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TECHNOLOGY AND THE ARTS REFERENCES COMMITTEE

Reference: Competition in broadband services

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

Wednesday, 10 March 2004

Members: Senator Cherry (*Chair*), Senator Tierney (*Deputy Chair*), Senators Lundy, Mackay, Tchen and Wong

Participating members: Senators Abetz, Allison, Bolkus, Boswell, Brown, Buckland, George Campbell, Carr, Chapman, Conroy, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Knowles, Lees, Mason, McGauran, Moore, Murphy, Nettle, O'Brien, Payne and Watson

Senators in attendance: Senators Cherry, Lundy and Tchen

Terms of reference for the inquiry:

To inquire into and report on:

- (a) the current and prospective levels of competition in broadband services, including interconnection and pricing in both the wholesale and retail markets;
- (b) any impediments to competition and to the uptake of broadband technology;
- (c) the implications of communications technology convergence on competition in broadband and other emerging markets;
- (d) the impact and relationship between ownership of content and distribution of content on competition;
and
- (e) any opportunities to maximise the capacity and use of existing broadband infrastructure.

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Committee met at 11.37 a.m.**ANDERSEN, Mr Terry, Project Manager, Operations Codes Reference Panel, Australian Communications Industry Forum****PLANTE, Ms Johanna Joyce, Chief Executive Officer, Australian Communications Industry Forum**

CHAIR—I declare open this public hearing of the Senate Environment, Communications, Information Technology and the Arts References Committee and welcome everybody here today. The committee has received some 49 submissions to its inquiry into competition in broadband services. We have previously conducted hearings in Canberra, Sydney, Ballarat and on the Gold Coast, so today is our fifth set of hearings. I welcome our first witnesses from the Australian Communications Industry Forum. Thanks for giving your time today. It is much appreciated.

For the benefit of all our witnesses here this morning, the committee prefers all evidence to be given in public. However, should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private, you may ask to do so and the committee will consider your request. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I now invite you to make a brief opening statement before we move to questions.

Ms Plante—I think I have spoken to the committee before and you requested that you might have some questions for us. As a brief introduction, let me just review: the Australian Communications Industry Forum was established in 1997 as an industry owned and resourced body to implement and manage telecommunications self-regulation in Australia. Our code and standard development activities occur in three main areas. One of those is the technical area, which is very much about connecting networks—and how to do that—and setting standards for customer equipment connected to those networks. The second area is the consumer codes area, where the codes we develop are there to provide protections for consumers in relation to things such as billing, credit management, complaints handling et cetera. The third area, which is probably the area that is most relevant to this inquiry, is the operations codes area. We develop codes, guidelines and specifications to assist carriers and service providers to work together on various things operationally and to transfer customers between each other. I might leave it at that and ask for questions. We have sent a fair bit of material to you on the codes and the operational codes that we have developed over the years that address some aspects of the customer transfer of various services.

Senator LUNDY—We have heard evidence from the TIO in Ballarat that they were very closely involved with ACIF in the operation and the application of codes. One of the parts of that evidence was that the TIO had some difficulty in assisting ISPs to understand their obligations and so forth. From ACIF's perspective, what are some of those challenges in getting different players in the market to understand their obligations under your codes?

Ms Plante—It really has been a challenge, in the whole six or seven years that I have been here, since ACIF started. We have tried very hard to write to all the hundreds of Internet service providers to tell them about the codes that exist, to invite them to participate, to invite them to

come to seminars and to invite them to come to lots of things. Basically it is very difficult. The big ones that are part of the carriers, like Telstra BigPond and the Optus ones, actually get to know about these things through their mainstream organisation, but the smaller ISPs just do not respond. We send out letters and they do not respond. We have also tried, and we still try, to get that message through to the various Internet industry associations, for example the IIA, the Western Australian Internet Service Providers Association and the South Australian one, but it is extremely difficult even though these ISPs are subject to all the obligations under codes that any carriage service provider is subject to.

Senator LUNDY—Can you explain briefly the development process of these codes of practice? I guess it is reasonable to assume that the larger organisations are better resourced to monitor and participate in the development of codes and their implementation. Are you able to make any observations about how that creates its own little divide between the big and the small in the market and how these codes are applied?

Ms Plante—I do not think it does create a divide. I will tell you about the process. Basically, whenever a regulator, industry participant or consumer organisation thinks there is a need for a particular code to be developed, they take that and put in a submission—it does not have to be very comprehensive—to the relevant reference panel, which in this case is always the operations codes reference panel. It is made up of various carriers, service providers, industry associations and consumer and user groups. That panel talks about whether there should be a committee set up to develop a code, a guideline or whatever. The board approves that. The committee gets set up, and we basically go around to all the people that we believe will be affected by that particular code and ask for them to actually participate in the committee.

Even with the carriers and the service providers, it is the larger ones that directly participate. However, the way we tend to actually try to get to the smaller ones is through getting the industry association to also participate in that working committee, such as SPAN, the service providers industry association. We will also go to the Internet Industry Association or any of them to try to get at least the associations to come into that working committee if we cannot get individual players.

Senator LUNDY—How would you characterise your initiatives to get that word out? The industry associations are one path.

Ms Plante—Given that most of our codes apply across the board to carriage service providers and Internet service providers, we would go directly, obviously, to all our members. At times where we have tried to do some work—we have never really been able to do a lot of work that has just affected the Internet service providers, because we are unable to get them involved as much—we have gone out to the industry associations, sent them a letter and said: ‘Look, this is happening. Do you want to nominate somebody? Do you want to actually get involved?’

Senator LUNDY—I want to turn now to the issue of Internet peering. ACIF hosted a forum on Internet peering. Can you provide an outline of it to the committee?

Ms Plante—We hosted a forum on Internet peering very much in our role whereby, if the industry wants to bring up something which they want workshopped or discussed, we are ready to organise that. We organised that not because we have a role in Internet peering but because we

were facilitating various players coming together to actually really learn about what was happening. It did create a bit of fuss along the lines that not everyone was in favour of our doing it but basically there could be no harm in everyone getting together and talking about these things. But we do not have any role in the resolution of those arrangements. In that case, we did get a fair few Internet service providers attending.

Senator LUNDY—We have had a little evidence about Internet peering. Are you in a position to explain to the committee what the major issues were that emerged during that forum?

Ms Plante—Not anymore, I am afraid. We could send you some material. I was there in the role of facilitator and I am not an expert on all these Internet peering issues. The main issue was the big four versus the others, in a nutshell. That was the main issue.

Senator LUNDY—What are the broad issues that ACIF could characterise as its work as it relates to competition in the playing field—particularly in relation to broadband, given that is our terms of reference? Where does ACIF cross over into those areas in the scope of your work?

Ms Plante—Our mission statement says ‘develop industry arrangements or self-regulation to both benefit end users and facilitate competition’. The main area where that facilitation of competition comes in is in the network and operations codes areas. On the network side, it is developing interconnection specifications or rules to enable the different networks to connect to each other and therefore enable different players to operate in the marketplace. On the operations side, it is to facilitate things like local number portability, mobile number portability and the transfer of customers between different service providers in terms of preselection or resale in commercial churn.

The area that is probably most relevant to the broadband issue is the work we did on the unbundled local loop services, the ULLS. We developed a network deployment rules code to assist in figuring out how and when people could use DSL services—how competitive players could get the unbundled local loop from Telstra and offer services to customers over those unbundled local loops. Another code in the ULLS area deals with the ordering, provisioning and customer transfer of ULLS services. That body of work was completed—it keeps getting revised, obviously—around a 2001-02 time frame.

Senator LUNDY—We have had some evidence about the processes with regard to carriers requiring access to Telstra’s network. They have made some statements on their concern about the implementation of that process. In particular, the Primus submission talked about concerns about information sharing within Telstra and the lack of timeliness of this process. If the way that is being handled is outside the code of practice, what can be done? What can ACIF do to either pursue complaints or take those issues up, on behalf of the complainant, against the carrier that is supposedly not doing the right thing?

Ms Plante—ACIF does not have a role in enforcing codes, because we do not have any powers, unless there are people that are signed up to a code. If there is a carrier that is signed up to a particular code and then another carrier or service provider complains about that carrier and registers a complaint with ACIF, we do have a process for getting the two carriers together to try to sort it out that way. If it does not get sorted out that way, we investigate. At the end of the day,

though, because we have no formal powers, the maximum penalty we can put down after the caution and warning is a public sanction notice.

Senator LUNDY—How many of those have you issued?

Ms Plante—We have never issued any, because we get very few complaints. Most of the codes that contain significant consumer protections—which include some of the operations codes—are registered with the Australian Communications Authority. Once that happens, the ACA can enforce that code. All the end user complaints go through the TIO anyway, so that is a whole different arrangement.

Senator LUNDY—I am looking at your list of codes here. It says:

The unconditional local loop service network deployment rules are currently being revised.

What does that mean?

Ms Plante—It is being revised because it specifies all these complicated technical things in relation to the actual DSL equipment to stick at the end of the unbundled local loop service. That one is being revised at the moment because there are some newer types of DSL equipment that need to be incorporated into that code.

Senator LUNDY—What impact does that have on the market? When a code is in a state of being revised, does the old one still apply?

Ms Plante—Yes, the old one still applies. The old ones are still registered with the ACA.

Senator LUNDY—Is the unconditional local loop service ordering, provisioning and customer transfer also registered with the ACA?

Mr Andersen—No. That is not a registered code.

Senator LUNDY—Could you tell me a little more about that? Is that potentially the code that could help manage some of the concerns that have been raised in this inquiry?

Mr Andersen—That particular code is about transferring the use of copper wire from one carrier to another and all the processes associated with it. Obviously it is related to the DSL services, because it is usually used to carry a DSL type service, but it is not directly related. The DSL is a service that goes over the copper wire, so there are some differences there.

Senator LUNDY—Does that add another layer of behaviour that is managed by the code in the process of getting access to that existing network?

Ms Plante—The code actually specifies what people have to do if they want access to the unbundled local loop from Telstra, yes. So it is about that unbundled local loop, not about the DSL service or whatever service is on top of that unbundled local loop.

Senator LUNDY—Would the sorts of complaints we are getting about the time delays in making that copper available be governed by this code?

Ms Plante—I am not quite sure whether the code specifies that. It must specify time frames of responding to requests and stuff like that.

Mr Andersen—To the individual transactions between the companies, yes, it does.

Senator LUNDY—When is that likely to be registered by the ACA?

Mr Andersen—It is through recommendations by the committee that actually put it together in the first place. It is then put up to the reference panel. Not all codes are registered. In this case, the recommendation was that it not be registered.

Ms Plante—One reason for that was that, in its early stage of development, before it went to public comment, there were a number of players involved in the development of that code. After it got to the date of introduction of DSL services—these were all draft documents at that stage and everyone seemed to be pretty happy with them—we could not get many people to continue to participate to finalise the code.

Senator LUNDY—Why was that?

Ms Plante—Because there were draft arrangements in place that were there in time for the official launch of the unbundled local loop—when the ACCC said, ‘Right, you can now go ahead.’ Basically, a lot of people seemed to feel that they were not bothered at that stage to continue putting in the effort to dot the i’s and cross the t’s. So we ended up with a situation where we had Telstra, Optus, ATUG and maybe another one—that was about it—involved in finalising that code. That was not the actual reason, I guess, that the committee made the decision; I am not quite sure why. However, because of that, it could have been pretty difficult to register. To register a code, you have to demonstrate that the people involved in its development are representative of all the people that were involved. At this stage, only Telstra, Optus and ATUG were involved. People lost interest because they felt that the draft code was enough for them to include in their bilaterals with the carrier, Telstra, and they did not seem keen to continue to be involved.

Senator LUNDY—What code would cover the provision of information by Telstra to another carrier that just needed to know the location of their physical infrastructure? We heard evidence on the Gold Coast—I cannot remember what carrier it was—that there was a 40-day period or something that they had to wait to just get information back about Telstra’s network to inform their ability to quote for work. Is that something that your codes address?

Mr Andersen—That code allows an access seeker to interrogate the Telstra systems to see if there is in fact a ULLS available at a particular location. So that code does cover it from that perspective.

Senator LUNDY—This code here?

Mr Andersen—Yes, the ULLS.

Senator LUNDY—But it is not enforceable?

Mr Andersen—It is voluntary, as Johanna mentioned earlier in the piece. I think you are alluding to a wider perspective. I understand the issue—that some access seekers are probably looking for wider marketing information on things like availability.

Senator LUNDY—That is part of it, but also there is this specific complaint about the timeliness. That delay just put this huge chunk of time in the ability of competitors to put together a quote. Obviously Telstra was not constrained by that same time delay, so they claim it was a direct competitive disadvantage to them.

Mr Andersen—I can answer the question with regard to specific services, because there is a time specified in that code. It really is a number of days—I think it is five days. When an access seeker requests a service qualification, there is a time limit to provide that.

Ms Plante—If people are unhappy with the way that code is running, what normally happens is that somebody comes to the ACIF reference panel and says, ‘We want that code to be reviewed to see if there is a need to revise it.’ In the revision process, people can get involved and the code can be revised. The committee can say: ‘Look, this is now of sufficient importance. We believe it needs to be a registered code.’ So there is a mechanism whereby any carrier or service provider that is experiencing problems can come to ACIF, to the reference panel, and request a review of the code and a revision of that code, which will also include the possibility of it being registered. The first time the LNP code, the local number portability code, was finalised and published, it was not registered because there were some problems with it and the ACA felt it could not be registered. But the second time we revised it and published the new code it was submitted for registration. Sometimes it cannot be registered because the way it was developed does not quite meet the needs of the regulator; however, there is a way forward for people if they do not want to revise that code and make it into a registered code so that it is enforceable by the regulator.

Senator LUNDY—Can those codes go ahead even if Telstra is opposed to them?

Ms Plante—It is a consensus process. In something like this, where the main player is Telstra—because it is Telstra’s copper network—it would be very difficult for the whole industry to get together and decide unilaterally that that is the way they want to do it if it were totally against Telstra’s view of how it should be done. In that particular situation, no.

Senator LUNDY—Would Telstra have effectively a right of veto over the types of codes developed?

Ms Plante—No. There are three codes and it is not a right of veto. In our operating manual, it is specified—

Senator LUNDY—Not formally but effectively, given their dominance?

Ms Plante—No. There are only three codes. The three codes where Telstra probably does have a stronger say are the commercial churn code, which basically specifies processes for reselling Telstra services. I think I am still right on that.

Mr Andersen—Yes.

Ms Plante—Therefore it is very Telstra specific, in a sense. There are the network deployment rules. The ULLS code is about Telstra's local network and how to use that. The ULLS ordering and provisioning code is almost totally related to Telstra's network, but there is no other code where that same situation exists.

CHAIR—If Telstra did not agree to the wording of a code, under your consensus decision making model, that would still have to continue to be discussed around the table until a consensus was reached, wouldn't it?

Ms Plante—No, because we have the 80 per cent rule. If 80 per cent of people are in favour, it can go through.

CHAIR—Do you have any codes under development at the moment which would assist in the broadband competition issues that are being raised by other elements of industry?

Ms Plante—Probably not. There is one code we have about Connect Outstanding. I will let Terry talk about that one.

CHAIR—I just read that briefly.

Ms Plante—That one was very much based on a relatively small number of complaints per month, but it is very much related to telephone services. Terry, do you want to talk on it?

Mr Andersen—Yes, it is indeed. In fact, the issue came up before about broadband services. I should explain what Connect Outstanding is. It is to do with the physical telephone services only. It does not really affect broadband services, but I will give the implication later. In a situation where a customer in a rented premises leaves that premises without making formal disconnection arrangements with the service provider, a new tenant who comes into that premises and wants to take that service over cannot do so easily at the moment. It takes something like 10 days or so to do so. A lot of complaints went to the TIO for that process. That is what Connect Outstanding is. It is to try to facilitate a new customer coming into a premises getting quick and easy access to that telephone.

There is an implication with broadband services because the TIO noticed that a number of these Connect Outstanding services originally had a broadband service connected to them. When the broadband service was disconnected, there were apparently some tags on that service left in the software systems which indicated that there was still a broadband service. A new person came along and wanted to get access to that service and said, 'I want a broadband service.' When they interrogated the system, they would come back and say, 'It's busy. It's actually got a broadband service on it already.'

Senator LUNDY—I have received specific complaints about this.

Mr Andersen—The committee considered whether this should be part of the terms of reference for that group. They determined that it was not an issue for Connect Outstanding; it was outside the scope of that work. Having said that, the major carrier, Telstra, was taking steps

to ensure that those tags were removed when the broadband services were disconnected. I do not have any statistics to show that that has improved, but I would be surprised if the TIO did not have those stats.

Senator LUNDY—Just to clarify, that is not an issue that ACIF is currently involved in as a result of that reference group decision? It is really up to the TIO to pursue that complaint with Telstra now?

Mr Andersen—Yes. It was pursued by the TIO through that committee.

Senator LUNDY—I see. What happens now? How do we know it will be resolved and that those tags will be removed from the information systems?

Mr Andersen—We can only refer that back to the TIO complaints to see what is occurring there at the moment.

Senator LUNDY—And to Telstra, I presume?

Mr Andersen—And to Telstra, of course, yes.

CHAIR—I would like to thank the witnesses for their evidence this morning. It has been very helpful to clarify those couple of points.

[12.04 p.m.]

FORMAN, Mr David, Director, Corporate Affairs and Regulatory, Comindico

JAYAWARDENA, Mr Rajiv Shanan, Manager, Industry Services, PowerTel Limited

SLATTERY, Mr Ian Thomas, General Manager Regulatory, Primus Telecom

WRIGHT, Mr Steve, Director, Stakeholders Relations, Hutchison Telecommunications

CHAIR—I welcome to the table our witnesses from the Competitive Carriers Coalition. You have all been through the wringer before, so I do not need to repeat any statements. I invite to you make an opening statement, after which we will move to questions. I ask you to keep your opening statement reasonably brief because we are on tight timetables today. The committee has received your supplementary submission. Is it the wish of the committee that we publish it? There being no objection, it is so ordered. Do you need to make any changes to that written submission at this stage?

Mr Forman—No.

CHAIR—I invite you to make an opening statement.

Mr Forman—The supplementary submission provides a chronology of the recent events that motivated us to get back in contact with the committee. I will not go through them, although obviously we are happy to help you with any questions if there is anything unclear in that submission. One point we did wish to make is that we think these events of the past few weeks, as described in that submission and extensively reported in the media, have to be seen as part of the pattern of behaviour by Telstra across a number of realms that, taken together, we argue make a mockery of arguments from Telstra that there is a meaningful wholesale and retail separation, specifically in DSL but also more broadly. It is a pattern of behaviour that we have seen and described numerous times in areas as diverse as what we regard as the manipulation of the pricing of fixed line to mobile phone calls, for example, and the way that Telstra bundles its monopoly facilities access with competitive services in ways that other participants cannot match.

The DSL example is a particularly blatant one in terms of what it shows about Telstra's modus operandi. I do not think Telstra could have demonstrated more clearly that it regards itself as being in a position where it can choose to play by the rules or choose not to play by the rules. It has seen the worst the ACCC can do in relation to these specific issues in DSL wholesale-retail pricing, because it was subject to a competition notice on exactly these issues in 2001, yet it has repeated the behaviour. Even some of the language is spookily reminiscent of when Telstra in 2001 vigorously defended its prices at that time.

It said that they would take whatever the ACCC wished to throw at them in terms of court action before stepping back from the brink at the last moment and making adjustments to their pricing. We also think it important that it is understood that damage has been done in this market

in the last three weeks that cannot be undone. Changes happened in this marketplace at the time and were of a nature that Telstra willed which cannot be reversed now.

Our understanding of the regime and observations of the way it has been applied further give us no confidence that there is anything to stop this all happening again. From our observation, this means the regime itself is too weak, the administration of the regime is too weak or it is a combination of both of them. Ultimately, though, it shows that Telstra is unmanageable because it is structurally predisposed to manipulating wholesale and retail market power in ways to disadvantage other participants in the market. Taken together, all these observations demonstrate to us yet again that, without structural reform to get to the heart of Telstra's incentive to use its monopoly infrastructure advantages in this way, there is no prospect of genuine sustainable competition in communications in Australia and all of the associated benefits that Australian consumers could expect from genuine competition. It is a point we think the ACCC has made numerous times and certainly we have made numerous times.

CHAIR—Does anyone wish to add to that?

Mr Wright—No.

CHAIR—You indicated in your submission that you believe the ACCC needs to pursue an investigation towards a competition notice and, if need be, to actually declare the wholesale ADSL market. You then indicate that the history demonstrates that even these actions would be insufficient. What further powers are needed for either the ACCC or structural reforms to resolve the competition issues you are complaining about?

Mr Jayawardena—We are not only a competitor in the DSL market but also a customer of Telstra when it comes to the acquisition and reselling of DSL services. The current regime, from our perspective, is hampered by the processes available to it. We reiterated this. I think the ACCC also graphically illustrated this in its emerging markets paper published last year, where the only true long-term benefit course of action from a consumer and competitive market standpoint is structural separation. Going down that path will be the only way to have a sustainable market over the long term. There are a lot of short-term fluctuations in customer acquisition, pricing and those things, but we must maintain and be mindful of what we want to see over the long term and the benefit to the end user or the consumer.

Mr Slattery—The problem we are faced with here—and I think it gets to the heart of the DSL issue we are facing—is that we are fundamentally in a regulatory regime which is an ex post facto regime; it is after the fact. I had to smile when I read some quotes recently by Bill Scales, from Telstra, where he talked about encouraging valued wholesale customers to continue dealing directly with Telstra so that they can address their needs on an individual basis. My managing director at Primus, Greg Wilson, was waiting next to the phone for the call to come in from Telstra Wholesale when the \$29.95 retail price was announced, and we are still waiting. As my colleague Mr Forman said, the damage is being done on a daily basis. We still do not have what we consider to be an appropriate wholesale price. It is because Telstra is legislatively under no obligation to consult us or offer us a wholesale price in advance of it offering deeply discounted retail prices, or any retail price for that matter.

CHAIR—The wholesale price has shifted since February 16, hasn't it?

Mr Slattery—It only shifted once the ACCC issued Telstra with an advisory notice, which was some eight days after Telstra's announcement.

CHAIR—Has that resolved the problem to your satisfaction?

Mr Slattery—No, it has not resolved the issue to our satisfaction. In fact, the price offered by Telstra is still some 10c above the retail price. The wholesale price is still above the retail price. Just to finish, we believe that we still do not have a reasonable offer on the table for a wholesale price for that particular service from Telstra which would offer us as a competitor—who is dependent upon access to Telstra's network and wholesale services to compete in this market—an operating margin that would enable us to compete.

CHAIR—What would you regard as a reasonable margin? Has the ACCC done any studies on that?

Mr Forman—The ACCC is working at the moment to try to calculate what it would regard as the appropriate wholesale price, but we would point to the September 2001 and December 2001 competition notices from the ACCC. It regarded as acceptable in that instance actions by Telstra to create a margin in the order of 30 per cent. Telstra reduced its wholesale prices by about 30 per cent in that instance where there was a price squeeze. Over time, through a number of pricing changes and, most notably before this—those in December last year—that margin has been whittled away. This is a particularly gross example of Telstra's ability to manipulate the market. They have wiped away all that was left in a public announcement made at the beginning of February on a new retail price. So they went from what was already a crimped back margin that had been forced upon them by the regulator back to nothing.

CHAIR—The nature of technology generally is that the price for supplying does fall over time. Could there be an argument that the price for Telstra supplying broadband has fallen over time, particularly since 2001?

Mr Forman—Absolutely, it should be. Firstly, we would contend that there is a question about whether the wholesale price was ever cost reflective. The only people who are truly in a position to know that are Telstra, although the ACCC, it might be argued, is in a position to ascertain that information if it so wishes. The question for the ACCC is whether they actually have those powers. The first question is whether there was ever a cost reflective wholesale price. In a market that is not genuinely competitive, there are no market pressures on Telstra to drive down to that price. I agree that over time, as they reach scale, they should be reducing the price because they should be seeing costs fall, but that should be reflected in the wholesale prices. If Telstra Wholesale is the provider of the access to the facility, Telstra Retail is simply selling off that cost base like the rest of us. One would then imagine that wholesale prices would lead retail prices back and that the pressure from people such as us, as we build larger retail bases, to demand of Telstra that they reflect those kinds of economies of scale in their wholesale prices should be what impacts upon Telstra Wholesale's pricing behaviour. But that is not the case. In this instance, we have Telstra Retail pricing leading the market down and wholesale pricing following at a time of Telstra's choosing or when they are forced.

Senator LUNDY—At the time, it was reported in the newspaper that the new retail price was \$29.95, and the wholesale price was \$29.75. Was that what was provided by Telstra at that time?

Mr Slattery—Yes. Telstra put an offer on the table to Primus. It is not confidential, so I do not have a problem in revealing it. It was \$29.75.

Mr Forman—It was a single price offered to everyone in a form letter, where they changed the name of their valued wholesale customer and replaced it with the name of another valued wholesale customer.

Mr Jayawardena—PowerTel received the same offer from Telstra.

CHAIR—It was \$29.75?

Mr Jayawardena—It was \$29.75.

Senator LUNDY—So it was 20c less than what they are offering retail?

Mr Jayawardena—That is correct.

Mr Slattery—Just to be clear, that is an ex-GST price.

Senator LUNDY—So it is even worse?

Mr Slattery—So it is still above the \$29.95.

Senator LUNDY—If you add GST to that, you add \$2.75?

Mr Slattery—I think that is how the sums work out.

Senator LUNDY—No, that is not right. It would be \$2.95 or \$2.97. But the issue there, as I read it at the time, was that you were not able to effectively pitch a lower retail price to your customers in the market as a result of that offer.

Mr Slattery—To be clear, I guess any carrier can match it. The point is: for how long do you want to take a loss?

Senator LUNDY—And you would be taking a loss in that circumstance?

Mr Slattery—Absolutely.

Senator LUNDY—What are the additional costs that have to be built into that from a competitive carrier's point of view?

Mr Forman—All the direct costs of retail, such as customer acquisition and all of the costs of aggregating the service back and actually getting the customer to you, depending on how you had structured your network. I should add, by the way, that in the last two days, after the ACCC issued the consultation notice with a 48-hour deadline, Telstra have contacted some retailers selectively and opened wholesale price negotiations. Those meetings, as I understand it, were all scheduled on or about that deadline, which has now been extended by another 48 hours.

Senator LUNDY—Was the extension of the ACCC deadline as a result of Telstra initiating those meetings?

Mr Forman—I am unaware of the thinking inside the ACCC, although I understand that Telstra were contesting the legitimacy of the notice that they were given and the consultation notice separately to commercial discussions.

CHAIR—Just to clarify an issue, is the Telstra price of \$29.95 ex or including GST?

Mr Forman—The retail price?

CHAIR—Yes.

Mr Forman—I believe it includes GST.

Mr Jayawardena—It is inclusive of GST.

CHAIR—The product they are offering you at \$29.75 is exactly the same as the \$29.95 product. I notice there were a number of products with different throttle speeds and down the line usage costs and so forth. I just want to check that we are comparing apples with oranges.

Mr Jayawardena—From our understanding, if we compare the 256K and 64K service, it is equivalent to what Telstra are offering at \$29.95 in the retail space.

Mr Forman—Except for the 200 meg limit. The wholesale product is not a capped data or data inclusive product, is it?

Mr Slattery—No. You pay additional for data.

Mr Forman—So for \$29.95 you get the service and you get a minimum amount of data—200 meg of data—above which you pay in addition. The service that they provide wholesale is exclusive of data. That is my understanding.

Mr Slattery—Correct.

CHAIR—So you pay for the data as well?

Mr Forman—Right.

Senator LUNDY—Which is a worst-case scenario?

Mr Slattery—It is an additional charge.

Mr Forman—Yes.

Senator LUNDY—In terms of what happens next, a strong focus of your submission is this ongoing process of the ACCC's intervention and Telstra's response to that. You make some

pretty strong statements about your fears of ongoing manipulation. Can you describe for the committee what the potential scenario is now that the ACCC has issued an advisory notice? Telstra have now approached different companies for meetings to discuss those prices. What is likely to happen next? What could happen or what should happen next?

Mr Slattery—There is a different answer to each of those questions.

Mr Forman—There are several answers. There are a number of potential scenarios, and I will have a stab at some of them. I am sure people will add their own views. The process so far has been one that indicates to us that Telstra is playing absolute hard ball with the commission in ways that have caught everybody by surprise including the commission, although I cannot speak for them. That suggests that Telstra will be dragged to every hurdle and will choose how it clears or avoids that hurdle. They responded to the advisory notice by setting out these new restructured wholesale pricing offers, which were clearly regarded by the commission as inadequate. They responded to the consultation notice by beginning to have selective discussions and negotiations with larger customers in the marketplace. From their public statements, it would now appear that they are saying to the commission: ‘Well, you can’t now intervene on the basis of us having these consultations with our potential or existing customers. You cannot intervene with a competition notice because you would be interfering in the market.’ It would appear that Telstra is setting up a situation where they can legally challenge the commissioner every step of the way. There were some comments from Bill Scales a few days ago that suggested to me very clearly that the message Telstra were giving the commission was that they would go to the courts to prevent a competition notice and then they would challenge a competition notice. Potentially it could run for years.

Senator LUNDY—Can they still do that despite the legislative changes to the way these things can be appealed?

Mr Forman—One of the problems with the legislative changes of 2001 is that they introduced the requirement for this consultation notice, which has further slowed the process. I would be interested to hear the commission’s views on that because I think they would say exactly the same thing. Previously the commission was not required to issue an advisory notice, although they were able to before issuing a competition notice. Prior to the 2002 legislation, they would have been able to issue a competition notice. Last week they issued the consultation notice. Now not only do we have the additional period, I think from Friday until Tuesday, as the period of the consultation notice but we have added 48 hours to that. We can assume that that will be challenged again, so we add another challenge before the competition notice is issued. It seems to me to be a bit cute for Telstra to argue that they did not have enough notice on this when not only did they choose to take these prices out three weeks ago, having been in constant negotiation with the commission since then, but they went down this path in 2001.

Senator LUNDY—So it is a reasonable interpretation that the changes to the legislation in 2001, which were supposed to reduce Telstra’s ability to gain the regulations or exploit loopholes in the regulation and delay activity, have had the opposite effect or not had that effect at all?

Mr Jayawardena—It is difficult for us to see how the consultation notice process has actually shortened the time frames. As it is graphically evident in the recent notification that it has been introduced, it is another layer, another drag on the process, to getting a result. Not only

do we want to see a fair result for the industry and the consumer but we want a timely result. It does no-one any good, apart from possibly Telstra, to drag a process out for six months and then end up with the right result. Untold damage is being done in those six months that can never be undone.

Senator LUNDY—Going to those damages, you mentioned before something like an eight-day delay between when Telstra's new retail price was announced and activity from the ACCC. Can you just detail what you mean by 'damage'? Do you lose customers in that period? What is the impact on you in your ability to compete?

Mr Slattery—It is our clear view that the \$29.95 plan is quite clearly targeted at the dial-up Internet customer base in this country. I do not think I am in a position to reveal what percentage of Primus's customer base we think we could lose, but it will be substantial unless we can somehow offer a competitive product.

Mr Forman—You can lose customers or money. That is your choice.

Mr Jayawardena—Both from a competitive and customer perspective, it does us a lot of damage. I would like to tie it to some of the infrastructure costs like the ULL. Telstra, in its recent undertaking that is with the commission, has put out a metro price for ULLs at \$22. Surely if the price is eroding over time and they are offering cheaper pricing in the retail space, there must be some flow-on effect to the wholesale or the infrastructure cost. What it means to us is that the customers we are talking to or the customers we are targeting are suddenly either out of reach or they are a loss leading proposition for us, which is difficult when we are trying to build the business and be competitive in this space.

Mr Slattery—Just to finish off answering your earlier question about the possible outcomes, Rod Bruem, from Telstra, was quoted as saying that the ACCC has not had a good record in the past with competition notices. They have backed down in court and had some mixed results. To me, that sends a pretty clear signal that Telstra is quite prepared to challenge the whole regime and take the ACCC on.

CHAIR—Yet we were told—I cannot remember who told us in the committee—that Telstra is keen for a better relationship with the ACCC in terms of working through these regulatory issues without the need to get into the regulatory gaming that has been an area of telecommunications in the last few years. Have you seen any evidence of that change in attitude?

Mr Slattery—We have seen a change, but I would not say we have seen it change for the better. I get back to the fundamental point here. Primus cannot understand why, if that is Telstra's position, we could not have been at least consulted and engaged by Telstra in commercial negotiations as a wholesale customer prior to this retail price being released.

Mr Jayawardena—From a PowerTel perspective, the offer on the wholesale pricing was made to us on 26 February.

Senator LUNDY—Thank you for those answers. There may be a law or an ACCC requirement that means Telstra should have notified you in advance of this change. There could be a gap in the law at the moment. There may be a reason for you to believe that Telstra should

have notified you under a formal obligation or code of practice, even under the self-regulatory regime. Is there anything you can point to which says Telstra should have done that rather than engage in the process you are going through now, the impact of which being that Telstra being potentially anticompetitive in their conduct?

Mr Forman—We will try to answer that in a couple of ways. Is there anything in the regime that requires them to do it? Clearly not. They have \$50 million worth of lawyers who told them that they did not have to. Is there anything in the regime that could require them to do it? There are powers the ACCC could exercise that would require them to file the prices before releasing them. I think we refer to them in the submission. But whether the exercise of those powers would be effective in making any difference is highly questionable.

Senator LUNDY—But they have not have not been tested yet?

Mr Forman—They have not been used in this instance.

Senator LUNDY—Would the whole process be ex post facto or is there a proactive step they could take?

Mr Forman—Arguably, they would make no difference whatsoever. Telstra would simply have filed these and announced them publicly in exactly the same way as if they said, ‘We are taking these prices out in a week’, and then had the argument. On the question of whether there should be something, the fact that Telstra owns the monopoly access facilities in the national telecommunications infrastructure and that those facilities were in effect gifted to Telstra when the company was created suggests to us that there are obligations that should go along with that. That is, you should be required to act equitably to all of the people who want to provide retail services and create competition off those bottleneck facilities. That is where we come to our argument about structural separation because we cannot see how the regime does anything to affect that kind of behaviour from Telstra.

Senator LUNDY—Is it fair to say that, in offering this \$29.75 price, clearly if they were structurally separated, Telstra wholesale would not be currently in the position of offering Telstra retail \$29.75?

Mr Forman—It would be against their own interests. They would be suffocating the retail market that they would be trying to expand. If you are a wholesale only player, it is in your interest to have vigorous growth in the retail market. The way to get vigorous growth in the retail market is to have as many people in there competing with each other as possible. If, however, you own a chunk of the retail market, it is not necessarily in your interests. You balance your interests and choose where to obtain your margins, wholesale or retail.

Senator LUNDY—You are saying that Telstra wholesale, in offering this price, is not acting rationally as a wholesaler that is operating independently of a retailer?

Mr Forman—Absolutely.

Mr Jayawardena—Telstra has said all through this process that its objective is to grow the market—to get Australia into an equivalent position to some of the other leading broadband

countries. I would have thought this was a perfectly good opportunity for Telstra, by offering wholesale customers and the rest of the competitors in the marketplace, to offer equitable pricing terms and conditions and growing the market collectively.

Senator LUNDY—So everyone else has the ability to grow it as well, not just Telstra?

Mr Jayawardena—That is right. I am making a few inferences, but one would think that, if the intention is to just attempt to grow the market in a completely unbiased fashion, that would be the approach one would take.

Mr Forman—It seems only yesterday that Telstra was saying the reason broadband take-up in Australia was less than people had hoped had nothing to do with price and that it was all about applications and the lack of content.

Senator LUNDY—I recall at one point they argued it was the ACCC's fault.

Mr Forman—That was one of their arguments. I remember well that they created a fund to stimulate others to develop applications because, they said, it would be content that drove growth. Now they want to say they have cut their prices in order to stimulate growth. They want to have it all ways, it seems to me.

Mr Slattery—In terms of discussing the legislative instruments, I think this also reveals that, with all the perhaps good intentions, the accounting separation regime clearly cannot deal with this sort of conduct.

Senator LUNDY—Does it have any relevance?

Mr Slattery—It may have some relevance post the event but, again—as we unfortunately keep harping on it—the damage has already been done and is continuing to be done. In the next set of accounting separation reports in three months—I am not sure what the date is—it may reveal that something smells about all this. But it is too far away for that to be a satisfactory solution.

Mr Jayawardena—Without going into too much detail about the accounting separation, I am sure Telstra will come out with a lot of imputation test information to support the \$29.95 pricing. They will say that, if you look at the suite of broadband services, this pricing passes all the tests. One has to question whether you can actually use the current accounting separation testing regime to bring to them to task on these things. The first report that was run and released earlier this year was, in my view, an example of the system being manipulated in some fashion. The strict guidance of the process was not adhered to, so one would have to question whether you can actually use that information to benchmark the next report and how effective it is.

Senator LUNDY—Your submission describes this as a crisis as far as the impact on the market goes. If the ACCC, for whatever reason, is constrained in acting or issues a competition notice and is unable to pursue it, how bad is the crisis? What is the impact likely to be either on you as competitors or, as I have certainly read in the press and heard directly from ISPs, on many of the ISP retailers of these services in the Australian market?

Mr Slattery—Primus believes it will potentially send smaller ISPs to the wall. That is to put it in simple terms. In a bizarre sort of way, there might be an upside for carriers like Primus whereby we can then acquire them, but I do not think that is necessarily the ideal outcome. It is just a possible outcome. But as I said before, a substantial percentage of Primus's dial-up customer base is at threat here. Bear in mind that the \$29.95 plan will lock in customers for 12 months. They will have a Telstra modem. They will then more than likely realise they are exceeding the 200 meg download limit and Telstra will quite happily push them up the price scale.

Senator LUNDY—And the TIO will get busy again with all those complaints. We had some evidence on the issues there. The competitive carriers have made it clear that you are looking for a fairer wholesale price that will be more equitable. Is the general issue of the reduction of price in the ADSL market consistent with your understanding of what the underlying costs are in the market anyway? I guess I am looking for a view on your opinion of the veracity of the costing models. Given what has changed, are those underlying costs more real than they perhaps were?

Mr Forman—We do not have transparency into the real costs to Telstra of providing these services, but it has been interesting to note some of the plans that have come out of Telecom New Zealand and TelstraClear in New Zealand in the last couple of weeks. It is fascinating to hear some of the rhetoric from TelstraClear.

Senator LUNDY—What did TelstraClear say?

Mr Forman—I can take it on notice and give you the precise details, but I think TelstraClear's marketing campaign says 256K is not really broadband. They are offering 512K as a minimum service. I think they are offering about \$A50 for a 512K service. They are ridiculing Telecom New Zealand for offering a 256K service.

Mr Slattery—The bizarre thing about it is that, in our view, this is obviously a core service or should be a declared service. What ever term you want to put on it, it is a pretty important service for competitors to be able to compete in this market for the wholesale broadband product.

Senator LUNDY—You think it should be declared?

Mr Slattery—Getting back to Mr Forman's comment, we have no transparency on the underlying costs of this. We have an essential service, basically, if you want competition to happen here and yet there is no transparency of the cost base. It is rather strange.

Senator LUNDY—So a declaration and a structural separation would be one way of resolving that.

Mr Slattery—It would be a move in the right direction. However, a declaration, tariff filing or whatever will still not address what we consider being the underlying problem here: Telstra's conduct with respect to how it treats its wholesale competitors.

Senator LUNDY—For the sake of time, I would like to ask Hutchison Telecom a question. I will get you to take it on notice. Given your operation in the 3G market, what has been the

impact on Hutchison with respect to the changes to bundling that have been put in place? What observations do you have about Telstra's content plays in their purchase of *Trading Post*? What are the implications of some of those content and media acquisitions or aspirations?

Mr Wright—I will take it on notice. I would like the opportunity, if I could, to say a couple of quick things.

CHAIR—Add a few quick things, yes. Senator Tchen has some questions.

Mr Wright—We appear to be one of the odd men out in this grouping because we are offering wireless services. We do not deliver DSL. We are offering what we regard as broadband wireless services. The real reason why we are keenly interested in this issue is because we regard it as indicative of behaviour that crosses into a lot of other areas and it is to do with the leveraging of market power across markets. So it is not just a one product line issue. For us, we feel the impact of access pricing policies by Telstra in exactly the same way as being discussed here right now.

Senator LUNDY—Through what mechanism? You have your own network, haven't you?

Mr Wright—We have our own network, but that does not inure you because input costs come from a lot of different sources. I do not think there is a single business in the telecommunications market that you can carry out that does not include some kind of requirement to interconnect with Telstra.

Senator LUNDY—That impacts on what you charge?

Mr Wright—It impacts on the business. I will mention one example of that to you. Bundling is the underlying methodology of delivering it. Fixed-to-mobile call prices are the example. I brought with me some advertising, copies of which I will provide to the committee.

Senator LUNDY—Can we table them?

CHAIR—Yes.

Mr Wright—They indicate, for instance, a recent initiative which allows a 50 per cent discount on call prices between a Telstra fixed line and a Telstra mobile service on call prices. That discount is not available anywhere else. No equivalent can be delivered. There is a terminating access wholesale price arrangement on mobile networks which, given that kind of discount off retail, would leave absolutely no margin for competition. You could not possibly compete with that in offering a service in the retail market, as our colleagues are trying to do. We have also discussed those issues with the ACCC. There is a current inquiry into it.

Once again, that particular phenomenon underlines the difference between operating on input costs internally within Telstra for an entirely separate network, let alone a business, and another network providing a service obviously at a price which is much less than is available to others in the wholesale competition world. Otherwise it would be loss leading. If loss leading is driving growth, and that is what is going on in this case, I am yet to find any commercial operation which operates on the basis of loss leading to its own customers.

CHAIR—It could just be our corporate generosity.

Mr Wright—That is a reasonable way to put it.

Senator LUNDY—Consumer altruism. Just to get this really clear, what you are saying is that, whereas Telstra will offer that 50 per cent discount as a result of bundling, they do not unpick that and offer that same discount to wholesalers like you or service providers in another area.

Mr Wright—That is right.

Senator LUNDY—You get no commensurate benefit from that.

Mr Wright—When we suggest that perhaps a way of driving growth in that fixed-to-mobile market may be to bring down the actual retail cost, we are met with horror.

CHAIR—Senator Tchen, do you have questions?

Senator TCHEN—Not so much questions, Chair, but some comments. Thank you for the opportunity. Gentlemen, thank you for coming along today to give us your thoughts. I very much appreciate it. However, listening to your comments about Telstra, I find that essentially you are offering instances or comments about alleged anticompetitive behaviour by Telstra. All of it has been referred to the ACCC for further action. In some cases, the ACCC has taken action and in some cases it has not. It seems to me that what you have told us, interesting though it may be, actually does not have any direct bearing on the reference to this committee, unless you are lodging complaints about the ACCC for the way it conducts its business and carries out its charter. Having said that, I have to put it on the record that, in my opinion, the information you have given us today actually should not be part of the committee's consideration on this reference. That is my opinion. Do you have a complaint about the ACCC's conduct or lack of conduct?

Mr Forman—As we said in our opening remarks, we do not feel we are in a position to say that the core of the problem is wholly with the regime, that the core of the problem is wholly with the ACCC or with a combination of the two—the application of the regime by the ACCC. We think it probably has elements of both. We are not in a position to determine whether it is a problem with the ACCC or a problem with the regime or a combination of the two. We will put on the record that, if this reference is about the state of competition in broadband services, the events of the past three weeks go absolutely to the heart of whether there is an environment where it is possible to have sustainable competition.

Senator TCHEN—If those events are permitted to persist.

Mr Forman—Our point is that, even the fact they have happened to this point, they have fundamentally changed the nature of broadband competition, as evidenced by Mr Slattery's comments about the impact on the dial-up base of his company and my company and everybody else who is offering Internet services. This has been a turning point in the industry because price points are now converging between dial-up and broadband. That point of convergence has been

reached in a way that we argue fundamentally points to the internal conflict of Telstra and the extent to which they can stomach and digest competition.

Senator TCHEN—Yes. On the other hand, this convergence of pricing in itself is actually beneficial to the consumers.

Mr Forman—There is a question about whether the convergence of pricing—

Senator TCHEN—The word is ‘artificial’.

Mr Forman—whether it is artificial and whether it is in the interests of consumers to allow one company to determine the nature and timing of that convergence.

Senator TCHEN—Whether it is artificial is a matter for the ACCC to decide, not for us to speculate on. Is that a fair comment? The ACCC is investigating it.

Mr Forman—The ACCC’s investigation is relative to that.

Senator TCHEN—I notice in your additional supplementary submission you refer by implication to ACCC concerns that the core problem undermining competition in the telecommunications market is the vertical and horizontal integrated structure of Telstra. I notice that Mr Jayawardena said in a very quick comment that structural separation is the important issue, if I heard him correctly. That takes us to another issue. If that is the path the community should go down, it actually requires every telecommunication network owner providers to undergo the same structural separation. I notice Optus, which owns the second biggest network in Australia, is not part of your submission. Do you think that is a likely or acceptable scenario? I am not sure. I think Primus and Hutchison both owns network as well.

Mr Forman—I do not know I agree necessarily that a structural separation regime requires every network owner to be structurally separated.

Senator TCHEN—Why not, to be fair to everybody?

Mr Forman—The tests applied in other jurisdictions and the test applied in the mergers power, for example, is about the substantial lessening of competition impact. If somebody was not a position of market dominance but happened to own two networks which were not perceived as providing them with market power, I do not think necessarily that a structural separation requirement would capture them. But that is not an issue I wish particularly to speculate on. I am just saying that I do not know that I accept the premise.

Mr Jayawardena—I would like to reiterate Mr Forman’s statement. I am not sure you can extrapolate that a structural separation should apply to all players in the industry. I have to support his statements by saying PowerTel are putting that forward based on Telstra’s market dominance and the reliance on getting access to the Telstra network by all competitors in the market, be it Optus, PowerTel, Comindico, Hutchison, Primus or the many other registered licensed carriers in the domestic marketplace. I would also like to say that it is important to look at this issue in the context of broadband in a longer term perspective. What do we want to see in the next five, seven or 10 years? If the landscape is that there is only Telstra and possibly a

couple of resellers of Telstra left in the marketplace, is that a good result for the end users, the consumer? I would contest that that may not be a good result, because to really offer quality services at reasonable prices, the only way you can do that is through a true competitive market.

Senator TCHEN—On the other hand, another possibility is that there is another vigorous entrant into the network development field where—perhaps in many years—a second network is established. My point is that we are talking about competition. You are talking about competition in the marketplace in a matter of days or weeks whereas if we are looking at competition in terms of development over the years, it is a different issue.

Mr Forman—I would simply suggest that the people at this table represent investment in telecommunications infrastructure in this country in the order of about \$4 billion. There is one third-generation mobile generation network in the country and that was built by Hutchison. I think Primus is proudly EBITDA positive. Nobody else at this table has seen any return on their investment. I think any suggestion that in this environment anybody else would come in to put billions of dollars on the table to invest in another network, particularly in the light of the events we have seen in the last few weeks, is optimistic in the extreme. I think these events, as much as anything we have seen in the last two years, says very clearly to investors: ‘You would be insane to think that you can put money on the table and get a reasonable return on your investment. You are going to lose a lot of money for a long time.’

Mr Slattery—I will make a quick comment with respect to the senator’s earlier remark about the relevance of this issue to the inquiry. We fully support the whole notion of efficient competition. If you are an inefficient operator, you do not survive. But this is not about promoting efficiency. This is almost the opposite—about promoting inefficiency. There are already ISPs who have openly said they have matched Telstra’s price or bettered it or and they are taking a loss on it. We do not want to see a repeat of the OneTel saga, which I do not think anyone would say was a good outcome. What we are really doing here today is ringing the warning bells.

Mr Wright—We certainly have offered to wholesale our only 3G network. We are willing to talk to any players. We are not trying to do what every other mobile operator has done in the past, including Telstra, Optus and Vodafone—that is, to duplicate infrastructure with no efficiency gain but purely for their own business goals. We are under intense pressure to get a return on investment. It is the biggest and the only investment going on in the mobile industry of any significance despite the fact that we are the smallest player. We would not be doing it if not for the fact that we are part of a bigger global roll out. I am probably going into an area that is off the terms of reference.

CHAIR—Yes, you are. It leads me to my very last question, which is about the issue that you are all to some extent linked into, which is global corporations doing work. There has been a big debate in recent weeks about the US free trade agreement, which builds on WTO rules that parties must prevent anticompetitive conduct and ensure that major suppliers provide interconnection, resale, designated services, least circuit services and the collocation of equipment on reasonable, timely and non-discriminatory terms and conditions. Do you think the current regulatory regime in Australia is meeting those requirements? Does anyone want to have a go on that one? You can take it on notice if you like.

Mr Forman—I would love to take it on notice and give you a more full answer. Obviously we do not think it does. We think there are structural reasons why the regime does not meet those requirements. Further, we look to the assessment of people like the US trade representative and our equivalent organisation in the US, CompTel. They look at their regime and they look at our regime. We simply do not stack up. There is the ability of the regulator to order divestiture where anticompetitive behaviour is established, and they have done this. It is also about the particulars of the access regimes that exist there. They do not just say: ‘You must provide access on reasonable terms and conditions. Go away and work that out.’ They said when they introduced their regime, ‘You will provide this access and the price will be this.’

Senator TCHEN—When you take those questions on notice, I encourage you to make your submission not only to this committee but also to the Joint Standing Committee on Treaties, which is looking at this issue of the trade agreement.

CHAIR—It is the Senate Select Committee on Treaties. Don’t waste a stamp on the joint committee on treaties.

Senator TCHEN—That is the senior committee.

CHAIR—Thank you very much for appearing today, and thank you for your evidence.

[1.03 p.m.]

BRYANT, Mr Simon, General Manager, Regional Communications Policy, Telecommunications Division, Department of Communications, Information Technology and the Arts

CHEAH, Mr Chris, Chief General Manager, Telecommunications Division, Department of Communications, Information Technology and the Arts

LYONS, Mr Colin, General Manager, Telecommunications Competition and Consumer Branch, Telecommunications Division, Department of Communications, Information Technology and the Arts

CHAIR—I welcome witnesses representing the Department of Communications, Information Technology and the Arts. Thanks for your time today; it is much appreciated. You are aware of the general procedural comments that I have made to the others. I also add that, as officers of the Commonwealth, you will not be expected to answer questions which invite you to express an opinion on matters of policy. You will be given a reasonable opportunity to refer questions to superior officers. Is there an opening statement, or are we going straight to questions?

Mr Cheah—We do not have an opening statement as such. However, I think Mr Lyons would like to make a few comments on some of the previous evidence we have given, simply to correct possible misinterpretations about the way the legislation might work.

Mr Lyons—There were a couple of statements made in the previous evidence on the 2002 amendment to the Trade Practices Act which I think require clarification, at least in terms of our understanding of how the legislation operates. The first of the two statements I am referring to is the statement that the ACCC is required to issue an advisory notice to Telstra before it could issue a competition notice. The second is that the provisions requiring the ACCC to issue a consultation notice adds another step in the procedures. I would like comment on both of them. Section 151QB of the Trade Practices Act says the ACCC may issue an advisory notice at any time. We do not understand that to mean that it has to issue an advisory notice before it issues a consultation notice. The ACCC can issue either a part A competition notice or a part B competition notice. The advisory notice is basically a provision advising Telstra, in this case, of action it could take to make sure it does not engage in anticompetitive conduct.

CHAIR—Is that different from a consultation notice?

Mr Lyons—The first point I was making is that the advisory notice can be issued at any time. In relation to the consultation notice, it is true that there was a provision placed in the 2002 amendments which required the ACCC to issue a consultation notice before it issued a part A competition notice. That is definitely true. On the issue of the consultation notice—getting to that direct point—the ACCC's previous practice has been to issue in effect a consultation notice before it issued a competition notice. A consultation notice is merely a procedural fairness requirement, which we codified in the legislation. The ACCC had, on our understanding, routinely entered into the equivalent of that notice. Because of the importance of the part A

competition notice and the fact that a part A competition notice opened up the way to both the recovery of pecuniary penalties by the ACC and third party action, it would be a matter of procedural fairness for the ACCC to consult with Telstra or any other person it is going to issue such a competition notice to before it actually issued it. So we believe that that provision codified best practice and did not add a particular extra step in the process.

CHAIR—Sure.

Mr Lyons—I probably did that in a disorganised way, so I am happy to explain to you the differences between an advisory notice and a competition notice if that would assist the committee.

CHAIR—Probably not.

Senator LUNDY—No.

CHAIR—I want to ask a few quick questions about some of your programs. In particular, could you give the committee an update of where the HiBIS program is up to in terms of the development of the program, applications, assessments, criteria and so forth

Mr Bryant—Yes. You are probably aware that we issued a draft for industry consultation back on 23 January. Since that time, we have had some very constructive feedback to that particular draft from a number of industry players and others. Our intention really is to finalise the guidelines in March, this month, and we are very close to that. Finalising the guidelines will mean that we will be in a position to call for the registration of HiBIS providers. As you may be aware, the way the program will work is that we will register HiBIS providers. As a result, we will be able to guarantee to consumers that, when they get a HiBIS service, they will get a certain quality and a certain price and a number of other terms and conditions. Then those HiBIS providers, once registered, will be free to market their services and sign up eligible customers in eligible HiBIS areas. Once they have signed up those customers and are providing services to them, they can then claim incentive payments from the government under the program.

CHAIR—Where is the demand aggregation program up to at this point in time?

Mr Cheah—It is administered by the National Office for the Information Economy. It is probably better if you direct your comments to them. We can give you a very rough understanding, but it would be technically better if you asked them. They will be able to give you a more precise understanding of exactly where that is at.

CHAIR—There were some complaints when we were at the Gold Coast—I do not know if you have seen our evidence from there—that both the HiBIS program and the demand aggregation strategy program appeared to preclude large urban areas such as the Gold Coast, which are regarded as ‘near metro’ areas and not regional areas. It touches a very raw nerve on the Gold Coast that they are constantly regarded as being ‘near metro’ as opposed to metro or regional. Has that been addressed in the draft guidelines you are working on?

Mr Bryant—As I said, they are still draft and we are considering them. We had not intended to change the boundaries you refer to. I will go back one step. The overall concept has really

replicated the approach taken by Networking the Nation, which was really to try to focus support on regional Australia. Those metropolitan or urban conurbations very close to metropolitan areas were considered to be non-regional. Having said that, the boundaries for what we are calling metropolitan exclusion areas are set by the Australian Bureau of Statistics. I think that is based on the 2001 definition. Our assessment of that is that both for centres like the Gold Coast, the Central Coast, Wollongong, Newcastle and so forth and for capital cities, the outer edges will be captured by the HiBIS program under those boundaries. So a lot of what might generally be considered to be urban or metropolitan areas will actually be captured under HiBIS.

CHAIR—I think you gave both answers and managed to confuse me. It will cover those areas or it will not cover those areas?

Mr Bryant—No. It will not cover the UCL areas that are enclosed within the ABS definition of that UCL. But having said that—sorry for confusing you—there will be areas both in those regional locations, such as the Gold Coast, around metropolitan areas and in capital cities, which will be in HiBIS because they are outside those UCLs. The point I think I am trying to make is that those UCLs are reasonably narrow in how they define the metropolitan areas.

CHAIR—What is a UCL?

Mr Bryant—An urban centre or locality as defined by the ABS.

CHAIR—Is that the same as a statistical division?

Mr Bryant—No.

Mr Cheah—There are some standard ABS approaches to how they define metropolitan areas. Our approach has been to stick with the standard ABS definitions. If you try to move from them it is a very slippery slope where you try to decide metro ends and regional ends, so we have stuck with the standard ABS definitions. I think what Mr Bryant was saying is that the practical consequence, though, of the ABS definitions is, because they lag a bit, some of the metropolitan fringe does get picked up. The ABS definitions may not have quite caught up. We have been quite careful to use the standard definitions for metropolitan.

CHAIR—Could you provide those maps for Queensland and the Central Coast to the committee?

Mr Bryant—Certainly. They are on our web site at the moment. I can provide them.

CHAIR—Okay. Too easy.

Senator LUNDY—In terms of those definitions, we heard evidence that there was some concern or confusion about the definition relating to the CCIF, the Coordinated Communications Infrastructure Fund from the Gold Coast City Council. The definition was different from that of HiBIS, and that has caused some confusion and problem with their eligibility to apply for CCIF funding. Presuming someone in the department dealt with those complaints, what was that original complaint from your perspective and what action has the department taken to resolve any residual ambiguity about the CCIF definition?

Mr Bryant—I take it you are referring to complaints about the CCIF?

Senator LUNDY—Yes.

Mr Cheah—We administer HiBIS. CCIF is also administered by the National Office for the Information Economy.

Senator LUNDY—They are going to be part of the department very soon, according to the circular in DCITA today.

Mr Cheah—I have not heard anything.

Senator LUNDY—I assume you will be taking up some responsibilities.

Mr Cheah—Possibly. The point I was making is that the department has not received any complaints from the Gold Coast about the way HiBIS has been designed. If they have raised issues about the way CCIF interacts with HiBIS, they may have raised them with NOIE but they have not raised them with us. I suggest you take that up with NOIE.

Senator LUNDY—Indeed. What is the relationship between the definitions of the two funds, or is it part of the problem that there is no relationship from an administrative perspective and that that has contributed to the confusion?

Mr Bryant—We have certainly been clear about the boundaries for HiBIS from a very early stage. As Mr Cheah said, we would have to take on notice how NOIE treats their demarcation of the CCIF.

Mr Cheah—If there had been a widespread concern about that, we expect it would have been raised with us as well, and it has not been.

Senator LUNDY—That is just a reflection on NOIE, I suspect, Mr Cheah. Out of all of the elements of the broadband strategy, which ones do you specifically have responsibility for? Just HiBIS?

Mr Cheah—Of the particular program elements, it is HiBIS.

Senator LUNDY—I want to ask a couple of general questions. I do not know if Senator Cherry wants to go back to HiBIS. In evidence to this inquiry, we have heard that Telstra itself has described its network as being on the last sweat. Paul Budde later gave evidence that, if you look at HiBIS, which this government has implemented, it is like investing \$107 million in the steam train. It is not investing in new infrastructure. Can you confirm with the committee that HiBIS will be able to be used to provide ADSL services?

Mr Bryant—Yes, it will.

Senator LUNDY—It will. What is your understanding of evidence from Telstra saying that they do not plan to install ADSL in any exchanges beyond their current program, which I presume is nearly finished? What is the department's view of Telstra's decision to do that? Are

you concerned at all that Telstra decided to access HiBIS money to fund the DSL enabling in their exchanges rather than pay for it themselves, as they have with the existing 1,000 exchanges that are currently enabled?

Mr Bryant—I guess a program design issue that we always faced with HiBIS was that, when you are trying to establish an incentive program that is very broadly based, has very broad objectives to provide equity for consumers and is intended to provide opportunities across the industry and is a multiprovider scheme, in a sense the HiBIS program will be an important part of the market in regional and rural Australia once it gets going. So that has always meant that there will be a transitional issue, where providers who have been providing broadband services face the risk that they will slow down their activity or stop their activity. We have sought to deal with that by having this concept of imminent access, where we say that any public statements that have been made before the start of the program about expanding high bandwidth services of any kind, not just ADSL but other services as well, will be taken to be imminent access. While customers who may benefit from that rollout will initially be eligible for HiBIS support, once the rollout has taken place, those services will not attract HiBIS incentive payments. So that is the way we have tried to deal with that issue. There are a number of exchanges that Telstra have announced will be upgraded and will be subject to those imminent access arrangements.

Senator LUNDY—So they will not be eligible for HiBIS?

Mr Bryant—Once they are rolled out, the provision of services to customers in those exchange service areas will not attract incentive payments.

Senator LUNDY—Telstra changed their test for what was considered commercial viability in relation to their broadband register. We have received evidence or guidance through various committees about the number of potential ADSL customers in a given area. I would have to go back and look, but I do remember very early on figures in the area of 20, 25 and 50 being used. Telstra have subsequently made it very clear it is 100 or 150. They retain the right to assess the commercial viability of potential customers, and this will govern their decision making. Do those factors come into it for you? Are you able to revert back to those original demand figures of 20 potential customers as a guiding point as to where you can apply the HiBIS money? Does the benchmark relate more to exchanges rather than what constitutes commercial viability, given that is one of the criteria of HiBIS? It is not considered commercial. Aren't you really setting yourself up for a hiding for nothing for taxpayer funded rollout that Telstra should be doing?

Mr Bryant—The question of the number of customers that any provider needs to roll out infrastructure pre and post HiBIS is really a matter for them. It is a commercial decision. HiBIS is trying to provide a financial incentive across the board.

Senator LUNDY—So you have empowered the carriers to determine what constitutes commercial viability?

Mr Bryant—Post HiBIS, yes, because that is the only sensible way to do it. We cannot say how once you identify a number of case customers. We hope there are some quite powerful incentives within the structure of the HiBIS program that will encourage providers to actually lower those numbers, because it is a multiprovider scheme and we are gratified by the extent that there is a strong interest in participating in the scheme. There will certainly be a first mover

advantage for providers to go out and establish new facilities because they will have first access to those incentive payments. We hope out of that process there will be a more aggressive approach to rolling out infrastructure in series.

Mr Cheah—Whatever the threshold was before commercially, the effect of HiBIS should be to lower the threshold of the number of customers you need to provision an exchange. I think Telstra has always said that the numbers you need to actually provision an exchange do need be looked at on a case by case basis because there are a number of factors—cost factors in particular—that go into making the decision on particular exchanges. I think the threshold that they had actually been talking about had been where we actually decided to have a look and see whether we wanted to move forward or not.

CHAIR—With changes in technology, how can you guard against giving money for jam in terms of the new changes, such as the DSLAMs, and the new technology in ADSL coming on board? How do you know you not simply giving money for something which would be profitable without the incentive?

Mr Bryant—As with any scheme of this kind, you are really trying to speed up access for the consumers out there. If we waited 10 or 15 years, those technologies might come along and roll out to those communities. But the point that has been made to us and the point raised in the RTI report, is that access is not the problem; it is the price and the speed at which technologies roll out to those customers so they get a more affordable service. HiBIS is trying to very quickly get price equity across the board in rural, regional and remote Australia and encourage and speed up the rollout out of those, as you say, new technologies and innovative services.

Senator LUNDY—I am sure you were listening really carefully to the earlier evidence by the competitive carriers. Given their concerns about the anticompetitive impact on other retailers ISPs and obviously them—I am trying not to ask you a policy question—do you believe those issues relating to competition override or impair the operation of HiBIS in the circumstances you have just heard about?

Mr Bryant—There are certainly some issues there. The previous witnesses spoke at some length about the wholesale resale arrangements. We have consciously taken that into account in designing the HiBIS program in a couple of ways. Firstly, we will only make HiBIS payments payable to resellers or retailers of broadband services for a couple of reasons. The first reason, I think, is we believe that is the only way you can guarantee that the consumer will get an end to end service of the quality and price we want them to get. So that is important. The second reason behind that approach is that we can ensure resellers of wholesale services have the opportunity to participate fully in the HiBIS program and compete out there on an equal basis.

Mr Cheah—There are a couple of other quite specific overall design parameters. We have a provision in the HiBIS scheme which says that in any one year there is a soft cap on the amount that any particular carrier can get in HiBIS funding, and that is 60 per cent. No one carrier in theory can get more than 60 per cent of the funding as long as all the others are keeping up with their share. If they do not meet their share, because we do not want to consumers to miss out, the cap is a soft one. But if all the other carriers are out there meeting what they say they want to do, we will do that.

I should also stress that we have gone to really quite some lengths to try to address these competition issues. The very fact that the government has decided to go with an incentive based scheme is itself a recognition that they would like to see a system which has the least distorted effects on the market while also trying to get services to consumers in regional Australia broadly equivalent to metro prices. It is a bit of a balancing act in all of that, but we think this approach stands the best chance of trying to meet that complex mix of objectives.

Mr Bryant—I will perhaps round off the issue about wholesale resale. The point has been made to us by a few wholesalers that they are the ones who are incurring the biggest business risk in rolling out new infrastructure to new areas and that they should get some incentive payment to enable that to happen. We agree with that. The proposal has been put to us: why don't we administratively determine an amount for the wholesaler and an amount for the reseller? We do not want to go down that path, because there are lots and lots of different resale wholesale arrangements. We say we will make the payment to the reseller but, before we register a reseller, they will have to have an agreement with the wholesaler as to how they will share the incentive payment, if at all. That really means that both the wholesaler and reseller have a strong incentive to reach an agreement because if they do not, they will not go get any incentive payment at all.

Senator LUNDY—What date do you think your first HiBIS grant will be able to be made?

Mr Bryant—As I said to Senator Cherry, our intention is to finalise the guidelines in March, this month. When we do that, we will then call for the registration of service providers and services. How long that will take will really depend on how long it takes providers to come back to us with proposals, register services and tariff those services and new prices under HiBIS, but we are hoping that can be achieved within six to eight weeks. We will then be in a position for those providers to go out and provide those services and start claiming incentive payments in May.

Senator TCHEN—I have a couple of questions. One of the constant themes that the committee has heard in submissions from consumers, as distinct from providers, has been that the 19.2 kilobits minimum dial-up and the 64 kilobit DDSO standards, which the government has adopted, are inadequate. In fact, some people tell us that anything that less than two megabytes should not be described as broadband. So this sort of low level makes no actual demand on Telstra over and above its current service standard. Does the department have any comment on that, particularly about what actually constitutes broadband?

Mr Cheah—Certainly nobody would regard 19.2 kilobits per second as broadband. That is clearly very much a narrowband kind of service.

Mr Cheah—Certainly nobody would regard 19.2 kilobits per second as broadband. That is clearly very much a narrow-band kind of service. Probably these days 64 kilobits would not be regarded as broadband either. The consensus we have adopted in the HiBIS scheme is to say that broadband is broadly equivalent to current ADSL services being provided in metro areas, which is 256 kilobits per second downstream and 64 kilobits per second upstream.

Senator TCHEN—Quite a few people have told us that ADSL is definitely not broadband.

Mr Cheah—Broadband tends to be one of those things where there is a fairly long string on some of this stuff and, undoubtedly, it will evolve over time as well. I am sure that in five years there will be all sorts of different views about what is broadband. That is another point about these data services. One reason for designing HiBIS in the way that we have is not to say that broadband is one size fits all; it is to say, ‘Here are some minimums.’ We are expecting the market to work in a way to provide a range of different products at different data speeds and with different quality of service standards with some minimums in place. That is the nature of this market.

That is one reason why the government has opted for an incentive scheme rather than a regulatory strategy. A regulatory strategy arguably worked quite well when you had the plain old telephone service, which was very much a vanilla service: one size fits all. It was a finding of the RTI, the regional telecommunications inquiry, that a one size fits all approach just does not work in this area. Then we come to the 19.2 and people regarding that as inadequate for broadband. As I said, we would not regard it as broadband and the government does not regard it as broadband.

Senator LUNDY—I do not think we would regard it as adequate for dial-up.

Mr Cheah—The 19.2 kilobit per second standard is regarded as a basic safety net. It recognises the fact that we have a telephony system in place that was designed for telephony; it was not designed for data. We think the right answer for people to get data services is to move to a broadband kind of product. That is the reason why a scheme like HiBIS is in place. It is to encourage people to move to a ‘proper’ data service. But essentially the 19.2 kilobit licence condition says, ‘Here is a safety net that’s in place about what you can do over the old telephone system’, which was never designed to do data in the first place.

Mr Bryant—In terms of the actual structure of HiBIS, we will allow what we call ‘added value services’ to attract incentive payments. They will be services above the threshold limit of 256-64 to whatever level providers want to sell to customers.

CHAIR—Do you have any up-to-date figures, as a matter of interest, on how many phone services are still below 19.2 that will have to be upgraded as a result of that new standard?

Mr Cheah—No. The way things like the Internet Assistance Program and the licence condition used to work was that, if people had a problem in that they were getting data speeds that were unacceptable, they would test their service. The problem is at their end, because the reasons for getting low data speeds can be quite complicated. It can be associated with such things as the way your computer and modem are set up.

Senator LUNDY—That is what Telstra says. What it really has most to do with, of course, is the pair gains. We have proved that through evidence in the previous inquiry.

Mr Cheah—There then can also be a range of issues on the network side. If it turns out that the problem is on the network side, Telstra has to take remedial action. That is really the way the 19.2 kilobit per second licence condition works as well. We do not actually test the market to say how many people are getting things at what data speeds; it just does not work that way.

Senator LUNDY—In estimates recently, we had evidence that Telstra is not under any obligation to remove pair gain systems that cannot provide 19.2 and that it is complaint based. Is that your understanding of the government's acceptance of that particular recommendation of the RTI? Is it your understanding that there is no proactive program required of Telstra to remediate dial-up speeds of less than 19.2? That is what Telstra has told us.

Mr Lyons—I understand that, as a supplementary part of the RTI report, Telstra has given an undertaking to have a strategy for rectifying pair gain problems.

Senator LUNDY—But not proactively; it is complaints based, as Mr Cheah has just described.

Mr Cheah—The 19.2 kilobits per second issue must be fixed on a case-by-case basis.

Senator LUNDY—Not according to Telstra. What does 'case by case' mean?

Mr Cheah—If a particular customer does have a problem—

Senator LUNDY—So it is complaints based?

Mr Cheah—But Mr Lyons is saying that, in addition to that complaints based system, they also have a broader program of remediation of pair gains systems.

Senator LUNDY—No, they have not; they told us that at estimates. I ask you to review the *Hansard* and respond to the committee with your understanding of that particular recommendation.

Mr Cheah—We will; we are happy to do that.

CHAIR—I find it fascinating that essentially the department has no idea of how many lines are affected by the 19.2 kilobits per second rule before imposing it as a condition.

Mr Cheah—There were estimates made by Telstra. Telstra does not know absolutely but has made pretty good estimates based on a number of assumptions. Those assumptions are detailed in the RTI. The RTI reported in late 2002. Since then, the situation basically would have had to have improved. The potential of the 19.2 problems was pretty small even then.

The kind of methodology that Telstra used was to look at the potential systems that could cause problems. There was also a bit of statistical analysis on the different types of infrastructure it had in place. It then calculated the maximum number of customers who could be affected, given that it did not know how many customers had actually subscribed in those different areas, and it made some assumptions and estimates in that way. When the different licence conditions that were put in place were imposed, I think it was on the basis that we knew what kind of effect it could potentially have.

Senator TCHEN—I would have thought that setting a minimum technical standard on the basis of technology and perhaps a safety standard, without the knowledge of how many people

actually are not getting the service yet, shows a commitment on the part of the service provider that it will lift its standard.

CHAIR—If people complain.

Senator LUNDY—If it were doing something about it; we now know that it is not.

Senator TCHEN—Does the department have a view on what might be the major impediments to competition in broadband services? I know I am probably asking you to write the committee's report for it. Does the department hold any view about what may be the major impediments? You can take that on notice if you want to.

Mr Lyons—I think the general policy of the government is to make sure there are the right regulatory settings to allow sustainable broadband competition rather than to distort the market. So the general philosophy, I think, is to have sustainable competition and make sure that the ACCC has a range of very strong regulatory powers—which it has—to intervene if there is anti-competitive conduct. One challenge to competition will always be the potential for anti-competitive behaviour. I do not think there is any argument that the ACCC has extensive powers in that regard.

Some of the other challenges relate more to things like the development of technology. Technology will develop over time and there will be a range of technology delivery platforms to deliver broadband. I do not think we should see any particular technology—be it ADSL, fibre, wireless or satellite—as being the exclusive or only way to deliver broadband services. There will always be challenges for equity because these services will be rolled out at different times according to, quite properly, the commercial deployment decisions of the competing providers. That is where the government has targeted funding, for example, and HiBIS plays a role.

CHAIR—Thank you. We will leave the evidence there for today. I thank you very much for your time. I note that we were expecting NOIE to appear as part of the portfolio. I have two questions on notice for NOIE and I would encourage you to get answers to them back to us as quickly as possible.

Mr Lyons—We apologise for that confusion. We just understood that we were the department to appear.

CHAIR—We presumed it was part of the portfolio.

Mr Lyons—It is part of the portfolio, not the department

Mr Cheah—It is an executive agency; it is not part of the department.

Senator LUNDY—Up until today.

CHAIR—We thank you for your evidence.

Committee adjourned at 1.38 p.m.

