Markus—This act creates a special account for the purposes of section 21 of the Financial Management and Accountability Act 1997. That is provided at 158ZH, and section 21(1) of the FMA Act does provide a standing appropriation for amounts accredited to the special account.

Senator CONROY—My point is that once it is in a special account it never comes before the parliament again for any determination.

Mrs Holthuyzen—But there are other provisions in this bill about how the funds are to be expended and how they are linked to the regular reviews process.

Senator CONROY—So initially it may not be \$2 billion in cash and it may be in Telstra shares, as an example of what goes in, with a notional value at the time of the determination?

Mrs Holthuyzen—That is possible. The legislation provides that. That is possible.

Mr Markus—The \$2 billion cap applies to amounts of money credited to the special account.

Senator CONROY—Okay. So you could put the entire Telstra thing in and it could still be worth \$2 billion in a few weeks time?

Mr Markus—The \$2 billion figure relates to cash amounts. The special accounts are within consolidated revenue, so what they do is provide—

Senator CONROY—I am intrigued by it. So you could put notionally \$10 million worth of Telstra shares into this fund and because it is not a cash amount—

Mrs Holthuyzen—I think what it means is that you can actually put \$2 billion in cash into the fund and no Telstra shares.

Senator CONROY—I want to make sure I did not misunderstand Mr Markus. What is the value of the Telstra shares that you could notionally put into it? It is any amount—from the sound of what you said—because it is only a cash cap.

Mr Markus—The legislation does not provide any cap.

Senator CONROY—So it is only a cash cap.

Mr Markus—Yes.

Senator CONROY—So only the cash is capped, and you could actually put more Telstra shares into it. That was the impression I got from what you said, Mr Markus.

Mr Markus—The cap is a cap on the cash that can be credited to the fund, not the investments.

Senator CONROY—So you really could stuff it with the entire 51 per cent value of Telstra if you wanted to?

Mr Markus—I could say that the legislation—

Senator CONROY—allows it to happen.

Mr Markus—It does not prevent it from happening.

Senator CONROY—*Yes, Minister*—it is okay. If the attention is that the total assets of the fund in cash and investments not exceed \$2 billion—and we have had some discussion about whether or not that is actually what would happen—would the government be able to dump financial assets into the fund—for example, Telstra shares—and revoke a prior 158ZJ determination relating to cash, enabling it to withdraw cash from the fund account? What I am saying is you could put \$2 billion in cash today and then the next day you could rip the cash out and put \$2 billion worth of shares in.

Mr Markus—There may be some difficulty in doing that. You have to read 158ZJ together with section 21 of the FMA Act, which I referred you to, and that provides the mechanism. What the determination does is credit an amount to the account. What section 21 says is that when the money is debited against the appropriation—when it is spent—then it is debited against the special account.

Senator CONROY—That is not what I am suggesting. I am suggesting you could put \$2 billion in cash in today and tomorrow you could move it to another special account, so it does not actually get spent; it can just be moved across to somewhere else and \$2 billion in Telstra shares could be substituted. I am reasonably familiar with special accounts—you might be aware of that.

Mrs Holthuyzen—They are very theoretical questions.

Mr Markus—I am conscious of the fact that we are talking about the interaction of this with the Financial Management and Accountability Act, which is administered by another department. I am a little reluctant to give opinions about it.

Senator CONROY—I am not suggesting that there is anything untoward happening. I do not want you to misunderstand. I am not suggesting for a moment that the money goes missing. I am saying it is moved to somewhere else. So you could put in \$2 billion up front in cash if you wanted and then, without ever coming back to parliament, you could swap the cash into another approved special account and put shares in the next day if you wanted to.

Mrs Holthuyzen—I do not know the answer to that, and we are not sufficiently across the FMA Act, which is the responsibility of the department of finance, to answer that. They are very theoretical questions. I think the government's commitment in this area is quite clear. It has said it will commit \$2 billion to the communications fund going forward.

Senator CONROY—I am just trying to find out exactly what the form of that \$2 billion will be. We have agreed that it can be Telstra shares, and various spokespersons for the government have said it would be Telstra shares. If it were shares, how would you value them—by their price on the market at the time? The government have a notional \$5.25 value for Telstra shares at the moment, in the budget, so I was just wondering what the valuation mechanism would be for these financial assets.

Mrs Holthuyzen—Presumably there is already a process that exists in relation to the valuation of those sorts of shares or whatever funds go into such an account. I presume there are standard procedures for how you value assets.

Senator CONROY—There is not one, though. They could put three shares in and say they are worth \$2 billion if they wanted to.

Mrs Holthuyzen—As we said, we are not experts in this area.

Mr Markus—It would be an issue in the financial accounts and how those were reported.

Senator CONROY—Yes. As I said, the government currently have a particular value placed on Telstra shares within the budget. It does not actually reflect what they are trading for. I will move on. I understand that the future proofing bill allows the funds to use derivatives. Why is that necessary? Why do we need derivatives in the communications fund?

Mr Markus—I think that is really just something that is there. At this stage we do not know what investment strategy might be appropriate. That is simply there to ensure that the power is there should it be thought prudent to use that option.

Senator CONROY—Doesn't this create the potential for ministers to be turned into market speculators—using all sorts of fancy, whiz-bang derivatives?

Mrs Holthuyzen—I think the simple answer is that it leaves the option open for the government to do that if it wishes to do it.

Senator CONROY—What checks and balances are there on the investment decisions, whether in the exercise of due diligence and probity in their unfettered choice of investments or within a framework of accountability for their performance?

Mrs Holthuyzen—An investment strategy would have to be put together, and I presume it would be subject to proper accountability arrangements when it was put in place.

Senator CONROY—There is, under section 44 of the FMA Act, an obligation for the chief executive of an agency to manage in a way that promotes the 'efficient, effective and ethical use' of the Commonwealth resources for which the chief executive is responsible. Is there a similar thing for the communications fund?

Mrs Holthuyzen—The provisions which establish it are here, and the purpose for it is quite clear, I think.

Senator CONROY—Are there any dangers that ministers will be perceived as picking winners in the market, depending on the investment strategy?

Mrs Holthuyzen—I would not have thought so. I am sure ministers of the Crown will undertake an appropriate investment strategy.

Senator CONROY—Would a minister be able to create winners or losers by manipulation of investments?

Senator RONALDSON—Mr Chairman, the witness cannot possibly answer that.

CHAIR—That is getting into investment issues that really are not relevant to the reference, I think.

Senator CONROY—I think that that is not right, Senator Eggleston. Mrs Holthuyzen can say she does not know and it is a matter for Finance if she wants to.

CHAIR—Let us let her say that, if she wishes to.

Senator CONROY—Well, she would have been able to before you and Senator Ronaldson interjected.

Senator RONALDSON—You shouldn't expect her to even comment on hypotheticals.

CHAIR—It is purely hypothetical.

Senator CONROY—What happens when markets fall? Are taxpayers wearing the losses from the communications fund?

Mrs Holthuyzen—We are not in a position to answer all these questions. The investment strategy has not yet been determined for this fund.

Senator CONROY—This is a slightly different investment strategy. What I am saying is: if there are shares in there and the market goes down—I am presuming it is market to market—and therefore the value of the communications fund goes down, who wears those losses? Senator Joyce or me?

Mrs Holthuyzen—Presumably the fund. The fund will operate in a certain way, and that will be approved—

Senator CONROY—That is what we are asking you.

Mrs Holthuyzen—As we said, the strategy for the investment of the fund has not yet been determined, so I cannot really answer all these hypothetical questions.

CHAIR—Also, these officers are not Finance officers.

Senator CONROY—Is one of the effects of the section to uncouple the fund from the provision of the FMA Act—that is section 39, I think—that sets the constraints around the investment of public moneys? It appears that the communications fund will be prevented from investing in Commonwealth securities. I was just wondering if you could explain why.

Mr Markus—It is correct that the bill provides that section 39 does not apply. That is in subclause 158ZP(8). I am not aware of anything in the bill which would indicate that the options open to the responsible ministers—that is, the Minister for Communications, Information Technology and the Arts and the Minister for Finance and Administration—would prevent them from investing in something that they could invest in under the FMA Act.

Senator CONROY—Perhaps you could take that on notice and come back to us. There is one particular aspect—and unfortunately I cannot remember which exact section it is—around the transfer of Telstra shares into the Future Fund. Are you able to help me with that?

Mrs Holthuyzen—You do not mean the communications fund; you mean the Future Fund?

Senator CONROY—No, not the communications fund.

Mrs Holthuyzen—No, that is the policy of Treasury and the department of finance.

Senator CONROY—Is that one of the five bills?

Mrs Holthuyzen—No.

Senator CONROY—If Telstra shares are transferred into the communications fund, who will own them?

Mrs Holthuyzen—The Commonwealth will still own them.

Senator CONROY—There is no provision in here that says they are not deemed to be owned by the Commonwealth anymore?

Mrs Holthuyzen—I do not think it says they are not deemed to be owned; I think it says that the Commonwealth—

Senator CONROY—That is the issue I am trying to get an understanding of.

Mrs Holthuyzen—would not exercise its rights in relation to those shares.

Senator CONROY—Rights?

Mrs Holthuyzen—It would still own them, but it would not exercise its rights.

CHAIR—At this stage, we still have 50 minutes left.

Senator JOYCE—Unfortunately—of course, it is in the media—I also have questions about the trust fund. Senator Conroy was speaking about 158ZJ, where it refers to ‘up to \$2 billion’. I might be naive, but does that mean you could put in less than \$2 billion and still be within the scope of the act? It actually refers to ‘up to \$2 billion’, not to ‘no less than \$2 billion’.

Mr Markus—The act provides a mechanism to credit up to \$2 billion.

Senator JOYCE—So could I put \$1 billion in there and still be complying with the act?

Mrs Holthuyzen—Yes.

Senator JOYCE—Could I put in \$20 and still be complying with the act?

Mrs Holthuyzen—Yes.

Senator JOYCE—What guarantees do I have to go out to people back in Queensland and say, ‘Look, you actually are going to get \$2 billion in this; not less than \$2 billion’? Because I am walking around telling them that they are going to get \$2 billion.

Senator CONROY—Well, they are getting \$100 million—the interest on \$2 billion.

Mrs Holthuyzen—I think the issue is that this is a drafting exercise—how the bills are drafted. The government’s policy position has been quite clear in relation to the provision of \$2 billion into the fund.

Senator JOYCE—So is that going to be changed to represent \$2 billion and not ‘up to \$2 billion’?

Mrs Holthuyzen—I do not think there is any intention to change the legislation. As I said, I think it is a drafting issue in the legislation.

Senator JOYCE—Do you see how this can cause me a problem? I am an accountant, so I am fascinated with numbers. If you put shares in there, are you going to put in an option price or an option mechanism so we can put it on the market—if we ever get to \$2 billion—at \$2 billion and no less than \$2 billion, should something happen to the price of Telstra by reason of, let us say, an executive going bananas and talking on the radio?

Senator CONROY—As opposed to a senator.

Mrs Holthuyzen—As I said before, we are not the experts in how the valuation of the assets in the fund would occur. I presume there are proper processes about the proper valuation of assets which would take into account movements in the price value of shares.

Senator JOYCE—But you will put a safety mechanism in there? You could put the \$2 billion of shares in there tomorrow and in a couple of years time sell when we actually get to a position where they are worth while—they may never be worth while; we do not know what will happen in the future. Do we have an ability—that is, the right but not the obligation—to put the shares back on the market at the price they were allocated to the fund, because it is an easy derivative that could be bought off the market?

Mrs Holthuyzen—I do not know the answer to that question.

Senator JOYCE—It is something I need to know as well.

Mr Markus—Okay.

Senator JOYCE—When the \$2 billion is allocated to the fund—and to be perfectly frank, if you put a put option in there, I do not care if it is shares or money, as long as it represents \$2 billion; as long as you have the bottom side covered, as any other fund manager would say—where do the returns from that \$2 billion go in the period between the allocation to the fund and when Telstra is actually sold? Where do the returns on that money go?

Mrs Holthuyzen—The returns go into the fund. The provisions of the act say the communications fund consists of the fund account itself and the investments of the fund.

Senator JOYCE—So it could compound?

Mrs Holthuyzen—Yes. The investments of the fund will remain in the account.

Senator JOYCE—That is good. We are talking about \$2 billion now in the fund. Let us say that for some reason, by some stroke of genius, the Labor Party were to win an election and Mr Conroy were to be responsible for the fund. Is that going to have a CPI increment in it. Obviously, if it is \$2 billion in five years time, the present net value of \$2 billion in five years time is not \$2 billion now?

Mrs Holthuyzen—That is not a matter that is in the legislation. That will be a matter of policy, I guess. It is not in the legislation now. What it requires is that the returns on the investment stay in the fund.

Senator JOYCE—Moving away from the \$2 billion. In regard to the local presence plan that Telstra is supposed to come back with, we know that Countrywide is basically a shopfront—and it is great that we have it—but we also need technicians to fix the problems in

country areas. It is vitally important that the technicians be there to fix the problems. Are the technicians going to be a vital part of the local presence plan?

Senator CONROY—They are not mandating the number of technicians available.

Mrs McNally—The local presence plan has been developed in a way that we have not actually prescribed the exact things that Telstra has to do to meet its local presence. What we have asked it to do as part of that local presence licence condition is to come back with a plan that represents a number of key areas—similar to the things that they already do and the sorts of things that are outlined in the RTI review. We have not actually been prescriptive, saying you have to have this many people and you have to have them in these specific locations. These seem to be commercial decisions. We have asked them to describe for us how they intend to provide services to regional Australia.

Senator CONROY—There is no designation that you must have at every shopfront one technician or anything like that?

Mrs McNally—No, there is not.

Senator RONALDSON—It is probably fair to put on the public record that Countrywide addressed a dramatic removal out of regional and rural areas under the previous government of people like technicians.

Senator JOYCE—I am just conveying the issues that people have brought me. I think they are going to want to see them raised. Going back to Telstra, has there been any calculation of what Telstra actually has to spend to comply with their USO, customer service guarantee and network reliability framework? Why do I ask that question? So there is some comparison between the money that they are required to spend and the money they are actually allocating in their capital expenditure budget to cover those issues.

Mr Bryant—In a general sense, the way that we have dealt with trying to ensure that Telstra delivers effective services out there—as I think Mr Cheah from ACMA indicated today—is to look at results in trying to assess performance. We all know what the capital budget is. You can have a capital budget X and you can have a capital budget Y and that does not necessarily mean anything if it is not spent efficiently and in a well-targeted kind of way and so forth. We have always thought that the best way to assess how well that capital budget has been allocated and invested is to look at the actual results on the ground.

Senator JOYCE—From your investigations so far, have you seen Telstra allocate money in the capital expenditure budget that would have the capacity to pick up their current problems in complying with the USO, the customer service guarantee and the network reliability framework?

Mr Bryant—You should probably ask that question of ACMA as the regulator. I will flick that one back to Mr Cheah; he flicked a few to us, I guess.

Senator JOYCE—I will put that question on notice.

Mr Bryant—But, essentially, over a period of time the performance of Telstra under the CSG—I think this was reflected in the evidence given earlier today—has steadily risen and

there has been an overall improvement in services. Most witnesses have indicated that there has been an improvement in services; whether it is a sufficient improvement is another matter. But there is no doubt that there has been a significant improvement in services. The question then is: are we monitoring the arrangements effectively to make sure that we pick up all the parameters that need to be assessed to see that they are doing the right thing?

Senator RONALDSON—Were you present when Senator Joyce put some figures to the Telstra representatives about improvements?

Mr Bryant—Yes, I was.

Senator RONALDSON—Could you confirm that those figures are correct?

Mr Bryant—Yes, we understand that they are broadly correct. I will finish off that point, if I could. Over the last period of time—certainly over the last five years—we have been concentrating on trying to make sure that our monitoring and evaluation parameters are well targeted. We are not just looking at the CSG, as important as that is; we now have the network reliability framework—which is designed to narrow down and disaggregate our assessment of how the network is going on an individual service level, an exchange service area level and a field service area level—so that we can effectively monitor that performance.

Senator JOYCE—I am just trying to allay fears that people may have; that is my job. It would be remiss of me not to ask this question: do you know of any perceived problems by delaying next week's vote on the legislation for the sale of Telstra?

Mrs Holthuyzen—We cannot answer that question.

Senator JOYCE—A whole heap of things have been dropped onto the table in the last week. Is there anything else out there that we need to worry out?

Mr Bryant—We really cannot answer that question.

Mrs Holthuyzen—There is nothing that we are aware of.

Senator JOYCE—I get worried when the Telstra executives do not turn up; I wonder where they are.

Mr Bryant—That is a question that you should probably ask Telstra.

Mrs Holthuyzen—The addition I would make to the comments about the USO is that Telstra is obliged to comply with its USO, CSG and NRF obligations. It is required to do that, so it needs to put capital to do that.

Senator JOYCE—I could not let you go without asking this next question; it is a good one, and it is for Senator Conroy, really. There has been discussion about leveraging of funding. Can you provide any evidence of the sort of leverage that can be obtained under the provisions of the Commonwealth telecommunications program?

Mrs Holthuyzen—Yes. Some particular projects have already been done called the National Communications Fund and the coordination communications fund, where the government has provided funding of \$72 million for certain projects. In that area, for instance, we have delivered \$242 million of additional infrastructure. So, with a range of projects that

were undertaken in previous times, there has been a fair bit of leveraging of funding from state governments and the private sector.

Senator JOYCE—So I am not spinning a yarn when I tell people that if we put in \$1—'we' being the government—it is quite possible that Telstra and other people will put in \$2, \$3 or, as has been stated today, possibly \$5.

Mrs Holthuyzen—That is correct.

Mr Bryant—I think that goes back to the philosophy of how we have tried to approach providing targeted funding to rural and regional areas; that is to do it on a competitive basis to try to leverage up contributions, on the premise that in a lot of cases there is almost a business case but not quite. So carriers and service providers are prepared to invest if they get a bit of assistance.

Senator JOYCE—So the total worth of this package in dollars is actually way in excess of \$3.1 billion. When everything is done and dusted—

Senator Lundy interjecting—

Senator JOYCE—It is. Everybody here who knows the industry has agreed that it is quite possibly a \$6 billion package—possibly more. I just want to have that on the record. People like the NFF have to know what they possibly are compromising by not supporting us.

Senator ALLISON—On that point, Senator Joyce raised a range of leverage ratios, from \$1 to \$5. Has the department made an estimate of what is likely to be leveraged out of this package or does it have an objective in this respect?

Mrs Holthuyzen—We do not have any particular estimates in mind. I think in some ways it depends on the nature of the particular programs that we are rolling out. For instance, as I said, the NCF and CCIF projects were leveraged from \$72 million up and they leveraged \$244 million out of that. So it depends on the nature of the project. Certainly, with the new Broadband Connect proposal, a very substantial sum of money is going towards broadband investments and we would expect to be able to make considerable leverage out of that. We want to look at that in quite a strategic way so that we are getting quite strategic investments and sending these new networks into the country. We would expect to be able to leverage reasonable sums of money out of those programs.

Senator ALLISON—Will that package go to the areas of so-called market failure?

Mrs Holthuyzen—Yes, that is right. A really important part of the government's strategy in all of this is that it really does want competition to drive out a lot of the new investments and the provision of new services. A lot of the programs that we have are targeting what we call 'areas of market failure' or areas where you would not get commercial services now or where we are able to bring them forward. So they might come eventually, but some of this is about putting them where they would never get or bringing them forward and then trying to make things sustainable, so that the investment becomes sustainable in going forward.

Senator ALLISON—What criteria will be used to establish what are areas of market failure?

Mr Bryant—Essentially, that is what happens under HiBIS at the moment. The government has said that it is trying to get equitable broadband out across Australia.

Senator ALLISON—Universal coverage?

Mr Bryant—Yes, under HiBIS. That is the objective.

Senator ALLISON—Would it match the 98 per cent that was in the Telstra proposal?

Mr Bryant—The government's objective is to provide those services across Australia and that is how this money will be provided. That is the key objective.

Senator ALLISON—To what percentage of Australians?

Mr Bryant—To 100 per cent.

Senator ALLISON—One hundred per cent? Over what period of time is this—20 years?

Mrs Holthuyzen—With a range of different technologies.

Mr Bryant—Yes, and with a range of different strategies as well.

Mrs Holthuyzen—Telstra's proposal was quite a different one, which tended to concentrate more on upgrades to their network even from the government. They indicated that the money was for tendering but proposals tended to be built around ADSL services rather than a combination.

Senator ALLISON—So this proposal will deliver 100 per cent broadband coverage. Can you define what that broadband coverage will be?

Mrs Holthuyzen—I think at the moment we would say that most of Australia, probably 100 per cent, already gets access to broadband services. A lot of the aims of these programs are to make the prices equitable, so that not only do we roll out more services to people in regional and rural Australia but they get them at comparable prices to metropolitan services.

Senator ALLISON—I am sorry. You did not answer my question about how you define 'broadband services'.

Mr Bryant—We have tended to define it on the basis of what is the most popular product, and that has been 256/64 kbps. It is now going up. One of the questions we face from a policy perspective is: do you not support 256 and only support higher services? Our view has been that that takes away choice. A lot of people will continue to want 256. Currently, under HiBIS, we support 256, 512 and 1.5 and will want to keep on supporting higher speeds as well. One of the key objectives is to provide that choice.

Senator ALLISON—Is there a plan, something that shows us a map of Australia, that shows where we get 250, where we get six et cetera? What is the proposal that the government is working on? Is this going to be yet another ad hoc 'see who puts their hand up to make an application for funding' approach?

Mr Bryant—No.

Mrs Holthuyzen—No.

Senator ALLISON—When are we going to see a proper blueprint, for want of a better word?

Mrs Holthuyzen—As I said earlier, we are trying to develop this in a strategic way because these are large sums of money. The department has already written to a range of service providers to seek comment in relation to how we might further develop these incentive proposals to take them forward. We propose over the next while to develop a discussion paper, have discussions with people, try and understand what the best way is to develop and take these proposals forward.

Senator ALLISON—Earlier today we heard Telstra tell us that the legislation will reduce shareholder value and that it will force Telstra to give away value-added services. There was a very significant implied threat that, as a result of these bills, Telstra would not invest as much as it might otherwise have done. Can you guarantee to this committee that Telstra's underinvest as a result of these bills will not negate entirely the package which is being put before us?

Mrs Holthuyzen—In considering these proposals, that is certainly one of the very important things that we always look at to make sure that the government is not investing money where other carriers or other players were going to invest anyway.

Senator ALLISON—But Telstra says it was prepared to invest in this system to 98 per cent of the population.

Mrs Holthuyzen—But that proposal was based on the government also providing \$2.6 billion and significantly winding back the regulatory regime in Australia. So it was based on a very fundamental winding back of the competition regime.

Senator ALLISON—So how do you know where you are going to invest and where Telstra would not have been going to invest?

Mrs Holthuyzen—It is not an easy question, but, for instance, under HiBIS there have been proposals where we do get plans of carriers and people in advance. We try to understand where their investments are going to be so that, when we do plan a proposal, we go to the areas where we know they are not going to be. It is not an exact science, of course, but it is something that we are very conscious of in the expenditure of government money.

Senator ALLISON—So will you meet with Telstra and work through with them the areas, as a result of the regulatory change, they now will not invest in where they previously might have done?

Mrs Holthuyzen—That assumes that they will not invest.

Senator ALLISON—I have just indicated to you the evidence that was given to us this morning.

Mrs Holthuyzen—That is right. We also heard Telstra say that they are not going to invest in those areas. But at the end of the day the thing that will most drive investment strategies for all companies in this country is the competitive regime. If we have a competitive environment out there then Telstra will have to respond to that. So it is not only regulation. We and the

government do not believe that the regulation hinders Telstra terribly. It is actually trying to address those market power issues. But, in fact, with a competitive environment Telstra will have to invest to meet the competition.

Senator RONALDSON—Four billion dollars in the last two years.

Senator ALLISON—Telstra said what you are doing with regard to Telstra's viability is like making the rules of the road vague and then tripling the fees. Do you agree that this package will reduce shareholder value?

Mrs Holthuyzen—I am not in a position to comment. I cannot comment in relation to shareholder value.

Senator RONALDSON—Mr Chair, I think it is impossible for this witness to answer that question.

CHAIR—You are not obliged to answer that question.

Mrs Holthuyzen—Okay.

CHAIR—These people are not finance officers.

Senator ALLISON—Well, Telstra claims that this will reduce their profitability. Do you agree with that?

Mrs Holthuyzen—Again, they are not matters that I can or should comment on. All we would say is that we and the government consider that the competitive regime that exists in Australia and the enhancements that we are making through the operational separation arrangements are actually good for competition in this country. It is good for consumers. As I think has been said before, we think that the operational separation arrangements are ones that Telstra could take advantage of to their own benefit to help improve their own performance.

Senator RONALDSON—And the ACCC said that this morning.

Senator ALLISON—I go back to the grant arrangements. There has been quite a lot of criticism of the way that has been set up. I will put one of those criticisms to you. In the legislation the minister may make payments not exceeding \$2 billion into the fund, but the minister is not required to put such payments into the fund. Should the bill, as is suggested by a submission to the inquiry, 'be redrafted so as to ensure the transfer of funds and/or assets if Telstra is sold'?

Mrs Holthuyzen—That is a matter for the government.

Senator ALLISON—Should \$2 billion be put into this fund, there is the question of whether those assets might be devalued over time—say, the share price goes down. Do you accept that, if \$2 billion worth of shares and/or money was put into this fund over time, that could lose value?

Mrs Holthuyzen—That is a possibility, but I think the important issue there is the commitment made by the government to providing \$2 billion.

Senator ALLISON—Is there a definition in the bill of the words to do with the RTIRC evaluating the adequacy of telecommunications in regional, rural and remote parts of

Australia? The criterion for that adequacy is said to be 'equitable access', but there is no definition of what 'equitable access' is. Can you indicate to the committee whether that is coming or whether that will be entirely up to the committee to determine? In other words, should it say that there should be equivalence of access to all types of services offered in urban areas? Should it say equivalence of service levels offered and achieved in urban areas and affordable and/or reasonably priced services?

Mrs Holthuyzen—To a certain degree the RTIRC, the independent review committee, can probably make some of their own assessments about what 'equitable access' means as well. I think there is a general concept that we want people to have access to broadly the same types of services at the same sorts of prices. The review committee will make their own assessments about what that means as they go around, I think. They may want to define it, but I am not sure that we need to define it in the legislation.

Senator ALLISON—If that were in the legislation, could you see any problems with it by way of amendment?

Mrs Holthuyzen—I am not sure that it is necessary.

Senator ALLISON—Just not necessary?

Mrs McNally—One of the issues is that technology and the requirements of people change over time. One of the things that would need to be looked at at the time is what is happening in other parts of Australia and what sorts of services people want access to, before they determine that they are receiving adequate services. Those sorts of issues would need to be looked at when the review took place.

Senator ALLISON—The suggestion that I have outlined is equivalence—urban and regional.

Mrs McNally—The legislation says 'significant to people' in those parts of Australia and it also says 'currently available in one or more urban parts of Australia'. So there are some links there to what is happening in other parts of Australia.

Senator ALLISON—But you are not suggesting that people in rural areas would have a different view from those in metropolitan areas about what was equitable?

Mrs McNally—Our experience to date has been that people have looked at what is happening in other parts of Australia to see what sorts of services they need.

Senator ALLISON—The Commonwealth does not have any obligation to implement the recommendations of the committee. Why was it decided that that would be the case? Why is the government having the responsibility for determining what projects go ahead and what do not?

Mrs Holthuyzen—The government has to be able to determine its own budgetary expenditure. I do not think you can have an independent review committee coming forward and making proposals which could involve considerable expenditure that the government would automatically accept. That would not be consistent with good, accountable financial arrangements by the Commonwealth.

Senator ALLISON—You have a set amount being put into this expenditure on an annual basis—\$250 million a year for four years and then \$100 million after that. Why can't they be the parameters around which the committee determines its decision making?

Mrs Holthuyzen—At the end of the day, I think it is an appropriate decision for the government to make.

Mr Bryant—The genesis of this regular review is the RTI report. In its recommendation, that committee said: 'No future government should be prevented from exercising its proper fiscal responsibilities and considering on a case-by-case basis whether the service upgrade should proceed, particularly when significant funds may be required. At the same time it is important to establish a process for future funding that is as certain as possible.' So there is that balance there. That committee, in recommending that a review process be set up in the future, said that any future government has to exercise its proper fiscal responsibilities and balance competing priorities.

Senator ALLISON—Will the review process take public submissions, and will they be made public?

Mrs Holthuyzen—I think so. I do not know whether the legislation says that, but our understanding is that they would take public submissions.

Senator ALLISON—And the report will be made public at the time it is delivered to government?

Mrs McNally—It is required to be tabled in both houses of parliament.

Senator ALLISON—At the time it is delivered to the government?

Mrs McNally—I think the legislation says within 15 days.

Senator ADAMS—The National Farmers Federation referred to data on faults and the network reliability framework. What has been announced to tighten the network reliability framework?

Mrs McNally—What has been announced is that Telstra will be required to undertake automatic remediation of the worst performing parts of the network. We are looking at remediation of cable pair runs in the exchange service area. Essentially that is an end-to-end cable run remediation process. Also, part of the announcement is that the NRF will be reviewed in a further two years to make sure that there are some improvements to Telstra's network.

Senator CONROY—When was the legislative package finalised?

Mrs Holthuyzen—Fairly recently, before it was introduced into the parliament.

Senator CONROY—Presumably it was finalised before it was tabled yesterday at 12 o'clock. Was it finalised in the morning, the night before, the day before?

Mrs Holthuyzen—I am not sure that is a matter that I should comment on. That is a matter of internal government workings, I think.

Senator CONROY—So it is not about advice to the government.

CHAIR—In effect, it is.

Senator CONROY—When you completed the bill is not about advice to the government. If I said to you, ‘What is in the bill?’ and you had not produced it, that is cool. But if I say to you, ‘When did you finish?’ it is not a matter of advice to government—

CHAIR—But that is also a matter of a ministerial area of responsibility.

Senator CONROY—Everything that the department does is a ministerial responsibility.

CHAIR—I do not think the witnesses have to answer that question. They should refer it to the minister.

Senator CONROY—They do not have to be badgered by the chair.

CHAIR—The chair is just being helpful.

Senator CONROY—Yes, Minister! Did you want to answer that, Ms Holthuyzen?

Mrs Holthuyzen—No, Senator.

Senator CONROY—Now you have got your orders, that is okay. How would you describe the process of negotiating the form of the operational separation model? Have you had an easy time of it? Has it been nice and simple?

Mrs Holthuyzen—It was, Senator. As Ms McKenzie said, we have been having some discussions with Telstra since April and we have also been having discussions with the ACCC in relation to this matter. It is a very complex policy issue to work our way through and so we have had detailed consultations and discussions with them.

Senator CONROY—Under the way these bills are drafted, you still have quite a bit of negotiation to do, don’t you?

Mrs Holthuyzen—That is right.

Senator CONROY—You still have to negotiate the terms of the operational separation plan?

Mrs Holthuyzen—That is correct.

Senator CONROY—The local presence plan?

Mrs Holthuyzen—No, the local presence plan licence condition has been issued and Telstra is currently in the process of preparing a local presence plan which it has to put out for public consultation.

Senator CONROY—Then you have got to negotiate the pricing principles?

Mrs Holthuyzen—Yes, the pricing equivalent arrangements.

Senator CONROY—There are a lot of things still. What sort of time frame are you envisaging on those? When will we know what the operational separation plan is?

Mr Bryant—Yes, you are right; there are a number of strands that we have to work our way through. We are endeavouring to develop the pricing equivalence framework this calendar year.

Senator CONROY—This calendar year?

Mr Bryant—Yes.

Senator CONROY—So there is no prospect of me getting to see that before I have to vote next week.

Mr Bryant—Not very much opportunity at all. As witnesses, including the ACCC, have said, these are complex issues. You are quite correct—they have been discussed at some length already, and I think that was raised today as well. Clearly there are some complex and difficult issues to work through, but our timetable is the next four months. Concurrently with that we obviously need to develop all of the non price elements of the operational separation plan—

Senator CONROY—Is any part of the operational separation plan available at all, or are there just some notes in the explanatory memorandum about what it should look like?

Mr Bryant—I am happy to talk through an overview of what it would look like, if that is of any benefit to you.

Senator CONROY—Do I have time?

Mr Bryant—I could do it in five minutes.

Senator CONROY—I am asking that quite genuinely. I am actually really interested in what it is going to be.

Mr Bryant—I am happy to do that.

Senator RONALDSON—It probably will take more than five minutes. It is quite detailed. The objectives and other aspects are very detailed.

Senator CONROY—I did not have the advantage of a Liberal Party room briefing on it.

CHAIR—I am sure you can arrange a briefing.

Senator RONALDSON—Do you want to come to them?

Senator CONROY—Decidedly not. You are struggling to get Barnaby to come to them, mate! And they keep locking the door on him to keep him out.

Senator RONALDSON—He is a significant contributor.

CHAIR—Barney is a team player.

Senator JOYCE—It is a broad church, a very broad church.

Senator CONROY—That is about as broad as it gets! I sometimes think I have a broad church; you have a cathedral—a broad cathedral. Sorry, Mr Bryant, you were being rudely interrupted by Senator Ronaldson and the chair did not notice.

Mr Bryant—I am getting briefer by the minute. The core objective, as we have discussed today, is really to try to establish both transparency—

Senator CONROY—Sorry, I am not after you reading out the explanatory memorandum to me.

Mr Bryant—No, I do not have the explanatory memorandum in front of me.

Senator CONROY—I am sure you do not need it.

Mr Bryant—I do not need it.

Senator CONROY—You are the only person who knows what is in it.

Mr Bryant—If we can cut to the chase—

Senator CONROY—Please!

Mr Bryant—Essentially, what we are trying to do is to establish a plan where Telstra will substantially separate its wholesale, its retail and its key business units.

Senator CONROY—Let me refine my question to save us both time.

Senator RONALDSON—No, you asked him the question; let him get on with it. It is very important.

Senator CONROY—Thank you for that, Senator Ronaldson. What I am asking you, Mr Bryant, is whether any legislative or regulatory parts of the package about operational separation are available for me to scrutinise today, tomorrow or next week.

Mr Bryant—No.

Senator CONROY—None at all? There is an explanatory memorandum and there is an expression of intent.

Mr Bryant—There is the core framework that is in this bill, there is an explanatory memorandum and there are a number of legislative instruments that will be developed, including a determination as to what should be in the plan, what should be the designated services and what should be the declared services.

Senator CONROY—You see my point. There is not even a determination about what should be in the plan.

Mr Bryant—There is a very good reason for that. We need to consult broadly, not just with Telstra and the ACCC but with the carriers who are going to benefit most from this framework, and that is the wholesale carriers.

Senator CONROY—They are excited. They are teeming with excitement.

Mr Bryant—I am sure they are.

Senator CONROY—They are beside themselves about being consulted about what Telstra will do to them.

Mr Bryant—We hope to consult with them about how they can get fair wholesale services.

Senator CONROY—I will move on; I have too many other questions.

CHAIR—Eleven minutes, in fact.

Senator CONROY—If the objective of the operational separation regime is to promote the principle of equivalence of treatment between Telstra's retail business and its wholesale

customers, why was the decision taken to create a structural divergence in treatment between those entities through the creation of a separate wholesale business unit?

Mr Bryant—I think, as people have said in evidence today, there are different views as to what value there is in focusing on establishing a separate wholesale unit. We believe there is a lot of value, for the reason—and this is based on discussions with wholesale customers as well—that, by having a dedicated wholesale unit within Telstra, you can actually generate both a better customer focus and, importantly, I think, a better incentive within that business unit to actually focus on their core business of providing quality wholesale services.

Senator CONROY—So the network is not in the wholesale business?

Mr Bryant—Perhaps I can continue. The importance about having a separate wholesale unit as well is that, under this framework, we intend to ensure that network services that are common to both wholesale customers and retail business units within Telstra are provided on an equivalent basis. We intend to do that through establishing internal contracts between the network unit on one hand and Telstra Wholesale—

Senator CONROY—What is an internal contract?

Mr Bryant—It is a notional contract; you obviously cannot contract with yourself.

Senator CONROY—A notional contract.

Mr Bryant—It is very similar to a service level agreement, if you will.

Senator CONROY—So it has gone from being an internal contract—in the space of 30 seconds—to a notional contract, to something similar to a service agreement.

Mr Bryant—It is an agreement between Telstra network and Telstra Wholesale, and between Telstra network and the Telstra retail business unit to provide that service on equivalent terms and conditions and equivalent performance.

Senator CONROY—Is this agreement between Telstra Wholesale and Retail a legally binding document?

Mr Bryant—It will be a requirement under the operational separation plan.

Senator CONROY—I asked you whether it will be legally binding. Are you saying it will be?

Mr Bryant—It will be a requirement under the plan. That will be the enforcement mechanism.

Senator RONALDSON—Once it is a requirement under the plan, then of course it is legally binding.

Senator CONROY—Chair, I wonder whether you would let Mr Bryant answer the question without Senator Ronaldson's help.

CHAIR—I think Senator Ronaldson was just seeking to aid you.

Senator CONROY—You are normally not quite this partisan, Chair.

CHAIR—He was just using his legal background.

Senator CONROY—Ronno would not have seen the inside of a court—I would have seen the inside of a court more times than Ronno in the last 10 years.

Senator RONALDSON—I have got to say ‘thankfully’.

CHAIR—We probably do not dispute that.

Senator CONROY—Ronno gives new meaning to the term ‘bush lawyer’. I’ve known you too long, mate. Mr Bryant, are you telling me that the service agreement has the same legal standing as a legal contract? I am trying to get to the bottom of this.

Mr Bryant—Perhaps Mr Markus can answer.

Mr Markus—Clearly, because these are notional contracts between one part of Telstra and another part of Telstra, they would have no more legal status than, for example, a memorandum of understanding between one government department and another government department.

Senator CONROY—That little status? I have seen the catfights over MOUs.

Mr Markus—At the end of the day, because it relates to the same legal person it has no legal status as a contract.

Senator CONROY—They cannot really sue each other, can they?

Mr Markus—That is right.

Senator CONROY—You cannot really sue yourself?

Mr Markus—That is right. To the extent that they are required to have them in the operational separation plan—and the operational separation plan determines the terms and conditions, as it were, of these notional contracts—and to the extent that the operational separation plan requires, and I presume it will do, Telstra to observe those terms and conditions—

Senator CONROY—Do they have to be written down or can there just be an understanding between two individuals?

Mr Bryant—They will be written down.

Senator CONROY—Are they written in secret ink or are they publicly available?

Mr Bryant—I think it is our intention to make them publicly available.

Senator RONALDSON—They will form part of the plan.

Mr Bryant—Yes, they are an element of the plan.

Senator CONROY—So all the prices that Telstra Wholesale are charging Telstra Retail for all the products will be publicly available, because they are part of the plan?

Mr Bryant—At this stage we see the internal contracts relating to, as I said, essentially those common support services that are provided from the network to both Telstra Wholesale and to Telstra Retail. The pricing equivalence framework will really be to try and establish an internal wholesale price for Telstra which can be used to assess whether Telstra’s retail

pricing, vis-a-vis their wholesale pricing for the same products, is fair, and that is where it fits with part XIB and compliance with that part of the act.

Senator CONROY—At least we have established that there will be a piece of paper.

Mr Bryant—There will be more than one piece of paper.

Senator CONROY—There will be something written down that is a reference point.

Mr Bryant—Yes.

Senator CONROY—Whether it is legally binding, because it is between the same parties, and whether they can be held to it—

Mr Bryant—It will be legally binding to the extent that it is part of the operational separation plan and Telstra must comply with that. If they do not comply, they will be issued with a rectification plan. That is the legal framework.

Senator CONROY—Will the ACCC have access to these?

Mr Bryant—Yes.

Senator CONROY—Which products will be covered by these?

Mr Bryant—I think we have an indication of some products in the explanatory memorandum, but we have not finally settled that list yet. The reason for that is that, in terms of the designated services, which are the services you are talking about, we have a focus on those key wholesale services that wholesale customers particularly rely on to compete effectively with Telstra. At the same time, we want to identify the retail services that are provided by Telstra's retail business unit that correspond to those wholesale services. While we have some initial ideas on that, Mr Fletcher from Optus stressed quite strongly that we have to have a very detailed matching process to make sure that we have those comparisons right and that we have got the proper wholesale and retail services that will enable an effective comparison and effective performance measures to be put in place.

Senator CONROY—Okay. Has the department given any consideration to what services will be designated under the government's operational separation regime?

Mr Bryant—Yes, we have, as I said.

Mr Markus—It is there on page 87 of the explanatory memorandum.

Senator CONROY—You mentioned that. I will go to the next question. What was the reasoning—and I am trying to understand this generally—behind the decision to develop a designated services list that would operate in parallel with the declared services regime? What is wrong with the declaration process?

Mr Bryant—Going back again to my original comment, really this is intended to complement that regime. So, if we think about the range of services that we want greater transparency and equivalence around, it really is those core services that you would expect would be subject to declaration under the access regime in any event. So what we are trying to do here is to enhance that regime by providing additional transparency and additional equivalence, to ensure that range of services is being provided.

Senator CONROY—Is broadband one of those services?

Mr Bryant—Yes, we are looking at ADSL.

Senator CONROY—You have noticed there has been a little bit of a skirmish in recent months about the actual true cost of broadband?

Mr Bryant—Indeed.

Senator CONROY—Are you looking forward to negotiating with Telstra about what the true cost of broadband is?

Mr Bryant—I do not think it will be our role to do that.

Senator CONROY—You are on the committee though, aren't you? I thought the committee consisted of you—as in the department—

Mr Bryant—The working group is intended to develop the methodology. Essentially it is really between the technical experts and—

Senator CONROY—Yes, but you are on the working group?

Mr Bryant—Yes, we will be chairing the working group.

Senator CONROY—So you will be part of these negotiations?

Mr Bryant—But we will not be in the business of establishing actual prices. We want to establish the methodology, the protocol, how the pricing equivalence framework will work and how it will effectively interact with—

Senator CONROY—Has the ACCC tried that in recent years?

Mr Bryant—I think they have—

Senator CONROY—With a lot of success? Have the ACCC and Telstra managed to establish one single price in the last 12 months on any product? They have a methodology, they have processes. It is chaired by Graeme Samuel sometimes. But I do not think they have come up with any prices yet, have they?

Mr Bryant—I am not quite sure what point you are making.

Senator CONROY—I am just wishing you luck.

Mr Bryant—Thank you.

Senator CONROY—What was the thinking behind giving Telstra a right of veto over the determination of new designated services? This one I find quite extraordinary. ADSL 2, for instance, is not in the running for being on the list, I understand, although that may change. But, if we take it as an example—or whatever people may decide in the future is the go-to technology—will Telstra have a right of veto?

Mr Bryant—Over non-declared services?

Senator CONROY—Yes. About having something become a new declared service?

Mr Bryant—Getting back to the core focus of what we are trying to do here, it is to focus on those core services. As I said earlier, we would expect there to be a very strong correlation

between the designated services you would want to work with and services that would be declared under the access regime anyway. So we see that correlation. We want to identify others initially that might go beyond that.

Mrs Holthuyzen—Future declared services could be included by the minister. It is only if they are not declared that Telstra has the veto.

Senator CONROY—Now you have confused me: Telstra has a veto over something that is not declared?

Mrs Holthuyzen—Yes. So any declared service the minister can automatically include.

Mr Bryant—Can I just make the point as well that—

Senator CONROY—I would love to spend a little more time on this, because I am still confused, but—

Mr Bryant—Just to make a general point that is probably quite an important one: we see that there will be significant parts of the non-price side of the operational separation framework that will apply generally across wholesale services. The key points are really that we intend to have an information security plan that will operate across all wholesale services. I think the competitors see that as very important. We want a plan in place about access to information about network developments, about access to exchanges and about all of those sorts of things. We want a wholesale service improvement plan to be put in place to address a range of the concerns that wholesale competitors have expressed about the delivery of wholesale services by Telstra. So under this framework a range of elements that will be general across all wholesale services will be put in place. The designated services essentially relate to the pricing equivalence framework and to the delivery of those common support elements.

Senator CONROY—How can access seekers be assured that the agreements between Telstra network and Telstra retail address the non-price issues that are important to them? Will access seekers be consulted about the development of these terms?

Mr Bryant—Yes.

Senator CONROY—I would like to talk briefly about the way in which breaches of the operational separation regime are dealt with under the proposed legislation. Is it correct that the sole first instance responsibility for the enforcement of the operational separation regime rests with the minister?

Mr Bryant—That is correct, in terms of issuing a rectification plan.

Mrs Holthuyzen—That is right. And the ACCC would be involved in providing advice in relation to that matter.

Senator CONROY—So they would be as relevant as me?

Mr Bryant—No. Can I address that, because—

Senator CONROY—Oh, they are more relevant than me!

Mr Bryant—The key part of the bill which we intend to use to ensure the ACCC has adequate monitoring and investigation powers is 51(1)(d), which, in establishing the plan, requires Telstra to comply with the requirements that the minister determines, and we would expect that the minister would determine a range of measures to ensure that there is appropriate opportunity and power for the ACCC to investigate and be aware of all of the activities under the plan. Also, there is 51(3), which provides for the plan to give administrative decision-making powers to the ACCC.

Senator CONROY—Is it the case that the ACCC is precluded from taking enforcement action with respect to breaches of the operational separation regime?

Mr Bryant—No, it is not true.

Mrs Holthuyzen—That is not correct.

Senator CONROY—The first instance?

Mr Bryant—Again, as I indicated, on advice from the ACCC, the minister can issue a rectification plan. If that rectification plan is not complied with, the ACCC can take enforcement action.

Senator CONROY—The ACCC would be prevented from taking enforcement action until the minister has first intervened?

Mr Bryant—For a rectification plan.

Mrs Holthuyzen—That is correct.

Senator CONROY—So that is a yes?

Mr Bryant—Yes.

Mrs Holthuyzen—Yes.

CHAIR—Senator Adams has some questions that she would like to put on notice, I believe.

Senator ADAMS—Yes, I have some questions to put on notice, so I have just put them on the record.

CHAIR—The arrangement for questions on notice is that they have to be in by 6 pm tonight and they have to be responded to by 6 pm tomorrow night. Are you happy with that arrangement?

Mrs Holthuyzen—'Happy' might not be the right word.

Senator CONROY—I just want to make sure that that is recorded in *Hansard*: the questions on notice have to be in by one hour?

Senator ADAMS—No, we have given the questions to them.

Senator CONROY—They have to be lodged by six o'clock?

Senator ADAMS—Yes.

CHAIR—My question was serious. If you would prefer that the questions were asked and you respond to them, we can do that. If you would prefer to take them on notice, you must have the answers in by 6 pm tomorrow night.

Senator RONALDSON—There are about six questions there; I am sure the department would be more than happy to do it by 6 o'clock tomorrow night.

CHAIR—I saw the look of anguish on their faces.

Mrs Holthuyzen—No, Senator. We can take them on notice.

CHAIR—Okay, it wasn't anguish; it was delight at the fact that the session was coming to an end. That being the case, we will conclude these proceedings. I thank all the witnesses for their evidence, including those who have made written submissions in such a short time frame. I thank the *Hansard* people for being here today and also for producing the proofs so quickly. And I thank the secretariat, who have done a magnificent job to put this hearing together on very short notice. I would particularly like to record my thanks to the secretary, Miss Louise Gell. With that, I close these hearings. Thank you all.

Committee adjourned at 5.04 pm