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SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION
TECHNOLOGY AND THE ARTS REFERENCES COMMITTEE

Reference: Performance of the Australian telecommunications regulatory regime

MONDAY, 9 MAY 2005

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

Monday, 9 May 2005

Members: Senator Cherry (*Chair*), Senators Mark Bishop, Conroy, Lundy, Tchen and Troeth

Participating members: Senators Abetz, Allison, Bartlett, Bolkus, Boswell, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Humphries, Knowles, Ludwig, Mason, McGauran, Nettle, O'Brien, Payne, Robert Ray and Watson

Senators in attendance: Senators Cherry, Conroy, Lundy, Tchen and Troeth

Terms of reference for the inquiry:

To inquire into and report on:

- (1) Whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable, with particular reference to:
 - (a) whether Part XIB of the Trade Practices Act 1974 deals effectively with instances of the abuse of market power by participants in the Australian Telecommunications sector, and, if not, the implications of any inadequacy for participants, consumers and the competitive process;
 - (b) whether Part XIC of the Trade Practices Act 1974 allows access providers to receive a sufficient return on investment and access seekers to obtain commercially viable access to declared services in practice, and whether there are any flaws in the operation of this regime;
 - (c) whether there are any structural issues in the Australian telecommunications sector inhibiting the effectiveness of the current regulatory regime;
 - (d) whether consumer protection safeguards in the current regime provide effective and comprehensive protection for users of services;
 - (e) whether regulators of the Australian telecommunications sector are currently provided with the powers and resources required in order to perform their role in the regulatory regime;
 - (f) the impact that the potential privatisation of Telstra would have on the effectiveness of the current regulatory regime;
 - (g) whether the Universal Service Obligation (USO) is effectively ensuring that all Australians have access to reasonable telecommunications services and, in particular, whether the USO needs to be amended in order to ensure that all Australians receive access to adequate telecommunications services reflective of changes in technology requirements;
 - (h) whether the current regulatory environment provides participants with adequate certainty to promote investment, most particularly in infrastructure such as optical fibre cable networks;
 - (i) whether the current regulatory regime promotes the emergence of innovative technologies;
 - (j) whether it is possible to achieve the objectives of the current regulatory regime in a way that does not require the scale and scope of regulation currently present in the sector; and
 - (k) whether there are any other changes that could be made to the current regulatory regime in order to better promote competition, encourage investment or protect consumers.
- (2) That the committee make recommendations for legislative amendments to rectify any weaknesses in the current regulatory regime identified by the committee's inquiry.

WITNESSES

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission..... 1

COSGRAVE, Mr Michael, General Manager, Telecommunications, Australian Competition and Consumer Commission..... 1

SAMUEL, Mr Graeme, Chairman, Australian Competition and Consumer Commission..... 1

WILLETT, Mr Edward, Commissioner, Australian Competition and Consumer Commission..... 1

Committee met at 7.02 pm

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission

COSGRAVE, Mr Michael, General Manager, Telecommunications, Australian Competition and Consumer Commission

SAMUEL, Mr Graeme, Chairman, Australian Competition and Consumer Commission

WILLETT, Mr Edward, Commissioner, Australian Competition and Consumer Commission

CHAIR—I declare open this public hearing of the Senate Environment, Communications, Information Technology and the Arts References Committee and welcome the witnesses. The committee is inquiring into whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable. The committee has now received 45 submissions from organisations and individuals interested in the inquiry. This is our seventh day of hearing. We have already been to Canberra, Sydney, Dubbo, Townsville, Perth and Melbourne. The reporting date is 23 June.

For the benefit of our witnesses, I point out that the committee prefer all evidence to be given in public but should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and we will consider your request. Thank you for your time tonight; it is much appreciated, particularly on such short notice. We have received your submission as No. 17. Do you wish to make any amendments or additions to your submission at this stage?

Mr Samuel—No, it is fine.

CHAIR—You are reminded that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I now invite you to make an opening statement before we move to questions.

Mr Samuel—The Australian Competition and Consumer Commission welcomes the opportunity to appear at today's hearing on the very important subject of telecommunications regulation. I should say at the outset that the ACCC is agnostic when it comes to the privatisation of Telstra. Regardless of the ownership structure, the role of the ACCC is to, as far as possible, protect and promote competition in telecommunications. Significant competition in telecommunications only began in 1997 but, even in the short time since, benefits have flowed to consumers, business and, more broadly, the Australian economy. However, the initial benefits of the current telecommunications regulatory regime were almost entirely due to competitors entering at the retail level and making use of regulated interconnection rates to drive down retail costs.

While there have been some areas of relatively effective competition, such as in corporate markets and mobile services, it is still somewhat patchy in terms of service offerings and

geographic reach, particularly for residential consumers. Notably though, the more competitive markets are those in which there is more facilities based competition. For example, corporate and business customers have benefited to a much greater extent than residential customers by virtue of infrastructure roll-out by newer players. Similarly, the development of competing mobile networks has put in place the structures for more durable competition. It is no coincidence that in these markets there is also substantially less regulation.

However, the overriding issue in this industry is the fact that Telstra continues to be the sole provider of the ubiquitous local access network, connecting virtually every home and business in the country. Consequently, even in the more competitive markets, those seeking to compete with Telstra often have a continuing reliance on some form of access to its network. This leaves those seeking to compete with Telstra with just two alternatives—either reselling services or bypassing some or all of Telstra's network by investing in competing infrastructure. To date, the bulk of the ACCC's activities in telecommunications have been directed towards ensuring that competitors are able to get access to the copper network where they need it, at reasonable prices and on reasonable terms. By this, I mean that they can buy wholesale services from Telstra at prices that still allow them to compete at the retail level. These wholesale services might be a straight resale of Telstra's offerings, or competitors might want to use only some parts of the copper network—for example, the local access networks that run from the exchanges to customers' premises.

Some of the mechanisms currently available to the ACCC are reasonably effective, some are less so. Access regulation does provide some incentives for infrastructure owners to reach commercial agreements with those seeking to use the infrastructure, but it can be a lengthy process and subject to game playing. Furthermore, the detailed rules on accounting separation do not of themselves ensure that all the necessary information is available to the ACCC when it is making access-related or enforcement decisions. The most significant impediment to the effectiveness of the telecommunications specific provisions of the Trade Practices Act in promoting competition is a lack of transparency. Being unable to determine the way that Telstra's retail and wholesale operations interact makes it difficult for the ACCC to detect if anticompetitive behaviour is occurring and to obtain the information necessary for carrying out other regulatory functions.

Accounting separation as it stands today does not require the carrier to reorganise its internal affairs and operate as if it were running two or more separate discrete businesses—a process that has recently been labelled operational separation. There has been some confusion about what is meant by operational separation and how this differs from structural separation. The essential difference between the two is that of ownership. Both types of separation involve establishing some parts of Telstra as separate business entities. Under structural separation, these separate business entities would be sold to new owners and would no longer be part of Telstra. Under operational separation, these separate business entities remain as part of Telstra.

The ACCC sees meaningful operational separation as having a clear internal separation between a retail business supplying services to end users and a network business supplying wholesale services to both Telstra's retail business and its competitors. In order to be effective, any process such as this would need to be underpinned with formalised arrangements, including requirements that the two businesses first deal with each other on a commercial arm's length basis, including explicit pricing, invoicing and billing; maintaining fully separate accounts and reporting systems capable of capturing all transactions between the businesses; and maintaining

staff at all levels, with staff remuneration tied exclusively to the performance of the relevant separated businesses. Most importantly, this model would increase the competitive discipline around the internal businesses and reduce the need for regulatory intervention.

The other key to increasing competition and reducing regulation in telecommunications is for competitors to invest in their own infrastructure. In this regard, emerging technologies are one avenue for those looking for alternatives to Telstra's network. Wireless local loops are one model being pursued. Another critical development is the increasing availability of much higher capacity ADSL 2+ broadband delivered over the copper local access network through the installation of DSLAM infrastructure in local exchanges. A third development is fibre all the way to customers' premises.

However, in capacity terms it remains to be seen whether the new generation of DSL broadband services are really much different from those delivered over fibre. Telstra's ADSL 2+ roll-out in response to similar recent moves by competitors is estimated to cost \$210 million. This is a fraction of the tens of billions of dollars that Telstra's Bill Scales recently told this committee it would cost to roll out a fibre network to more than 90 per cent of homes. There is little doubt that current investment activity is focused around copper, and it looks like it will be for the next three to five years, driven primarily by ADSL 2+ and related infrastructure roll-outs by competitors and Telstra alike. So that last sweat of the copper network may have some way to go yet. Indeed, Telstra itself has suggested that there are 15 to 20 years of useful life in front of it. This in turn suggests an ongoing role for the regulator.

Senator CONROY—Your submission, which you have referred to, notes again the failure of the accounting separation regime and the difficulty that the ACCC has in obtaining the evidence it requires to deal with anticompetitive behaviour. The ACCC submits that operational separation may be able to deal with these issues. However, in the past the ACCC has advocated the need to re-examine the structural separation of Telstra. Examples are the report on emerging market structures and a large number of speeches given by the former chairman and Mr Willett. Mr Samuel, you also signed off on a submission to the abortive House of Representatives inquiry into the structure of Telstra in 2002 that identified the shortcomings of operational separation and advocated the pursuit of structural separation. Is structural separation still the ACCC's preferred approach from a pure policy perspective?

Mr Samuel—I think it is fair to say that there has been some work—but not an extensive amount of work—done into the cost and benefits associated with structural separation. The process that has been discussed by the ACCC in previous submissions—and I think you referred to a document signed off by me which would have involved a previous role that I had with the National Competition Council—has indicated that it may have been beneficial to examine the costs and benefits associated with structural separation. I am not aware that such a detailed examination of those costs and benefits has been undertaken.

Operational separation is seen as giving significant benefits to the ACCC in the context of the provisions of the act relating to enforcement of the procompetitive or the prohibitions on anticompetitive conduct that are contained in the specific telecommunication provisions of the act. If we had the operational separation regime in place, with the transparency it would offer about Telstra's dealings between its wholesale and retail operations, then it would make it

significantly easier for us to exercise the powers available to us in respect of anticompetitive conduct under the telecommunications-specific regimes.

Senator CONROY—I did not get the impression that you put your submissions forward previously on the basis of what was good for the ACCC; I assumed you put them forward based on what was good for consumers, not on whether or not you could exercise your powers adequately. I was working on the basis that the ACCC put it forward believing that the benefits must outweigh the costs.

Mr Samuel—It is before my time.

Senator CONROY—Mr Willett made a number of speeches on it.

Mr Willett—Are we talking about structural reform?

Senator CONROY—Yes.

Mr Willett—All the work that the commission has done has suggested that further work needed to be done to determine what the appropriate—that is, the efficient—structure of Telstra is and should be. The report on emerging market structures identified several options for structural reform. It did not discuss in great detail the question of vertical separation, which has been the focus previously of proponents of structural separation, preferring to focus a little more on horizontal structural separation because the report noted that the costs of that form of structural reform were likely to be lower than in the case of vertical structural separation, but nonetheless suggesting that some more work needed to be done in that area.

By and large, structural reform does offer more in terms of potential benefits in facilitating competition and increasing efficiency, but there is also a greater potential for costs and loss of economies of scale and scope for the incumbent service provider. It is because of that uncertainty about all those costs and benefits that the commission has never advocated a particular structural reform option. I do not think it has, even before my time. I think that holds.

Mr Cosgrave—No, that is correct. The emerging market structural recommendations were certainly based upon the need for a closer examination of the costs involved in the proposals put forward in that paper.

Senator CONROY—In what ways does Telstra's vertically integrated structure inhibit the ACCC's ability to detect and act against anticompetitive behaviour?

Mr Cosgrave—I think the best way to highlight that is in terms of the criticisms we have made in relation to accounting separation and specifically to use the example of the recently finalised competition notice in relation to broadband price.

Mr Samuel—If we are going to get into a discussion of that, then we ought to go in camera. I think any discussion on the competition notice—

Mr Willett—Let me answer that more generally first.

Senator CONROY—I was not going to go there but I have to say to you, Mr Samuel, that I am not planning on going to the broadband notice tonight.

Mr Samuel—Okay; that is fine.

Senator CONROY—I appreciate that Mr Cosgrave may have mentioned it. But can I put you that it is the committee that decides whether we go in camera.

Mr Samuel—I may not have expressed it properly. I wanted to suggest to you that we go in camera.

Senator CONROY—More importantly, in no way when the committee agreed to receive your confidential information in camera did we then suggest that any questions we wanted to ask would have to automatically be held in camera.

Mr Samuel—Yes.

Senator CONROY—You would have to hear what the questions were before you sought that rather than just say, ‘No, I’m not going to answer any questions whatsoever about that information.’

CHAIR—But you can request to go into camera.

Senator CONROY—Yes, you can request. But a blanket request saying, ‘Oh my God, if we’re going to mention the words broadband notice we must be in camera’—

Mr Samuel—No, I did not express it properly.

Senator CONROY—But I am not looking to go there.

Mr Samuel—Okay, that is fine.

CHAIR—But I do note that I may go there with my questions and I think Senator Lundy may go there with some of hers. But I do note that there is a case study attached to your submission which we can ask you questions about. But certainly if it touches on the matter of privileged legal opinions and the content of those opinions, I would certainly be of the view that we would need to go into camera to discuss those.

Mr Samuel—That is fine. Thank you for that.

CHAIR—But the issues arising out of that whole competition notice I do believe can and should be dealt with on the public record.

Senator CONROY—Back to the integrated structure inhibiting the ACCC’s ability to detect and act against anti-competitive conduct.

Mr Willett—The principles here are the same as in any bottleneck infrastructure with gas or electricity. Those principles are that what we are trying to do is facilitate competition, where competition is viable, by appropriate access arrangements to the bottleneck infrastructure. The problem with a vertically integrated structure is that there are opportunities for cost shifting between the non-contestable regulated area and the contestable area, and there is a lack of transparency and certainty about the appropriate prices for the regulated services and a lack of confidence that there are no opportunities for the incumbent to price effectively to itself at a lower level than it does to its competitors downstream and thereby get a competitive advantage.

That is the broad principle, and our experience has been to date that those risks are writ very large. We do not—and we think a lot of industry participants do not—have a lot of confidence that we can get to the heart of appropriate pricing principles and Telstra's costs to determine what Telstra effectively prices to itself and therefore what it should be pricing to its competitors. In broad terms, that is the problem and our experience has been that that problem is being realised.

Senator CONROY—Telstra, it probably will come as no surprise to you, do not agree. We had them, as I mentioned before, before this committee last week and Mr Scales made the following statement:

... it looks as though we have a regulator that has decided that it wants to have structural separation of a company; and to ensure that it puts itself in the best position to argue the policy case for structural separation it will undermine—or at least the opportunity and moral hazard is there that it will undermine—the existing policy to ensure that its policy is implemented.

Is that true? Do you agree with Mr Scales?

Mr Samuel—I would be interested if he could support that with any evidence. It is just not true.

Senator CONROY—Are you undermining the effectiveness of the regulatory system to advance the case for structural separation?

Mr Willett—No. We want to get it working as effectively as we can. In fact, we want to do ourselves out of a job and get competition working sufficiently that we do not have to regulate any more. That is our objective.

Senator CONROY—It is a pretty big statement to say that you are undermining the effectiveness of the regulatory regime to advance the case for structural separation.

Mr Willett—It is indeed. Did Mr Scales offer any examples or evidence?

Senator CONROY—I have a few more quotes from him coming up.

Mr Samuel—I would be interested to hear the rest of his quotes.

Senator LUNDY—He engages in a bit of rewriting of history.

Mr Willett—I went back in my earlier answer to the broad principles to be applied. What we have been saying about structural reform and about accounting separation reflects exactly the same sorts of principles that have been applied in other industries in Australia and in other similar industries around the world. There is nothing particularly new or innovative in this. It is applying basic economic or regulatory principles to a problem that we see. Telstra is a particularly big problem because it is the most ubiquitous and integrated telco in the world. But the principles are much the same as in other industries and in telco industries overseas.

Senator CONROY—The ACCC has submitted to this inquiry that the operational separation of Telstra could use the ring fencing arrangements currently in place in the gas industry as a model. You indicate are you referring to the access code for natural gas pipelines with gas codes. Would you agree that the object of operational separation should be to replicate as far as possible the conditions of structural separation?

Mr Willett—From an accounting point of view; it does not deal with all the issues associated with structural reform. It does not fully, for example, deal with the conflict of interest that an integrated entity faces in selling to itself effectively and selling to its competitors. That is something that can only be fully dealt with, and all the benefits of that can only be fully derived, through structural reform. But, as I said earlier, there are also some potential costs associated with full structural reform. That might mean that there are options where full structural reform is not the appropriate outcome. But to the extent that you can get transparency and certainty in pricing arrangements within the integrated entity, then what you are trying to achieve from an accounting point of view with the ring fencing arrangements is to replicate the situation that would exist if you were, in fact, dealing with very separate wholesale and retail businesses.

Senator CONROY—So you think operational separation would stop Telstra engaging in anti-competitive behaviour?

Mr Samuel—It will not stop them engaging in anti-competitive behaviour, but it certainly makes it far easier for us to establish if any anti-competitive conduct is being engaged in and then to take appropriate procedures under the telecommunications specific provisions of the Trade Practices Act.

Senator CONROY—Mr Scales went to great lengths to say to us that Telstra had never engaged in anti-competitive behaviour and that you have never found them guilty of it.

Mr Samuel—When you say ‘found them guilty’, if you are talking about obtaining a court order that determines that Telstra has engaged in—

Senator CONROY—That is usually the definition of being found guilty in a court.

Mr Samuel—Actually being found guilty probably more specifically refers to criminal conduct, and I do not think that even the telecommunication provisions of the Trade Practices Act refer to criminal conduct. It is accurate to say that there has not been a court order that determines that Telstra has engaged in anti-competitive conduct since those provisions have been in place.

Mr Willett—It might be worth noting that on every occasion—Mr Cosgrave might correct me—on the issue of a competition notice Telstra has changed its behaviour.

Mr Samuel—It has changed its behaviour significantly.

Senator CONROY—As I say, I am just passing on to you Mr Scales' views. He also told the committee last week that the ACCC's model, which is your operational separation model:

... does look to me like structural separation. It has all the elements of structural separation ... I am inclined to think that if it looks like a duck, walks like a duck and quacks like a duck then it is a duck. This to me is structural separation under another name.

Mr Scales is saying that to him the ACCC's model looks like structural separation. Does that indicate to you that your model for operational separation is a good one and that it successfully mirrors structural separation to the greatest extent possible?

Mr Willett—Mr Scales is quite wrong on that, quite ill-informed. It is not structural separation.

Mr Samuel—If it is a duck, then it has no beak; I can tell you that. Basically it does not have separate—

Senator CONROY—It is hissing rather than quacking.

Mr Samuel—I am not sure the beak is relevant to it hissing or quacking.

Senator CONROY—You try hissing without a beak!

Senator LUNDY—Or quacking.

Senator CONROY—You try quacking without a beak; exactly.

Mr Samuel—But I think the important thing to note is that it does not have separate ownership of the two divisions. So, in terms of economies of scale and economies of scope, it potentially does not have the costs that can be associated with separation of ownership.

Mr Willett—The ring fencing arrangements in the gas code, which we have already referred to, were not structural separation. In fact, exclusively in the policy context, they were not structural separation; they were ring fencing. To call it structural separation by another name totally misunderstands the whole policy and regulatory context.

Senator CONROY—We asked Telstra what they thought operational separation should look like. Their response was that the question they are always asking themselves is: 'What are we trying to solve for? It is not clear to us yet what the issue is that we are trying to resolve.' This goes to the issue of never having been found to be in breach of any laws—to avoid using your 'guilty' phrase, Mr Samuel. 'We have not been found to be in breach of any laws, and what is it people are trying to solve?' That is what Mr Scales kept asking us. Can you answer the question for Telstra? What should an operational separation regime solve?

Mr Samuel—I suggest that Mr Scales might well re-read, because I am sure that he has read them at least once, the several speeches that Mr Willett and I have given on this subject, including a recent speech to the National Press Club. And if even that did not establish it clearly in his mind, he might want to read the introductory comments I have made to this hearing today. It is all about transparency, accountability, commercial arm's length dealings between Telstra wholesale and Telstra retail and the verifiability of those dealings—the transparency and accountability of those dealings. It is about an increased ability on the part of the ACCC to determine whether or not Telstra is engaging in anti-competitive conduct in its respective dealings on the part of its wholesale division, with its retail division on the one part and other wholesale customers on the other.

Senator CONROY—I wanted to have a bit of a chat about the minimum requirements for a ring fencing regime, based on the gas code, for it to be effective in this particular case. Is there a need for the ACCC to be given a stick to ensure Telstra's cooperation with the development of an operational separation regime?

Mr Willett—There are different ways you could implement this. One way would be to set up some principles and rely on the regulator to ensure that those requirements were adhered to—in which case you would need strong verification and enforcement mechanisms. But there are other ways of doing it. It could be simply implemented as a set of internal operating arrangements for Telstra. That would, if it were done up front, reduce the level of regulatory intervention that was required to make sure it happened. It is much easier to ensure from a regulatory point of view that a certain internal structure is continuing and operating effectively than it is to set it up within the organisation against the opposition of that organisation. That is quite a difficult thing to do. I think, first of all, you need to make a decision about how we are going to do this and how we are going to approach it. Perhaps it might be preferred to ensure that those arrangements are put in place up front rather than requiring them to be put in place through coercion by the ACCC.

Senator CONROY—Minister Coonan often cites the UK experience as a model for Australia. In fact, I think she has just recently come back and made a big thing about the fact she caught up with Ofcom. Ofcom has the stick of a reference to the commerce commission to force structural separation. Should the ACCC be given a divestiture power as a stick over Telstra?

Mr Samuel—First of all, the Ofcom, BT structure, if you like, is still in the process of development, as I understand it, so I am not sure we have any final model at the UK end. The second comment to make would be that, as a matter of principle, if operational separation processes and procedures are to be put in place they need to be mandatory. It is no use making them voluntary; otherwise we are back to where we started. The third point is that if they are mandatory then there would need to be some requirement obviously on the part of Telstra to comply, and failure to comply would—

Senator CONROY—What legal regime would make it mandatory?

Mr Samuel—Under the telecommunications-specific provisions of the Trade Practices Act or regulations pursuant to those.

Senator CONROY—What are the fines under those regimes if they breach them? I know you have never fined anyone. I am just wondering what the powers would be. I actually do not know the answer to the question.

Mr Samuel—I guess this is getting into more detail than perhaps we are in a position to comment on at the moment, because I do not know that we have actually gone into this level of detail.

Mr Willett—It may well require new provisions of the act.

Mr Samuel—And mandatory requirements.

Mr Willett—That is right. And if there are new provisions of the act then—

Senator CONROY—Possibly new penalties as well.

Mr Willett—New penalties—that is right.

Senator CONROY—Do you know what the existing penalties are?

Mr Willett—No. I am not sure we thought we could do this—

Senator CONROY—You do not know?

Mr Willett—No. As Mr Samuel has said, we have not got that far in terms of our thinking, but broadly we have thought that it probably would involve new provisions, depending on the approach that was taken. That would determine the design of those provisions, and if there were new provisions then there would be new penalties associated with lack of compliance.

Senator CONROY—What sort of penalties do you think would be necessary, as a ballpark sort of indication, for an organisation the size of Telstra for them to be meaningful? Many people are critical of the \$6 million settlement that you imposed on them around the broadband notice—they felt that was just a slap on the wrist for a company the size of Telstra. What do you think would be meaningful?

Mr Samuel—I am not sure that penalties are necessarily the appropriate way to go. It may well be that if these are mandatory requirements then they are subject to court orders for compliance in the event that there is noncompliance.

Senator CONROY—So you would not want any penalties?

Mr Samuel—I guess part of the difficulty is that, when you are dealing with a company the size of the Telstra, any ‘meaningful’ penalties would be so significant that you would have to raise a question mark as to whether or not a court would ever impose them.

Mr Willett—You could have a provision that had a penalty attached to it, but the main enforcement mechanism that we might use would be an order of a court to comply. That is not inconsistent with the way we enforce the act more generally.

Senator CONROY—They are then in contempt of the court?

Mr Samuel—Yes, and a form of mandatory injunction.

Senator CONROY—Are there any limits on how much you can fine someone for being in contempt? Is it just whatever the judge feels like at the time?

Mr Willett—People do not usually disobey an order, because they stand to face the prospect of spending a bit of time behind bars.

Senator CONROY—They might if there are no penalties involved.

Mr Willett—Spending time behind bars until you comply might be adequate.

Senator CONROY—Mr Scales behind bars! That would be a disincentive.

Mr Willett—It is a serious matter to ignore an order of a court; it is a very serious matter.

Senator CONROY—Is there a need to require that Telstra be divided into separate legal entities for wholesale and retail businesses, as is the case between distribution and retailing businesses under the Gas Code?

Mr Samuel—Again, I am not sure that our thinking has gone to the extent of that level of detail. We have suggested that the ring-fencing arrangements under the Gas Code are an example of how ring fencing has been developed in the area of one utility. We have suggested certain principles, which I outlined and summarised in the opening comments I made and which are in our submission. They go to the heart of what we have been discussing—that is, commercial arm's-length dealings; separate and clear transparent accounting arrangements, including arrangements relating to transfer pricing; and then separate staffing, with remuneration that is focused upon the performance of the division rather than the performance of the company as a whole.

Senator CONROY—So you are backing away from the suggestion in your submission regarding using the ring-fencing arrangements in the gas industry as a model?

Mr Samuel—No. Let me make it clear.

Senator CONROY—That is what they currently have.

Mr Samuel—No. I think we indicated that the concept of operational separation is not a new concept. Our submission indicated that there are other examples of operational separation, such as those contained in the ring fencing provisions of the gas code—a copy of which we supplied as part of our submission. That is not to say that these provisions under the ring fencing arrangements of the gas code are either appropriate or inappropriate; it is merely to make some suggestions as to how this might be undertaken. We have also referred to the BT Ofcom model as another example but we have not gone into the detail of all that.

Senator CONROY—I think the suggestion being kicked around by Ofcom is for separate legal board. So just a separate legal identity—

Mr Cosgrave—By BT.

Mr Samuel—Yes.

Senator CONROY—I fully understand that. We could have a lengthy conversation about the governance issues—and we might even do that. I am just trying to get an understanding of whether or not you think there need to be separate legal entities for wholesale and retail as opposed to what you have described so far. It seems that you have taken a step back.

Mr Samuel—No, there is no step back.

Senator CONROY—That is how it looks to me, given what has been said previously and what your submission points us towards.

Mr Willett—A separate legal entity is one option. Certainly it needs to be a separate entity and there need to be appropriate governance arrangements to maintain that separation.

Senator CONROY—Are you familiar with the corporate governance debates that have swept the world over the last few years, Mr Willett?

Mr Willett—Somewhat, but not in great detail.

Senator CONROY—About conflicts of interest and how you can serve two bosses?

Mr Willett—Indeed. That is part of the discipline that a separate legal entity would impose. But there are other governance arrangements that could be applied that might be effective.

Senator CONROY—You can dress anything up and call it a governance arrangement, if you want, but it does not make it a decent one.

Mr Willett—Yes.

Senator CONROY—You could call this governance, but I do not think anyone takes us seriously, so—

Mr Willett—Yes. Equally, if they were separate shareholders you could not guarantee that they would not collude either.

Senator CONROY—What, the shareholders would not collude?

Mr Willett—Separate owners. We are not suggesting that these arrangements will be the end of all problems associated with breaches of the Trade Practices Act in this area. What we are suggesting is that these arrangements will provide for much more effective enforcement of the act and will get more transparency through those governance arrangements, through separate

accounts and through ensuring that staff do not face immediate conflicts of interest—by having separate staff dealing with confidential information. They are the touchstones of the ring fencing arrangement in the gas code. We have referred to those arrangements as an example of the sort of model that could be put in place to help deal with these sorts of problems. Just because laws are broken sometimes does not mean that they are totally useless. There can be breaches but—

Senator CONROY—Providing people are penalised when it happens.

Mr Willett—Indeed.

Senator CONROY—I just want to go back to the issue of divestiture. Did you say that you wanted divestiture powers or not?

Mr Samuel—In what set of circumstances?

Senator CONROY—In the circumstances we are talking about, with a privatised Telstra.

Mr Samuel—I think we indicated that—to the extent that our thinking has gone as far as it has, which is not that far in terms of sanctions—the most important sanctions would be those of court orders requiring enforcement of or compliance with legislative or regulatory requirements. Failure to comply would amount to a contempt of court.

Senator CONROY—Can I assume that is a ‘no’: you do not believe the ACCC should be given divestiture powers?

Mr Samuel—Perhaps I can take us back a step or two. I am focusing on the bottom of page 6 of our submission. We have indicated that there are a number of models for operational separation. Some of those have been referred to. Before them is what I call the Ofcom BT model. We have talked about existing models in the Australian context, the national gas code and the national electricity code. But the primary objective in all of this is not to bring about the destruction of Telstra. The objective is not to destroy Telstra or to—

Senator CONROY—Are you suggesting that Telstra is under any threat, Mr Samuel?

Mr Samuel—No. Perhaps I can just finish my line of thought. The objective of this exercise is not to bring about the destruction of Telstra or the destruction of its business or of its overall operations. It is to bring about a position where there is greater transparency of dealings between its wholesale and retail operations to enable us then to more effectively enforce the specific telecommunications provisions of the Trade Practices Act. So putting in place penalties, which for example, would have to be of hundreds of millions of dollars to be in any sense meaningful, because Telstra fails to adequately deal with operational separation, or putting in place a divestiture order because there is a failure to bring about operational separation, I might suggest with respect, tends to be focusing much more on the potential to do substantial damage to Telstra. Whereas it is far more important that we get the ultimate objective which is: clear, transparent and commercial arms-length dealings between Telstra’s wholesale and retail operations. One of the simplest and certainly least damaging ways of achieving that is to have regulations that require those transparent accounting and commercial arms-length dealings to take place and to have those capable of being enforced by a court of law.

Senator CONROY—So your proposition to us today, Mr Samuel, is that an ACCC enforced structural separation would seriously damage Telstra?

Mr Samuel—No. I am putting to you that an ACCC enforced operational separation would enable us to achieve the objective that I outlined in my opening statement, which is to be able to promote effective competition in the telecommunications sector.

Senator CONROY—You are the one who raised the question of damage to Telstra, I did not.

Mr Willett—There is a divesture power available to Ofcom one way or another. There is not one here.

Senator CONROY—Most commentators would make the point that the only reason that BT are taking the discussion seriously at all is because there is the ultimate threat of divestiture. I am not making that up. I am sure you read the correspondence and the articles from overseas. Most people believe that the only reason that Ofcom has been taken seriously at all is because of this threat.

Mr Willett—Yes. There are two things about that. First of all, while the power is there, Ofcom is not talking about needing to use it at this stage.

Senator CONROY—Absolutely.

Mr Willett—Secondly, we do think there are other ways of skinning that particular cat than having a divestiture in place—

Senator CONROY—No, it is plucking the duck I am worried about.

Mr Willett—Indeed. Certainly there need to be some enforcement mechanisms to ensure compliance, but we have not thought in terms of a divesture power as a threat being the only way that they can be achieved.

Senator CONROY—It certainly would be a threat though.

Mr Willett—Yes, it is certainly a threat.

Senator CONROY—But you do not want it.

Mr Samuel—It is not a question of wanting; it is a question of indicating what we think is an effective means of achieving the outcome that we are seeking, which is transparent commercial arms-length dealings. You have used your plucking of ducks and things like that. Can I also use the other one and that is—

Senator CONROY—Skinning a cat.

Mr Samuel—Skinning a cat, yes. I am not sure that we want a sledgehammer to crack a nut.

Senator CONROY—I will take that as a no.

Mr Willett—Take it as a no. But if Ofcom happen to find that the only way it could achieve what it is trying to achieve was through divestiture, then I think you would find the debate here might be very different. In those circumstances we probably would not want to rule out seeking a divestiture power, but we are not in that situation.

Senator CONROY—It is a last resort for them and I am just seeing whether you want the last resort.

Mr Willett—We are not in the business of asking for powers that we are not sure we need to achieve the outcome. We have proposed some arrangements here which we think should be given some thought and could be effective.

Senator CONROY—You used to propose structural separation but you have backed off from that.

Mr Samuel—I might say that the mere suggestion of operational separation seems to evoke certain responses from Bill Scales. It suggests that it might be having an impact.

Senator CONROY—I admire your optimism. How many more names do you want him to call you?

Mr Samuel—Methinks he might protest just too much. I am not sure—

Senator CONROY—How many more names does he have to call you? You are showing remarkable restraint. Moving on—and I think we have possibly covered this—should contracts between wholesale businesses and retail customers be lodged with the ACCC?

Mr Willett—They should be available.

Mr Samuel—Yes, available. In the event of a suggestion or a complaint of anti-competitive conduct we want to be able to see them.

Senator CONROY—This would be a useful reference point for the commission in determining whether Telstra were engaging in unreasonable discrimination.

Mr Willett—That is right. In terms of the sort of must-haves, we are fairly clear that full internal pricing and internal contracts should be part of these sorts of arrangements. That means contracts are written and it also means that they are available should we request them.

Senator CONROY—Should there be a requirement to mandate the use of separate IT systems by the wholesale and retail businesses?

Mr Willett—That is a level of detail we have not got to as yet.

Senator CONROY—We are just hearing a lot of evidence about a remarkable amount of suspicion of information between the retail and wholesale branches of Telstra seeming to flow backwards and forwards. I am not accusing Telstra; I am saying there are a lot of accusations.

Mr Willett—Yes. It is certainly a legitimate question but not one that we have formed a view on.

Mr Samuel—You would want a structure whereby the wholesale division was working its butt off to secure the very best results it could for that business in all its dealings with all its customers, including Telstra retail, and the Telstra retail division was equally working its butt off to secure the very best result that it could achieve in all its dealings with Telstra wholesale. There is an appropriate market tension involved in those commercial arms-length dealings.

Senator CONROY—Should all wholesale customers have the right to access the same IT provisioning systems?

Mr Samuel—We have not gone into that level of detail.

Mr Willett—Although the same sorts of services should be available to wholesalers as are available to Telstra.

Senator CONROY—We keep getting told that—and I am sure you are hearing the same stories—Telstra's wholesale customers are told that ADSL is not available with a specific line only to find that Telstra subsequently offers the retail customer the product. It seems reasonable that Telstra's retail and wholesale customers should be placed on an equal footing in this regard.

Mr Willett—Yes.

Senator CONROY—In your submission you note that Telstra should be required to maintain non-financial reporting systems. What does the ACCC mean by this? Are you referring to reports on service levels provided to wholesale customers?

Mr Cosgrave—Is that on the first page of our report?

Senator CONROY—I am sure I will be able to refer that to you in a moment. I will come back to that one. What would be the ACCC's attitude to a member of the ACCC being invited to sit as the member of the wholesale board of an operationally separated Telstra? This has been floated in the UK in the context of Ofcom's inquiry into BT.

Mr Samuel—Again, I do not think we have thought about that in any detail. But there is a very real issue of conflict of interest where a regulator is sitting on a board of governance of a company that it is seeking to regulate. It could make it quite difficult in terms of conflict of interest. Remember, our role in telecommunications is to regulate not just Telstra but the telecommunications sector generally.

Senator CONROY—What about a member of the ACCC being invited to join a wholesale board in an ex officio status—being an observer?

Mr Samuel—The same issue, I think. It raises some real issues of conflict of interest.

Senator CONROY—It would avoid conflicts of interest over, say, voting.

Mr Samuel—Yes, but—look, this is giving you a sort of an initial reaction because we have not thought about this in any detail. I am not sure that a regulator sees itself as having the role of supervising on a daily basis the activities of the regulated entity or taking any form of responsibility for decision making of that entity other than the responsibility that it needs to take as a regulator. I am not sure it would be terribly helpful to have members of the ACCC either sitting in board meetings or observing at that close proximity all the activities of the regulated entity.

Mr Cosgrave—I think that proposal comes from BT's proposal for an equal access board, which is not a decision making entity, as I understand it and, as I also understand it, it is still a proposal under consideration by Ofcom.

Senator CONROY—I was not suggesting that it was a final position; it was just an interesting one that probably raised my eyebrows as much as it has raised yours—and for much the same reasons, I suspect.

Mr Willett—You could envisage very quickly that the ACCC observer would be asked for advice on what would be compliant with the act and that would lead to some tricky situations, I think.

Mr Samuel—You would get a free mobile phone as part of the deal!

Senator CONROY—Haven't got a plasma TV yet, Mr Samuel? John Short is back on board; you will be able to get one soon. Page 5 I think it was, Mr Cosgrave—at dot point No. 2.

Mr Samuel—Financial and non-financial reporting systems.

Senator CONROY—What were you thinking of there?

Mr Cosgrave—I think we had in mind the sorts of things you have raised previously, such as the provisioning fault handling systems. They would be what we would consider non-financial reporting systems.

Senator CONROY—Another issue that has arisen before this committee is the influence of Telstra's ownership of the HFC on competition in telephony markets. What is the ACCC's position on Telstra's ownership of the HFC and its interest in Foxtel?

Mr Cosgrave—I think it is the position that was put in the emerging market structures report.

Senator CONROY—You have moved around on a few of those, so I want to get it on the record.

Mr Cosgrave—I think I just stated it. It is the position that was put in the emerging market structures report.

Senator CONROY—Do you mean the sale of both, getting out of both, or the sale of one and getting out of the other?

Mr Cosgrave—Read it carefully again. As I put it to you beforehand, the report said that there were competition benefits that should certainly be considered by government, subject equally to a consideration of the cost.

Senator CONROY—The emerging market structures report recommended divestiture of the HFC and the controlling stake in Foxtel.

Mr Cosgrave—Subject to a consideration of the costs, as it must necessarily when you have not considered in detail the costs of proposals that have, from our perspective, an obvious procompetitive—

Senator CONROY—You guys do not just come up with these ideas by pulling them out of a hat, do you? Presumably you have a think about it and go, ‘We reckon on balance there’s a benefit.’ You do not just go, ‘We don’t think there’s a benefit, but we’re going to recommend it anyway.’

Mr Cosgrave—Absolutely. Clearly we thought there were competition benefits to be considered by the government in making those recommendations.

Senator CONROY—What effect does Telstra’s ownership of the HFC have on the level of competition in the Australian telecommunications market?

Mr Willett—It could be argued that we have missed out on a level of competition that most other developed countries have had, which has been the competition between telcos and pay TV companies. That is arguable.

Senator CONROY—They are not in competition, so I do not think it is arguable that we may have missed out—we have missed out.

Mr Willett—It is arguable, because we do not have a comprehensive HFC roll-out in this country. You might argue about whether that would have happened.

Senator CONROY—But we might have one if there was not.

Mr Willett—That is right, but you do not really know. We do know that in other countries there has been some significant competition between pay TV providers offering services over HFC and other platforms and traditional telcos.

Senator CONROY—We do not have that competition in this country.

Mr Willett—That is right. It has been closed off.

Senator LUNDY—Why did you include the qualifier of ‘subject to assessing the cost’ in the emerging industries report?

Mr Cosgrave—For the usual reason you would in advocating any structural reform: you are going to do a cost-benefit analysis before you make a determination as to whether the advancements in relation to the competitive environment are outweighed by the cost to the economy as a whole.

Mr Willett—Remember it was part of some advice that was put together fairly quickly with our—

Senator LUNDY—I appreciate that. I am trying to ascertain whether that particular element of the advice related to the ACCC's role and powers or whether that was more general policy advice to the government in the context of that report, which I recall was a request from the minister.

Mr Cosgrave—It was a request from the minister. It was a recognition that it was a request for advice in relation to competition issues. We gave that advice. We gave what we would consider the usual rider.

Senator LUNDY—I have a couple of general questions relating to the ACCC's powers. I have asked this before. Are there any powers under the act, or lack of powers under the act, that have specifically made it either difficult or prevented the ACCC from pursuing your responsibilities under the act?

Mr Samuel—It is not so much powers as ability to gather proof.

Senator LUNDY—Can you tell me where those problems specifically have been and where you think some changes would facilitate the ACCC to do its job?

Mr Samuel—That goes to the heart of the discussion we have been having in response to the questions from Senator Conroy and to the heart of our opening comments on operational separation and our submission. In dealing with anticompetitive conduct, in the context of the area we have been discussing, the specific issue is actually bound to demonstrate that the activities of Telstra in dealing with its potential retail competitors—that is, its wholesale customers—are anticompetitive. To demonstrate that, we need evidence of the appropriate commercial arms-length dealings that ought to occur between Telstra's wholesale operations and its retail operations to assist us in determining whether the dealings that it has with its other wholesale customers, other than Telstra retail, are fair and give those wholesale customers the capacity to compete with Telstra retail. That involves extensive analysis, including margin analysis and imputation analysis, which is very difficult. It is an imprecise art. That is one of the reasons, probably the predominant reason, why we have put forward the proposition that operational separation with the transparency and commercial arms-length dealings capable of being verified would very much facilitate that task. So it is not so much the powers but the capacity to exercise the powers that we have available to us at present.

Senator LUNDY—Is the ACCC's view on operational separation a direct result of its experience in handling recent cases like the broadband competition notice?

Mr Samuel—The recent case of handling the broadband competition notice has highlighted to us the difficulties of proof, the difficulties of obtaining appropriate levels of evidence necessary

to be able to take a successful proceeding through to the courts. Operational separation would not only make that process much easier but the very fact of transparency and the verifiability of the transparency to the commercial arms-length dealings would operate as a deterrence against the sort of conduct that we allege was anticompetitive conduct in relation to the broadband competition notice.

Senator LUNDY—I will leave my other questions because they start to go to the legal advice.

CHAIR—We will deal with those in a block towards the end.

Senator TCHEN—Mr Samuel, on this operational separation model you have suggested, we are looking at arms-length dealings requiring cooperation for separate accounts, separate reports, separate staff and presumably separate boards. Would that impose a cost regime on the corporation?

Mr Samuel—We have not gone into that level of detail of examination. I have heard comments made by those who are relatively close to Telstra and its structures to suggest that there may be some transitional costs—that is, moving towards operational separation—but not so far as to suggest that there are significant ongoing costs.

Senator TCHEN—You have not heard any suggestion about the magnitude of the possible costs?

Mr Samuel—No.

Mr Willett—But neither have we seen anything in the way of evidence from Telstra that there are significant costs. Really they are in the best position to make that case. It is interesting that Mr Scales has not presented that evidence before this committee. It seems the focus has been on suggesting or questioning the motives of the commission.

Mr Samuel—It has been more rhetoric and platitudes than substance, I suspect.

Senator TCHEN—It does provoke a very strong reaction from him.

Mr Cosgrave—We are neither surprised nor disappointed by the strength of that reaction.

Mr Willett—Perhaps you can draw some conclusions from that.

Mr Samuel—If there were not a strong reaction, it might suggest that operational separation was of little impact in achieving the objective that we are suggesting, which is the ability to more effectively utilise the provisions relating to anticompetitive conduct that are contained within the act.

Senator TCHEN—On the other hand, I am suggesting that the reaction may be from the cost angle rather than the transparency angle.

Mr Samuel—I am not aware, not having read all his evidence—and perhaps you can assist because you have it there—of any substantive information being put forward to this committee

by Telstra as to either the transitional costs or the ongoing costs. There is a lot of rhetoric and a lot of platitudes.

CHAIR—We had hoped to have to you the *Hansard* of an earlier hearing we had in Sydney. It contains evidence from the GSM Gateway Association about—I can see Mr Cosgrave nodding—reselling fixed and mobile calls. I understand the GSM Gateway Association had raised the issue with the ACCC at various times. I wondered whether the ACCC had any active investigation going on with some of the concerns they raised. I do not know if there is anything you can say at this point. Alternatively, I can simply have the *Hansard* sent to you and you can send me a written submission.

Mr Samuel—It would be useful if you could forward that to us.

CHAIR—We will do that. We do have a tight time frame.

Mr Samuel—We will come back to you.

CHAIR—The issues raised on the *Hansard* were quite serious. It goes to the ability of the mobile operators to unilaterally alter contracts, which was a concern I had.

Mr Samuel—We are not unfamiliar with the problem.

CHAIR—Yes, I am sure you would not be—in many areas. Telstra in its submission to the committee suggested that it was time to repeal parts XIB and XIC and replace them with simply utilising the part IV powers of the act. Do you have any comment on whether competition is sufficient for those sorts of activities to occur as a reform?

Mr Samuel—You would not find us supporting that proposition with any degree of enthusiasm.

Mr Cassidy—Indeed, when XIB and XIC were originally implemented it was envisaged that one day XIB might be able to be done away with when competition was sufficient and we could just rely on the general competition provisions of the act. Because of the particular characteristics of telecommunications, it was never, I think, envisaged that XIC, which deals with access issues, would be able to be done away with.

Senator LUNDY—Sorry to interrupt. Mr Scales criticises the ACCC. He claims that Telstra have not even fully implemented accounting separation, yet people in the ACCC are saying it does not work. From previous evidence I know that the fact that accounting separation is not fully implemented is an issue in itself and a poor reflection on previous legislative amendments. But can I ask you to respond to that comment, because it implies that, were it to be implemented, it would in fact provide the information the ACCC needs? Can you comment on that and tell the committee whether you think, even if it were fully implemented, it would actually serve the purpose that the rhetoric suggested it would?

Mr Cosgrave—I think the principles of the accounting separation regime have been implemented in full. What I would contrast is the implementation of the principles that underlie the regime and the full application, say, of current cost accounting, which requires a lot of work

in relation to the valuation of assets et cetera. We have seen the nature of the material supplied in relation to that regime. Our comments on the use to which we think we can put it or the limitations thereof would remain the same now or at a time when the regime is fully extended.

Mr Samuel—I think it would be fascinating to have a detailed submission from Mr Scales on two issues. The first one is the use to which he believes the ACCC can put the current accounting separation reports. The second one is the extent to which he believes that Telstra could further comply with the record-keeping rules and the accounting separation rules, and then the additional use to which those reports could be put once they comply.

Senator LUNDY—I take the point.

Mr Willett—It is a non-argument because, whichever way you look at it, it will take such a long time to get anything out of this regime that it is effectively useless, in any case. Is there really any difference between something that takes 20 years to be meaningful and something that just does not work now?

CHAIR—I have a question about ring fencing. We were talking about rings and ducks earlier on. Does the current legislation, in your view, give the ACCC the power to pursue a ring-fencing arrangement in telecommunications, as it does in gas and electricity, as we were discussing?

Mr Samuel—No.

Mr Willett—No. Our powers in gas are those powers that derive from the gas law and the gas code. The gas code sets out some minimum requirements and it adds some discretionary requirements that the regulator can impose. But they are all set out as a matter of law. They are not things that we can—

CHAIR—Determine as policy?

Mr Willett—Yes, that is right.

CHAIR—My final question in this section is on the issue of churning of customers. We have had quite a number of smaller competitors of Telstra complaining that, when they take a customer off Telstra, Telstra takes the customer back in a very short period. I am sure you have heard the complaints before. Optus suggested that we should look at the rule which is now in the Canadian telecommunications market of a 183-day non-take type period. Have you investigated such a rule and does the ACCC have a view on those sorts of rules?

Mr Willett—We have not investigated it in depth. We are aware of the proposal. We do not have a firm view on it. We are a little uneasy with a requirement that a customer cannot go to someone else over what is a significant period.

CHAIR—Do you recognise that there is a market power issue involved where the firm is reselling access to the network of the dominant player?

Mr Willett—I certainly understand that there are potential problems there.

CHAIR—Some of the examples the committee has been given of what has occurred are quite horrendous. People are being told that they have a broken phone and if they turn back to Telstra it will be fixed within 24 hours. If they do not, it will be fixed sometime in 2012.

Mr Willett—Certainly, that problem should be dealt with. The question is whether you deal with it through the existing provisions or whether you add this provision that customers cannot be churned for a minimum period. Preferably, you would address that problem in a way that does not reduce the ability of the customer to choose the service provider that they want.

CHAIR—Has the ACCC had any thought on how that could be done?

Mr Cassidy—The answer is no, although I must admit, as you have raised those examples, I was wondering whether they would be more susceptible to being examined under the consumer protection provisions of the act, rather than being dealt with as competition issues.

Mr Samuel—Yes, misleading or deceptive conduct.

Senator LUNDY—On that point of misleading and deceptive conduct, certainly I have had the opportunity to raise a number of issues relating to the conduct of Telstra, under those provisions of the act. To what degree is the ACCC resourced to be proactive regarding pursuing issues relating to misleading and deceptive conduct in the area of telco, given that there is a fine line in many of the constituent and customer complaints we get as to whether it is anticompetitive behaviour or just straight up misleading and deceptive conduct by Telstra? How do you work out internally where you put your resources to pursue these issues?

Mr Samuel—The resources to pursue any competitive conduct are dealt with separately from those relating to misleading and deceptive conduct, but between the two branches there is very effective collaboration. We do not react to each and every single complaint. If we were doing that, then we would probably have no resources left for anything else. You would expect that with something in the order of 16 million telecommunications users in this country that telecommunications—not just Telstra but telecommunications generally—would feature pretty high on our hit list in terms of weekly complaints. But where we see a systemic problem arising it will tend to be pursued. In the first instance, if it looks like a matter of misleading and deceptive conduct it will be dealt with by the enforcement branch. But if they suspect that there is something wider than that in terms of anticompetitive conduct then it will be dealt with by the telecommunications branch. The two of them work very well together.

Senator LUNDY—What about some of the issues that I know through experience are very difficult to prove in terms of misleading and deceptive conduct, like the problems with Telstra's front-of-house advice to customers on the availability of ADSL? We had one example here in Canberra on which I think we took evidence. I was certainly advised by Telstra that it was a problem they identified within their database—that is, that they were providing inaccurate information and costing people a lot of money just because their database was wrong. The front-of-house complaints system still leaves a lot to be desired. We know that because we still hear the stories on a daily basis. What is the ACCC able to do to force Telstra to upgrade its own front-of-house system—to link it to its regional and locally based techies and that sort of thing? It has not got any better in the past five years I have been looking at the issue of pair gains and

ADSL access—in fact, it has got worse, because as demand increases and interest grows the complaints come in as thick and fast as ever.

Mr Samuel—The processes that we can adopt with Telstra in this context are not a lot different to those that we would adopt with any other mass volume retailer. That involves a series of processes through the so-called enforcement or compliance pyramid. For the most part, I would have to say to you that where issues of apparent systemic problems are raised with Telstra the response tends to be—I do not want to overstate this—reasonably satisfactory, although it takes time. The time that is taken will either depend upon the response of the senior management of Telstra or, alternatively, on the depth of the systemic problem within the organisation where you are dealing with a whole range of people at call centres.

Senator LUNDY—I think that is the issue. My experience is that if you can find a specific problem relating to a specific customer there is a high success rate in getting a problem rectified if it is almost one on one. But that is the only way to deal with it. There does not seem to be any movement in improving their front-of-house information and supply systems and how they link to their broadband register, and all that other technology that they have in place to try to facilitate customer information. That is probably one area where no number of individual consumer complaints will ever change anything, but potentially there is a role for the ACCC to play.

Mr Samuel—And of course the role then moves up the pyramid so that if we find there is a systemic complaint and a recalcitrance on the part of any telecommunications carrier to deal with it then ultimately we have to proceed to enforcement action. That happened last year or the year before with respect to zero dollar advertising of mobile telephones. We ultimately had to take court action and the court found in our favour. But we also recognise, without wanting to be an apologist for any telecommunications carrier and least of all for Telstra, that it is a very big organisation. There can be problems when you are dealing with call centres sometimes not located in Australia, a very large retail network and a large group of employees in any particular front-of-house circumstance needing to be trained and in a sense supervised and controlled as to their dealings with retail customers.

Senator LUNDY—Where would you look to see what the load of generic complaints about that front-of-house system was? Would you look to the TIO to see whether there was anything systemic there that you could base some activity on?

Mr Samuel—We would get some information there, but also from our first port of call, which tends to be through our info centre. Each week we receive a report from our info centre and that lists the number of complaints and the general nature of the complaints. You can generally pick it up if there is a systemic problem.

Mr Cassidy—We also have collaborative arrangements with both the TIO and the Australian Communications Authority; we have a tripartite group that meets on those issues.

Senator LUNDY—What is your current view on the quality of access of that front of house service of Telstra's in relation to ADSL? Do you have a view?

Mr Cassidy—I think the response might go to a broader industry and a broader issue than just the one you are raising. Our view would tend to be that this industry, the telecommunications industry as a whole—and again as you might expect to some extent with a mass consumer interface—consistently is the industry about which we have the most complaints. That is something we have had cause to highlight not only with Telstra but in broader industry fora as well.

Senator CONROY—I want to follow that up very quickly. Over the course of the inquiry, we have heard quite a lot of evidence from many of Telstra's competitors. They have made a number of comments about what they view as anticompetitive conduct on Telstra's part. I would suggest that you have a review of the transcripts of this evidence, especially the evidence obtained in regional areas, with an eye to taking action against this conduct where possible. I was going to ask some questions about them, but I think if you check the transcript of Wednesday's hearing with Mr Scales you will see that we go through quite a few of them. They are the summary of issues that were raised with us during the course of the hearings, particularly by ISPs, who were unanimous in their view. I just wanted to make that point.

CHAIR—That concludes our public evidence. I propose to move into camera to ask a few questions for about 15 or 20 minutes and get the witnesses out of here as soon as I can. I thank you for your evidence and declare this public hearing closed.

Evidence was then taken in camera—

Committee adjourned at 8.44 pm