



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

ENVIRONMENT, COMMUNICATIONS AND THE ARTS  
LEGISLATION COMMITTEE

**Reference: Telecommunications Legislation Amendment (Competition and  
Consumer Safeguards) Bill 2009**

WEDNESDAY, 14 OCTOBER 2009

CANBERRA

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**SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS**

**LEGISLATION COMMITTEE**

**Wednesday, 14 October 2009**

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

**Substitute members:** Senator Macdonald to replace Senator Troeth for the period 6 October to 23 October 2009

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

**Senators in attendance:** Senators Birmingham, Mark Bishop, Fisher, Macdonald, McEwen, Nash and Wong

**Terms of reference for the inquiry:**

To inquire into and report on:

Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009

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**Committee met at 9.47 am**

**CHAIR (Senator McEwen)**—I declare open this public hearing of the Senate Environment, Communications and the Arts Legislation Committee in relation to its inquiry into the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009. The committee's proceedings today will follow the program as circulated. These are public proceedings, but the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, be made at any other time.

[9.49 am]

**FORMAN, Mr David, Executive Director, Competitive Carriers Coalition**

**CHAIR**—Welcome. I invite Senator Lundy to make a statement.

**Senator LUNDY**—Mr Forman is my husband.

**CHAIR**—Thank you very much for coming along to talk to us today, Mr Forman. The committee has received your submission as submission No. 48. Do you wish to make any amendments or alterations to your submission?

**Mr Forman**—No.

**CHAIR**—I invite you to make a brief opening statement.

**Mr Forman**—Thank you for the opportunity to appear in regard to this extremely important piece of legislation. There has been a lot of discussion in the public arena, since this bill was announced, about issues such as the NBN and perceived implications for Telstra's rights. Our view is that a lot of this discussion has mixed together and confused issues that are not specifically related to this bill. The approach of the CCC has been to deal with this legislation on its merits. We think that the need for it stands apart from any other activity that is going on in the market or the industry today.

Our view is that, if passed, this legislation represents the first comprehensive attempt to deal with the problems in this industry since legislation to try to create a competitive market was first introduced in 1997 and that is why we support it. We see this not as a Telstra bill but as legislation that is designed to create a sustainably competitive industry for the benefit of investors and consumers. Clearly, the bill does have big implications for Telstra but that is because it is a measure of the failure of the existing arrangements that Telstra is not only still dominant right across this industry but is in fact becoming more dominant. This is a problem of market power and is a problem that cannot continue to go unaddressed.

Arguments to delay this bill, in the view of the CCC, simply do not wash. On the one hand, the problems that are being addressed by this bill could not be more clearly known or clearly understood and the proposed solutions that the bill presents are not novel but in fact well-established and there are plenty of precedents for them being used both here and overseas in telecommunications and in other industries. On the other hand, the cost of delay is quite clear while any benefits are dubious at best. Delaying the passage to see if Telstra chooses to negotiate some voluntary separation agreement with the government needs to be weighed against the certainty that every day that action is delayed is another day that Australian consumers suffer high prices and poorer services compared to the rest of the developed world. Let us remember that Telstra has before said that there were 98 per cent of the way towards concluding a secret deal with the ACCC only for us later to discover that Telstra was actually pursuing 110 per cent not 100 per cent and that entire deal evaporated into nothing.

In short, we regard this bill as representing reforms that are years overdue. It is not surprising that Telstra will attempt to delay their passage. Telstra are effectively in clover with profits that are the envy of the rest of the telecommunications world. The time has come, we believe, for those margins and this industry to be exposed to the disciplines of real competition. The rest of the industry expects action now and we believe that consumers need it.

**CHAIR**—Thank you very much. Yesterday we heard from Telstra their view that they still manage in their current structure to provide competition particularly to access seekers and they gave an example of how when carriers are seeking services from Telstra that Telstra's systems cannot identify whether it is a Telstra request or a request from another company. There was some debate about that. Could you, from your point of view, describe whether or not you believe Telstra in its current configuration is able to provide the necessary separation to ensure competition for customers?

**Mr Forman**—It is absolutely clear from the experience of my members that Telstra does not provide equal treatment when they seek access to the Telstra monopoly network to that it provides for its own retail division. I noted that Telstra has been talking about the quality of the information systems that they have built for their wholesale system. This would be the same information system that my members have had cause to complain about repeatedly to the ACCC because of the long periods where that system has been down where my members have had no access to customers, where their attempts to connect new customers have been delayed,

where their attempts to have faults fixed have been delayed, and where they have had no explanation from Telstra for days as to what is going on.

If Telstra have invested so much in these systems and these systems are so good, they should be using them themselves. But they are not saying that. If these systems are so good, Telstra should not be saying that it is so expensive for them to contemplate building another system under functional separation. They should simply be able to shift their retail business under the same system that they provide to us. That is not what they are proposing.

**CHAIR**—All right. Do you believe that the amendments to the act as proposed in this legislation will address that issue?

**Mr Forman**—We see the act as proposing two things, and what I want to talk about primarily is what is most clear in the act—that is, the functional separation arrangements. It also, as we understand it, provides a process by which structural separation could voluntarily be entered into and it is a bit less clear as to what the elements of that would be. The elements related to functional separation set up a set of principles that should be able to address those issues. It requires, for example, equivalence of treatment. We have some suggestions as to how that could be made clearer and how those principles could be outlined more precisely, but as a starting point we think that this act does set up the framework where those issues can be addressed, yes.

**CHAIR**—Could you just elaborate on those areas which you think could be made clearer in the legislation.

**Mr Forman**—Yes. I will refer to our submission. We think that the concept of equivalence should be defined in more precise terms. As we say:

- “Equivalence” should be defined to mean that Telstra cannot supply access seekers on terms and conditions less favorable than it supplies Telstra retail businesses

It is quite a simple, high-level principle, but we think it quite succinctly captures what the government intends to be the outcome.

**CHAIR**—All right; thank you for that.

**Senator BIRMINGHAM**—Mr Forman, thank you very much for your time today. Do you see the separation arrangements for Telstra as proposed in this legislative package as a short, medium or long-term solution?

**Mr Forman**—The functional separation arrangements?

**Senator BIRMINGHAM**—Yes.

**Mr Forman**—What is apparent is that there are a couple of things we know are occurring. The first is that sometime in the next eight years the government intends for there to be a national broadband network. I regard eight years in this industry as being the longer term. That is many generations of companies and many generations of services. What is also clear is that there is an intention to put in place a set of functional separation arrangements that deal with the way that Telstra operate in the marketplace for that period—which, as I said, we regard as the long term—but there is a separate process whereby an alternative path could be followed by Telstra if they wish to follow that path.

As far as we are concerned, what Telstra may or may not choose to do should not guide how we deal with the notions of functional separation that are presented here because, as I indicated in my opening remarks, Telstra could walk away from discussions at any point, as they have done in the past. So we regard this as setting up the industry so that over the medium to long term it will be able to put itself into a position where it can transition onto the NBN, with an alternative pathway that Telstra may choose to go down by agreement with the government and the regulator.

**Senator BIRMINGHAM**—The government claims that the NBN will deliver structural reform in the longer term. Regardless of what happens to this legislation, is that a claim that you agree with, looking at the longer term picture?

**Mr Forman**—If the NBN is built against the principles that the government has outlined in its public statements so far then eight years from now we should have a structurally separated industry supplied by the NBN. Where Telstra fits in remains to be seen.

**Senator BIRMINGHAM**—I note that everyone starts that statement with an ‘if’. If it is built in eight years, we should have a structurally separated arrangement on those terms, as you indicate. How long do you think is reasonable for Telstra to take to achieve separation, noting Telstra’s claims as to how long it took BT

to achieve separation and noting what seems to be the flexibility in the legislation for the arrangements that Telstra could enter into that may actually take up the entire eight years in any event?

**Mr Forman**—I will make two points. Firstly, it has already taken 12 years too long and so we are 12 years behind where we should be. Secondly, I would prefer to look at the statements by BT about their own arrangements rather than Telstra's statements about BT. BT said, in reports I understand they made to their own regulators and in information they have provided to other Senate committees here in Australia, that it took about three years and about £153 million. What is a reasonable time for Telstra to take to implement functional separation? The BT example would suggest that it should be fully operational within three years, and elements of it could be operational within a very short time, within months. That was also the experience of BT. I should also note that, if Telstra are serious about wanting to conclude discussions around voluntary structural separation, there does not seem on the face of it to be anything that they would be required to do in separating themselves under functional separation that could not be transitioned into a structural separation arrangement anyway.

**Senator BIRMINGHAM**—So you think that, with undertakings or agreements that might be reached between Telstra and the government if this legislation is passed, and based on the timing that should be put in place, in any set of circumstances it should be able to be done within a three- to four-year period and not stretched out potentially over the entire eight-year period leading up to the NBN?

**Mr Forman**—I said a functional separation arrangement should be able to be put in place in three years. That would be my view and that would be for all elements—and, as I said, a number of elements would be able to be put in place within months.

**Senator BIRMINGHAM**—Do you have any thoughts on how long it might take to get a set of structural separation arrangements?

**Mr Forman**—Again, the legislation anticipates that there are different ways in which structural separation may occur. The way we read the legislation is that it suggests that one of the options for Telstra may be—keeping in mind that the NBN build is going on in parallel—that, over time, Telstra could be divesting itself of some of its assets as the NBN is being built. That seems to us to be a reasonable assumption. If you were to seek to structurally separate by creating a separate company and simply transferring assets into it, disposing of the assets that way, or if you were to dispose of the assets in a trade sale, then it could be done very much more quickly. We have examples of that too. I point to what has happened in Singapore, where SingTel was voluntarily structurally separated because of the creation by that government of an NBN.

**Senator BIRMINGHAM**—Do you genuinely believe that the legislation does set up a choice for Telstra, given some of the potential penalties that lie within the legislative package that could be imposed on Telstra, particularly in regards to access to spectrum, ongoing ownership of Foxtel and so on?

**Mr Forman**—What Telstra and some of their supporters describe as penalties we regard as protections for competition and consumers. Telstra do have a choice. As far as we can discern from the legislation, they can choose to continue to operate across all of the horizontal domains in which they operate today with safeguards around the way they conduct themselves in relation to their vertical integration. The cost of that is that they cannot continue to expand into every other market that exists, and one that has been specifically identified is wireless. Again, that is not novel. There have been at least four occasions that I am aware of where there have been spectrum auctions with limits on who could bid. On occasions that has excluded Telstra on competitive grounds. We were a bit perplexed by the notion that there should be absolutely no limits on how far Telstra should be able to expand, when we saw evidence from the ACCC in June this year, in their annual competitive safeguards report, about the speed with which this industry is reconcentrating. We are going back to a situation where we are getting closer and closer to one provider to more and more people, particularly those people who are living in regional areas. Do we simply say that there is no limit to the extent to which Telstra can be allowed to dominate markets? We do not think that that is appropriate public policy and we do not think that that is appropriate competition policy. Telstra can make the choice. They might see it as being penalised, but, as I say, we see it as protection.

**Senator BIRMINGHAM**—Do you think the wireless market is competitive at present?

**Mr Forman**—The wireless market is more competitive than many other markets, but relative to some other mobile markets or wireless markets in the rest of the world it is not as competitive and in some locations in Australia it is not competitive.

**Senator BIRMINGHAM**—The coalition, over a long period of time, has made submissions to basically every inquiry and review under the sun.

**Mr Forman**—Probably hundreds!

**Senator BIRMINGHAM**—Have you ever proposed restrictions on Telstra's access to spectrum and/or highlighted concerns about the wireless market in those submissions?

**Mr Forman**—We have certainly made submissions around the concerns around Telstra's horizontal integration and we have spoken about their position as market leader in wireless along with pay-TV and cable TV as part of those submissions, yes.

**Senator BIRMINGHAM**—Thanks, Mr Forman.

**Senator IAN MACDONALD**—Can you explain how the universal service obligation will apply under the new regime?

**Mr Forman**—I cannot pretend to have read that part of the bill in detail but if you are asking how it will apply in terms of—

**Senator IAN MACDONALD**—Who is going to be obligated? Is it going to be NBN Co.?

**Mr Forman**—NBN Co. is not referred to in this bill and the universal service obligation as to the post-NBN world is something that we cannot speculate on in relation to this bill. This bill, as we read it, stands alone and apart from NBN. Universal service obligation is clearly something that needs to be reformed under any event as you move to different technologies. However, this bill speaks to some aspects of the USO and my understanding is that it strengthens some aspects of the USO. Under this bill a functionally separated Telstra remains a single entity and it continues to be the universal service provider. So there is effectively no change to the obligation.

**Senator IAN MACDONALD**—If NBN Co. have a network in addition to or instead of Telstra, why would Telstra not have the USO?

**Mr Forman**—NBN Co. does not exist today.

**Senator IAN MACDONALD**—No.

**Mr Forman**—I can speculate on the—

**Senator IAN MACDONALD**—I assume it is going to. I think that is where I—

**Senator BIRMINGHAM**—NBN Co. does exist.

**Mr Forman**—The NBN does not exist.

**Senator BIRMINGHAM**—The physical network does not exist.

**Mr Forman**—Again, this is not related to this bill. I am happy to speculate on our views on the future of the USO and the questions that need to be asked around the future of the USO, but they stand apart from this bill. Our view on the future of the USO is that if you have a new universal network—that is, 100 per cent of Australians have a right of access to a network—then that changes the underlying dynamic of the USO. The USO provides a requirement for the universal service provider to provide to any customer who asks for a certain very limited set of retail services.

**Senator IAN MACDONALD**—I will just read one line from the explanatory memorandum that says it does three things, the third of which is 'strengthening consumer safeguard measures such as the Universal Service Obligation (USO), the Customer Service Guarantee (CSG) and priority assistance'.

**Mr Forman**—Yes, that is in relation to the existing network today. That is not in relation to the NBN. So there are elements of this bill that strengthen the USO and—

**Senator IAN MACDONALD**—But Telstra could be put out of business in a relatively short time unless they succumb to the threats.

**Mr Forman**—Sorry, you have lost me. Can you explain that?

**Senator IAN MACDONALD**—Who performs the universal service obligation at the moment?

**Mr Forman**—The universal service obligation is an obligation on Telstra as a universal service provider to provide anybody who requests a certain very limited set of services to be supplied with those limited set of services.

**Senator IAN MACDONALD**—But if Telstra does not have a network anymore and NBN Co. has the network, how can Telstra be obligated to provide the service?

**Mr Forman**—Again, that is something that goes beyond the legislation that we are dealing with today. The circumstances under which Telstra voluntarily structurally separates will presumably be required to describe how they intend to deal with the USO, and then the government separately will need to make its decisions about the future of the USO. There is a process that is described in the bill as to how Telstra may achieve a voluntary structural separation. In relation to what is in the bill, though, Telstra is not structurally separated. It is functionally separated and that has no bearing on their obligations to provide the USO.

**Senator IAN MACDONALD**—I do not have a great understanding, so correct me if I am wrong, but, as I understand it, Telstra are obliged to do things because they are only ones with a network out where the USO might be relevant. In the future, they may not have—and who knows how long this is going to take—a network. So who then has the USO? Will it be the NBN?

**Mr Forman**—Again, I am glad to talk about the principles that we think should guide the future of the USO. When we move to a different world—it is not about this bill; it is about a future world—our view is that the starting point for the USO, where there is a new network that has 100 per cent coverage that is structurally separated, is the definition of the USO needs to be re-examined. At the moment, it is defined around saying that you, as a potential consumer, have a right to say, ‘I want a telephone,’ and Telstra is required to give you a telephone. What we are saying is that is a very old technology model. We are moving into a different environment. You will have the right to connectivity because 100 per cent of people are supposed to be built to by the NBN and so the entire USO model needs to be re-examined sometime in the future when we get to an NBN world. But we are not there yet and this bill does not, should not and cannot deal with that.

**Senator IAN MACDONALD**—If Telstra does not play ball and keeps its own network, it should continue to do this. But then there will be another network built beside it which will not have a universal service obligation.

**Mr Forman**—It might have. A government somewhere in the future will have to decide who is the appropriate universal service provider, if there are two networks.

**Senator IAN MACDONALD**—A while ago in your evidence, you said that there was a concern that services, particularly in the regional areas, were concentrating back on Telstra. Why is that?

**Mr Forman**—What has happened is there are a number of services that Telstra is required by law to provide that relate to the fact that they own the legacy copper network—the final piece of wire that runs to people’s homes. The regulatory regime has been set up to encourage competitors to enter the market beginning with what is, effectively, a resale service. So they will take a Telstra end-to-end service and put their own brand on it. Then, to encourage them to invest a little further and to provide what is called a wholesale service, they might have their own switches in the middle of cities that allow them to draw traffic back on a line that is activated by Telstra, Telstra puts a dial tone on, they bring it back to the cities and they redirect the calls or services. And then there is the final stage of the services, which is the so called ‘unbundled local loop’ where people invest into specific exchanges and rent only the copper, the space in the exchange, the power and the many other things that they pay for. This is the concept of the ladder of investment or the stepping stones of investment, so you can enter the market and gradually—

**Senator IAN MACDONALD**—But why aren’t others in it? Are you saying that it is just too difficult for them because Telstra are so awful?

**Mr Forman**—Let me continue. What has happened over the past few years is that that important middle stepping stone, the wholesale product, has been gradually made more and more expensive relative to the retail services, so people cannot make money on it.

**Senator IAN MACDONALD**—By Telstra?

**Mr Forman**—By Telstra. We have done some calculations based on Telstra’s annual reports over the last three years. The effect of that is the number, in total, of individual lines connecting customers to competitors in three years has fallen by 290,000, which is about the equivalent of the population of Canberra.

**Senator IAN MACDONALD**—It is not directly relevant to this, but we parliamentarians were given a modem to shove in our laptops. It happens to be an Optus modem. It does not work in the bush, which suggests to me that in that area—and it has got nothing to do with Telstra, as I understand—Optus just are not interested in servicing those parts of the bush that are not profitable.

**Mr Forman**—There are some places where, as the ACCC itself has said, there are not enough people to justify lots of people investing in a network; the issue then becomes how you provide competition. The wholesale service is how we traditionally provided competition. If you have the only network for that reason it is a natural monopoly and then the argument has been that you should allow access to it. It is the same discussion that has gone on in relation to railway tracks in the Pilbara. There is only one of them. Do you require people to build multiple networks to end users? Telstra was given about \$120 million of public funds to build the CDMA network in regional areas because they said it was not profitable or commercial to build it. Those funds came with requirements that wholesale services were provided. Telstra switched off that network, took the towers and the other investment in infrastructure that had been paid for by the public, put their own equipment on it and they then had no obligation. Telstra said, ‘This is now the Next G network not the CDMA network. We now have no obligation to provide a wholesale service’ and so an entire network, the Orange network, which had been built by competitors was shut down because a service that is called roaming was no longer available. Telstra said, ‘Bad luck. We’re just not providing it anymore.’

**Senator BIRMINGHAM**—Is there a prospect that under this legislation Telstra will either choose to attempt to vend into the NBN or switch off and entirely cease to use its existing copper network?

**Mr Forman**—As we have reminded people, Telstra said in 2004 in a Senate committee—I think in this very room—that they were into the last sweating of the copper network and the date for it becoming obsolete and too dilapidated to work any longer and needing to be replaced was five to 10 years, so the notion that the copper network is going to work forever is something that we need to put aside anyway. As to the copper network being vended into the NBN, obviously the NBN company will make commercial decisions about what assets it chooses to acquire from various parties under various circumstances. What happened in Singapore was that SingTel chose to voluntarily structurally separate and sell off some of the so-called passive network assets that were later used by their high-speed network because they made the judgment that they did not need to be in that business any longer. They could acquire access to that passive connectivity from another provider.

**Senator BIRMINGHAM**—So how does the CCC see traditional fixed line services or do you not see traditional fixed line services being provided to the 10 per cent of Australians who will not have fibre rolling up to their door?

**Mr Forman**—If you are talking about the NBN, I want to make the clear distinction that NBN issues are separate to this bill and that statements from the government as I understand them have been clear: it is about a connectivity technology; it is not about a service technology. They are saying that 10 per cent of the population will get a wireless or satellite service and that there will be a minimum of a 12 megabit per second connectivity speed. Keep in mind that voice is a service; broadband internet connectivity is a service. All streams of data are services in the new technology world that we are moving into. Providing connectivity in the new technology world is necessarily different to providing a service, which is where we depart from where we were 40 or 50 years ago. The network and the service were much more tightly integrated.

**Senator BIRMINGHAM**—Big challenges for government in how it structures, for example, untimed local calls in that type of world, who delivers them and how they are guaranteed and provided for those regional Australians, particularly in that 10 per cent area.

**Mr Forman**—Not necessarily. Clearly there are issues that need to be thought through, but the cost base of providing services on modern technologies is so much lower than it was on the traditional services. In fact, if you look at the history of the price determinations by the ACCC over the last 10 years, there was this concept called ‘access deficit charge’ where it was conceded that Telstra did not make enough from line rentals and local calls to pay back the cost of providing those services. The commission concluded about five years ago that the cost of those services had fallen so dramatically—the cost to Telstra—that there should no longer be such a thing as the access deficit charge. So costs are collapsing and, as you move onto the new networks, costs collapse further. It is a completely different basis. The notion of how you set retail pricing is a policy issue, and one that governments need to make calls about, but it is not particularly challenging from a policy point of view, I would have thought.

**Senator IAN MACDONALD**—I have just three quick questions and, to prove my quickness, I will ask them all at once. Firstly, are you happy with the extent of the ministerial determination? Are the determinations disallowable instruments, or is there any fetter on the minister’s ability to determine? Secondly, you have already referred to some suggested amendments, on page 5 of your submission. How essential are they? Should the committee really be going to bat to ensure those amendments are looked at? Thirdly—a more

technical question: you were talking to Senator Birmingham about Telstra's copper network, and everyone talks about that disparagingly, because it is old. But isn't it a fact that most of Telstra's network now is not copper? I mean in the numbers of people it serves—certainly not out in the bush. Those are the three questions.

**Mr Forman**—The first question had three parts; let me try to remember what they were. With respect to ministerial directions we do note that, in our view, there should be more detail in the legislation that guides the creation of those determinations. I do not think they are disallowable instruments, as I read it. We do not have a position on how we feel about that, simply because we have not had time to talk through the issue, but nobody has raised with me any strong objection to that—on the understanding that the important thing for us was to get more guidance in the legislation that sits around those ministerial directions.

**Senator IAN MACDONALD**—If there is any problem about that, could you get back to us on notice?

**Mr Forman**—Absolutely. With respect to how essential the amendments that we put are—these are the amendments in the regulatory changes?

**Senator IAN MACDONALD**—You say on page 5 of your submission that this legislation should include—and you have referred to them there—

**Mr Forman**—Right. Those are the things that I was just discussing.

**Senator IAN MACDONALD**—Yes. There are five dot points.

**Mr Forman**—Yes. They are also on page 9. There are some issues that go specifically to some of the more prosaic aspects of regulation around the pricing determination stuff. We think those are very important. We think that the balance is wrong in terms of the ACCC determination versus access agreements, because it opens the door to gaming. We think it is important that that is looked at and addressed. Most of the Telstra network, no longer being copper—the Telstra network is very hard to—

**Senator IAN MACDONALD**—Most of Telstra's customers, in number—which means capital cities—would be served by other than copper wire at the moment. Is that right?

**Mr Forman**—No, most people in what is called the customer access network, which is the piece of wire from your home to the first connection point: that is still almost universally copper. In CBDs there is a lot more fibre to premises, and there are a lot more other people who own that. But in most of Australia it is still copper.

**Senator IAN MACDONALD**—But to the node in the capital cities it is mainly fibre?

**Mr Forman**—No, there are a few small locations where there has been fibre taken down to the node, but it is rare. Almost universally it is copper to the exchange—or copper to the rim, as it is called, which is kind of a mini exchange.

**Senator NASH**—Mr Forman, I have a particular focus on regional Australia. Either functionally separating or structurally separating Telstra: is that going to have a benefit for regional Australia? If so, what?

**Mr Forman**—I would think that of all the people who would benefit most quickly would be regional Australia because you would have a wholesale access provider that had an incentive to try to get other retailers to come in and compete for those customers who today, in more and more cases, have no choice but to go to Telstra. That would be my view under both functional separation and structural separation.

**Senator NASH**—In your view, with your knowledge of the industry, if there is a more level playing field due to the structural separation or functional separation, are those carriers likely to go to the regional areas and offer a service under the new arrangements compared to the existing arrangements?

**Mr Forman**—They would. In fact, a number of my member companies are still attempting to get out there. Others have attempted and have been forced to pull back because of the difficulty that I mentioned around accessing wholesale services. It is worth noticing—and some years ago John Anderson put it very succinctly—that the best way to deal with the problems of service in the bush is firstly to get competition right so that you reach as many people as you can. On the basis of that you can identify the places where you have market failure and you can then build programs for those people. As a set of principles I think that that still holds as true today as it did in 2005.

**Senator NASH**—As you said, the NBN Co sits entirely separately from this piece of legislation. This is a pretty blunt question but, if we maintain the current arrangements of the structural or functional separation itself, are we right to think that regional Australia is going to be worse off?

**Mr Forman**—All of the evidence suggests that they are getting less competition. I am sure you can measure the number of constituent complaints that you get, but just yesterday I had yet another complaint from someone in the bush whose service had been down since 10 September and had no choice but to wait for Telstra to fix it.

**Senator NASH**—Just to clarify the issue that Senator Macdonald raised earlier about the USO, is it your view that separating either functionally or structurally under this legislation would not have any impact on the USO as it currently stands?

**Mr Forman**—No; not necessarily, as it currently stands. Certainly under the functional separation as it currently stands, and under this legislation, I do not see that it should have any impact. Under structural separation there would just need to be a decision made when the structural separation arrangements are put in place as to whom the obligation applied.

**Senator NASH**—Should there be any concern at all or is there any potential impact from these changes on the PSTN, or just on ordinary telephony services?

**Mr Forman**—No. There is a lot of confusion about the extent of these changes and what they mean for services but, again, taking the legislation as it stands, in functional separation it requires a set of internal business arrangements to be put in place within Telstra that defines the way in which they attribute their costs and requires them to acquire services on the same basis as others acquire services based on the fundamental network. It does not change the fundamental network.

**Senator NASH**—Quite simply, it is just a wholesale level playing field; isn't it?

**Mr Forman**—That is our view.

**CHAIR**—Yesterday, witnesses who appeared before this inquiry and representing shareholders made some heady claims about what they claim to be the effect on share value if the legislation went ahead. Can you offer your views on that? Also, do you have any thoughts about the future prospects of investment in the Australian Telecommunications Industry under this legislation versus the current legislation?

**Mr Forman**—We have been bemused by some of the statements from some fund managers. They have entered the debate like Rumpelstiltskin apparently having been asleep for five years of debate and have been woken up apparently by the booming voice of Mr Phil Burgess. The comments do not display an understanding of either what is being proposed or of the fact, as I said earlier, that this is not novel. If you look at what happened in the UK, BT share price actually improved relative to both the rest of the UK share market and to some of its standout competitors on the European continent. It improved because a lot of the uncertainty was removed and there was the promise that, over time, other aspects of regulation that constrained them in retail markets would be removed. In fact, that is what has happened.

As recently as, I think, June this year I had the opportunity to hear both OFCOM, the regulator, and BT in Europe proselytising what a fantastic outcome this had been—not only for BT shareholders but also for consumers. In fact, OFCOM reported in about August that broadband prices in the UK had fallen by 40 per cent as a consequence of the functional separation and the increase in competition. That goes to the other part of your question about investment. BT has announced plans to invest more deeply in its own network and competitors have rushed to invest in providing alternative broadband services, all of which have delivered these outcomes for consumers.

**CHAIR**—So if the broadband price is 40 per cent less in the UK as a result of the separation there, and Australia's broadband prices are higher than the UK's prices, what is the relative difference now between Australian broadband prices and the UK prices?

**Mr Forman**—I do not have those to hand but I can say that the OECD recently reported on the relative position of various prices, including basic fixed voice prices, and Australia was about the fourth or fifth worst in the OECD, for example, for basic fixed-line services for small business. That suggests to me that there is plenty of margin for price reductions here. Certainly we have seen that wherever any of my members have been able to invest and compete over the last decade or so—such as, famously, where Hutchison, now Vodafone-Hutchison, built the first 3G network—prices have come down very rapidly and the entire pricing structure changed. We moved away from timed calls toward so-called bucket plans or fixed plans. So, all of those things go on the table as soon as you get investment. I think we will see the same in broadband and fixed voice under the proposed changes that are in this legislation.

**Senator BIRMINGHAM**—What is more important to long-term competition in the sector? Is it the passage of this legislation with the separation issues for Telstra or is it the NBN?

**Mr Forman**—I did not know this was a choice but if you give me a choice I will take this legislation and let the NBN sort itself out over the course of the next eight years. If you suggested to me that the NBN was likely to succeed in the absence of this legislation I would suggest that that is a pretty big bet.

**Senator BIRMINGHAM**—But if this legislation were to pass and the NBN did not exist you would expect that a newly separated infrastructure entity created out of a separated Telstra—whatever that is called and however it is separated—would probably be more inclined to invest and, under the right regulatory regime, would increase investment levels on what we have seen in the past?

**Mr Forman**—I think that the experience in the UK suggests that that functional separation leads to greater competitive investment and greater investment in response by the incumbent. Would that ever lead to a fibre-to-the-premises network? I think that is a pretty big bet. Commercial telcos on their own cannot capture all of the externalities that governments look at when they think about that kind of investment. Some of my members were involved in some of the proposals to the government in the previous process. No-one was suggesting fibre to the premises.

**Senator BIRMINGHAM**—But it may lead to greater investment in fibre by the private sector in what you could broadly call the profitable areas, leaving government to focus more on incentivising investment in those non-profitable areas, and indeed to the home if that is the ultimate goal, rather than what seems to be the approach at present—of government stepping out first and seeing whether the private sector comes with it.

**Mr Forman**—That is possible. It is likely there would be greater investment in fibre anyway, because, as I said, the copper has to be replaced. I am not quite sure that I understand your question but if you are asking whether I think that fibre to the premises would be built by the private sector if the structure of the industry was put in place to create the right incentives for competition, I still think it would be a very long horizon, if it were to happen at all. As I said, the case for building fibre to the premises, if you look at a lot of work that has been done by the OECD and so forth, is quite geographically specific. That is because it cannot capture the broader externalities in areas such as health and education and so forth which, if you were taking an economy-wide perspective, you would be looking at to justify the investment.

**Senator BIRMINGHAM**—We are not in the NBN hearing, so I will not take the logical extension of that and say that if it is only stacks up on the basis of externalities it cannot possibly deliver the profits that government claims it will deliver. But that is for another debate.

**CHAIR**—As there are no further questions, thank you very much, Mr Forman, both for your submission to this inquiry and for taking the time to appear before the committee this morning. We appreciate your assistance very much. We will take a short break.

**Proceedings suspended from 10.36 am to 10.48 am**

**SINCLAIR, Mrs Rosemary, Managing Director, Australian Telecommunications Users Group**

**CHAIR**—I would like to welcome Ms Rosemary Sinclair of the Australian Telecommunications Users Group, conveniently known as ATUG. The committee has received your submission as submission No. 44. Do you wish to make any alterations or amendments to that submission?

**Ms Sinclair**—No.

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

**Mrs Sinclair**—Yes, and I will try to keep it brief because it is amazing how in these discussions we can get down into the detail and often get lost. Starting with who we are I think is important to understanding where we are coming from. ATUG represents all the business, government and community organisations who are using today's communications services and will be dependent on tomorrow's communications services to deliver their products and services to clients and customers throughout the entire economy. So our perspective on this whole debate is: how important is this legislation to the whole economy, not just to the telco sector and not just to investors in that sector but to the entire economy, and not just businesses in the economy but, very importantly, community sector organisations that are increasingly playing a role in bringing services to people? That is our perspective, No. 1.

Secondly, we are very interested in regional communications. A number of our members have branch offices that stretch the length and breadth of this country, or they are trying to deliver health services in the most remote places or education services and so on. So over the last five years we have had a roadshow and we have been to some 75 towns all over Australia, in regional and remote areas, talking to residents and businesses directly about their communications services and needs and, in particular, about broadband.

Central to the way we think services are best delivered is our commitment to competition having a core role wherever possible. We think competition delivers choice, price, service, quality and innovation. But over the last decade or more we have come to the conclusion that the fixed copper network is in fact an enduring bottleneck and that unless we deal with it in that way we are not going to get the right benefits for the economy overall. Competition around the fixed network depends on how it is regulated. Our view is that the current regulation does not work, and it is why we support the new regulatory approach that is proposed in this bill. The current regulation sees a lot of uncertainty, which deters investment; it sees an enormous amount of disputation, which delays outcomes; and it sees industry processes, particularly in broadband, that limit the choice, the ability of people to move from one broadband provider to another.

Given that perspective, the core message we want to focus on is that we think it is really important for the committee, in thinking about this legislation, to focus on the long-term interests of all the end users of communications services and not to be dragged down a path by any particular company in the sector or any particular interests of that company or investors in that company. The long-term interests of all the end users has really got to be the core concern of the parliament when it is considering this legislation.

That sounds a bit ephemeral—the 'long-term interests of end users'—so I want to take a moment to make it very practical. It actually means any-to-any conductivity, so I can pick up my phone and call anyone else who has a service, the length and breadth of this country and internationally. It means ubiquitous access. It means affordable prices. It means service portability, so that we can get the benefits of competition; service reliability; service quality; efficient investment, not investment at any price; and service innovation. We think those core elements apply to the current environment and we want to make absolutely certain that they apply in the NBN world as well. That has got to be the core policy in this sector.

History is really important in this discussion. We are very aware of problems that emerge in this sector. But, frankly, we like the model of the NBN: a structurally separated, wholesale only, open access model. We want to keep that picture in our minds and come back to the proposed legislative changes and get as close as we can in the current legislation to that philosophy. We think there need to be two elements. There definitely need to be changes to market structure, which is what the whole discussion about structural separation or functional separation is about. It is about changing the market structure in a particular market, and that is the market for fixed network services, but as well there need to be changes to ACCC powers so that we can get much quicker decisions out of regulatory processes.

We are very keen for the structural separation option to be voluntarily determined by Telstra. The reason that we are keen for that is we think that that will be the most sustainable outcome. So we very keen for those discussions, which we understand from various reports are going on, to conclude. We think a win-win for the

government and Telstra will also be a win for end users. But we do not see any reason for those discussions to be the cause of any delay to this legislation. We would like to see this legislation passed as quickly as possible. We think that it in fact contains the incentives that have caused the discussions that have happened so far to get underway, and that without those incentives there is no likelihood of a good outcome on that issue of structural separation. Should those discussions not get to the point of effective, sustainable structural separation then we would support the functional separation model outlined in the bill. I will stop talking there and start answering questions.

**CHAIR**—Thanks very much, Mrs Sinclair. Senator Birmingham.

**Senator BIRMINGHAM**—Mrs Sinclair, welcome and thank you for your time today and your submission on these important matters. You outlined in your conclusion a clear preference, it seems, for the structural separation pathway. Do you believe that the legislation is structured to at least engineer that outcome as a preferable outcome?

**Mrs Sinclair**—Yes. Our view is that the way the legislation is structured provides strong incentives for people to really seriously consider and work hard at that option.

**Senator BIRMINGHAM**—Some would describe those incentives as being threats. Some of those who appeared before us yesterday certainly used that type of language. Do you think to be picking up on access to wireless spectrum and using that as an incentive and/or threat against action in fixed line markets is reasonable?

**Mrs Sinclair**—I have tried to stay pretty unemotional about this, because I do not find the level of emotion helps my own thinking, and it probably does not help other people's thinking. The way I get to the spectrum issue is after a long and careful analysis about the competitiveness of the market. It is on the basis of the analysis which says that we have got competition problems in this market; therefore we would exacerbate those with spectrum allocations that did not take account of those. That is how I think we get to the spectrum piece. It is a power that exists already for the minister, and I think this is how it works: the minister asks the ACCC to look at the competitive impacts of allocating spectrum to particular people who bid for it; then, on the recommendation of the ACCC, the ACMA has the power to exclude people already from bidding for spectrum.

Spectrum is allocated through those processes. There is no guarantee, even if people are bidding, that they are going to be allocated spectrum. So I think it is very important to understand where that suggestion comes from and how existing mechanisms would work to try to ensure competitive outcomes. But I think that the strongest competitive outcomes would come from structural separation in regard to fixed network services. If we can get to that point then a whole range of other markets can develop quite happily on their own basis. If we look at the mobile market, it is a good example of where a competitive market will drive outcomes for end users that are good. If you look quite carefully at the OECD material that was referred to earlier, you will see better outcomes for Australian users in the mobile market than in the fixed market.

**Senator BIRMINGHAM**—Okay. The government has described these measures around separation as, in a sense, interim measures before achieving its end goal, that being the NBN. You said you framed your introductory remarks on the basis of seeing the NBN structure as the end goal and try to achieve models at best replicate some models of that along the way. Telstra have suggested to us that it could take six years to functionally separate. If it takes six years to functionally separate and eight years to build and NBN, is it worth while?

**Mrs Sinclair**—In terms of checking how long it would take to functionally separate, there is an expert in the department now, a fellow called Peter McCarthy-Ward, who was actually responsible for the functional separation of BT, and it did not take anything like six years. It was a much faster process than that. So I could not readily accept the claim that it would take an organisation as well resourced as Telstra six years to functionally separate.

In terms of the NBN comment, I must say, having been through many of these processes over the last 18 months, my own approach is quite practical. On my desk I have one squidgy toy up here which I call the NBN world and I have another squidgy toy down here which I call the current world, and I am always very careful to work out which world I am in when I am answering questions and writing submissions. Occasionally I go over here and I say, 'Okay, we have finally, finally decided that the fixed network, whether it is a copper network or a fibre network, is an enduring bottleneck and it needs to be treated in the same way.' So, having got that philosophical point, I then go back here, and say, 'How close can we get in the current legislation and

now the new legislation relating to the existing network and take the principles and philosophies from that and try to embed them here so that we actually start to create an industry with a culture and a way of working that is preparing it for this world and, as well—importantly, from my point of view—get much better outcomes for end users from the fixed network world that we have got?’

Someone asked a question earlier about broadband prices, comparing the UK to Australia, and I have the OECD numbers here. In every category of low, medium or high use of broadband, the UK prices are significantly lower than Australian prices. My view is that if we make these legislative changes now, during the time that we are building up the NBN, we will get those benefits in Australia as well.

**Senator BIRMINGHAM**—Okay. Telstra have proposed in their submission an alternative pathway. I do not know if you have had an opportunity to—

**Mrs Sinclair**—I have not, no.

**Senator BIRMINGHAM**—You haven’t? Okay.

**Mrs Sinclair**—No. I find it is best to just worry about my own submission!

**Senator BIRMINGHAM**—Right. Telstra’s submission did also only come to us on Friday, so there would have been limited time for you to comment on that one, which I appreciate. In regards to other changes in this legislative package, particularly those relating to the universal service obligation—and the government has long flagged a comprehensive review of that and flagged it again, in a sense, in these changes, rather than embedding any particular changes—what is ATUG’s vision for what the USO should include in the future?

**Mrs Sinclair**—Again, we have adopted more modern philosophies about delivering ubiquitous access, and we like the model of the Australian broadband guarantee. It was where a Liberal government, in fact, guaranteed broadband for 100 per cent of people, wherever you live or work. We think that that explicit acceptance by government of responsibility for the last 10 per cent, just to put a number on it, and explicit funding subsidy programs for that most difficult 10 per cent is the way to go. I guess our view on that particular issue—and that is a funding issue, I know—is informed by the degree of difficulty that an implicit cross-subsidy has caused, flowing through access deficit prices in interconnect prices and so on and so forth. We need some clarity on that. Was the question on the USO about delivering that in a structurally separated environment?

**Senator BIRMINGHAM**—I am interested in that too. The question was more at the heart of what is in or stays in the USO from a consumer perspective.

**Mrs Sinclair**—We have developed our thinking to the point where we think it should be a voicelike service to make sure that people with accessibility problems are covered in the universal service. We have gone to that position because the guarantee of broadband is there and the mobile take-up is very strong on its own basis. So we have focused the USO on a voice or voicelike service. We are keen for people to have the option, if they choose, to pick a mobile service, and we like the new legislation which talks about mobile and VoIP but makes explicit the difference between those services. We are okay with a bit of extended choice for people in terms of how they have their service delivered.

**Senator BIRMINGHAM**—Do services like untimed local calls have a place in a future USO?

**Mrs Sinclair**—Honestly, I do not think we have to worry about that, because when I look internationally what I see with next generation networks and packages are buckets. It is like with the mobile industry, where we now see bucket plans. I think that we will move to pricing structures that include all local and national calls in your monthly plan. But, having watched the history of untimed local calls for a very long time, I understand the political significance of it.

**Senator BIRMINGHAM**—Thank you. I will leave it there for now.

**Senator LUNDY**—I ask a question going back to some of your earlier points in your opening statement that were about the long-term interests of end users. I start by taking this opportunity to ask you to explain to the committee how you represent the interests of the long-term end users. I know ATUG has been in the landscape for a very long time. You are one of the few groups here representing end users per se, so I am keen for you to explain how your organisation represents the interests of the end users.

**Mrs Sinclair**—I will take a moment on the history. It was ATUG in 1981 that started us all down this journey of exploring how effective competition could be in delivering communication services throughout the country. Since 1981, we have been working to take direct account of what it is that business uses at the time. At that time it was large business users and what they wanted out of communication services. The position was

that government owned monopoly providers looked increasingly less likely to meet the needs over time. Since then, we have been working away. In fact, I brought down our 1994 submission to the debate about open competition, remembering that in 1990 we had the duopoly and then the third mobile licence.

This is our 1994 submission. There are all sorts of things in here that I have to say still resonate in terms of what a competitive environment that delivers for end users would look like. We thought then and we think now that this is a core policy objective that gets the best balance for everyone out of decisions in the sector. Whether they are policymakers, regulators or even industry self-regulatory processes, we think that if everything focuses on the long-term interests of end users then the right balance is found. We are always very careful to make sure our focus is on the long-term interests of end users.

So we are not looking for short-term price reductions, we are not looking to be the flashest taxi in the OECD rankings, because we do have a particular demography and geography in this country that we will have to take care of. My members are interested in having it taken care of because their bank branches and hospital clinics and schools are not only in central business district areas. They are very interested in making sure that all those groups are connected in a way that enables them to explore maximum efficiency and productivity outcomes. We keep talking about transforming the health sector and sometimes I think, 'That is a very glamorous discussion, how we are all going to transform the health sector.' The thing that we must do absolutely first is make sure that all the tiny little clinics where sister only turns up on Wednesday afternoon for two hours have to be connected to whatever network we have got so that whoever is running that clinic can use the same work processes as they do in bigger places. That is why we are interested.

Over the last 10 years there has been a very interesting change in the economy and our reliance as an overall economy on small business and even micro-business, people working from their residence, whether it be in Young or Chatswood in Sydney. That is a vital and growing part of our economy. Those people are people that we represent, because they are trying to use communication services for business type applications.

**Senator LUNDY**—So you are representing that group of home-based and small businesses.

**Mrs Sinclair**—Yes, anyone who wants to use communications for business purposes is within our frame of reference. Sometimes it is because those people are part of the supply chain for a bigger member of ATUG. So those little people would never be members of ATUG but they are supplying components in the vehicle manufacturing industry or they are part of a supply chain, they are part of a tourist industry. We are as interested in making sure that they have the kind of connectivity that is needed to get productivity outcomes, market share outcomes, innovation outcomes by bigger players. That is why our focus is on the economy as a whole. We have terrific relationships with members of the telco sector, but that is only one sector's point of view. Everybody has got to be reflected in this discussion.

**Senator LUNDY**—I think it is very important that you bring that broader economic representation to the table for the purposes of this inquiry. Can I ask you to go back to your knowledge and understanding about the impact of functional separation with respect to BT. Following on from Senator Birmingham's question, I think you mentioned you had some of the numbers handy to go through some of the cost and price differentials with respect to broadband services that have occurred in the UK so that we can get a bit of an idea in a very real sense of what those differences are and how Australia compares.

**Mrs Sinclair**—Every now and again I question my own thinking on this, on whether I have actually understood what BT says to me. Their model is a very robust model, it is not just a little tweak of our operational separation which was put in place in a great rush around the T3 legislation, which was a very truncated discussion about something that was very important. They talk to me about functional separation and they say it was very good because it provided them with clarity and certainty and enabled them to move on. Culturally what it did was give them a basis for rethinking their leadership role in the whole sector. For the last three or four years they have been having very significant discussions with all their wholesale customers about the updating and investment plans in that sector. I ring them from time to time directly when I read something and I think, 'I have not really understood that. I have got that wrong, they did not really mean that.' I actually ring them up and say, 'Tell me again, what did you think about this?' They confirm. After four years, they still think that was the best thing for their organisation.

In terms of prices, I will just quote a few. This is the *OECD Communications Outlook 2009* and its pricing as at December 2008. The OECD usually looks at low-speed, medium and high usage in all its categories, which capture residential, small business and then corporate and government type uses. So if I just go with low-speed in September 2008—and these are in US dollars purchasing power parity per month—United Kingdom is just a tad over \$US20, and Australia is just a tad under \$US40. For medium use, United Kingdom

is just bumping up against \$US30, and Australia is a little over \$US55. For high-speed usage United Kingdom is just under \$US40 and Australia is just over \$US60. So there are very significant differences there.

Along with their functional separation, it drove some much better industry processes around exchange access, ULL implementation and ULL pricing. It took all the aggravation out of the regulatory processes. If you look at access to exchanges and ULL uptake by competitors since functional separation was introduced up until now, it is a very steep curve. Once the structure is right then the competitors will come in—there is no doubt about it.

**Senator LUNDY**—What about overall capital investment by both BT and other telecommunications companies in the UK? What does the profile on investment look like over that same four-year period since functional separation began?

**Mrs Sinclair**—I like to ask two questions, really. One is about investment and the second is about noise level. That is the other group of people I ask. That is my equivalent. ‘What is it actually like? Is it really, truly better? Do you really feel you have more choice?’ The answer to that question is, ‘Absolutely.’ As business customers, people really now feel they have choice of providers at the national level—people that can provide you with service from one end of the UK to the other. That is a smaller problem than ours, but that is very important.

In terms of investment, once they got this structure right, if you look at the ULL uptake, then it is a proxy for significantly increased investment by competitors. BT did quite a bit of thinking about their own level of investment. Once they had worked through their own business case for extending fibre out to nodes then they made very significant investments in the last couple of years. So I think it has been good for investment. I think it has also been good for innovation. When you are in that market, you get a sense of a whole range of different products and services, pricing packages and innovations that are really important to customers. They are further ahead than we are on IPTV, for example, and those sorts of new services because they are not all worrying about the regulatory environment. That is set. It is well understood. It is clear. People can get on with investing and innovating.

**Senator LUNDY**—The regulatory environment as it is has been used here for years by various players, particularly Telstra, as an excuse not to invest. I still get constituents ringing up saying that they had been told by Telstra that with all the regulatory uncertainty they cannot fix their pair gain system or make whatever the local investment is in the exchange. That is the anecdotal experience I have observed here in Australia. Can you provide some observations, given your knowledge of the UK, of what the attitude generally is towards that regulatory environment in relation to that propensity or willingness to invest, not just by telecommunications operators but also by other ICT companies that are looking at providing, perhaps, data centres, applications or services—such as cloud computing and those kinds of things. I would be very interested in any knowledge or any references you could provide the committee about the level of economic activity facilitated by having fewer regulatory blockages and more confidence in telecommunications investment.

**Mrs Sinclair**—I would like to cover that in two ways. To go to the central point, my reading of the UK situation is that, once they took all the noise out of the regulatory environment and provided everybody with certainty, investment picked up. It was investment by the competitors because they could get in there and it was investment by BT in response to that. Local little examples exist in Australia, where, if you have strong competition in a market, investment by the incumbent will take place. We have seen this many times on our regional road show, when we will go out, talk to people in communities and sit through the long discussion about how we have as many DSLAMs in the exchange as we possibly can see a business case to install and it is a pity the ports are all full but that is where our business case takes us. Then other people will stand up who have got wireless, satellite or other offerings and we have a discussion about competition and choice. Then, some weeks later, people will ring me up to say, ‘You’ll never guess. There’s more investment—we’re going to get more DSLAMs in these exchanges.’ I say, ‘That’s good. That’s the power of competition. When you have effective competition you get investment and you guys get much better choices and much better services.’ You can have big examples or little examples.

Getting back to whether people are having different discussions now because of the investment in infrastructure that has taken place, absolutely. ATUG is a member of INTUG, which is the International Telecommunications Users Group, and one other member is a group that concentrates on multinationals—Nokia, Cisco and other very big companies—not wearing their ICT seller hat but through their user-network manager model. They and their customers are all talking now about cloud computing and unified

communications and collaboration. They are contemplating a ubiquitously available set of tools that is different from the set of tools that is available to Australian businesses and Australian government organisations, which we all need to be as efficient as they possibly can be. We are not having those discussions in a realistic way. We are talking about that future, and it is great, but it is not close to our business operations yet. That is the kind of transformation that is available once you get this world sorted out—whether or not we can sort this world out when we get there.

**Senator LUNDY**—I know ATUG is supporting these bills, but do you see them as essential to allow that further conversation to occur in a more substantive and perhaps meaningful way in Australia with respect to our future economic growth prospects?

**Mrs Sinclair**—Absolutely. Our view is very simple: we would rather have bread today than jam tomorrow. We do not want these bills delayed. Our view is that we have waited long enough. We have been banging on about this since 1994 and before that and we lived through the duopoly. We have been really on a mission about the competitiveness of this sector for the reason that it will drive economic outcomes—growth, productivity, better delivery of government services and, over the last 10 years, more efficient delivery of community sector services. It is a very important group that I think is under everybody's radar screens, but all of us are relying on these groups more and more to fill in around government services and private sector services. We really need to get this sorted out now. We cannot wait until this happens. If we get this sorted out now, then it would be our view that this will be better, because competition now will actually bring more people onto broadband. It will drive their use and innovation around broadband. It will, if you like, make the market ready for NBN type services. That is a really interesting discussion. People say, 'I can't imagine that we are all going to need this. This is just la-la land stuff.'

**Senator LUNDY**—What do you mean by the higher bandwidth?

**Mrs Sinclair**—The speed.

**Senator LUNDY**—That the NBN is proposing?

**Mrs Sinclair**—Yes. I say to people, 'Just cast yourself back 10 years ago when you thought that 56 kilobits per second delivered over a cable—

**Senator LUNDY**—On a good day.

**Mrs Sinclair**—Yes. It was way ahead of your dial-up experience. Now the ABS data shows us that the median service is around eight megabits. But if I take my 56 kilobits and multiply it up to 1.5 megabits over that period of time—

**Senator LUNDY**—We are already beyond the exponential increase of bandwidth in that short time.

**Mrs Sinclair**—Exactly.

**Senator LUNDY**—Thank you very much. Could I ask you to take something on notice. Do INTUG or indeed ATUG have any research or reports on the associated economic growth with higher bandwidth networks or the growth that is facilitated directly by higher bandwidth networks? Could you please forward that information to the committee?

**Mrs Sinclair**—Yes.

**Senator FISHER**—The minister has promised the same wholesale prices across the country and he has talked about the same wholesale prices for homes, businesses and end users, whether they are getting services by satellite, wireless, fibre or whatever. It is not clear how homes will pay wholesale prices, but leave that aside. What do you think should happen as a result of that promise? Can the minister keep it and, if so, how will it be kept? In other words, where will the cross-subsidy fall?

**Mrs Sinclair**—I have not really prepared to answer questions about NBN type matters in this hearing. When we prepare for these things we have a series of discussions amongst all our members all around Australia to flesh out these issues. We do that so that we can make sure to take into account views of other than CBD type members. But our very early thinking on that NBN type issue is that we actually want all the economies of scale to be captured by NBN and then reflected in wholesale prices. I cannot go much further on it with you at the moment.

**Senator FISHER**—What does that mean, for example, in terms of your call for equivalence of service and access and pricing, effectively, for rural and regional users?

**Mrs Sinclair**—When I am talking about that—and this is why I do this, Senator—I am absolutely in the existing copper network talking about functional separation in that environment. The discussion about the access regime for the NBN is a very important discussion and one that I believe should be an open and public discussion. I was saying earlier in the break that I think the next thing we need to see with NBN is its legislated objectives. Until we see those we are in a bit of a vacuum. I know there is a lot of work going on and I hope we are not hurtling down a path that we cannot pull back from when we get those legislated objectives in place.

**Senator FISHER**—Do you think that parliamentary consideration of this bill is hurtling down that path ahead of the legislated objectives which are absent at the moment?

**Mrs Sinclair**—No, I am talking about NBN. I see this legislation as standing absolutely on its own merits, and the discussion about NBN is another discussion.

**Senator FISHER**—Thank you.

**Senator NASH**—Mrs Sinclair, you have been very clear about your view that this legislation and any further NBN discussion or discussion around the future legislation should be kept separate. There is some view that these separation issues and the regulatory issues may well be dealt with in the future in that NBN context. Doesn't that work on the assumption that Telstra would agree and choose to vend their assets into that NBN process?

**Mrs Sinclair**—My thinking about it is at the policy level. The government has said for the next generation of fixed network in Australia we are going to have a wholesale-only open-access structure separated from all the retail service providers. That is the model we are going to use, with significant amounts of government funding involved and hopefully private sector funding involved, although that is yet to be worked out. But it is the philosophical model that I take. With the benefit of X years of experience in the sector and with our current hats on we say a fixed network to all premises is an enduring bottleneck. It has to be regulated in a particular way so it is structurally separated, and we are yet to develop the access regime around that. I am saying if we take that model and get as close to it as we possibly can in the current legislation which relates to the fixed copper network then we will be streets ahead of where we are now. There is still a lot of discussion around the access regime for the NBN. But the core principle is something that we should try to embed in this, and I think the legislation does that.

**Senator NASH**—You say that getting this legislation through and getting this bedded down will lead us to a better discourse about where we are going with the NBN. Hypothetically, if the NBN was to disappear, do you think the changes being proposed in the current legislation would serve to improve the current competitive environment in any way, regardless of whether or not it then led to further discussion about NBN?

**Mrs Sinclair**—I do. This has to be handled on its own merits, whether or not the NBN exists. These changes are absolutely essential to get a much more competitive industry right now, and that will then be in place for however long it takes to roll the NBN out.

**Senator BIRMINGHAM**—Would it have made more sense for the government to have conducted reviews and established its position on these types of changes as soon as it was elected, rather than tying up the review processes in NBN mark 1 and NBN mark 2?

**Mrs Sinclair**—Have I wanted these changes for a long time? Yes, I have. If we had done that the moment the government changed then I would have been very pleased about it.

**Senator NASH**—To be absolutely clear, you see no reason to roll the NBN and the current legislation together and look at them as a whole and you think we should keep them entirely separate and look at this legislation on its merits.

**Mrs Sinclair**—Absolutely.

**Senator NASH**—I am trying to get an understanding of ATUG's view of delivering out to the market. Correct me if I am wrong, but your view is that competition should be encouraged and facilitated where it can deliver and, where there is failure in terms of competition to enable that delivery, there is a role for government intervention and at that point government should intervene.

**Mrs Sinclair**—Yes.

**Senator NASH**—What do you see as the benefits to the regions of this particular piece of legislation? You outlined some of them earlier, but what benefits are going to flow to regional communities, in your view, as a result of this piece of legislation? What do you see as the negatives of this not going ahead for the regions?

**Mrs Sinclair**—They are two sides of the same coin, from my point of view. The benefits to the regions will flow from a much more effectively competitive market structure. When we started our roadshow in 2004, the question—and I am summarising overly here—was: why won't Telstra do what we want them to do? Through the years the idea changed and became: we like the idea of choice and we want more choice in our market. Then the idea was: we need more innovation in our market, we do not want to lose our young people to the cities, we want to keep a vibrant community with a range of different people, we want to create jobs for our young people and we want to create jobs for people working part time or running businesses from home, so we need innovative services like broadband. The broadband discussion in regional areas that I have been involved in is always about the economic benefits. It is not just that this is the latest toy and because they have it in Sydney or Canberra we have to have it. It is always about the benefits to our communities from having access to these innovative services.

I think that the changes in this legislation will open up those markets to a much more competitive dynamic than currently. If we get a properly structurally separated copper network or, if we cannot get to that point, a properly robust functionally separated network then I think we will see more investment by competitors in those regional communities, much stronger competition and the sorts of price and innovation outcomes that you get when you have a competitive market. Past the point of that being possible, we need the government to say, 'Okay, it's our ball now,' similarly to the untimed local calls in extended zones. We need a lump of money and a tender process. Even out of that process, there were much more innovative ideas that came back in the end from Telstra, as it was, than there would have been without that process. We need a very clear commitment to giving this kind of communications service to everybody, wherever their community is.

**Senator NASH**—Can you see any reason why either functionally separating or structurally separating should have any kind of impact on the delivery of fixed line telephony services?

**Mrs Sinclair**—No, I do not. I have not seen that in the UK.

**CHAIR**—Thank you very much, Mrs Sinclair, for your submission to this inquiry and for taking the time to appear before the committee this morning. It has been very useful; thank you.

[11.37 am]

**BUETTEL, Mr Rohan, Assistant Secretary, Networks Regulations Branch, Department of Broadband, Communications and the Digital Economy**

**HARRIS, Mr Peter, Secretary, Department of Broadband, Communications and the Digital Economy**

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

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

**Mr Harris**—We would like to thank you for the opportunity to appear and explain the bill. The government has embarked upon an ambitious program to transform Australia's telecommunications industry in the interests of all Australians. The Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 is designed to reshape regulation in the telecommunications sector. The measures will streamline the regulatory framework to enhance competition and better protect consumers while providing flexibility for Telstra to choose a new path.

At the same time, the government is proposing to establish the NBN. NBN Co is a wholesale-only provider to fundamentally transform the competitive dynamics of the communications sector of this country over the next eight years. But this bill is primarily not about the NBN; it is about the regulatory structure of the industry in Australia today.

The government has consulted widely and formally in the development of this bill. Taking into account the views expressed in response to the reform options canvassed in a regulatory reform discussion paper released on 7 April, the government has now put forward a reform package to promote equivalence, transparency and competition in the industry and to strengthen consumer safeguards.

Historically, Australia has tried quite a number of the normal alternatives to formal separation of the dominant carrier structure and yet, as the ACCC has noted, the competitive telecommunications market that was envisaged when the sector was opened up to competition in 1997 does not appear to be emerging. It is the government's view that Telstra's high level of integration has hindered the development of effective competition in the sector and has contributed to Australia continually lagging behind other developed countries on the availability, price and quality of telecommunications services. This view is shared by as diverse a set of committees as the World Economic Forum, commentating in the last week on economic performance around the world, and the OECD, with the latter stating in its 2008 economic survey that Telstra's dominance of all platforms makes it difficult to establish effective competition between the various types of infrastructure.

The reforms set out in this bill are designed to promote more effective competition in the sector by addressing the underlying incentives that a highly integrated company has to favour its own retail businesses. The government's bill also intends to promote competition across various telecommunications platforms and to encourage investment by streamlining the access regime. The bill also improves the position of consumers in a range of support functions, including in payphones and consumer compensation for poor performance. In all, these benefits promote the interests of all Australian consumers and businesses, including in rural and regional Australia, and the economy more broadly. Thank you.

**CHAIR**—Thank you very much, Mr Harris, for your opening statement. Senator Lundy.

**Senator LUNDY**—The issue has come up that there is a call to delay these bills, to await the implementation study and others—from the opposition and, I think, from Telstra yesterday. Can you just outline for the committee the detail of the consultation process and the review process that led to the preparation of these bills and explain why there was another consultation or review process once the NBN policy had been announced on 7 April.

**Miss Spence**—Views were sought from the public when the RFP process was underway. I think we had about 80 submissions in response to that process. Once the NBN announcement was made on 7 April, I think the decision was made to canvass some explicit options for reform. So, while the previous process sought general views on regulatory reform options, the discussion paper released on 7 April set out very clearly options that the government was seeking views on and therefore that was then sort of a natural progression from the previous process. As we have made clear, about 140 submissions came in, all supporting the need for reform.

**Senator LUNDY**—My recollection is that, given our policy announcement on 7 April articulated a fibre-to-the-premises approach, the government felt it was important that, in the environment of that policy having been announced, it was fair and due process to have another review and consultation with that knowledge being in the community and in the market.

**Miss Spence**—That is exactly right. The situation had developed from the previous process, so it was important to make sure that everyone had a fair opportunity to put their views forward to government.

**Senator LUNDY**—We heard also yesterday that shareholders organisations did not take the opportunity to make submissions to either of those consultation processes. We only spoke to two. Are you able to advise the committee whether submissions were received on behalf of shareholders or institutional investors in Telstra shares regarding the regulatory reforms in either of those extensive review or consultation processes?

**Miss Spence**—I will double-check it but, as far as I am aware, I do not think that we did receive submissions. But we can double-check that.

**Senator LUNDY**—I am happy for you to take that on notice. I think it is an important question to get correct. Thank you. Mr Harris, you mentioned in your opening statement the various pieces of commentary occurring in places like the OECD and the World Economic Forum. I would like to ask you first some questions about in general the contribution that high bandwidth networks can play in promoting economic growth and growth opportunities. Could you outline to the committee some of the commentary—I suppose it is more than commentary—about the findings about the relative importance of high bandwidth networks and smooth regulatory processes to facilitating growth, particularly of the digital economy.

**Mr Harris**—I will make a couple of comments and then I will see if Pip and Rohan have other useful things to add. The primary purpose behind this goes back, I think, to a lot of the thinking behind the original competition policy reforms of the early 1990s that applied to multiple industries, including in telecommunications—although telecommunications, as we know, had a unique form adopted rather than the general approach that is applied to a number of other industries. The biggest question is one of dynamic economic efficiency gains by changing the nature of the infrastructure inputs and providing access to that for parties who otherwise will not have access, either because they simply cannot afford to invest—they might have a fantastic idea and be innovative potential providers, but they cannot actually create their own infrastructure—or because the dominant party is in place and there is simply a limited amount of facilities available to provide that service.

The thinking behind this is that you can open up the system and allow that level of innovation to create dynamic economic efficiency gains, which are generally not easily captured other than by assumptions in the kinds of static equilibrium models that economists otherwise use to forecast performance in the economy. So the great gain you get from increasing effective access is that opportunity for players. It is often thought of as major services to big corporates and that sort of thing; in fact it is just as much to do with services to individual consumers.

In this sort of service area, if we look at the changes that have taken place in the last 15 years, mobile telephony is a perfect example of this. It was originally envisaged as being perhaps an adjunct to your standard home phone—I know, because I was involved in this quite directly back in the early 1990s—and was seen as being a consumer service but probably not necessarily even a business service. It has now evolved entirely into a complete field in its own right, dominating the fixed line phone services and likely to continue to do so in the future in interesting ways that we cannot envisage right now. But we need to create a set of circumstances in which those who can envisage this and can provide innovative services, not just to businesses but to consumers, can continue to do so.

That dynamic is stifled, and we have had commentary around the world. I think Ofcom is quoted in the explanatory memorandum at length as commenting on this out of the UK, but there are wider forums than that. The World Bank has commented on this, particularly as an enabler for developing economies. You can see, if

you spend more time in the less developed economies, the benefits that have come from them, as it were, jumping over the fixed line infrastructure and being able to run immediately to innovative services that are now being provided and rolled out reasonably slowly in developed economies because we have historically had, if you like, legacy infrastructure issues; the incumbent providers would be much happier exploiting these than providing the new innovative services. That is a generic overview. Pip, do you have specifics to add?

**Miss Spence**—I think that covers it.

**Senator LUNDY**—That was a very good overview, but I am just trying to make sure that, in contemplating the competition and consumer safeguards bill, we do so in the context of those broader economic objectives. Rosemary Sinclair from ATUG, the previous witness, talked about these bills being essential as, in a way—I liked her words—‘preparing the market’ for the NBN and the higher bandwidth networks and getting our businesses and our economy ready for the superfast network that the NBN will provide. Can you make a comment on the role that these bills play in sorting out those horizontal and vertical integration issues that you mentioned in your opening statement.

**Mr Harris**—I would rather not concentrate too much on the integration issues, although I am happy for Pip and Rohan to concentrate on them. The one that appears to me most specifically is the transformation that is inherent in this bill around how the ACCC will change its role from the outcome of negotiating and arbitrating to an outcome that is actually more common in what you might call regulated infrastructure providers across the rest of the economy. It is private sector and public sector businesses that I am talking about here. Effectively the inherent change here is that we are going to give the ACCC the ability to act as those other regulated price setters for basic infrastructure access now act—in electricity and gas in particular. I think those two sectors are pioneers in this area.

That prepares the way, as you have rightly pointed out, for a future transformation. The NBN will have to adopt the same sort of performance characteristic: it will be in a regulated industry with a regulated price-setting arrangement. For anybody else who wants to be in this role of being basic infrastructure access provider there will be a set of services, if you like, to complement what I described earlier, which is that for those who cannot afford or simply, in a physical sense, cannot get their own access to, that basic infrastructure, we will provide the mechanism by which, at a fair price—a return on investment for the relevant parties—they will be able to access that infrastructure and have those new services.

From my perspective, coming back into this area after 10 or 12 years—maybe a bit longer than that—I see that is the big shift that is inherent in this bill. Pip or Rohan, do you want to comment more on the separation issues?

**Senator LUNDY**—Thanks for that. I think it is an important aspect of the bill that probably has not got as much attention as it ought to through the course the inquiry.

**Mr Harris**—It does not get the attention and it is a pity in its own way. We look at the ACCC a lot as a regulator that wants to get involved in managing the individual disputes. This is shifting away from that. It is inherently shifting away from that, and therefore it is complementary to the idea that there will be the NBN and there will presumably be other parties who want to be basic infrastructure providers, but who will be in a regulated framework.

**Senator LUNDY**—Just on that: Mr Allan Asher from ACCAN yesterday described the regulator as ‘sleepy’. Do you think the provisions in this bill will more effectively enable the regulator to do what needs to be done and avoid the sort of gaming that we have heard occurs for years?

**Mr Harris**—The worst aspect of being a regulator is information asymmetry. The industry knows more about what is going on than you know. You do your best, but it is hard to keep up with the trends. Then you are called upon to settle a dispute. In order to do that you have to create quite a regulatory apparatus of extracting information, paying experts, getting arguments heard and going through procedural arrangements, courts and the like. The regulator really is in a pretty difficult position in that set of circumstances and that sort of dead weight of cost on the economy is something which economists regularly comment on.

I do not know whether ‘sleepy’ is a fair description at all, but I do think that regulators are often found to be behind the game for what I consider are inherent and normal reasons. They are not the service providers and they do not know the business as well as the service providers, but when they are called to get involved they have to bring themselves into the information stream sufficiently to be able to make a judgment. I think this bill reverses that burden, if you like, both on the regulator and, in part, on the industry.

When I say 'in part' I do not mean in total, and I do not think we are pretending that this is not a regulated industry: it is a regulated industry. Some of the commentary that has been made seems to presume that telecommunications is not a licensed industry; of course it is. It has a right to provide a service, but it comes with obligations. That is a very important characteristic for those who seek to comment in a generic sense about whether this is or is not a circumstance in which legislation of this kind is a legitimate right. It is a legitimate right.

**Senator LUNDY**—I have got to stop asking questions to give someone else a go, so I ask Miss Spence to keep comments to that integration issue. But before that, there was a comment yesterday about telecommunications essentially being deregulated. I think that was put forward by one of the shareholder representatives, implying that somehow it was a shock that a company could be asked to do the sorts of things that Telstra may be asked to do, given the choices presented to them by the government. Can you identify other industries where participation in that industry comes with similar rules relating to ownership across industry structure, just so we can clear up once and for all that this is not a unique situation for telecommunications?

**Mr Harris**—The model that is most self-evident right now is banking, which is a regulated industry in its own right and has obligations, and where the government participates both as regulator and as ultimate support mechanism through the Reserve Bank to the industry. In those circumstances, when the participants in the industry for good what I might call 'commercial reasons' seek to exploit the license that they have, that is considered a fair and reasonable part of providing business services in the Australian economy within the terms of the regulatory infrastructure and its intent. It is a regulated industry.

We have a variety of regulated industries. I mentioned gas and electricity earlier.

**Senator LUNDY**—Cross-media.

**Mr Harris**—In this area, when you are a participant in the business in this area, you know inherently that you are in a regulated industry. There is, legitimately, a lot of licence given to people to innovate and provide business services. But there are boundaries. Those boundaries are written in law and in licences, and the players know this. I think there is a reasonable recognition that this has been a regulated industry for a fair period.

**Miss Spence**—On your earlier question in relation to the transition to the NBN, I suppose on the integration side of it: obviously one of the key elements of the National Broadband Network is the wholesale only open access network. Some of the reforms that are set out in this bill at least go some way to try and set up the framework so that, in the lead-up to that network being rolled out, you are getting some of the advantages of a clearer delinking from a vertical integration perspective.

**Senator LUNDY**—Thank you.

**Senator BIRMINGHAM**—Firstly, I will follow up one issue that Senator Lundy raised. Telstra provided submissions to all of the regulatory review processes, didn't they?

**Miss Spence**—Yes, they did.

**Senator BIRMINGHAM**—Of course they did, and of course their submissions represented the views and interests of their shareholders.

**Mr Harris**—I am sure that they did.

**Miss Spence**—I took Senator Lundy's question to be in relation to the actual shareholder groups, but, yes, Telstra certainly put its views.

**Senator BIRMINGHAM**—Thank you. On the separation part of this legislative package, it is correct that the government has said it is its clear intent, its clear desire, that structural separation be the outcome.

**Mr Harris**—It is a voluntary option for Telstra to consider, yes.

**Senator BIRMINGHAM**—It is a voluntary option, but the minister and the minister's spokesman used the words 'clear desire that structural separation occur voluntarily'.

**Mr Harris**—I will stick to the bill for the purposes of today's discussion. It is a choice.

**Senator BIRMINGHAM**—We have the minister's words out there, so we will take it as a policy preference—which you are not to comment on, I understand, Mr Harris—

**Mr Harris**—Absolutely.

**Senator BIRMINGHAM**—for the government that option No. 1 be structural separation. Has the department undertaken any analysis of the costs around either structural or functional separation for Telstra?

**Mr Harris**—I think you have seen the explanatory memorandum that functional separation costings are addressed by information provided by Telstra. The department has observed costs in other jurisdictions, although the relative comparisons obviously suffer because every jurisdiction has some unique characteristics. To the best of my knowledge, that is about as far as it goes.

**Miss Spence**—That is right.

**Mr Harris**—Pip, is there—

**Miss Spence**—Telstra has undertaken its analysis, which we have looked at. We have taken that to be the outer envelope of what the likely costs of functional separation would be. Obviously the fine detail would depend on the end model—that is, on whether it is either structural or functional.

**Senator BIRMINGHAM**—For the benefit of Telstra, yesterday they cited figures of up to \$1 billion in their evidence to the committee. Is that commensurate with the advice they have provided to the government?

**Miss Spence**—Yes, and that is the advice they have previously put out publicly as well.

**Senator BIRMINGHAM**—So, whilst the department believe that would be at the upper end of the envelope, you do not have better estimates to put on the cost of separation?

**Mr Harris**—It is the information asymmetry problem again. The person best possessed of information as to what functional separation would cost is obviously the party involved in the separation itself—as in Telstra.

**Senator BIRMINGHAM**—With regard to timing issues around separation, what assessment has the government undertaken in relation to how long separation may take?

**Miss Spence**—Again, we have looked at the international experience, particularly in the UK and New Zealand, and that provides a model of five to seven years. I think that has been the experience internationally. But, again, the bill sets out steps that would have to be made along the way, particularly in relation to functional separation. The detail of the actual timing requirements would come through those processes that are set out in the bill.

**Senator BIRMINGHAM**—So the department accepts five to seven years as being the reasonable range in which the New Zealand and British experiences have played out?

**Miss Spence**—That is what the experience has been.

**Mr Buettel**—When you talk to people in the UK and New Zealand about their experience, it is quite clear that the full separation arrangements do take an extensive period. But the way they organise it is to actually have a set of steps to be undertaken and a set of milestones to be met. They require the most important measures to be taken up front. The system changes that are relatively minor are done towards the end of the process. So they tend to see the big gains from separation very much in the early years. They have tended to see positive benefits within 12 months of embarking on functional separation, but it may well be the case that the less important measures do take a longer time to put in place.

**Senator BIRMINGHAM**—What is the government's deadline for completion of separation activities?

**Mr Harris**—I think it will greatly depend on what is put forward by Telstra. I do not think—unless Pip wants to contradict me—we are sitting with a hard and fast deadline here. Clearly this sort of change should not hang over the industry for a long period in itself. All the players—from my understanding informally from the exchanges that have occurred since the bill has been tabled—are quite conscious of the fact that it would be better to resolve reasonably soon the direction in which we are going. That said, the choice is still in the hands of Telstra. There are time frames on functional separation in the bill. Pip, do you want to comment on those?

**Miss Spence**—Within three months of the bill coming into effect, the minister would have to issue the determination on the requirements for functional separation. There is then a three-month period in which Telstra could lodge a functional separation undertaking. The minister can give an extension to that time frame if either a structural separation undertaking has been lodged or he is satisfied that work is underway in preparing a structural separation undertaking. The bill does, as the secretary has indicated, put some pressure on to keep things moving. But there are issues that would need to be worked through in terms of the path that Telstra chooses.

**Senator BIRMINGHAM**—On the timing for the implementation of any undertaking, is there a deadline by which that must be complete?

**Miss Spence**—The undertaking would need to include the milestones that would have to be met and there would be an end point, but the bill itself does not say when the final separation would have had to occur.

**Senator BIRMINGHAM**—So it is open ended, depending on the determination of the minister?

**Miss Spence**—It depends on what goes into whichever undertaking it is. Again, as Rohan said, we would expect that the major steps would be taken in the early stages of the implementation process.

**Senator BIRMINGHAM**—I will come back to ministerial determinations shortly. Essentially there would be an undertaking reached with the ACCC., but ultimately then its acceptance or otherwise would be by the minister and in terms of the time line it takes.

**Miss Spence**—The only other point, which Rohan has just reminded me of, is this. In relation to the structural separation undertaking, there is a 2018 end point.

**Senator BIRMINGHAM**—If they were to choose the structural separation pathway, they would need to have completed by 2018—that is, approximately by the time that the NBN build is scheduled to be completed.

**Miss Spence**—That is right.

**Senator BIRMINGHAM**—That seems a little odd, I note, when the second read from the minister describes these as transition measures to the NBN. He says they will provide the structural reform in the longer term. It seems a little odd that somehow these transition measures could take as long as the actual construction of the NBN.

**Mr Harris**—Perhaps I could comment briefly on that. I think the intent, as Miss Spence was outlining, is that in the early stages of whatever undertaking is eventually created by the parties—in particular by Telstra—it will be evident how that undertaking and the NBN will align. The undertaking may take quite a few years to roll out, as it were, as the NBN will take quite a few years to roll out, but the idea is to have some form, to the extent it can be created through a diverse set of processes such as these, of alignment. But alignment will depend entirely on what is brought forward now by Telstra in response to the legislation.

**Senator BIRMINGHAM**—Has the department undertaken any analysis of the exposure or risks to compensation the Commonwealth may face from this legislation or from other possible models of structural separation?

**Mr Harris**—I think the answer is yes, we have taken legal advice on that. Our understanding is that there is not compensation under the terms and circumstances of this bill. Obviously other parties may have different views and I guess it is possible to see those views tested. But our position is that it is not.

**Senator BIRMINGHAM**—Did you receive advice that, had this bill mandated structural separation rather than setting up the so-called choice that it sets up, the Commonwealth may have been liable to compensation claims or have an increased risk or exposure to compensation claims?

**Mr Harris**—Given that we are experimenting here with legal advice perhaps it might be better if I take that on notice and provide you with a written answer if that is acceptable.

**Senator BIRMINGHAM**—If you do not have the answer at hand, that is the only option, Mr Harris.

**Mr Harris**—I am probably the worst person to give anybody legal advice, historically. My performance in assessing legislation and getting it right is legendary amongst lawyers and legendary for the wrong reasons. So I think it would probably be better if I gave you written advice on that. That would be helpful.

**Senator BIRMINGHAM**—That is fine. I am happy to go down that path. I have been a little remiss: I welcome you today. I think this is the first time the committee has had an opportunity to speak with you in your new role. Congratulations.

**Mr Harris**—Thank you very much, Senator.

**Senator BIRMINGHAM**—That reminds me that if you could provide that response—

**Mr Harris**—Soon.

**Senator BIRMINGHAM**—Yes, indeed—perhaps even by next Monday, ahead of when we will meet again for estimates.

**Mr Harris**—There will be no problem. We will provide you with the advice by next Monday. It is safer for me not to give you legal advice given, as I said, my relatively poor performance in this field in the past.

**Senator BIRMINGHAM**—Thank you, Mr Harris. Have you had a chance to review Telstra's submission?

**Mr Harris**—I have not. I was at community cabinet in Hobart yesterday but I believe Miss Spence and Mr Buettel have looked in detail across Telstra's submission.

**Senator BIRMINGHAM**—Excellent. About five pages in their submission—in chapter 2, which has a fairly blunt heading of 'Factual errors'—seems to be dedicated to claims of factual errors in the explanatory memorandum. Has the department reviewed these and does the department think that perhaps the EM overstates things in certain circumstances, to put it mildly?

**Miss Spence**—We think that the EM provides a fair assessment of the views that were put forward to us in the consultation process and on the review of the information and analysis that has been undertaken. We appreciate Telstra's position but we also consider that the EM is factually correct.

**Senator BIRMINGHAM**—Was Telstra wrong when it provided a long list of vertically integrated telco carriers on page 14 of their submission?

**Miss Spence**—I think it is a question of degrees. We maintain our position that Telstra is one of the most highly integrated incumbents.

**Senator BIRMINGHAM**—Is Telstra wrong when it talks about the extent of competition in different parts of the market, in particular in the mobile and wireless markets?

**Miss Spence**—We do not argue that the mobile market has competing networks; we accept that. But, again, we go back to the high level of vertical and horizontal integration in Australia being far greater than in other countries.

**Senator BIRMINGHAM**—What about when Telstra talks about separation as a global trend? Everyone likes to talk about the UK and New Zealand when talking about separation, but those instances have been matters of functional separation; they are not structural separation, which the government says is its clear desire from this. Where can we look to for structural separation and, indeed, can you point to separation as a global trend? Is Telstra wrong when it says that European regulators have explicitly rejected functional separation? It cites examples in the US and elsewhere.

**Miss Spence**—We would also look at the *OECD Communications Outlook 2009* publication, which refers to the fact that there are many cases where regulatory frameworks are being reviewed to ensure that competition prevails. We can send the details of that through to the committee if that would assist.

**Senator BIRMINGHAM**—What are the major impediments to mandating structural separation? If that is the clear desire of the government, why doesn't the bill do that?

**Mr Harris**—But the bill does not mandate that.

**Senator BIRMINGHAM**—That is the point, Mr Harris. The minister has said it is the clear desire of government to have structural separation. Why doesn't the bill do that?

**Mr Harris**—A little earlier, I was keen to make sure that I did not comment on the minister's comment. I can only answer in terms of what the legislation says. We are providing a deliberate, conscious choice that potentially has quite a lot of value-adding opportunity in it. There are other industries—not in telecommunications perhaps—which have chosen to split themselves into their base regulated infrastructure provision and their additional retail service provision internally in order to maximise value, such as in gas, for example. In rail, where I previously worked, the same sort of thing applied as well. I do not want to pretend it has not applied simply because there is also regulatory activity in the field. The answer is: I am sure that has been a contributing factor. But some industries have chosen to do this and enhance value for shareholders.

Therefore, I do think there are models—perhaps not in telecommunications, where Telstra may have concentrated its examples—which exist. It is a plausible outcome, in my view, for Telstra to consider how to value-enhance in the forms of separation that might be available to it under the terms of this legislation. As I said, those models do exist in other industries but perhaps not in telecommunications.

Historically in telecommunications, because we primarily started out in many economies with a government provider, the business is heavily regulated and then partially privatised. You tend to find that the structure is inherent because the government started the investment. But those economies that have not had this do not have to deal with that issue. The US is the most interesting example, although it is not a very good parallel with us in many other circumstances. Nevertheless, it is quite a good example of where you do not have to necessarily deal with structural separation but you may have to deal with other, quite bold regulatory

intervention. I am referring obviously to the break-up of the Bell corporations that occurred a substantial time ago. What I call competition related regulatory change—rather than structural separation per se—in the telecommunications industry is not unheard of.

Even in the most competitive and ‘free’ market of all, the US, it is quite a known factor that you can at some points encounter such an inherent clash between the intent of competition regulation and the intent of players in the market that you get a regulatory solution imposed. Those models are there. They may not be perfect fits for the Australian circumstances, but they are worth bearing in mind when you look at the context of this legislation and its intent.

**Senator BIRMINGHAM**—When the government uses the words ‘clear desire’, it is not the intent of this legislation ultimately to result in structural separation? If that is the intent then why is that not actually the clear result of the legislation? Rather it is to have an unusual structure of a model for structural separation that is to say, ‘If you don’t comply with a range of other requirements we will force you to do this.’ It is an unusual bill because it holds a gun to a corporation and says ‘You must comply in these ways or else’ rather than simply doing what the minister says is the clear desire and moving straight to structural separation.

**Mr Harris**—The only way I can answer is to say, maybe in a more succinct form, what I was trying to say earlier. I think the answer lies in the fact that there are alternatives available to a business that knows itself so much better than we the department or the regulator knows it. That might satisfy the intent of the bill, which is to make a choice between some outcomes that are related to structural or functional separation. I refer to information I sent to you earlier. I strongly believe that Telstra is better informed on how to value add in these circumstances than the government or the regulator could be, and thus it is quite plausible—to me, anyway, until proven otherwise—that they may be able to come up with a model which satisfies the government’s intent and yet perhaps is not a cookie-cutter model that we might otherwise want to mandate. I have seen—and you will as well—in the media that people have their own versions of what structural separation literally will be, yet in the explanatory memorandum we have attempted to say that there are models that may be brought forward that we have yet to conceive of but that Telstra may design and that may well satisfy the objectives of the government. In my view—in what I call the ‘policy designer’s view’—that is the reason for not going down that mandatory path.

I do not say that because I was not directly involved in the construction of this. Obviously, I have only recently joined the department. But I know from a long history of policy development that where we can we would try to gain from the regulated the best input we could on how to achieve the overall objective before we said, ‘No, it’s like this: here’s the cookie cutter and there’s the line.’ I think that is inherent in this legislation and a desirable characteristic from my perspective, and it partially explains, therefore, why when people refer to ongoing discussion with Telstra that is quite relevant here.

**Senator BIRMINGHAM**—So what is inherent in the legislation is that Telstra gets to design its own cookie cutter and the ACCC and the minister will decide at the end whether they like the shape of the cookie.

**Mr Harris**—That sounds like a reasonable summary.

**Senator BIRMINGHAM**—Okay. I never thought we would get to cookie cutters. Miss Spence, in response to the earlier question about the EM and Telstra’s gripes with it you said that the wireless mobile network is competitive. Optus said to us yesterday that it was highly competitive. What relevance does access to spectrum in a highly competitive market have on the fixed line market?

**Miss Spence**—I think it goes back to the issue of horizontal integration and the concern about a single player being so dominant across each of the platforms. Again, what is being said is that, if Telstra wishes to acquire spectrum for next-generation broadband services, we would want to see those issues of its dominance in multiple platforms addressed.

**Senator BIRMINGHAM**—It is correct, though, that Telstra currently has less than 50 per cent of the market in the wireless area.

**Miss Spence**—Yes, but I think it is difficult to argue that it is not a dominant force in the market.

**Senator BIRMINGHAM**—In what is nonetheless still a highly competitive market, notwithstanding its dominance in other sections and being a mutually dominant force, shall we say, in that market.

**Miss Spence**—As I said, we cannot just look at the mobile market in isolation; the concern is across all the platforms.

**Senator BIRMINGHAM**—If the mobile wireless market is functioning as a highly competitive market, why meddle with it?

**Mr Harris**—That is what I was going to say. This bill is not about, ‘You are the biggest competitor and therefore we don’t like you.’ This is actually about the infrastructure supply mechanisms that enable or do not enable competition to occur in a market. Although Telstra may be the largest player or not the largest player in any segment of the market, if there were a larger player in one segment, the bottom-line question from a competition policy perspective is: are they able through their integration of their businesses to reduce or eliminate the ability of somebody else to offer a similar product? That is the core question which all of the accounting separations and other forms of separation and all the access determinations and regulatory apparatus of the last 15 years have been trying to manage. In the explanatory memorandum is a quote by Lord David Currie in the UK:

All that is needed is for the incumbent not to try their hardest to achieve reliability, timeliness and predictability to disrupt significantly the launch by competitors of a rival retail proposition.

That is what the bill is meant to be about. It is at that end, not who is the largest mobile phone player, the largest wireless player or the largest fixed-line player. It is about that competition angle. Are you able to disrupt someone’s ability simply by not trying hard because across your set of businesses that part of your business that does infrastructure supply can simply say, ‘I think I’ll just be passive in the face of this person’s needs. I might delay it or lose it or sleep on it.’ None of that is unusual behaviour in marketplaces, and we all know it. The question in this is: has it arrived at a point where it sufficiently impedes supply of innovative services to consumers and businesses? The conclusion we have reached is that it does.

**Senator BIRMINGHAM**—What evidence does the department have that Telstra is in any way impeding investment by competitors in the wireless market?

**Mr Harris**—I cannot specify on the wireless market, although we can go and look for individual advice, but I know the submissions from the ACCC listed and the EM contains examples of specific activities or inactivities. We can provide you with some advice on that if you would like.

**Senator BIRMINGHAM**—Are those specific activities all relevant to the fixed-line market?

**Mr Harris**—I do not have them with me, so it is very hard for me to say what they do or do not do. I am saying that we will ask the ACCC for what information they have in this area, if that is what you are looking for. In this hearing we are trying not to turn this into a Telstra-bashing outcome. But, if you are interested in gaining information, we can supply information to the committee.

**Senator IAN MACDONALD**—Telstra thinks it is.

**Mr Harris**—I would understand their position entirely.

**Senator MARK BISHOP**—Mr Harris, in response to questions raised by Senator Lundy, you made the point that this is a regulated industry and firms that engage are licensed. You then referred to the changing role comprehended for the ACCC by this bill and its role into the future. You made some comments then upon fair return and return on investment. That was the sequence of discussion. On that issue of fair return/return on investment, does this bill comprehend any particular role for the ACCC in setting or determining that fair return or return on investment? If the answer to that is yes, how does it do so?

**Mr Harris**—I will give an overview and then turn to someone who is much better across the detail, either Rohan or Pip. There is no doubt there is a power in this bill for price setting in response to declared services.

**Senator MARK BISHOP**—And declared services are defined?

**Mr Harris**—Effectively they will have to be declared. Therefore they will be specific; they will not be generic. Perhaps I will let Rohan answer this rather than give a half-tutored answer.

**Mr Buettel**—Senator, under part (11C) at the moment there is a mechanism for the ACCC to declare particular services that are subject to regulation. In general, they tend to be the bottleneck services that access seekers need access to to supply services. Under current arrangements, we have a negotiate-arbitrate model where individual players in the market seek to negotiate terms and conditions of access and, if they cannot reach agreement—

**Senator MARK BISHOP**—Arbitration.

**Mr Buettel**—Yes, and you are familiar with all the submissions from—

**Senator MARK BISHOP**—I remember all that background from many years ago.

**Mr Buettel**—We are moving to a situation where the ACCC will be able to determine access determinations up-front, to apply across the industry. That access determination will set out the terms and conditions of access, including pricing, and all the access seekers will then be able to take advantage of the terms and conditions of access that have been determined by the ACCC. So pricing will be set up-front, and we should not see all these disputes occurring about individual cases.

**Senator MARK BISHOP**—Pricing being set up-front according to a particular regime then necessarily determines the level of return to investors in industry companies in due course. Is that regime in the bill for price setting proposed to be a public regime? Does the bill establish the principles that the ACCC will have regard to in determining prices or does the bill comprehend that the ACCC will over time develop a regime that establishes the principles for determination of price?

**Mr Buettel**—Yes, it will be an open regime and the ACCC will seek submissions from all the players in relation to any access determination that it proposes to make. There are quite a lot of criteria set out that the commission is required to take into account. For example, under proposed new provision 152BCA, the commission has to take into account ‘whether the determination will promote the long-term interests of end users’. That test requires it to have regard to the extent to which the determination will promote competition, achieve any-to-any connectivity and encourage efficient use of and investment in telecommunications infrastructure, having regard to feasibility of supply of services, the legitimate commercial interests of the suppliers of the services and the incentives and risks for investment. All those factors get taken into account in relation to that criteria.

Then there is a criteria in relation to the ‘the legitimate business interests of a carrier or carriage service provider who supplies, or is capable of supplying, the declared service, and the carrier’s or provider’s investment’; ‘the interests of all persons who have rights to use the declared service’; ‘the direct costs of providing access to the declared service’; the value of extensions to networks; ‘the operational and technical requirements necessary for the safe and reliable operation’; and ‘the economically efficient operation of’ a ‘network or a facility’. So there are quite detailed criteria set out in the act.

The ACCC will have regard to the submissions that are put forward. It will determine pricing and we can expect it to develop models as to how the pricing will work. It may be the case that the ACCC decides for particular services on legacy networks to set a regulated asset base so they may determine on a one-off basis that this is the determined value of that network. In having regard to declared services that are provided over the network, it will have a formula or principles to be used to say what part of the costs will apply for this service. That is how the prices will be set for those services.

**Senator MARK BISHOP**—Is that determination process by the ACCC proposed to be done at single commissioner level or at panel level? Is the appeal mechanism from determination in the first instance on merit review or only on point of law review?

**Mr Buettel**—On the first question, the power is given to the commission. For significant access determinations, I would expect that the commission as a whole would make the determination. But I must admit I am not actually sure what arrangements the commission has for delegation of powers. Whether they have the power to delegate to a single commissioner to make a determination is a matter that we would have to check with the ACCC.

**Senator MARK BISHOP**—Can you check that and advise the committee? I remember that appeals up the line on merit let alone on points of law were a constant point of problem years ago.

**Mr Buettel**—There is no mechanism for merits review for an access determination decision in the same way as there is no provision under the current act for merits review of decisions on terms and conditions on individual arbitrations. So, yes, there is no merits review. But of course the ACCC is subject to judicial review—all those requirements of general administrative law about not taking irrelevant considerations into account, only considering relevant considerations, not acting unreasonably—

**Senator MARK BISHOP**—They are points of law not points of merit.

**Mr Buettel**—Yes, they are points of law.

**Senator MARK BISHOP**—So it is public and by panel. You will advise the committee whether it is a group panel or a single panel, and the review process is on points of law only?

**Mr Buettel**—Yes.

**Senator IAN MACDONALD**—Have you done any assessment of the cost of this legislation to Telstra?

**Mr Harris**—I think we answered earlier that we have taken into account their estimates to us of the cost of functional separation, and we have taken some account obviously of what others have said overseas about the costs. There has been a regulatory impact assessment on the bill itself, as I understand it.

**Miss Spence**—There have been regulatory impact statements on the competition and consumer elements of the bill, and the regulatory impact assessment on the structural elements.

**Mr Harris**—But the analysis does not go any further than that. I referred earlier to the fact that parties in the market know a lot better than us the costs of these sorts of activities. Telstra in particular will obviously know better the costs. We have made the comment in the explanatory memorandum that we consider some of their estimates perhaps to be upper bounds, but that is only by reference to what others have told us it has cost in other jurisdictions. But we know that the costs in different jurisdictions are the product of their unique circumstances as well.

Perhaps some of the costs will be reduced in this area by the fact that these varying forms of accounting separation that I referred to earlier and operational separation have been addressed by the previous government, and probably by the government before the previous government, in different forms. So I would have thought that would have reduced some of the costs that would otherwise occur if you were starting from scratch here. Notwithstanding that, I think the best source of advice on that will be what the market participants pay, bearing in mind that that will probably be the upper bounds.

**Senator IAN MACDONALD**—But the department has done no modelling of what it might cost Telstra in cash terms?

**Mr Harris**—No, I do not think that is the case.

**Miss Spence**—No, we have not.

**Senator IAN MACDONALD**—The department accepts that it was the government that led shareholders to believe that they were buying and paying a lot of money for shares in a particular company, which is now going to turn out to be quite a different company if this legislation becomes effective. Has that figured at all in the government's consideration of the issues?

**Mr Harris**—I think the important point is the one I was making earlier, that the government certainly sold shares in a regulated business which had requirements upon it which included competition policy, requirements with the clear health warning that these were under review. That advice is pretty much like you get with any prospectus. The important thing is for investors to do due diligence on what that actually might mean.

**Senator IAN MACDONALD**—But it did not include that they would not be able to bid for future spectrum and that they would have to divest themselves of what I assume is a substantial profit centre of the business, in the Foxtel business.

**Mr Harris**—Perhaps not in specifics, Senator, but I have a list here of the quite generic warnings that went in every Telstra share offer: 1997, 1999 and 2006. The 1997 offer said:

There can be no assurance that the current or future governments will not take further steps which alter Telstra's competitive position or the manner in which the Australian telecommunications industry is regulated.

In the 1999 offer:

There is also a risk that current or future governments will take steps that further alter Telstra's competitive position or the manner in which the Australian telecommunications industry is regulated.

**Senator IAN MACDONALD**—We did go through these yesterday with the shareholders group.

**Mr Harris**—I am sorry, I did not want to—

**Senator IAN MACDONALD**—They acknowledge that but, of course, never expected that it would be so radically changed, or perhaps shareholders would not have paid the big price the shares when they were issued. No doubt you would have had someone listening to the evidence of Telstra yesterday. Telstra said they are discussing things with you. That is correct, is it?

**Mr Harris**—That is correct.

**Senator IAN MACDONALD**—You are in negotiation.

**Mr Harris**—Discussion would be a better way of describing it, I think, at this point.

**Senator IAN MACDONALD**—Okay. Telstra did not say this, and I do not want to put words in their mouth, but they thought the discussions should continue through to the end of this year. Again I do not want to verbal them, but they seemed to think there was a possibility of the discussions being mutually fruitful if they continued through to the end of this year. I do not, of course, expect that you will be able to tell me what the discussions are, but is there any expectation that following these discussions everybody might be happy?

**Mr Harris**—I think you should not go into a discussion like this unless that is a possible outcome, and we are certainly going into it with that in mind. I think the important thing to bear in mind here is that, as you get with any discussion that may lead to a negotiation, both parties have now laid out quite transparently their going-in rules, if you like. That is what has happened. This bill contains some elements that are highly relevant to those discussions, but there are other factors outside this bill that are also highly relevant—we have mentioned the creation of the NBN itself. The whole market structure is therefore going to shift. The biggest question which we are putting on the table with Telstra, and they in their own way are putting on the table back with us, is about the fact that we are looking at a new world in regulated content that cannot even be called telecommunications any longer because the nature of the NBN, as I am sure you are aware, is that it imports not just telecommunications but broadcasting and a whole bunch of other potential input types of arrangements.

In this new world which will grow and clearly exist by the end of the coming decade, what form of regulated entity do you want to be? That is why I said earlier to Senator Birmingham that I think the model behind the legislation is intending to say to them that you can make some quite clear choices now which can set you up within the new regulatory environment or you can let it unfold and pretty much say as we have done historically—and as a participant in that I share the guilt of everybody else who took part in it—that we should let this unfold in an incremental manner because it was probably the path of least resistance in an industry which was clearly undergoing a lot of change. But having undergone a lot of change, the threshold shift with the broadband network is to import all these other potential entities into what was previously considered to be a telecommunications field, and I refer to broadcasting but there are others as you know. This is a big question for a major corporation like Telstra and that is the context in which we are prepared to have this discussion, and I think it is plausible that we can come out with a positive outcome.

**Senator IAN MACDONALD**—Do you think that it is perhaps worth waiting until those discussions are finished?

**Mr Harris**—No, I do not in the sense that traditionally with the negotiation both parties set out their high ground positions. That is what we are doing and Telstra is doing it, too. We are doing it quite transparently really, more transparently than you often see in a negotiation like this. We each have our high ground positions but we are attempting to come to a meeting and that is why passage of legislation, I think, is quite important.

**Senator IAN MACDONALD**—But you just said that you understand that there is a purpose in the discussions and that is why you are continuing them. Telstra seem to think that. As I said I have no idea what they are talking about or what you are talking about in the negotiations, but they seem to think that if things are not resolved by the end of this year it will be all sabres drawn. Bear in mind this is not just Telstra. Many thousands of Australians are shareholders in Telstra and rightly or wrongly feel some political and commercial anger at the way this is all going. But if there is the prospect of it perhaps being resolved in a win-win situation, why wouldn't we provide an opportunity for that to happen?

**Mr Harris**—In effect that is what the bill does. It provides for that discussion to result in an outcome which satisfies the intent of the bill—that is, it will either be a functional separation path or a structural separation path, and on passage what the bill will do is create a framework which has to be filled by a decision. The framework will create the place to put that decision and the decision is what we are trying to discuss now with Telstra. Thus passage is inherently part of the change.

**Senator BIRMINGHAM**—‘High ground position’ sounds much like ‘gambit claim’, Mr Harris. Is the parliament essentially being asked to pass a negotiating position, a tactical position here that the government intends to then work its way down from?

**Mr Harris**—No, I do not think that is at all true. As I just said it is the framework. On passage the framework will be in place under this legislation and the answer will be placed into the framework—functional separation; structural separation. That is why passage is important. Without it, it becomes a decision that does not have a framework. I implore the committee to consider that for regulatory certainty what is decided via an undertaking or in the form of agreement—I will just use the term ‘undertaking’. I do not want to be held to the legal interpretation again—has to slot into something, and I believe even Telstra would agree

it has to slot into something where they know with certainty the new bounds around which you will exercise your regulatory power over us.

**Senator BIRMINGHAM**—Is this a high ground position or are they fixed terms?

**Mr Harris**—They are fixed terms because there is a regulatory structure into which the decision will go. The passage of this bill will create a framework as I tend to think of it. It is literally a set of wooden boxes. Into one box goes functional separation and into another box goes structural separation: functional separation will mean certain things for the next decade; structural separation will mean certain things for the next decade. That creates the regulatory certainty.

**Senator IAN MACDONALD**—But the threat of the passage will do all that. The passage is not necessary. What is the urgency, bearing in mind this is all to do with the NBN and it is not due to start for—good heavens, I do not think we have even got our staff organised yet for the NBN. What is the urgency? Why does it have to be done before the end of this year?

**Mr Harris**—I will answer the question on the timing, but on the staffing: Mr Quigley is moving like greased lightning to acquire staff right, left and centre, and I keep finding out about them—

**Senator IAN MACDONALD**—We know that and we know he is a good man, but quite frankly there is a long way to go before the NBN—keep aside the political rhetoric and the great enthusiasm of the minister—

**CHAIR**—Excuse me, Senator Macdonald and other senators, I do not want to interrupt you but we are 15 minutes over time. We had a meeting scheduled at 12.30, so can I ask people to be succinct with your questions.

**Senator IAN MACDONALD**—The crucial thing was: what is the urgency to do it before the end of this year?

**Mr Harris**—I think I did mention earlier that I think all parties would agree that, this now being out, it needs to be resolved and should not hang for a long period—

**Senator IAN MACDONALD**—Well, all parties do not agree. Telstra obviously do not, and they are a very substantial party.

**Mr Harris**—I did not read the transcript of what remarks they made but—

**Senator IAN MACDONALD**—You would have had someone there listening.

**Mr Harris**—I think if you put the explicit question to them ‘Should this go on over a long period, with the continuation of uncertainty?’ they would say: ‘No. We want certainty.’ That would be my guess. I do not want verbal them, but the idea is that that is what is behind timing. In terms of answering your question, that is what is behind timing.

**Senator IAN MACDONALD**—The *Hansard* will confirm this or otherwise, but I thought Telstra were saying to us yesterday: ‘Leave it till the end of the year. Don’t pass it this year. Maybe a lot of things will become clearer.’ Again, I do not want to verbal then, but a check of the *Hansard* will show exactly what they did say. There does not seem to me to be any huge necessity to do it this year. The threat is there, and that will keep the discussions going, which seems to be the government’s greatest desire. Whether it happens in what is going to be a fairly busy final four or five days of parliament seems to be another issue.

**Mr Harris**—The answer I have given is the only answer I think I can give in the circumstances.

**Senator IAN MACDONALD**—I appreciate that is the only answer you can give, but can you tell me where your plans will be put out if the Senate, in its wisdom, decides to defer consideration of this bill until the February sessions? What impact is that going to have on your ability to implement whatever you have got in front of you?

**Mr Harris**—It is just the uncertainty factor. It should not continue any longer than it need continue.

**Senator IAN MACDONALD**—I take the chair’s—

**CHAIR**—You will have another go at them at estimates, Senator Macdonald.

**Senator IAN MACDONALD**—Yes. I was going to ask about the USO. It is not directly relevant, so perhaps we will leave that to another day. Can I just finish by saying that I was not aware that you had been appointed, Mr Harris, so congratulations. Sometimes it shows how irrelevant Canberra is when you are not in Canberra, but congratulations and well done.

**Mr Harris**—Thank you. I should say—I know it sounds superfluous and unnecessary—that I am very happy to be back.

**Senator NASH**—I will be as brief as possible. I am assuming that some work has been done around this legislation on the impact on regional areas. Can you outline for the committee what you see are going to be the benefits, if any, for regional areas specifically from this legislation.

**Mr Harris**—I will let Miss Spence and Mr Buettel supplement this, but I guess when I came to look at the legislation the first thing that struck me was that it is not just about the separation issues. They are big, but it is also about consumer support and consumer protection. Payphones have been a bedeviling issue, particularly in regional areas, for a long time. There is a lot of strengthening of provisions around payphones in this legislation, and I am sure that will get widespread support. The customer service guarantee again tends to impact regional areas more than it impacts city dwellers, and it has strengthening provisions in there as well.

There is the support for customer assistance, that being about those who need customer assistance, as in people who live a long way away—and you would remember the ambulance issue and that sort of thing. That is also strengthened with a requirement in this legislation for a provider who perhaps cannot provide that level of support to be required to advise a customer who needs it whom they can get it from; in other words, which other provider can give that high level of customer assistance to someone who has a need for an ambulance and lives a long way from town.

In terms of the more generic factors, I mentioned earlier the change to the regulated provision of pricing. I think that is a positive. That is not just consistent with where we have seen the nature of regulated industries at basic infrastructure level go in terms of electricity and gas. I think that also provides a high level of confidence that if you are at the high-cost end, as regional consumers often are, there is going to be a regulated provision of service which is going to take into account your needs at the basic level.

**Senator NASH**—That is what we were talking about before, moving from the negotiate and arbitrate model to what is more or less a set-and-forget-type model. So that is the benefit from that, as you see it.

**Mr Harris**—I think so. That is well worth taking into account particularly if, as I have said, you are necessarily, as you are—and I come from the country too—at the high-cost end of the spectrum and you know that and you would like to know that somebody is going to take some account of it. Those sorts of benefits are underestimated. I understand why, as the bigger picture in the bill is separation.

**Senator NASH**—Do you think the competition aspect itself, which I would assume is the underpinning area of the whole separation, will improve services in regional Australia?

**Mr Harris**—We believe so. We strongly believe that this will provide what you might call smaller players who will work actively in country areas to provide services, services which are perhaps in supplementation. We are not here today to talk about the NBN, but, as you know full well, fibre will go so far and then satellite will be utilised. For example, at that interface point you need, if you are going to be a satellite provider, to be able to ensure that you get all the backhaul capability that you need, so there are all those sorts of issues. I think you are seeing behind this the regulatory structure of the ACCC. You are seeing the same sort of form that will go towards the NBN. In other words, it is in support of those issues that will come up when we talk about the NBN in a different forum as I think there is another committee hearing at some later point on the NBN. So I think it is important to take into account that the relevant aspects of how this bill will amend the ACCC's involvement in price setting for basic infrastructure will clearly have some crossover relevance to the NBN itself. I think that will also benefit the people in the regions.

**Senator NASH**—I have two other very quick ones. Can you explain to the committee if there will be any effect on the operation of the USO from moving to functional or structural separation?

**Miss Spence**—I think there is the more general issue, whichever path it goes down, that there is an expectation that there will be a looking at the USO in the future. But I do not see, in terms of how it currently operates, that that can be factored in. Either the functional or structural separation would not necessarily impact on the USO for the existing arrangements.

**Senator NASH**—So consumers who are currently covered by that should not be concerned by any of the changes in this legislation and that that would be the impact of these changes.

**Miss Spence**—That is right.

**Mr Harris**—In fact, these provisions go through the licence. You will be licensed and therefore, regardless of whether it is functionally separated or structurally separated, the provisions will still be in place.

**Senator NASH**—Finally, can you see any reason why this legislation would impact on the delivery of fixed line telephony?

**Mr Harris**—In other words, are you suggesting that there would be an investment strike, a reduction in investment because—

**Senator NASH**—It was just raised with me about the services that are delivered currently in respect of the fixed line telephony. I do not particularly have any real concerns. I am just concerned to know that there are not any curly things in this that are going to affect the delivery of fixed line telephony.

**Mr Harris**—It is a very interesting question built around the possibility in the future that whoever wants to put in place a transformational technology like optical fibre will clearly look at what they have in the ground at the moment and say—and I am not trying to be too negative—‘Should we maintain this? Should we keep the copper in the best form we can given that we are replacing it in the next year or two with optical fibre?’ I think that will occur—and it is possibly even occurring now—regardless of who the investing party is. In other words, it would not be an unnatural business decision. I think that does occur.

**Senator NASH**—But people should not be concerned about anything in this legislation that would mean a telephone service, through some mechanism, will not be provided.

**Mr Harris**—It would not be changed by this legislation at all. I think we all know that it is a factor out in some places, but it is indifferent even to who is the actual provider. It would be the same, whichever entity was considering that they have a new technology to introduce, that they have an incumbent technology and what they are going to do to maintain the incumbent technology when it is about to be replaced with a new one.

**Senator NASH**—But, as you say, it is not affected by this legislation at all.

**Mr Harris**—That is not part of the bill. It has nothing to do with this bill.

**Miss Spence**—If anything, it actually strengthens the regulator’s ability to make sure that in respect of the fixed line service, in terms of the universal service obligation requirements, the copper network is maintained when there are those other issues being visited.

**Mr Harris**—That is a very good point. The USO is still in place.

**Senator FISHER**—What consideration was given in the formulation of this bill to the impact of the bill on Telstra’s workforce?

**Miss Spence**—To some extent it depends on which path it goes down. Can we take that on notice?

**Mr Harris**—Can we give you a written answer, Senator? I am sure that consideration was given to it, but I was not in the job at the time. If you go on to another question, maybe we could extract an answer as you are doing so.

**Senator FISHER**—Yesterday Telstra indicated that they have upwards of 30,000 employees—potentially 40,000, if you include those contracted other than full time employees. They also indicated that, of those, some 11,000 or thereabouts are involved in serving fixed lines. In addition to that, they indicated that they utilise contractors who are not employees but nonetheless are contracted to provide services to Telstra. Some of those deal with fixed line services, which of course would change were the bill to proceed. Bearing that in mind, do you have an answer ready?

**Mr Harris**—The second question that you just posed is not dissimilar from Senator Nash’s question. This bill does not say in any form that fixed line services will decline and be replaced by optical fibre. We all know that that is the context in which the bill is proceeding but the bill itself does not alter that. This bill does not alter the fact that one technology is going to replace another over time and that there will be different labour requirements with that technology versus the incumbent technology. I very much doubt that anyone would have done analysis of this bill on that specific issue because the bill does not create that kind of outcome. What create that kind of outcome are the investment choices of Telstra, NBN Co., Optus and a number of other players, I am sure.

They do alter the labour component required for maintaining telecommunications infrastructure into the future. But this bill does not, and that is quite important because I have seen in some of the commentary—and it is interesting, if Telstra did raise it yesterday—about why you would necessarily import that into this. The only way I think you could is by looking at the question of structural separation and saying, ‘If we have to.’ I will take the highly simplistic notion that has been put out there. It is not by any means the sole notion, and the explanatory memorandum does make that very explicit. But, to take the option of structural separation which

says there is a separate company, it has the same employees and they have the same terms and conditions; that is structural separation. As far as this bill is concerned, the employees are unaffected.

As I said to Senator Birmingham earlier, it is not the cookie cutter model we are working on but, just taking that one for illustrative purposes, there is no labour impact per se of structural separation. It just says, we have got a separate company with a separate business model, but that infrastructure is earning significant profits at the moment and would be capable of sustaining employment into the long haul. If that separated entity were to join with a party that is putting in optical fibre, which in a sense it is currently in one, which is Telstra, were to join with another one, which is NBN Co, the same rollout rate would create the same employment impact regardless of which entity was doing it, and this bill would not alter that.

**Senator FISHER**—Okay. Nonetheless, are you agreeing that the bill would mean different labour requirements within Telstra albeit the labour requirements no longer required by a Telstra would be picked up somewhere else. Is that what you are saying?

**Mr Harris**—No, I am saying it is a matter that relates to the creation of NBN Co rather than the creation of this bill. This bill will not alter the labour requirements one iota.

**Senator FISHER**—So you are saying that in the department's view, if this bill were to pass, Telstra would not need to make one iota of change to its workforce either in terms of the jobs that its workforce is currently doing, or—and you referred earlier in your answer to the terms and conditions—to the terms and conditions of employment of those workers. Is that what you are saying?

**Mr Harris**—I am saying that they could translate the entire workforce and their terms and conditions into this hypothetical second company. It would be a sustainable business model in the sense that it currently earns significant revenue in excess of its costs and therefore could sustain itself. The transformational change is actually the introduction of optical fibre, it is not the creation of a structurally separated entity.

**Senator FISHER**—Workers might be reassured by that and then again they might not be. But has the department modelled the cost impact of that scenario that you outlined?

**Mr Harris**—Not for this bill, I am sure, because the bill does not do it.

**Senator FISHER**—The bill talks about cost to government of maintaining the framework. Potentially there is a cost to government of workers who may be dislocated. So are you saying that is why the regulatory impact statement does not contemplate cost to government of workers dislocated albeit potentially picked up somewhere else in the economy? Are you saying because the bill does not do that?

**Mr Harris**—How can I put this? In a structural separation outcome there is no obligation that a worker loses their job.

**Senator FISHER**—But that may be a consequence, although you are saying not for Telstra, in your view.

**Mr Harris**—That is right. I am saying that, to the extent it exists, it will be a consequence of the march of technology. The delivery of optical fibre will change the maintenance arrangements. For a copper network it will have a certain labour requirement and for an optical fibre network a different one.

**Senator FISHER**—So that could be a march on workers' jobs over, say, eight years of the rollout, could it?

**Mr Harris**—I cannot speculate on that. All I can say is that this bill does not induce any of that. We are here to discuss the bill.

**Senator FISHER**—Do you have an answer now as to whether the department did do that analysis that you were looking for before?

**Ms Spence**—The work that we looked at was what the impact on employment would be, and is it as a secretary has indicated. Under functional separation employees remain employees of Telstra and under structural separation again they would be separated into two companies but there is no change in the employment requirements.

**Senator FISHER**—Why does the regulatory impact statement not say that, then, when you are talking about cost to Telstra? Why does the regulatory impact not specify exactly that, Ms Spence, if you did that analysis and that is the result of it?

**Mr Harris**—Because you take into account costs that are real rather than costs that do not exist.

**Senator FISHER**—The regulatory impact statement talks about the benefits. So, given the concern about a potential negative or a potential cost, would you not have headed it off at the pass by indicating that there need not be this cost?

**Mr Harris**—Hypothetical costs that do not exist would not normally form part of any regulatory impact assessment that I have done in my 20-odd years doing this.

**Ms Spence**—We spoke in terms of working with the OBPR and we were consulting with them on the nature of issues which would need to be covered. So we have thought those things which are reasonable have been included in the assessment.

**Senator FISHER**—This is my final question. Given the concerns about this issue, are you able to make that work public, the work you have said you have done?

**Ms Spence**—As I said, we considered what the impacts would be. I can take on notice to see if there is anything further that we can put into the public arena, if that is all right.

**Senator FISHER**—And if it is not able to be made public, why not? Thank you.

**CHAIR**—That being the end of questions, thank you very much to the officers of the department for appearing before us today, and my belated welcome to Mr Peter Harris as well. We have enjoyed having you here today and we are sure you are looking forward to estimates next week! I should also indicate that the committee will probably have a number of questions that we will put on notice to the department probably relating in particular to proposed amendments put forward in various submissions. We would appreciate, if possible, a response to those questions by Monday afternoon.

**Mr Harris**—Sure.

**CHAIR**—That concludes today's proceedings. I thank all the witnesses for their informative presentations. Thank you also to Hansard and Broadcasting and to the secretariat for their assistance.

**Committee adjourned at 1.06 pm**