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SENATE

STANDING COMMITTEE ON ECONOMICS

ESTIMATES

(Supplementary Budget Estimates)

THURSDAY, 7 DECEMBER 2006

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SENATE**STANDING COMMITTEE ON ECONOMICS****Thursday, 7 December 2006**

Members: Senator Brandis (*Chair*), Senator Stephens (*Deputy Chair*), Senators Bernardi, Chapman, Joyce, Lundy, Murray and Webber

Participating members: Senators Adams, Allison, Barnett, Bartlett, Boswell, Bob Brown, George Campbell, Carr, Conroy, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fifield, Forshaw, Hogg, Kirk, Lightfoot, Ludwig, Marshall, Ian Macdonald, McGauran, Mason, Milne, Nettle, O'Brien, Parry, Payne, Robert Ray, Sherry, Siewert, Watson, Webber and Wong

Senators in attendance: Senator Bernardi, Brandis, Conroy and Watson

Committee met at 3.33 pm**INDUSTRY, TOURISM AND RESOURCES PORTFOLIO**

Consideration resumed from 1 November 2006

In Attendance

Senator Coonan, Minister for Communications, Information Technology and the Arts

Senator Minchin, Minister for Finance and Administration

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman

Mr Brian Cassidy, Chief Executive Officer

Mr Michael Cosgrave, Executive General Manager, Communications

Mr Joseph Dimasi, Executive General Manager, Regulatory Affairs Division

Australian Securities and Investments Commission

Mr Jeffrey Lucy, Chairman

Australian Competition and Consumer Commission

CHAIR (Senator Brandis)—I declare open this meeting of the Senate Standing Committee on Economics. In accordance with a resolution of the committee on 1 November 2006, today's hearing is convened to resume consideration of matters related to Telstra, which were postponed from the supplementary budget estimates hearing on 1 November. The committee intends to hear from officers of the ACCC and then from ASIC. The committee has fixed Friday, 15 December 2006 as the date for the return of answers to questions taken on notice. Under standing order 26, the committee must take all evidence in public session which includes answers to questions on notice.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on

account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The Senate by a resolution in 1999 endorsed the following test of relevance of questions at estimates hearings: any questions going to the operation or financial position of the departments or agencies which are seeking funds in the estimates are relevant for the purposes for estimates hearings. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless parliament has expressly provided otherwise, including by privilege resolutions which are contained in the volume of standing orders.

The Senate has resolved that an officer of a department of the Commonwealth will not be asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits questions asking for opinions on matters of policy and does not preclude asking for explanations of policies or factual questions. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed.

I should also indicate that a report of this committee into an unrelated matter is being tabled in the Senate probably within the next hour and, in that event, it will be necessary for me to absent myself briefly. I will pass the chair to Senator Bernardi in that event.

I welcome the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel, Mr Cassidy and officers of the ACCC. Mr Samuel, do you have an opening statement?

Mr Samuel—Yes, and I will, I promise, be mercifully brief. I wish to assure the committee that my fellow ACCC officers and I will, as always, seek to answer the questions put to us today as fully as possible. However, there may be some matters of detail where the ACCC may well seek some indulgence from this committee to respect the commercial confidentiality of some information provided to the ACCC by parties who might be seeking informal guidance from the ACCC on regulatory issues. In particular, on the last occasion the ACCC was before this committee a number of questions were asked about discussions that took place between the commission and Telstra in relation to fibre to the node which we expect will be resumed today. You may have heard that last week I called upon Telstra to release the ACCC from the confidentiality constraints surrounding the details of Telstra's fibre to the node proposal. It was clear from the outset that our discussions with Telstra would be confidential, but it was hoped that a prospective outcome of those discussions would be the lodgement of an access undertaking and an application for exemptions under the Trade Practices Act, and that these would be put forward for public scrutiny. Telstra has chosen not to release the ACCC from its commitment to maintain the confidentiality of those discussions and it would not be appropriate for the ACCC to unilaterally decide when such material should be disclosed in the public domain.

The ACCC conducts itself transparently to facilitate and promote open scrutiny of its actions, decisions and reasons, whilst balancing the need for disclosure with respect for the

confidentiality of information. However, the ACCC considers that there is a clear public interest in the ACCC respecting parties' wishes for commercial confidentiality where those parties are developing proposals which will be later subject to public scrutiny. In relation to access undertakings, in particular where the ACCC has the option of only accepting or rejecting the undertaking, such a process is of particular importance in enabling firms to develop proposals with a reasonable chance of satisfying the relevant legislative criteria under which the ACCC must make its assessments. Thank you.

CHAIR—I am required in the chamber now, Mr Samuel, so I am going to hand the chair to Senator Bernardi.

Senator CONROY—Did you say that the talks over FTTN are being resumed today?

Mr Samuel—No, I did not.

Senator CONROY—I might have misheard you. I just wanted to clarify that. I want to divert for a couple of moments. In late October of this year, you gave a speech warning ISPs to be careful about the claims they make in their promotional material for broadband services. Do you remember that speech?

Mr Samuel—I do.

Senator CONROY—Can you give some examples of the types of claims the ACCC is concerned about?

Mr Samuel—I would not want to go into the specific details of matters that we may or may not be investigating. Where claims are made of speeds up to—and the 'up to' is in relatively small letters—or are not part of the headline of the claim then consumers can be misled into believing that what they will receive is in fact the speeds that form part of the headline. As I observed in that speech—and is well known from a technical basis and I think has been more latterly observed by some of the ISPs concerned—the speeds claimed are subject to a number of constraints relating to congestion. The speeds can also be constrained, particularly with ADSL, by the distances from the exchange in terms of the ultimate outlet, the home or place of business and, of course, the speeds can also be constrained in terms of wireless by the number of parties that might be using the bandwidth at the time, and the capacity constraints that are imposed, particularly where visual material is being transmitted over wireless.

Senator CONROY—In that speech, you stated:

It is not enough for service providers to make 'blanket claims' that customers will get speeds 'up to' a certain threshold when significant limitations apply to the attainment of those speeds.

And you went on to state that ISPs:

Need to delineate the whole range of parameters that will dictate the likely speeds the customers will obtain for fixed line or mobile data services.

In that speech you indicated that even if they include the words 'up to', it is not enough to make a blanket statement.

Mr Samuel—Yes, and indeed some of the more diligent ISPs are actually indicating that speeds may vary according to distance from the exchange and congestion in terms of the

number of users, and that there will be some factors that do cause a variation. There are a number of ISPs that are actually doing this at the present time, and I think it is fair to say that we have probably seen some improvement in the advertising of speeds since that speech and since we have been communicating with a number of ISPs around that time as to this particular issue.

Senator CONROY—Your concern when you gave that speech was that it was misleading to state that a broadband service would deliver up to a certain speed when there are clearly a range of real world limitations on the service.

Mr Samuel—I think it particularly depends on the impression that is given by the advertising and the spruiking or the spinning that accompanies the advertising. If the words ‘up to’ are there but are not given sufficient prominence or are not sufficiently explained so the average consumer forms the view, ‘Actually, I should not be expecting to receive the speed that has been headlined,’ then we think the consumers are capable of being misled or deceived, and that would potentially be a breach of the Trade Practices Act.

Senator CONROY—Would it be misleading to say that a HFC broadband service offered, ‘Speeds up to 17 megabits,’ without mentioning the congestion issues that can greatly reduce the speed of the service?

Mr Samuel—I think we would need to see the context in which that appeared and to see what else was disclosed. If it merely said, ‘Up to 17 megabits a second’ and the ‘up to’ was in relatively small letters and, therefore, the average consumer could be forgiven for believing that they were going to receive generally around 17 megabits a second, and if that speed was not the case as a result of congestion and other issues, then we should—

Senator CONROY—Should they have to identify what the constraints are? I think it is a little weak to say whether they are misleading depends on the size of the print.

Mr Samuel—It is not so much the size of the print; I think it is the disclosure of sufficient information for consumers to be aware that they should not be expecting to receive the headline speed.

Senator CONROY—If they just baldly say, ‘Speeds up to 17 megabits,’ is that potentially misleading or misleading?

Mr Samuel—The reason I am being cautious is that we would need to see the context in which it appears. If all that appears is material that gives the impression that you could generally expect to receive speeds of around 17 megabits a second, then that would have the potential to be misleading or deceptive. My colleagues might want to elaborate.

Mr Cosgrave—I would certainly agree with what the chairman said. Since the chairman’s speech, we have corresponded with a number of ISPs in relation to advertising over a number of technologies. What we are dealing with here I think is a broad industry practice generally around advertising of broadband speeds, which we have some concerns with. What we have endeavoured to do is make them known publicly and, as instances come up, raise them with the individual ISPs concerned and make sure that their advertising does not lead to potential breaches of the law.

Mr Samuel—Often we get an indication of this from the level and nature of complaints received by our information centre. If we start to receive a relatively high volume of complaints from disappointed consumers, we can make a reasonable judgement that consumers have been misled. It would flow from the fact that they have been disappointed by the speeds they have been receiving.

Mr Cosgrave—I should add that, in relation to this type of conduct, we have actually had very low levels of complaint from consumers. We have been concerned about the potential to mislead, given that we are dealing with services that are continuing to develop.

Mr Samuel—It may be that consumers are just getting used to the fact that they do not get anything like the speeds that have been suggested that they will get from ISPs.

Senator CONROY—You just have to pick up any newspaper and the ads drop out of them, quite literally—the glossies with the tiny, fine print: subject to variations. There is a proliferation of this advertising technique. What about an ADSL2+ service that says it supplies, ‘Speeds of up to 24 megabits,’ without mentioning the attenuation problems that reduce the speeds able to be provided over ADSL2+ with distance?

Mr Samuel—Similar issues but, again, it depends on the context in which it is said and on the level of knowledge of consumers. Consumers are, I think, moving into a new arena here with ADSL2+ for the most part, although some ISPs have been supplying ADSL2+ for up to two years now. Consumers are moving into a new arena and it is a question of them having sufficient knowledge as to what to expect and what might be actually achieved. All this is fairly new for consumers; as it is new for service providers.

Senator CONROY—Just going back to your speaking notes, you made it clear when you said:

It is not enough for service providers to make ‘blanket claims’ that customers will get speeds ‘up to’ a certain threshold when significant limitations apply to the attainment of those speeds.

You go on to say that ISPs:

Need to delineate the whole range of parameters that will dictate the likely speeds the customers will obtain for fixed line or mobile data services.

You say that they just cannot say that; it is misleading to only say ‘up to’. You are saying you have had some success in getting companies to identify that there are these technical and other types of limitations.

Mr Cosgrave—It may be that you could also overcome the issue not simply by delineation of the limiting factors but by talking either about a range of speeds that might be able to be achieved and/or average speeds or something of that nature. There may be a number of ways in which to cure the ill that we are concerned about.

Senator CONROY—You mentioned earlier that when you see an ad like this you write to them to engage them in conversation?

Mr Samuel—Yes, we are; that is right.

Senator CONROY—Have you written to the minister yet?

Mr Samuel—About what?

Senator CONROY—Her claims in which she talks about ‘up to’ speeds without actually explaining any of these problems.

Mr Samuel—I was not aware that the minister was an ISP supplying a service in the course of business.

Senator CONROY—Speeds are being spruiked and the minister is using the words ‘up to’. I can send you the speeches and the public commentary, if you like. You might want to take it up with her.

Senator Coonan—I do not think he would.

Senator CONROY—Moving on. What action has the ACCC taken on this issue? You say you have written to the ISPs. Have you given any specific warnings, and if so, to whom?

Mr Cosgrave—We have given warnings to a number of companies. I would have to take on notice the specific companies, but I am aware of at least half a dozen pieces of correspondence on that issue.

Senator CONROY—What factors does the ACCC take into account before it will take enforcement action against an ISP over these claims?

Mr Cosgrave—Again, one of the things we are dealing with here is a broad ranging issue. We are also dealing with a form of advertising that, as you pointed out, is prevalent not only in this country but also in other countries as a form of advertising broadband throughput rates. In the first instance, I think we are seeking to educate the market by: firstly, bringing it to their attention in a broad ranging way in the nature of a speech; secondly, selectively bringing it up when it comes to our attention and giving people the opportunity to ameliorate their conduct, which generally they are doing; and, thirdly, giving some guidance to companies when they come to us for advice. Although we do not give blanket advice around questions of law, we would seek to give them some assistance around how their advertising might not breach the act. Then, in accordance with a usual sort of pyramid of enforcement approach, if the practice continues, it may be a matter over which the commission determines to take enforcement action if the other strategies do not ameliorate the problem.

Senator CONROY—I think you gave that speech on 26 October this year.

Mr Samuel—That is right.

Senator CONROY—That is not the first time you raised this issue though, is it? At an ATUG conference on 4 March 2004 you stated:

It has been alleged that whilst ISPs are advertising broadband services that offer specific download rates, for example, 256 kilobits per second, the download speed when accessing Internet sites is often considerably less than this. Advertising that makes false claims about the standard, quality and value of products and services is a breach of the Trade Practices Act and will not be tolerated by the ACCC.

And you went on to state:

Those who fail to take note of this warning will find themselves the target of enforcement action by the ACCC.

What action did you take after you gave that speech in March 2004?

Mr Samuel—I would have to take that on notice, but I think Mr Cosgrave outlined the course of action that we do take. I think we need to understand that this industry is not Robinson Crusoe in regard to this sort of practice. This occurs in many industries where the use of the words ‘up to’ and other expressions are designed in a sense to create an impression which may or may not cause consumers to be misled, depending upon their level of knowledge, information and perhaps expertise and maturity in relation to the matters concerned. I would have to take on notice the various processes we put in place but, suffice to say, that, as I think Mr Cosgrave has noted, we have not received a large number of complaints in this area. That either suggests that consumers are becoming more informed and therefore are not being misled by the nature of the claims being made. That does not say to us, ‘We don’t do anything about it;’ it says to us that the consumers are being informed, and that is probably one of the best ways of dealing with non-compliance.

Senator CONROY—I would put it to you that that is an optimistic view. I think people are so disillusioned with the speed of their broadband that they are just not bothering. They are just used to getting a rubbish service. They think everyone is in on the scam and no-one thinks they can do anything about it, even by complaining to you. Given that you have raised it now on two separate occasions and we still have an industry which engages extensively in this practice, people probably just shrug their shoulders and say, ‘We have to live with it’.

Mr Samuel—I think I indicated before that I suspect there are many consumers now, particularly the users of broadband, who are just simply not expecting to get anything like the speeds that they are offered. I think it is appropriate to note, on the more positive side, that a number of the advertisements that are now appearing and a number of the claims that are being made are actually featuring in reasonable prominence some of the qualifiers that we have talked about: that speeds may not be achievable depending upon the number of users at any particular time, the congestion obviously and the distance from the exchange. These are factors that are being drawn to people’s attention. That is not to say that it is pure and clean, but it is to say that the practice is improving.

Senator CONROY—So it has improved from a situation that was a breach of the law to one that is not quite as much of a breach of the law.

Mr Samuel—In some cases improving from a breach of the law to a non-breach of the law—to compliance of the law.

Senator CONROY—Does the ACCC agree that the broadband speeds that are being claimed to be available in the market via technologies are relevant to the current debate about Telco regulation?

Mr Samuel—Could you repeat that? Did you say the speeds claimed or the speeds actually being achieved?

Senator CONROY—No, the speeds being claimed to be available in the market are relevant to the current debate?

Mr Samuel—What I think is probably more relevant than any claims by any parties as to speeds that might be available are the speeds actually being achieved and the developing technology to provide high-speed broadband to Australians.

Senator CONROY—There is a real need to get this right for education reasons so that we can have an informed policy debate. Everywhere I travel to talk to people about this issue, they just shrug their shoulders in despair. That is the common reaction I get. ‘I just don’t think anything will be done. We’re just getting rubbish service.’ I think it would be better to try and get the truth out there rather than companies and others continually being misleading about the quality of the service that they are supplying.

Mr Samuel—If you refer to a more recent speech I gave just a couple of weeks ago to the AFR broadband conference, you will see that the whole theme of that speech was about transparency and accountability, about getting some of the facts out on the table so that we actually know where we are going—and that relates to a whole range of issues, including the take-up of broadband in this country; the speeds that are actually being achieved relative to other countries, particularly within the OECD; and issues of how better broadband services might be achieved. I think that some transparency and accuracy of claims would not hurt all around, ranging from some of those that describe our broadband service as ‘a disgrace’ through to those that claim that it is absolutely perfect and that nothing more needs to be done. The truth probably lies within that range.

Senator CONROY—I would like to talk to you about the collapse of the discussions between Telstra and ACCC regarding the company’s plans to roll out a fibre to the node network. I appreciate the comments you made at the opening. There have been a series of public comments on the reasons for the collapse of those discussions, including comments from you. Could you summarise the reasons that those discussions collapsed, from the ACCC’s perspective?

Mr Samuel—The talks relating to fibre to the node started around March this year. They were progressing very satisfactorily between Telstra and officers of the ACCC, dealing with a whole range of issues—which I am sure you will ask us about in a few moments. What essentially occurred was this: towards June or July, we felt that the discussions had potentially reached a stage where there ought to be some public exposure of the proposals that had developed to that point in time, and that was as part of the original understanding between Telstra and the ACCC reached back in early March when the discussions first took place.

Perhaps I should just explain a bit of the time line. The discussions opened, as I indicated, early in March. The original time frame that had been set between the ACCC and Telstra for public exposure of the proposal was to be about the first week of May. Come the first week of May, the proposal did not appear to have been developed far enough for Telstra to release it publicly, and they indicated that they thought that public exposure would not take place until early June. Early June arrived, and they indicated that they thought that towards the end of June would be appropriate. And then, come the end of June, we were put onto a process which did not set any particular time deadlines. Some time towards the middle or end of July, I indicated to Telstra publicly and privately that the ACCC thought it was appropriate that, in order to remove some uncertainty and doubt in the marketplace, the proposal as developed at that point in time ought to be put out into the public domain for examination so that end users, consumers, consumer groups, competitors and others who might be considering seeking access to the fibre rollout could examine the proposal and thus help its development. It was only two or three days after that that the proposal was withdrawn.

We are uncertain as to the reason for the proposal being withdrawn—in other words, for the discussions terminating. In Telstra's own words from Dr Phil Burgess, he indicated on several occasions through June and July that, as far as he was concerned, we had reached '98 per cent' agreement on the significant issues. I will not comment upon his assessment of 98 per cent—I do not think it is appropriate—but those were his words. Therefore we felt that, at the 98 per cent mark, Telstra ought to feel that it was in a position to put the matter out for public exposure and consultation. As I say, Telstra decided at that point in time to withdraw.

Senator CONROY—Would you disagree they were 98 per cent complete? Was it 95 per cent? Was 98 per cent too optimistic?

Mr Samuel—It is not appropriate for me to be measuring percentages. One of our officers wryly observed to me at the point in time that being 98 per cent is like standing outside a locked door: the remaining two per cent is unlocking the door. That could be quite significant.

Senator CONROY—Telstra has produced a summary service description of the access product that it told the ACCC it was willing to offer to competitors, called the high-speed access service. It has made this available on its website?

Mr Samuel—That is right.

Senator CONROY—Is this service description an accurate description of the discussions between Telstra and the ACCC?

Mr Samuel—Yes.

Senator CONROY—Were you able to come to an understanding about what the ACCC would view as acceptable non-price terms of access to Telstra's proposed FTTN network?

Mr Samuel—In general principle, yes. There are a number of elements of the non-price terms and conditions that we are still discussing with Telstra, including some transition arrangements relating to DSLAM installations that have taken place by competitor ISPs and how they might be dealt with. The question is whether any element of the copper network—leaving aside the tails from the nodes in premises that were always going to continue to be used—would continue to be used and thus to what extent those DSLAMs might continue to be available to be used and, where they were not, what transition or other arrangements might be made with respect to those. I think it is fair to say—and I will ask Mr Cosgrave or Mr Dimasi to expand if appropriate—that in general we had reached agreement on matters of principle. There were issues about the number of points of interconnection that had to be dealt with and they were going through a process of development in our discussions, but there did not appear to be any significant matters that would have caused concern other than, as I say, those transition issues in relation to existing DSLAM installations.

Senator CONROY—Without going into any of the details of what the agreements would have been, did these in-principle positions include giving access seekers the ability to tailor the quality of service enjoyed by the customers?

Mr Samuel—That was a principle that we had established earlier on in the discussions with Telstra—that is, that access seekers ought to have a bit stream service that would enable them to differentiate their product from others rather than simply a wholesale resale product.

Senator CONROY—So that was covered off?

Mr Samuel—In principle, I think. I have to say to you, in principle all these issues—

Senator CONROY—I do not want anything more than just an in-principle—

Mr Samuel—I think in principle that was well understood and I do not think we had any fundamental disagreement on those issues. Let me emphasise that this was not a case of the ACCC reaching ‘agreement’. I think I slipped into that language, which I want to move back from. This is a matter of—

Senator CONROY—I am not trying to catch you out, Mr Samuel. I accept the qualification.

Mr Samuel—But I think it is important for the record. What we were heading towards was reaching a position where Telstra could have a reasonable degree of confidence that subject to, as we described it to Telstra, certain amber lights and potentially even one or two red lights what they could put out into the public domain was something that was worthy of putting out for public consultation.

Senator CONROY—The option for competitor points of interconnect at Telstra exchanges? In principle?

Mr Samuel—In principle, yes.

Senator CONROY—A satisfactory discussion of a transition process from a ULL world to an FTTN world? I think you indicated that already.

Mr Samuel—That is correct.

Senator CONROY—Did the ACCC have any serious concerns around these non-price issues of access or did it all essentially come down to a haggle over the price?

Mr Samuel—I do not think there were any serious concerns over the non-price issues. You will ask me about price in a moment, so we will deal with that separately.

Senator CONROY—It sounds like there were, as I think you have put on the record, constructive discussions on the non-price terms of access?

Mr Samuel—That is correct, yes.

Senator CONROY—But access pricing was the biggest stumbling block?

Mr Samuel—No. I would not even necessarily concede that was the biggest stumbling block either.

Senator CONROY—How would you describe the issue of subsidising the cost of services in rural and regional areas? Was that a topic of significant discussion between Telstra and the ACCC?

Mr Samuel—That is a separate issue from the issue of access pricing. Access pricing itself, of course, has a number of factors that are not necessarily related to that issue of cross-subsidy for rural areas. The fundamental factors relating to access pricing were the subject of extensive discussions, and I am happy to comment in principle about those in a moment. The issue of cross-subsidies for high-cost areas was really a separate issue from the fibre proposal because it was never part of Telstra’s proposals—or, should I say, the potential for a stage 2

development was never part of their proposals that rural and remote Australia would be afforded high-speed broadband via a fibre to the node proposal.

Senator CONROY—I will move on now. Given that you have said that you would not describe access pricing as the biggest stumbling block, what would you describe as the biggest stumbling block?

Mr Samuel—It is really difficult, because we have never had fully outlined to us by Telstra what the stumbling block was. We had, on access pricing, reached—I do not want to say an agreement—an understanding in principle as to the fundamental issues: the issues of costs. Clearly there were going to be some debates about forecast take-ups, and that is not unexpected. In terms of rates of return, again the ACCC recognised the necessity for the rate of return to reflect not only the nature of the investment but also the risks associated with the investment. So all those issues, I think, would have been developed very constructively.

There were some issues that needed to be developed, shall we say, a little more constructively than was happening at the time, in relation to the retained copper network—that is, the tails—and what values and what return ought to be provided for in respect of that sunk investment. That was the subject of some extensive discussion, and I am not sure that we have reached full agreement or a proper understanding between Telstra and the ACCC on that issue.

We did get an impression that one of the fundamental factors that might have caused some difficulties in this area was the relationship between ULL pricing generally and the prospective fibre pricing. It is a bit hard to describe it. I know *Hansard* cannot actually describe gestures, like the relationship between hands, so I will also try to describe it in words for the purposes of *Hansard*. The fibre to the node service is a premium service. It does not suffer from many of the technical limitations of ADSL2 Plus and wireless in terms of congestion and distance from the exchange that—

Senator CONROY—Are you saying that ADSL2 Plus is not a premium service?

Mr Samuel—I said it is a premium service relative to other services in terms of the technical—

Senator CONROY—Does that mean premium service in terms of the things that can be delivered across it, or premium service in terms of the continual supply?

Mr Samuel—Actually I gave the answer before. What I was saying was that it was a premium service relative to ADSL2 Plus or DSL and the wireless service because fibre does not suffer some of the deficiencies that we were earlier talking about in terms of congestion, distance from the exchange, bandwidth capacity and the like.

Senator CONROY—But why does that make it a premium service? That is what I am trying to understand. You have introduced the word ‘premium’, and if you live 1.5 kilometres from an exchange and you have ADSL2 Plus, what is the premium difference from fibre?

Mr Samuel—No, as I indicated to you, the premium is in relation to what occurs if you are living further than 1.5 kilometres from the exchange, so that the distance issues become—

Senator CONROY—But that is not a premium issue. That is a distance issue—a geographical, technological issue. It is not a quality or provision of service—

Mr Samuel—Let me put it in these terms. A fibre network means that some of the issues of congestion and distance and slower speeds from those that are otherwise promised become less relevant because of the existence of fibre and the fact that fibre is not subject to some of those distance issues and congestion issues that we have described earlier in our discussion today concerning copper and/or wireless.

Senator CONROY—Sure.

Mr Samuel—But seeing as it is causing you discomfort, I will withdraw the word ‘premium’.

Senator CONROY—I am concerned at the concept that if you live further away from the exchange you should consider that you are getting a premium service when you are just getting the same thing that people living 1.5 kilometres away get. I am just concerned about that concept of ‘premium’.

Mr Samuel—Let us take an example. If you live five kilometres from an exchange, under ADSL, then the likelihood is that you will not be receiving high-speed broadband. Certainly, you will not be receiving the same speed of broadband, it is well acknowledged, as you would receive within 1½ kilometres of the exchange. If, on the other hand, fibre is rolled out to a node, and the distance from the node to the end point of use—that is, the home or place of business—is less than 1½ kilometres, then you would expect to receive the high-speed service all the way through to the end use. Anyway, let us not debate ‘premium’.

Senator CONROY—No, we can debate the concept of premium another time.

Mr Samuel—I have lost track; we will have to rewind.

Senator CONROY—I wanted to move on from that.

Mr Samuel—Yes, I was doing my relatives! Without using the word ‘premium’, let us assume that the provision of a service through fibre to the node provides speeds and a lack of congestion issues relative to an ADSL service—which is my longhand way of describing premium—which give rise to an ability to charge a price that is a premium over—I will have to use those words—what would otherwise be charged for ADSL. Let us assume that that price premium is X per cent, whatever it might be. Now, if you are basing your fibre to the node proposal on an X per cent premium over a base price of ULL of Y, and then ULL pricing is dropped below Y to Z, at a lower level, then clearly it drops that premium back as well and therefore drops the ultimate price at which fibre is charged to a level which, according to some analysis, may well be an uneconomic or a non-viable business case.

So, to put it in its context, sometime in the middle or towards the end of June, the ACCC issued a draft interim decision in relation to ULL which brought the ULL price down by something—and I am using band 2 figures here—in the order of \$4 a month. It may well have been that the dropping of that price had the impact of dropping the business case price that had been assessed by Telstra by a similar amount, which had the impact of raising some question marks over the business viability of that fibre proposal. That is one possibility. I am raising these as speculations, because we do not know.

Senator CONROY—Sure.

Mr Samuel—Another possibility may well have been that, as Telstra further developed its own analysis of costs, it realised that the costs were perhaps greater than initially expected and therefore the returns that it could reasonably expect to receive were not making the business case work. We just do not know. We do not have that information.

Senator CONROY—Thank you for that. Hopefully Hansard captured the hand-waving.

Mr Samuel—Yes. Right hand above the left hand is the only way I can describe it!

Senator CONROY—Does the ACCC believe that the costs of fixed-line telecommunications are the same across Australia, and, generally speaking, does Telstra currently charge a flat \$30 access fee across the country?

Mr Dimasi—No, as far as the ACCC can see, we do not have a reason to believe that the cost of providing the service is necessarily the same throughout the country.

Senator CONROY—And, generally speaking, Telstra does charge a flat \$30 access fee across the country?

Mr Dimasi—I think the access fee that it charges varies across the country.

Mr Cosgrave—Can I just ask you to clarify what you mean by ‘access fee’? Are you talking about a retail charge here or a wholesale charge? What are you talking about?

Senator CONROY—Let us start with wholesale.

Mr Cosgrave—If we are talking about a ULL charge then we are not privy to the individual commercial arrangements, but it is well known that we support a level of aggregation across bands and that Telstra is apparently arguing for—

Senator CONROY—I am just trying to get to that point. That is actually where I am trying to get to. Essentially, there is cross-subsidisation involved? That would seem to have to be the case, logically.

Mr Dimasi—Sorry, you might just need to explain.

Senator CONROY—If it costs different amounts across the country and in general there is a flat fee then some areas are being cross-subsidised by other areas. That is just a simple mathematical issue, not even a technological issue.

Mr Samuel—Yes, but I think we need to understand what we are talking about access to. If we are talking about voice, that is different from ULL. Are we talking about ULL? Because ULL in certain parts of the country is basically a nonexistent concept. It is not relevant.

Senator CONROY—How about, very specifically, FTTN pricing?

Mr Dimasi—FTTN does not exist.

Senator CONROY—I think you indicated there were discussions about it.

Mr Samuel—No, as I think I indicated, FTTN was never part of the plan to apply in terms of rural and remote Australia. The initial footprint—and this was publicly stated by Telstra—

Senator CONROY—No, I understand that; I am coming to that.

Mr Samuel—The initial footprint was in five capital cities and in what I call the more densely populated areas.

Senator CONROY—Well, call it 4½.

ACTING CHAIR (Senator Bernardi)—Senator Conroy, as indicated before, Senator Watson has some questions. I will hand over to him.

Senator CONROY—This is an estimates hearing being held on specific issues. I am just wondering whether Senator Watson has come to ask questions about the specific issues.

ACTING CHAIR—Senator Watson is perfectly entitled to ask questions about this issue of the ACCC.

Senator CONROY—Only if they are relevant to what this hearing is about.

ACTING CHAIR—Senator Watson.

Senator WATSON—I have some concerns which I would like to use this opportunity to bring before you, Mr Samuel, about some anticompetitive pricing practices of Telstra so far as my own state is concerned. I refer to excessive pricing of the wholesale internet bandwidth into Tasmania. As you well know, the situation in Tasmania is that, because of our geographical location, we have always attracted a sort of premium when buying internet bandwidth, and this has been pretty much accepted. But, in the past three months, one of the largest ISPs has been unable to secure any additional bandwidth from any supplier other than Telstra, and now the Telstra wholesale bandwidth costs represent nearly a fivefold increase compared with the cost previously, which is very significant. The belief in Tasmania is that Telstra has artificially inflated the costs over the link to Tasmania with the intent of limiting competition. This is evidenced by the fact that it is now five times more expensive to transmit the best rate cable than the trans-Pacific link to the west coast of the USA, up to six times more expensive than transmitting the fibre length to Perth, a distance of some 3,000 kilometres, and—wait for it—four times more expensive than obtaining bandwidth to Darwin.

One of the concerns that my constituents have—and they are in the course of preparing a submission to you—is that they have been told that it is going to take approximately six months for you to fully investigate the issue and even longer for a resolution to be reached. But, in the meantime, these people will have lost their customers, and there is the problem of redress. Could you provide some assistance to us? You are there to try and stop this sort of behaviour, but the investigation time length is certainly a real problem. What is the use of getting a result that is just going to be a slap on the hand, maybe in two years time, when their business has been really ruptured?

Mr Samuel—As you have been putting the question to me, I have been asking my colleagues whether they have any knowledge of this particular issue, and I am afraid that I do not think any of my colleagues or I have enough information on this to be able to provide you with an answer. If we can take that on notice, we will give you an answer as soon as we possibly can.

Senator WATSON—Yes. The people are in the course of preparing a document, but they say that there is a real urgency about it, and that is why they have asked me to use this opportunity today, because otherwise their business will be wrecked by the time you have an opportunity to investigate and to provide a resolution.

Mr Samuel—If they provide that material to us as soon as they can then we can work on it and obviously take account of the need to do so efficiently and speedily, but unfortunately I do not have any other information.

Senator WATSON—Yes. But in principle it looks terrible. We see you as being there to try and provide a competitive environment. When a player in such a monopoly position can be doing this to wholesale customers, it is appalling.

Mr Samuel—All I can do is undertake that we will look at that very quickly, but we will need to receive the material before us. I am not even aware that we have received any information at all from the parties that you have referred to on this matter today.

Senator WATSON—I could not give the parties' names for reasons of confidentiality.

Mr Samuel—If they can provide that material to us as soon as possible then we will obviously get onto it.

Senator WATSON—Thank you.

Senator CONROY—Just coming back to the issue, I was trying to ascertain whether the costs of fixed line telco are the same across Australia, and we have agreed that they are not. The \$30 is the line rental fee, and that is universal, generally speaking.

Mr Cosgrave—We are talking about retail line rental? I think we gave an answer in relation to wholesale.

Senator CONROY—No, I said we would start with wholesale, and now I am moving on to retail. So, \$30 is universal across Australia, generally speaking. So there has to be some cross-subsidisation taking place, because it does not cost \$30 across the country.

Mr Cosgrave—There are a number of voice line rental products, so I would not necessarily agree with the proposition that there was a single line rental charge, but—

Senator CONROY—I said 'generally speaking'; I was not trying to be absolutely universal. So the reason Australians have been able to enjoy telco services at a consistent retail price, regardless of where they live, is because of the cross-subsidisation. Is that a fair statement?

Mr Samuel—I think we are talking about voice services, primarily, and we are talking about line rentals on voice services, and that is the subject of the universal service obligation, which is provided by government but funded essentially through the other—

Senator CONROY—A consistent retail price across Australia is not just a historical position, though; it is government policy, as far as I am aware. I believe that is the case. The minister has communicated the government's support for averaged retail pricing to the commission? That is correct?

Mr Samuel—Yes, but I am just trying to clarify the difference between voice and—

Mr Dimasi—That is for voice.

Senator CONROY—So, is it fair to say that in practice the price which Telstra is allowed to charge city residents for fixed line service influences the price it is able to charge to rural and regional Australians?

Mr Dimasi—For voice services there is a relationship, yes.

Senator CONROY—Technologically speaking, Telstra's proposed FTTN network replaced large segments of its city fixed line network, didn't it? That was the proposal?

Mr Dimasi—It would substitute fibre for copper for the footprint area, yes.

Mr Cosgrave—Or for part thereof.

Senator CONROY—In 4½ cities—Adelaide was half, apparently.

Mr Cosgrave—Yes, but it was also intended that some portion of the copper network be retained and that services continue to be provided.

Senator CONROY—Yes, I accept that it is not a full replacement. Telco commentator Graham Lynch has written that the FTTN net replaces the PSTN and thus becomes the primary engine of Telstra's fixed line revenues and profits. Is that a fair analysis?

Mr Samuel—I do not think that we could comment on that.

Senator CONROY—So there is a recognition that there is a need for a cross-subsidy in order to fund the costs of providing a network to rural and regional Australia? Is that a fair statement?

Mr Samuel—It would depend upon the nature of the service provided to rural and regional Australia and the costs associated with that service as to whether a cross-subsidy were required.

Senator CONROY—Telstra have claimed that there was an in-principle agreement on this issue with the ACCC. Their website 'Now we are talking' states:

While the principle of providing a subsidy was recognised by the ACCC, the talks reached an impasse when the regulator refused to accept Telstra's actual costs.

I am sure you are aware of the website.

Mr Samuel—I am certainly aware of it. I am not sure that I would be quoting it as a reliable source of information; but that is fine.

Senator CONROY—Telstra are claiming that there was an agreement that you had signed off—well, not signed off on, I am sorry; I retract the 'signed off on' part.

Mr Samuel—As I say, I am not sure that I would be quoting that website, with respect, as a reliable source of information about the relationship between Telstra and the ACCC.

Senator CONROY—It is a Telstra official website. And following some recent commentary about the minister, I understand now it all goes through Mr Burgess for his approval.

Mr Samuel—As I say, I am not sure I would necessarily be claiming it as a reliable source of information about the relationship between the ACCC and Telstra. Let us just accept that in terms of any cross-subsidy there was a debate, and the debate, if we were still talking about the issue, would continue with Telstra at the moment about the question of costs and therefore the appropriate charge that ought to be levied in certain bands. We can get into a whole debate about what these bands are and what they are not and some further discussion we had as to the redelineation or a different delineation of the bands, which have been commonly known as

bands 1, 2, 3 and 4 but which I think we were contemplating as part of this process redefining to take account of what might happen with fibre to the node and the fibre footprint.

Senator CONROY—I appreciate all of that. But this is not crikey.com; this is an official Telstra website, where what goes onto it—

Mr Samuel—Are you asking me to make a comparison about the reliability of those two websites—

Senator CONROY—That is exactly what I am asking.

Mr Samuel—because that might be difficult, Senator.

Senator CONROY—Oh, dear! No wonder you are a sceptic on the web as a solution to cross-media laws. They claim—

Mr Samuel—Is this crikey or ‘Now we are talking’?

Senator CONROY—This is ‘Now we are talking’, an official Telstra website where the contents are ticked off by Mr Burgess. They claim: ‘while the principle of providing a subsidy was recognised by the ACCC’. Is that true or not true? Telstra have made a claim about your position. I would just like you to clarify it.

Mr Dimasi—I would not agree with that expression. I think the ACCC has always agreed that costs should be recovered. That is quite a difficult issue. You mentioned actual costs in different bands. The fact is that the costs that are used by Telstra are generally theoretical costs not actual costs, so there is quite a lot of debate about what the actual costs might be and whether there is or is not a cross-subsidy required and what that might be.

Senator CONROY—So you do not believe there is a cross-subsidy involved.

Mr Dimasi—No, we are not saying that.

Mr Samuel—The problem, Senator, is that this is not a black-and-white issue and it is not capable of a yes or no answer.

Senator CONROY—Whether or not there is a cross-subsidy, whether it is a dollar, there must therefore, by definition, be a black-and-white, yes or no answer, Mr Samuel.

Mr Samuel—No—

Senator CONROY—One cent’s worth of cross-subsidy makes it a cross-subsidy.

Mr Samuel—No, Senator, with respect, it does depend upon the nature of the service that is provided and the manner in which the service is provided and the area in which that service is provided and then the nature of the cost mix. There has been a fair degree of confusion in the public discussion of this that perhaps requires some clarification. For example, we talked in the earliest part of this discussion today about the use of the fibre proposal, the fibre to the node network, in terms of rural and remote Australia. I think I have clarified that it was never, ever intended, even I think in the longer term, that that would have been part of the network and therefore was not part of anything that needed to be costed as far as the so-called cross-subsidy was concerned.

What we are dealing with is that there are developing technologies that are providing alternatives for the provision of high-speed broadband and potentially other services,

including voice services, to rural and remote Australia. At the same time you would be aware from public commentary—but the minister is here to comment on this—that there is a fund that has been established called the Broadband Connect Fund, which is currently the subject of some assessment by the minister and the department of communications as to various proposals for the provision of quality services to rural and remote Australia.

Now, until we know the nature of those services, until we know the nature of the subsidy to come from the Broadband Connect Fund and until we know what the shortfall might then be in terms of those costs relative to the costs of providing, for example, a fibre network or a ULL network in the more densely populated areas of Australia, it is impossible to even answer the question about whether a cross-subsidy is required of the nature that you are describing, let alone attempt to define whether that cross-subsidy, if one is required, is 1c, \$1 or \$10.

Senator CONROY—No wonder you say the two per cent is ‘unlocking the door’, with an answer like that. So, in Telstra’s view, is there a need—

Senator Coonan—Was that a question, a comment or—

Senator CONROY—That was a comment, thanks, Senator Coonan.

Senator Coonan—It was a comment. Okay. We are here for questions.

Senator CONROY—I am glad you are awake!

Senator Coonan—I am glad you are here!

Mr Samuel—Senator Conroy, let me observe, if I might, that the issues I have just described in that answer are so fundamental to this matter that has been the subject of much public rhetoric and debate, whether it is on ‘Now we are talking’ or elsewhere, that I think it needs to be clearly understood. To attempt to set specific figures and dollar amounts for suggested or hypothetical cross-subsidies, in the absence of knowledge of both the nature of the technology that will be used and the costs of the technology, and the level and the extent to which the Broadband Connect Fund will actually provide its own government funded subsidy for the development of that technology and the insulation of that infrastructure in rural and remote Australia—that makes it very difficult indeed for us to deal with whether or not a cross-subsidy is required. That is why I think we are in a state of, shall we say, divergence with Telstra on this particular issue.

Senator CONROY—I would like to explore the commission’s view of the potential declaration of access to Telstra’s new 3G 850 network. There is currently a lot of interest in the ACCC’s intentions with respect to the declaration of this network; I have seen many articles. Current access seekers on Telstra’s CDMA network want to know whether they will be able to get similar terms of access on Telstra’s 3G network. Telstra listed the declaration of this network as a ‘threat’ in its prospectus. What is the ACCC’s view? Are you able to provide the industry with any certainty on this issue?

Mr Samuel—This is not a matter that has been the subject of analysis by the ACCC. I have given a speech or two on that, as has Commissioner Willett. We have indicated that, at this point in time, in terms of the Next G or the 3G network that Telstra has just rolled out and commenced operating, we have not had put before us an issue of declaration of that network either in respect of resale or in respect of roaming. So it is not on our agenda at this time.

Senator CONROY—What is the ACCC's view of the argument that it is not economic for an additional carrier to replicate Telstra's 3G network in rural and regional Australia because the population in those areas would only support a single network?

Mr Samuel—It may well be that there are certain areas of Australia where replication is indeed not possible. But these are issues that we would want to consider in a little more detail than potential public announcements that are being made by some that may have an interest in the ability to roam or to resell in respect of that network. These are not matters that have been brought before us in any significant or considered way by any other party at this time and, therefore, I think it is fair to say it is not—

Senator CONROY—I am talking about the principle rather than whether or not any individual has brought the issue to you. Would this argument—and you have indicated there may be some areas—

Senator Coonan interjecting—

Senator CONROY—You will have to speak up, Senator Coonan; Mr Samuel cannot hear you.

Senator Coonan—I said it would have to be applied; you cannot just answer a theoretical question about principle, Senator Conroy—as much as you might like to get an answer of that kind and then extrapolate from that and misrepresent it.

Mr Samuel—I have mentioned that both Commissioner Willett and I have made a couple of speeches on this subject. Perhaps I could, just for the record, Senator Conroy, give you two paragraphs from those speeches. We said:

The ACCC could only do so—

that is, examine the declaration or the issue of roaming—

after it has held a public inquiry and there has not been a decision by the ACCC that there is sufficient reason to hold such an inquiry.

Importantly, we said:

Any such inquiry would need to determine whether any bottleneck characteristics exist in 3G services, for example, in regional and remote areas. In other words, a focus on whether there is a good case that there are economic impediments to competitors building their own network(s).

I would have thought that that gave an in-principle, high level of certainty to both competitors and Telstra.

Senator CONROY—That is a speech you have given about in-principle positions, so I think I am entitled to ask you in-principle questions about your in-principle statement. Thanks, Senator Coonan, for your help. I want to talk about the argument that is being mounted by some—it is not an argument that I necessarily agree with or disagree with; I am just interested in your in-principle views on it—that it is not economic for an additional carrier to replicate Telstra's 3G network in rural and regional Australia because the population of that area would only support a single network. Would that argument alone justify declaration?

Mr Samuel—I would not want to give an answer based on that issue alone. There are so many factors that would need to be taken into account. This would be a matter for a full public inquiry.

Senator CONROY—Where would you do that? Where would you assess that? Would that be in cities or in regions?

Mr Samuel—As I indicated in the extract that I just read from my speech, it is more likely to be an issue in rural and remote Australia, where there may be—and I underline the words ‘may be’—bottlenecks, because there is a good case that there are some economic impediments to competitors building their own networks.

Senator CONROY—Let me give you a slightly more specific scenario. Would a competitive impact on the ability of access seekers to secure customers in metropolitan areas be relevant? If access seekers were able to obtain access to a mobile network that covered metropolitan areas but they were losing customers in the cities because they could not offer national mobile coverage, would that be justification for a declaration, or would that be part of the considerations?

Mr Samuel—It would be part of the consideration. I do not want to rule things in or out at this time. If this matter became relevant there would be a full public inquiry and a range of factors—I suspect that you have several more you want to raise—would all be taken into account.

Senator CONROY—I am not familiar with the ACCC holding any full public inquiries in recent times. When was the last time you held a full public inquiry?

Mr Cosgrave—The ACCC held a mobile services inquiry in 2003 and 2004 which included the issue of domestic and international roaming. It was a protracted inquiry that related to a whole range of issues in relation to mobile services, including the issue of mobile termination, which is the current mobile service that is regulated and considered in the context of the facts at that time—the issues around domestic roaming. It did not consider, I should add, any issues around the provision of an end-to-end wholesale service.

Senator CONROY—There has been some uncertainty about the approach the ACCC would take to regulating Telstra’s 3G network. It was an issue that was discussed at some length as a risk in Telstra’s prospectus. John Durie thought Telstra was going over the top in highlighting the risk in the prospectus. He noted on 10 October 2006 that, while the ACCC could technically call a declaration inquiry into 3G at any time, ‘Why would the ACCC touch it? The wireless market is competitive and everyone started together.’ Do you think Mr Durie’s sentiments are a reasonable assessment of the ACCC’s thinking?

Mr Samuel—So we have ‘Now we are talking’, crikey.com and now Mr Durie. I am not sure who is the most credible source.

Senator CONROY—I think you are being unfair. Chanticleer has long been considered a column of some note—and you are very popular in it, Mr Samuel.

Mr Samuel—‘Now we are talking’ has also been ticked off by Dr Phil Burgess. So we are comparing John Durie and Dr Phil Burgess, which is an interesting comparison.

Senator CONROY—I accept that point.

Mr Samuel—I think we need to say two things about this. Firstly, it is not possible for us in this context to give you any definitive answers about what might or might not happen with respect to a 3G service and Telstra's Next G service. What we have indicated is that it would be the subject of a full inquiry if that were the course of action determined to take place.

I have indicated in various public comments on this that, with the issue of the declaration of a service such as this, there is a risk of developing what I call 'anti-blinking psychology' amongst major competitors in this area. Let me put it in this context. We have four major competitors in the area of mobile telephony—Hutchison, Vodafone, Telstra and Optus. Three of them had the opportunity to start mobile telephony at the same time and one then followed. We have had 3G telephony available—and Hutchison started approximately 18 months to two years before the others. They have entered into various arrangements for the joint development of what we call 'dumb infrastructure'—towers and the like—and developing their own networks. Each has chosen its own technology, with three of them choosing to proceed with the 2,100 megahertz network and Telstra choosing the 850 megahertz network.

I liken the anti-blinking technology to running a 1,500 metre race: all four of them start at the starting line at the same time, the starting gun is pulled and three of them say to the other one, 'You run the first three laps and we will jump on your back for the fourth lap and go towards the finishing line together.' Anti-blinking psychology can develop if there is a belief that we will declare any network that is developed, on the basis that it enables other competitors to piggyback on the network. It really says to competitors: 'Whichever one blinks first will make the capital investment. Others, do not worry about it because, if you don't blink first, you will simply be able to ride on the back of the party that proceeded first.' That is why we are cautious in providing strong suggestions that Telstra's Next G network, or indeed any other network of that nature, might be declared. On the other hand, as I have indicated, where there are bottleneck characteristics, it may well be that that is appropriate for dealing with that. But that would be particularly in rural and remote areas, where it would be economically unviable for competitors to build their own networks.

Senator CONROY—Do you think that what Telstra has said in its prospectus could merely reflect the ACCC's most recently stated view in its final report on the mobile domestic intercarrier roaming service—the mobile services review published in December 2004—and do the findings of this final report still reflect the ACCC's view? With regard to the potential declaration of roaming onto Telstra's 3G network, it says at page 14 of the final report that:

... the Commission has not included 3G networks within the service description. This does not rule out the consideration of 3G domestic inter-carrier roaming at a future time should it appear that declaration may be appropriate.

Is that still the ACCC's position?

Mr Samuel—I do not think that position actually says much more or less than what I have just quoted to you from the comments we have made in more recent times. I think that is perfectly consistent, except that we have probably been a bit more specific in recent times as to the issues that might lead to declaration.

Senator CONROY—At page 58, the final report also says:

In the Commission's view, national geographic coverage is an important competitive dimension of the market for retail mobile services. Domestic inter-carrier roaming provides a means by which the impact of barriers to nationwide network deployment (spectrum, economies of scale, sunk costs) can be ameliorated, thereby improving competitive conditions.

This makes it sound like the ACCC would view a national mobile network as a major competitive advantage that could justify declaration. Is this still the ACCC's position?

Mr Samuel—I do not think I can elaborate any more on what I have already said. I have given some long answers—relative to my normal habit, you would probably regard them as brief answers, Senator Conroy! I have been trying to say that there is a balance here. The balance is to deal with the bottleneck characteristics that I have described but, at the same time, not induce an anti-blinking psychology amongst Telstra's competitors.

Senator CONROY—I appreciate your anti-blinking psychology. I have not yet discovered it in any of your reports. In your final report—the one I have been quoting from—you go on to say:

... given the Commission's concerns regarding structural features in the markets within which CDMA domestic inter-carrier roaming is supplied, the Commission intends to monitor the terms and conditions for the supply of domestic roaming on CDMA networks over the next 12-24 months and will re-examine the case for declaration if the information it receives suggests that these terms and conditions are unreasonable.

This statement would seem to indicate that the ACCC would monitor the terms in which Telstra voluntarily provided access to its CDMA network, the network the 3G network is replacing, and if these terms become unreasonable the ACCC would consider declaration. Is that still the ACCC's position?

Mr Cosgrave—No, what we said is we would monitor the CDMA. That was a particular technology in place at that time—

Senator CONROY—Yes, but it is being switched off and it is being replaced by an upgraded CDMA.

Mr Cosgrave—It has not as yet, Senator.

Mr Samuel—Through the period of the coming 12 months, prior to its being switched off in 2008, we will be monitoring that situation.

Senator CONROY—Telstra does not seem to want to voluntarily provide access to its 3G network. That is the indication, certainly publicly. Are you aware of that?

Mr Samuel—Are you informing me or—

Senator CONROY—I am asking you if you are aware that that is their view.

Mr Samuel—I am aware that that is their public commentary.

Senator CONROY—Finally, and most explicitly, this report I am quoting from said:

... the Commission proposes to monitor developments with respect to the provision of domestic inter-carrier roaming services, and may initiate a further inquiry should it receive information indicating that declaration of a 3G domestic inter-carrier roaming service may be appropriate.

In light of this statement, do you think it was reasonable for Telstra to list the threat of a declaration of its 3G network as a risk in its prospectus?

Mr Samuel—I do not think it is for us to make a comment on that. That is a matter for Telstra and the Australian securities commission.

Senator CONROY—They are sitting right behind you. It's all right, they're not coming for you!

Mr Samuel—I noticed my colleague Mr Lucy is sitting there.

Senator CONROY—I just did not notice any anti-blink sentiments expressed in this report at any stage. I have gone through it and I have quoted it extensively.

Mr Dimasi—Senator, it is where we refer to dynamic efficiency and investment. That is what that means.

Senator CONROY—Thank you for clarifying that. I have some other questions but I am conscious of the time and I will put them on notice. Merry Christmas to you all.

CHAIR—Thank you very much, Mr Samuel, and other officers of the ACCC. I am sorry I was not able to be here because of business detaining me in the chamber; no discourtesy was intended. I add my felicitations to those of Senator Conroy for the Christmas season.

Mr Samuel—The very best for the festive season to you both and to your colleagues.

[4.49 pm]

Australian Securities and Investments Commission

CHAIR—I welcome to the table Mr Lucy, the Chairman of the Australian Securities and Investments Commission, and the Minister for Finance and Administration, Senator Minchin. Mr Lucy, do you want to make an opening statement in relation to the matters before us?

Mr Lucy—I do not, thank you, Chair.

Senator CONROY—Last time, Mr Lucy, we were discussing ASIC's involvement in the preparation of the T3 prospectus, and you indicated that ASIC officers were involved in a dialogue between solicitors acting for Telstra and the government during the preparation of the prospectus. I would like to return to that, as we adjourned rather than risk Senator Minchin's pet project, which was fine.

Senator Minchin—I appreciate that, thank you, Senator Conroy.

Senator CONROY—I was seeking to ascertain who initiated the contact over the dispute over the form of words to do with the regulatory issues in the Telstra prospectus—that specific issue. I appreciate that last time you said there was ongoing dialogue for many months just in a generic sense, but I want to know who initiated the contact over that dispute regarding the form of words.

Mr Lucy—Which dispute are you referring to?

Senator CONROY—The dispute about the statements around Mr Cousins. It was widely reported in the newspapers that ASIC were involved in discussions.

Mr Lucy—In respect of Mr Cousins, it was not ASIC that precipitated the discussions.

Senator CONROY—I am asking who did.

Mr Lucy—I am not able to say whether it was the adviser representing the government or Telstra or the other independent adviser who communicated, but it certainly was not ASIC communicating with the advisers.

Senator CONROY—I did ask this sort of question three or four weeks ago. I am surprised you have not had any briefing on it since then, given I was quite specific in my question of a few weeks ago.

Mr Lucy—My recollection is that it was to do with the communications more broadly; I did not realise it was particularly to do with Mr Cousins.

Senator CONROY—As I said, two or three issues arose. I mentioned the regulatory issues.

Mr Lucy—There were numerous communications between ASIC and the advisers on a whole range of issues. But what I can do is confirm that it was not ASIC that initiated those communications.

Senator CONROY—I would be surprised if it was, Mr Lucy; I am just trying to get to the bottom of who it was. Are you able to take that on notice and advise us—

Mr Lucy—Yes, certainly.

Senator CONROY—who dragged you into it?

Mr Lucy—We were not dragged into it, Senator.

Senator CONROY—You said that someone contacted you.

Mr Lucy—Yes, but that does not mean that we were dragged into anything. There are lots of instances—

Senator CONROY—Refereeing an argument about the wording of a prospectus to do with Mr Cousins?

Mr Lucy—We were not involved in any refereeing on any matter.

Senator CONROY—So what were you doing in the discussions around Mr Cousins? Were you just having a cup of tea?

Mr Lucy—No, there were a number of matters in a very complex prospectus where our views were sought, and we provided them in the normal course, as we would in such a process. But at no point did we participate in anything that might be described as acting as a referee.

Senator CONROY—Okay. I have set you off on a defensive path when I did not intend to. What I am trying to understand, because we discussed it at the last hearing before we came to the Telstra issue, is the role ASIC normally plays in issuing a prospectus. It is a quite limited role.

Mr Lucy—Yes.

Senator CONROY—I am trying to understand in what way you were involved in this particular prospectus and the advice—if I can use the word ‘advice’, given that you did not

like me using the word 'refereeing'. I am happy to use any phrase you like, but I am seeking to understand your involvement in the discussions around regulatory issues—and that is a large heading in the prospectus. I am not sure if Mr Cousins fell within the regulatory issues; I suspect he was a different part of it. I would like to know what your involvement was with regard to those two parts in particular.

Mr Lucy—In the first instance, around May 2005 we were contacted by Freehills, the firm of solicitors, indicating that they wished to have dialogue regarding what regulatory issues might exist in a prospectus such as the T3 prospectus. In particular, in August 2006 we met again with all the advisers on a topic that they describe as a 'flat plan', which in essence is almost a skeleton as to what issues may be needed to be inserted into a prospectus—questions and answers, different sorts of reports and so on. Because of the nature of the prospectus and the very high level of public interest and also consistent with our responsibilities under the law to facilitate business by providing regulatory certainty—and also, in our view, it clearly being in the public interest for ASIC to engage in pre-vetting—we undertook through the process to provide commentary as to whether there were issues with the various iterations of the prospectus that would cause us any regulatory concern. That process continued. There was regular dialogue leading up to the release of the prospectus on the Monday morning.

Senator CONROY—I will come to exactly when you finished up in a moment. But I am interested in your description of 'whether there were any regulatory issues or commentary that might cause us concern'. What exactly do you mean by that?

Mr Lucy—We are talking in a general sense about any prospectus—whether there are statements or omissions in a prospectus that we would anticipate to be provided in a different manner. Clearly what we are looking to do is to ensure that the material provided to investors enables them to form informed views. We are looking for consistent presentation of material, and that is the sort of thing which we are typically looking for in playing our role.

Senator CONROY—How can you know about an omission? I understand if you are given a set of words and you are asked to make a judgement on a set of words—

Mr Lucy—Our role is very definitely not to conduct that of an independent, as it were, auditor. Therefore, we do not have an inquiry to search as to whether everything that is contained in the document should be contained in the document. Inevitably, one develops a level of knowledge as you go through the process; therefore, having the benefit of that knowledge, if there is something you think should be contained in that prospectus and it is not then you would naturally raise it.

Senator CONROY—So there was nothing, omitted or included, in the prospectus, as it was issued, that caused you concern?

Mr Lucy—As far as we were aware, there was nothing in that prospectus that caused us concern.

Senator CONROY—How many hours did ASIC officers spend ensuring regulatory certainty for the government and Telstra?

Mr Lucy—I would like to take that on notice, because I imagine you are looking for an aggregate number of hours.

Senator CONROY—I did not think you would be able to answer that. I am looking for an aggregate number of hours.

Mr Lucy—Quite a considerable number of hours.

Senator CONROY—I am sure it was. It was the biggest float in the country.

Mr Lucy—And complex.

Senator CONROY—I understand that. I would like to know aggregate hours and who was involved. Were you involved, Mr Lucy? Were you dragged in? I apologise; was your advice sought?

Mr Lucy—I had limited involvement.

Senator CONROY—Mr Cooper?

Mr Lucy—I do not believe he had any involvement.

Senator CONROY—Mr D'Aloisio would not have started yet, would he?

Mr Lucy—Not at that time, no.

Senator CONROY—From a commission perspective, you are the only one who had any involvement?

Mr Lucy—Yes. Malcolm Rodgers, however, in his capacity as Executive Director, Regulation, certainly had an involvement but, frankly, it was in that role, as distinct from being an acting commissioner.

Senator CONROY—I appreciate that. I would like a breakdown of the hours and the costs. What are the man-hour costs of all ASIC's involvement?

Mr Lucy—For the purposes of costing, if we use how we would typically cost a new policy proposal, is that satisfactory?

Senator CONROY—I would like to know what the hourly rate, for instance, for Mr Rodgers is.

Mr Lucy—We do not have an hourly rate.

Senator CONROY—He gets paid, so I am sure you are able to work out what he is worth per hour. I am happy if you want to inflate it. I do not mind that.

Mr Lucy—Based on his salary cost then I am happy to provide that, if you wish.

Senator CONROY—That is probably a lower figure, which is why you are now very excited. Can I have it costed both on the suggestion you made and on the number of person hours?

Mr Lucy—Yes.

Senator CONROY—Were ASIC involved in the two previous Telstra sales? I appreciate that you were not there.

Mr Lucy—I expect so but, again, to provide an authoritative answer I should take it on notice.

Senator CONROY—I have just been looking at ASIC's website and there are a number of upcoming offerings and announced offerings. I wondered whether you had been personally involved in Arafura Pearls, Liontown Resources, Natural Fuel, Shaw River, AMP Capital and Bluefreeway. Are any of those familiar to you? Have you been consulting on those?

Mr Lucy—No, I have not personally been involved. But, as you know, the number of prospectuses which we would describe as a pre-vet is indeed a fairly small number.

Senator CONROY—What about Goodman Fielder? They are a fairly large company.

Mr Lucy—No.

Senator CONROY—They have an announced offering. I thought you might have helped with them. What about Timbercorp and Insurance Australia? Have any of those come across your desk?

Mr Lucy—Not mine, no.

Senator CONROY—Was the prospectus changed as a result of ASIC's advice? Were any of the iterations changed following ASIC's advice?

Mr Lucy—No. Again, in a process such as this, there are numerous iterations.

Senator CONROY—So you were no help at all?

Mr Lucy—I think the point you suggest is whether it had been changed because of our intervention.

Senator CONROY—I said advice, not intervention.

Mr Lucy—Okay. It really does not work like that. I think it is typically a situation where perspectives are introduced by different parties: the vendor, the company, the government and so on. Therefore you have different perspectives.

Senator CONROY—Did you or any ASIC officers offer any views? Did you just sit there and nod or shake your head?

Mr Lucy—That is not the question. The question was whether our role caused any changes—in other words, did it get to the point where we needed to make a statement such to cause a change? That is in essence the question you are raising.

Senator CONROY—Did you nudge them in any directions?

Mr Lucy—No. We certainly provided views and in all instances those views were accommodated to our satisfaction.

Senator CONROY—What were the views that you provided?

Mr Lucy—Me?

Senator CONROY—The commission. If you want to start with yourself, I am happy with that.

Mr Lucy—I was involved in only two areas and both of them involved discussion between myself and the secretary of the department of finance. One was in late September and the other one was in early October. Both matters were raised in the essence of a head's up and

both matters were understood and reflected upon by Dr Watt. There was no need at any point for ASIC to participate further on those issues.

Senator CONROY—Mr Cousins came onto the scene fairly late when the government announced his appointment. Were you involved in any of those discussions yourself?

Mr Lucy—There was no need for me to be involved in respect of any matter to do with Mr Cousins.

Senator CONROY—Were any other ASIC officers involved in discussions about Mr Cousins?

Mr Lucy—We were involved in the discussions, yes.

Senator CONROY—What was the context of your involvement in the discussions about Mr Cousins?

Mr Lucy—There was dialogue between the advisers as to how best to describe the nomination from the government regarding his involvement on the board of Telstra, and we participated in that discussion. Again, I stress that at no point did we need to further participate in a manner to cause any changes or adjustments to any wording.

Senator CONROY—If you are embedded in the process, by the time it gets to its final iteration, of course you can say you have not caused it to be changed; you are embedded in the process. It is like a newsman in Iraq during the Gulf War.

Mr Lucy—No. When you are embedded in a discussion such as this, you do not always get your point of view accepted. That is the key. If we had a view which had not been satisfactorily—

Senator CONROY—Are you seriously suggesting that if you expressed a point of view that was negative that the parties would continue down that path?

Mr Lucy—It is up to them. It is their prospectus. In the normal course, one would reasonably expect that they would have a fairly serious view of the regulator's perspective or view on an issue.

Senator CONROY—The point of them asking you to come is so that you will have no concerns. If you sit there and say, 'We have concerns'—and I mean generic—then surely they are taking your advice. You cannot possibly suggest that they do not listen.

Mr Lucy—Again, as I said, it is not quite as simple as you describe. You used the word 'concern'. It is really a matter of putting a perspective on the table. In most instances, indeed, in any dialogue backwards and forwards in regard to something like the preparation of a prospectus, so much of it is a matter of putting one's perspective on the table and that perspective is considered and tossed around. It is more an issue of putting our perspective as distinct from laying down a particular concern.

Senator CONROY—Sure. Coming back to a phrase borrowed from the US recently by Mr Downer, how did you know what you did not know? Given that you were not part of the prospectus intimately, how do you know that nothing was omitted that would cause you concern? How do you know what you don't know?

Mr Lucy—The document was issued by the government and therefore is the prime responsibility of the government, and clearly it had content provided by Telstra—Telstra was a participant in the prospectus. Our role is not to independently verify. Our role which we undertook was essentially a pre-vet which, in essence, provided a level of certainty so that the parties knew that we would not stop the prospectus once it was issued.

Senator CONROY—Sure. But you made the point in your introduction about what the role was of your pre-vet, about inclusions and omissions.

Mr Lucy—Yes, quite so.

Senator CONROY—And you have gone on to say that the prospectus caused you no concern.

Mr Lucy—Yes.

Senator CONROY—You see, I may be going to refer to you a matter that was omitted. My concern now is that you are hopelessly compromised by being involved—and I do not mean you personally. I mean ASIC are so hopelessly compromised by ticking off on the issue of omissions that as the corporate watchdog in this country you are not going to be able to vet your own work.

Mr Lucy—Senator, I think you are being quite inappropriate in your use of words. I have not said that we signed off on any omissions at all.

Senator CONROY—No, and I know you do not, so I asked you that question—

Mr Lucy—The point that you were just suggesting is that therefore we could not, as it were, consider an omission because we had in essence signed off—

Senator CONROY—I did not say ‘signed off’. I was borrowing your words exactly, to be precise, Mr Lucy. I was talking about you having no cause for concern, which is what you said earlier about this prospectus—

Mr Lucy—Yes.

Senator CONROY—after being involved in a process where you were happy there were no omissions.

Mr Lucy—I did not say that we were happy that there were no omissions.

Senator CONROY—I asked you: how do you know what you don’t know?

Mr Lucy—And I have said on a number of occasions—

CHAIR—Mr Lucy, can you just say what you want to say so you can get it on the record. I am sure Senator Conroy will not mind. I have been listening to the exchange and I do not want there to be any raggedness on the record leaving doubt about what your position is. Can we please let Mr Lucy say, without interruption, what he wants to say and then you can ask your next question, Senator Conroy.

Mr Lucy—Thank you for that, Chairman. I think the point again is to state our role in the Telstra T3 prospectus. We undertook a pre-vetting role because we felt with the prospectus it very much was in the public interest for there to be a level of certainty as far as whether or not the regulator—

Senator CONROY—Isn't it in the public interest for all prospectuses?

Mr Lucy—Of course it is, but it is not necessarily in the public interest for ASIC to undertake a pre-vetting. In 2000 the parliament changed the requirements as far as prospectuses—

Senator CONROY—Absolutely; I support that.

Mr Lucy—So it is typically for a large prospectus and/or a prospectus where there is a high level of community interest that we, at taxpayer expense, would indeed undertake a pre-vetting process. We did that in respect of the T3 process. Typically that involves, having regard to the material that is provided to us, making sure that in our view there is a consistent presentation of the facts; and to the extent that we are able to apply our knowledge, based on what we know that has been accumulated through the process, we look to see whether or not there are any obvious omissions. Our process, though, does not undertake independent verification and independent audit.

Senator CONROY—Thanks, Mr Lucy. I look forward to the answers on notice. Merry Christmas.

Mr Lucy—The same to you.

CHAIR—Thank you very much, Mr Lucy. I add my felicitations to those of Senator Conroy.

Mr Lucy—I have not written but congratulations on your SC.

CHAIR—Thank you very much, Mr Lucy. I might say that Mr Cooper did send me a letter, which I was very pleased to receive.

Mr Lucy—I am sorry, I just frankly have not got around to it. I did read about it and I was very pleased for you.

CHAIR—Thank you very much for those kind words. Have a happy Christmas. The supplementary estimates for 2006 are now concluded.

Committee adjourned at 5.09 pm