Chapter 3

Other issues

3.1 The terms of reference required the Committee to consider three other issues, each of which is discussed in turn below:

- the role of the ACCC;
- the role of the ACMA; and
- the proposed Communications Fund.

The role of the ACCC

3.2 The Committee was required to consider the ACCC's role under the legislative package with particular reference to two issues: the requirement to consider the costs and risks of new infrastructure investment when making access decisions; and its power to make procedural rules.

Considering the costs and risks of new infrastructure investment when making access decisions

3.3 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, said in her statement, *Telecommunications for the Future*, on 8 September 2005:

> An issue of concern to investors in new telecommunications networks is whether the access regime sufficiently takes into account the uncertainties and risks of investing in those networks. The Government recognises that the access arrangements must balance the needs of access seekers with the need to maintain adequate incentives for investment. The access arrangements must not only provide certainty but must also recognise that investors risk their capital and are entitled to returns on their investments.[1]

3.4 Schedule 9 of the Competition and Consumer Issues Bill amends section 152AB of Part XIC of the TPA. This section sets out the objects of Part XIC, which guide the ACCC when it makes regulatory decisions under the telecommunications access regime. Subsection 152AB(1) provides that the object of the Part is 'to promote the long-term interests of end-users of carriage services or of services provided by means of carriage services'.

3.5 According to the Explanatory Memorandum, the proposed amendments would clarify the meaning of long-term interests of end-users in two ways:

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1 *Telecommunications for the Future,* p. 7.

- by making it clear that it is necessary for the ACCC to consider the encouragement of investment in future infrastructure, and alternative infrastructure, in addition to current infrastructure (Items 1 – 5); and
- by making it clear that when the ACCC considers the incentives for investment in infrastructure, it must also consider the risks that are involved in such investment (Item 6).[2]

3.6 This Schedule is designed to clarify the current ACCC practice and provide greater certainty to new investors.[3] Under the change, the ACCC will be required to take account of the costs and risks of new network investment when making decisions about access pricings, accepting or rejecting access undertakings or granting exemptions from the access regime.[4]

3.7 Mr Graeme Samuel, Chairman of the ACCC, explained:

> Part XIC does not currently stipulate that the ACCC must have regard to the risks and issues associated with potential investments in new infrastructure. The objects clause in part XIC will be amended accordingly. I should note, however, that the ACCC considers that it already takes account of such issues in the long-term interests of end users test.[5]

3.8 Some submissions and witnesses expressed concern about this Schedule. For example, Mr Ross Kelso submitted that:

> There is no need to amend Part XIC of the TPA to create greater certainty for investment in future networks because existing mechanisms of assessment adopted by the ACCC are adequate and the justification for biasing the LTIE [long-term interests of end-users] test in favour of such investment is flawed.[6]

3.9 AAPT submitted that the current regime adequately compensates for investment and risk. AAPT further argued that these amendments were not a 'minor clarification', but rather a fundamental change. AAPT concluded by recommending that Schedule 9 be deleted from the Bill.[7] In particular, Mr David Havyatt, Head of Regulatory Affairs at AAPT, was concerned the provision could mean that:

> … every regulated service that is in place in the regulatory regime—would immediately be recontested by Telstra. They would take the issues to the

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2 *Explanatory Memorandum*, p. 71.

3 *Explanatory Memorandum*, p. 71.

4 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, *Telecommunications for the Future*, 8 September 2005, p. 7.

5 *Committee Hansard*, 9 September 2005, p. 5.

6 *Submission 12*, p. 1.

7 *Submission 7*, p. 5.

> Australian Competition Tribunal and they would be arguing for prices that are as much as twice the existing interconnection prices.[8]

3.10 Mr Havyatt explained further:

> … there will be an expectation by a review body that the ACCC should have changed its approach to pricing services as a mere consequence of the fact that you have made the amendment, irrespective of whether or not that was the intention.[9]

3.11 Similarly, the CCC agreed that this amendment could 'have the consequence of increasing access prices to Telstra's existing network.'[10] Mr Forman, Executive Director of the CCC, explained his view that this amendment:

> … will allow Telstra to go back to some of the services that are already made available, such as basic telephony interconnection, and argue that there should be a recalculation of the pricing principles. We have not formed a view that that is necessarily the case; we just think that there is the risk there ... [11]

3.12 However, a representative of DCITA explained that:

> This provision, from our perspective, is intended to clarify that investment risks, particularly those of new investments, are taken into account. We do not consider this to be a substantive change. It is simply making it clear that, at a time when investment in next generation networks is developing apace, the risks associated with those investments are considered.[12]

3.13 The Explanatory Memorandum also states that the intent of these parts of the legislation is to clarify, rather than to fundamentally change, the way the ACCC considers the long term interests of end users.[13]

3.14 Other submissions, including Optus and Vodafone, supported this amendment.[14] For example, Mr Paul Fletcher of Optus stated that that he did not have any concerns about these provisions of the Bill:

> It seems to us to be sensible … we think that the ACCC today has regard to investment risk in making its pricing decisions. We think that this simply makes it a little more explicit in the legislative framework.[15]

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8 *Committee Hansard*, 9 September 2005, p. 27; see also *Submission 7*, p. 5.

9 *Committee Hansard*, 9 September 2005, p. 45.

10 *Submission 6*, p. 7.

11 *Committee Hansard*, 9 September 2005, p. 45.

12 *Committee Hansard*, 9 September 2005, pp 84-85.

13 Explanatory Memorandum, p. 71.

14 Optus, *Committee Hansard*, 9 September 2005, pp 44-45; Vodafone, *Committee Hansard*, 9 September 2005, p. 44; see also ATUG, *Committee Hansard*, 9 September 2005, p. 26; CEPU, *Committee Hansard*, 9 September 2005, p. 30.

3.15 Similarly, Mr Peter Stiffe from Vodafone welcomed the provisions:

> As an infrastructure investor we actually welcome the clarifications that have been made. The bill is not just about Telstra; there are a lot of other investors' interests at stake as well.[16]

Procedural Rules

3.16 Schedule 7 contains amendments to allow the ACCC to make rules, known as Procedural Rules, providing for the practice and procedure of the ACCC in performing its functions and exercising its powers under Part XIC. The existing provisions in Part XIC that provide for the practice and procedure of the ACCC under that Part would continue to apply unless, and until, the ACCC makes Procedural Rules that modify or displace the operation of the current provisions.

3.17 The purpose of the proposed amendments in Schedule 7 is to address concerns that the current provisions in Part XIC do not provide the ACCC with sufficient discretion to determine its own procedures, to avoid delays caused by procedural obligations and to respond to changing activities in the industry.

3.18 The operation of the access regime is detrimentally affected by the problems of delay and 'gaming' of the regulatory arrangements in relation to the procedures and processes of the ACCC, as well as substantive issues. This has meant that the indicative six-month timeframe for the consideration of access exemption applications and access undertakings introduced in 2002 has rarely been met, and is often extended by considerable periods, because of these delays.

3.19 The Procedural Rules would enable the ACCC to determine how to prioritise consideration of access disputes and access undertakings and the factors it would consider in doing so. The Procedural Rules would not affect the current provisions in Part XIC that provide for decisions to be made in relation to access exemptions and undertakings in the indicative six-month time limit wherever possible.[17]

3.20 Criticism of Schedule 7 came primarily from the large telecommunications infrastructure companies. Mr Paul Fletcher from Optus noted:

> In relation to the changes to the ACCC's powers, we are concerned that the ACCC will potentially be able to change the rules of the game in midstream on undertakings which are currently being considered by the ACCC. Optus have an undertaking before the ACCC on mobile termination and we would want clarification that the changes are not intended to have retrospective effect.[18]

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15 *Committee Hansard*, 9 September 2005, p. 44; see also Optus, *Submission 16*, p. 6.

16 *Committee Hansard*, 9 September 2005, p. 44.

17 *Explanatory Memorandum,* pp 48-49.

18 Mr Paul Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 33.

3.21 Similarly, Mr Peter Stiffe from Vodafone told the Committee that the ability of the ACCC to reject an access undertaking simply because it asked for information within a specified timeframe, which was not furnished on time, was of concern. And that:

> … this is especially concerning, given that the commission believes that at the moment it can acquire information and analysis that is very broad and that may not actually currently exist. We do not understand why it needs this new power when it can already request such information and can already make its own judgments about how to treat an access undertaking in the event that the information cannot be supplied or is not supplied by an access provider.[19]

3.22 Mr Stiffe went on to argue that:

> The second issue for us seems to be a relatively small part of the bill but it appears now that the ACCC can defer consideration of an access undertaking. It is not exactly clear under what circumstances it can defer that consideration but we consider it to be quite concerning if it is able to do so because it moves the regime further away from the idea of being able to establish access undertakings as a means to set prices in the industry.[20]

3.23 Ms McKenzie outlined Telstra's concerns in regard to the ACCC's procedural rules:

> Under the competition and consumer bill, the ACCC is being given the right to write its own procedural rules, including in some cases rules with no requirement to provide procedural fairness. This gives the regulator expanded powers to interfere in crucial issues impacting Telstra and the wider industry, leaving us with very few avenues of appeal. The bill appears to require us to give away to our competitors, whenever they ask, value added services in which we have invested. Why would anyone invest in these circumstances?[21]

3.24 In contrast, Mr Tom Amos, from ATUG raised a concern, that as Telstra had indicated that it would more readily pursue legal appeals to regulation, the ACCC should be given sufficient powers in regards to procedural rules:

> … a power has to be established by which the ACCC can determine and amend, in consultation with industry, these procedural rules. ATUG is concerned, given the recent statements by Telstra with regard to exercising a more legally based approach to regulation, that any ACCC attempts to develop procedural rules will lead to court action rather than speedy

19 Mr Peter Stiffe, Vodafone, *Committee Hansard*, 9 September 2005, p. 34.

20 Mr Peter Stiffe, Vodafone, *Committee Hansard*, 9 September 2005, p. 34; see also Vodafone, *Submission* 9.

21 Ms Kate McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 67.

> regulatory action and outcomes which the industry presented and supported from the very beginning, with ACIF and self-regulation.[22]

3.25 The ACCC's view on the provisions that would allow it to make procedural rules was positive. Mr Samuel said:

> … the empowerment of the ACCC to make procedural rules in relation to access disputes should enhance the process and efficiency of dealing with those matters and provide for greater certainty. As I indicated in my opening comments, it will also minimise the ability by those involved in disputes to game the process.[23]

New penalties for breach of the competition rule

3.26 Schedule 4 of the Competition and Consumer Issues Bill increases the penalty that may apply to a body corporate for a breach of the competition rule in Part XIB of the TPA.

3.27 Currently, the maximum penalty for breach of the competition rule for a body corporate is $10 million for each contravention and $1 million for each day that the contravention continues (subsection 151BX(3)). Schedule 4 to the Bill amends section 151BX to increase the penalties for breach of the competition rule. The penalty for a body corporate would continue to be $10 million for each contravention and $1 million for each day for the first 21 days during which a breach continues. However, under the proposed amendments, where a breach exceeds 21 days, the penalty would be $3 million for each day the breach continues.[24]

3.28 The ACCC, and other witnesses, welcomed the increased penalties under Part XIB.[25] Ms McKenzie from Telstra was not so welcoming of these provisions:

> The penalties for certain anticompetitive conduct have increased from $1 million a day to $3 million a day. When this is put in the context of a regime that is very discretionary, it is like making the rules of the road vague and then tripling the fines for breaching them.[26]

3.29 In contrast, the CCC submitted that:

> ... the increase in the maximum daily fine only after a competition notice has been in place for 21 days is, in practice, meaningless. The ACCC has indicated to a Senate committee that it does not believe that a court would ever apply the maximum fine, and that it would find it difficult to

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22 Mr Tom Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 26.

23 *Committee Hansard*, 9 September 2005, p. 10.

24 *Explanatory Memorandum,* p. 44.

25 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 9 September 2005, p. 5; see also Mr Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 26.

26 *Committee Hansard*, 9 September 2005, p. 67.

successfully mount a case under the competition notice arrangements under any circumstances.[27]

3.30 Ms Karen Lee suggested that the penalties under section 151BX should:

> … be determined by reference to a set percentage of turnover as is done in the UK and by the European Commission. Using this formulation avoids the problem that the increased amount of fines stipulated in the Bill may cease to have any deterrent effect over time.[28]

3.31 According to the Explanatory Memorandum:

> … the existing penalties for a breach of the competition rule are not considered to provide sufficient deterrent because it is open to larger telecommunications providers to weigh the potential financial benefit of breaching the competition rule against the possible financial penalty, and to knowingly take action in breach of the competition rule if the financial benefit is greater than the financial detriment. Increasing the size of the penalty after 21 days will give the carrier or carriage service provider a greater incentive to rectify its conduct expeditiously in order to avoid the possibility of this significantly increased penalty.[29]

The Committee's view

3.32 The Committee considers that the role of the ACCC under the proposed package of legislation is broadly appropriate. The Committee accepts that the amendments to objects of Part XIC of the TPA will clarify the current ACCC practice and provide greater certainty to new investors.

3.33 Experience with the access regime has demonstrated that provisions in Part XIC that provide for the ACCC's procedures can sometimes be used to frustrate the objective of timely decision making. Concerns have also been raised about a lack of certainty in the procedures the ACCC follows in considering access undertakings and resolving access disputes. Schedule 7 goes to the heart of these issues.

3.34 The Committee also acknowledges the evidence received which welcome the increased penalties for breach of the competition rule in Part XIB of the TPA.

The role of the Australian Communications and Media Authority

3.35 The terms of reference required the Committee to consider how the legislation affected the role of the ACMA, with particular reference to two issues: the provision of additional enforcement powers, and the improvement of the effectiveness of the telecommunications self-regulatory processes by encouraging greater consumer representation and participation in the development of industry codes.

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27 *Submission 6,* p. 3.

28 *Submission 13*, p. 4.

29 *Explanatory Memorandum,* p. 4.

3.36 Mr Chris Cheah, Acting Deputy Chair of the ACMA, outlined the changes to ACMA's role. As well as the two functions mentioned above, the ACMA will have functions relating to the independent review of telecommunications services:

> We now have two defined roles: firstly, to assist the Regional Telecommunications Independent Review Committee—the RTIRC—which may include information, advice or resources and facilities, including making secretariat services and clerical assistance available, and, secondly, to provide advice to the government about the recommendations of the RTIRC which must be considered by the government in its response to the RTIRC's recommendations.[30]

3.37 The bills contain other changes to the ACMA's role:

> We also have some other involvement in future-proofing measures, which include an increased monitoring and enforcement role in relation to the circumstances where a service provider seeks an exemption from the CSG [Customer Service Guarantee] for circumstances beyond their control; the development of a voice-quality strategy; the provision of advice from the ACMA to the minister about Telstra's compliance with the local presence plan licence condition and annual reporting requirements; and a review of the existing industry obligations to provide information to consumers, including a review of compliance.[31]

Provision of additional enforcement powers

3.38 As the Minister stated:

> The Government is extending ACMA's powers by providing it with greater flexibility to respond to breaches by carriers and carriage service providers of their regulatory obligations.[32]

3.39 Under Schedule 10 of the Competition and Consumer Issues Bill, the ACMA will be able to accept enforceable undertakings from companies to ensure compliance with the Telecommunications Act and the TCPSS Act. The undertaking will state that a person will take specified action directed towards ensuring that there will be no such contraventions (proposed section 572B). These undertakings will be enforceable in the Federal Court (proposed section 572C).

3.40 The Explanatory Memorandum notes that the ACMA currently has powers to issue formal warnings and remedial directions and to commence proceedings in the Federal Court to recover civil penalties.[33] However, there is no express power to accept enforceable undertakings, unlike the ACMA's express power under the *SPAM*

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30 *Committee Hansard*, 9 September 2005, p. 12.

31 *Committee Hansard*, 9 September 2005, pp 12-13.

32 *Telecommunications for the Future*, p. 8.

33 Explanatory Memorandum to the Competition and Consumer Issues Bill, p. 73.

Act 2003.[34] Such a power would mirror the ACCC's powers under the *Trade Practices Act 1974* (section 87B).

3.41 Mr Cheah stated that the ACMA welcomed the enforceable undertakings power:

> … as an efficient enforcement tool that avoids the costs and delays that may occur where court action is the only other available mechanism.[35]

3.42 He told the Committee the strength of the enforceable undertakings power was its flexibility and explained that, potentially, it could lead to positive outcomes for users and consumers affected by the relevant breach.[36]

3.43 The Committee did not receive any evidence opposing the grant of this additional power to the ACMA.

Improvement of the effectiveness of self-regulatory processes and the development of industry codes of practice

3.44 Telecommunications industry bodies are almost entirely reliant on funding from voluntary membership fees and, as the Minister stated, 'It is becoming increasingly difficult for these bodies to meet the costs of developing comprehensive consumer-related industry codes of practice from these fees.'[37]

3.45 Schedule 3 of the Future Proofing Bill amends the *Telecommunications Act* to allow the ACMA to reimburse industry bodies and associations for the costs associated in developing consumer-related industry codes. In turn, the ACMA will be able to recoup these costs from telecommunications carriers. The Carrier Licence Charges Bill increases the maximum amount of charges that may be imposed on licensed telecommunications carriers.

3.46 The relevant industry code must deal 'wholly or mainly with matters relating to the relationship between carriage service providers and their retail customers' (proposed section 136A (c)). Organisations may apply for a declaration by ACMA that they are eligible for the reimbursement of 'refundable costs' (proposed section 136A). Refundable costs are costs other than those specified by ACMA under a written determination (proposed section 136E).

3.47 The Minister's second reading speech stated that:

> This scheme will mean more equitable funding of consumer-related codes. It will also increase funding certainty for industry bodies or associations, and enable increased consumer participation in, and more timely

34 Explanatory Memorandum to the Competition and Consumer Issues Bill, p. 73.

35 Mr Chris Cheah, *Committee Hansard*, 9 September 2005, p. 13.

36 Mr Chris Cheah, *Committee Hansard*, 9 September 2005, p. 14.

37 *Telecommunications for the Future*, p. 10.

development of, industry codes that benefit residential and small business customers.

3.48 Mr Cheah on behalf of the ACMA stated that '[h]opefully the extra resourcing will contribute to a better quality of code making'.[38] The Committee notes that the Environment, Communications, Information Technology and the Arts References Committee took evidence on problems with code development and enforcement earlier this year as part of its review of telecommunications regulation.[39]

3.49 Ms Anne Hurley, on behalf of the ACIF, acknowledged that ACIF's 'track record in the experience of consumer involvement has not always been optimal'.[40] She referred to recommendations of the *Consumer Driven Communications* report[41] prepared in late 2004. Ms Hurley noted that the code development is a costly process 'not only because of the labour of the volunteers around the table but because of the support mechanisms which need to be put in place to get a high-quality and timely outcome.' She referred to the recent consumer contracts code as a model for effective code development:

> … it has a model of equal sides—demand side and supply side—representation. It particularly utilises the experience of an independent chair; it utilises a law firm to do the drafting to enable the working committee to concentrate on matters of principle; and it makes facilitation services available in the event that issues within the working committee get bogged down. All of those measures are expensive in the context of the consumer code. ACIF expended around $250,000 to support the development of that code.[42]

3.50 Ms Hurley told the Committee that the measures in these Bills:

> … are an affirmation of the success which industry self-regulation has had to date and that they allow ACIF to harness opportunities to do it even better in the future … In respect of the measures in the bills, ACIF sees that they will contribute to a more effective development of codes – in particular, by providing a revenue stream for the development of the codes in ACIF.[43]

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38 Mr Chris Cheah, *Committee Hansard,* 9 September 2005, p. 15.

39 See Senate Environment, Communications, Information Technology and the Arts References Committee, *The performance of the Australian telecommunications regulatory regime*, August 2005, pp 142-151, 214-216.

40 *Committee Hansard,* 9 September 2005, p. 24.

41 ACA, *Consumer Driven Communications: Strategies for Better Representation,* December 2004.

42 Ms Anne Hurley, *Committee Hansard,* 9 September 2005, p. 24.

43 *Committee Hansard,* 9 September 2005, pp 24-25.

3.51 The Consumers Telecommunications Network (CTN),[44] ATUG[45] and the CEPU[46] also supported the ACMA amendments, although some reservations were expressed about broader long-term issues with the self-regulatory regime.[47]

3.52 In relation to funding for code development, Ms Corbin on behalf of CTN stated:

> CTN applauds the inclusion of the mechanism to fund the development of the industry codes. In particular, we welcome criteria for such funding which stipulate that consumers are adequately represented in the process for the development of such codes. Whilst it is acknowledged as important, adequate consumer representation has not always been the case. We endorse the approach to generate these funds through carrier licence fees.

3.53 Ms Corbin also told the Committee:

> It is absolutely imperative that you have the consumer voice at the table. In the long run, the industry cannot see all the ramifications from the consumer perspective. The thing that has come through time and time again with the ACIF process is that you need a diverse representation from consumers. Because rural and remote consumers have very different concerns to, say, people with disabilities, whilst there might be similarities, they both need to be represented at the table in some way, shape or form.[48]

3.54 Ms Corbin stated that the CTN was 'particularly pleased' that the bill specifically required:

> … that you have to show that you have had consumer representation in order to recoup any funds for that code development. We have had examples, not with ACIF but with other industry associations, where codes have been developed without consumer representation or consultation, and that, I think, has been ultimately to the detriment of the outcome.[49]

3.55 Ms Karen Lee, Associate Lecturer in the School of Law at the University of New England, argued that the scheme for reimbursement under proposed section 136A:

> … does not address the problems of ensuring active and meaningful participation of consumer groups in the development of codes … The Government should consider amending this provision so that consumer

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44 Ms Teresa Corbin*, Committee Hansard*, 9 September 2005, p. 31.

45 Mr Tom Amos, *Committee Hansard,* 9 September 2005, p. 26.

46 Ms Ros Eason, *Committee Hansard,* 9 September 2005, p. 30.

47 Ms Ros Eason, *Committee Hansard,* 9 September 2005, p. 30; Ms Teresa Corbin, *Committee Hansard,* 9 September 2005, p. 31.

48 *Committee Hansard,* 9 September 2005, p. 50.

49 Ms Teresa Corbin, *Committee Hansard,* 9 September 2005, p. 48.

> groups may apply for funding from the ACMA to participate in and/or pay their travel expenses etc as part of code preparation.[50]

3.56 Ms Lee also argued that the scheme should be extended to all codes rather than being limited to codes which relate principally to 'carriage service providers and their retail customers', on the basis that all ACIF codes have some bearing on services to retail customers, such as number portability and codes adopted by the network, operations and customer equipment and cabling references panels.[51]

3.57 Ms Hurley from ACIF agreed that it was 'absolutely imperative' that the self-regulatory regime have strong consumer protection and 'listen to the consumer voice'.[52]

Other proposed ACMA powers and broader consumer issues

3.58 During the public hearing, there was also some discussion of the ACMA's new powers in relation to mass service disruption notices, which will allow the ACMA to clarify the extraordinary circumstances in which they may apply,[53] the past record of enforcement of the ACA in enforcing industry codes,[54] Customer Service Guarantee (CSG) obligations and the removal of the necessity for carriage service providers to prepare industry development plans.[55]

3.59 Discussion also canvassed some broader consumer issues. Ms Corbin noted that the CTN was ' very pleased with the sentiment that is reflected in this legislation' in relation to the ACMA's proposed improved powers to direct industry compliance with codes of practice.[56]

3.60 There was also some discussion of the specific needs of different groups of consumers, including those in rural and remote areas, Indigenous consumers and those with disabilities, and the importance of their perspectives being represented both on the RTIRC and in code development.[57] The Committee also received several submissions from organisations representing the needs of people with disabilities[58] and people in rural and remote areas.[59] However, as noted in Chapter 1, given that the

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50 Ms Karen Lee, *Submission* 13, p. 4.

51 Ms Karen Lee, *Submission* 13, pp 3-4.

52 Ms Anne Hurley, *Committee Hansard,* 9 September 2005, p. 49.

53 Mr Chris Cheah, *Committee Hansard*, 9 September 2005, pp 15, 20-21.

54 *Committee Hansard*, 9 September 2005, pp 18-19.

55 *Committee Hansard*, 9 September 2005, p. 21.

56 Ms Teresa Corbin, *Committee Hansard,* 9 September 2005, p. 48.

57 Ms Teresa Corbin, *Committee Hansard,* 9 September 2005, p. 48.

58 For example, Tedicore (Telecommunications And Disability Consumer Representation) *Submission 11*, People with Disability Australia, *Submission 21*.

59 National Rural Health Alliance, *Submission 18.*

Committee was required to consider specific terms of reference, this report has not explored those issues which go beyond them.

The Committee's view

3.61 The Committee considers that the new powers proposed for the ACMA will be valuable in strengthening the self-regulatory regime and providing additional support to consumer bodies participating in industry code development. However, the Committee suggests that the Government could give consideration to extending the availability of funding for consumer groups concerned with the development of codes, as suggested by Ms Karen Lee above, perhaps at the discretion of the ACMA.

The proposed Communications Fund

3.62 As noted in Chapter 1, the Future Proofing Bill will establish the RTIRC to conduct regular reviews of the adequacy of telecommunications services in regional, rural and remote areas of Australia.

3.63 To provide greater certainty that funds will be available to implement the Government's response to the recommendations of the RTIRC, the Bill also establishes a $2 billion Communications Fund. The Communications Fund will be accompanied by the $1.1 billion Connect Australia package which will extend access to, and improve the affordability of, broadband. This will fulfil the intent of the recommendations made by the Estens Review of Regional Telecommunications, particularly in terms of 'future proofing'.

3.64 Revenue generated from the Fund will be directed to improving telecommunications services in regional, rural and remote areas. The Fund will exist in perpetuity, thereby ensuring that a source of revenue will always be available to implement the Government's response to the recommendations of the RTIRC.

3.65 Mr Corish from the National Farmers Federation welcomed the $2 billion Communications Fund, and said a linkage between the fund and regular reviews, and the timing of these reviews themselves, were crucial. He told the Committee the NFF wanted to ensure that the funding was delivered where it was needed. Mr Corish said that if the money were spent effectively it would deliver 'very significant outcomes for rural Australia' and 'dramatically improve' rural telecommunications.[60]

3.66 The Communications Fund consists of:

- the Communications Fund Special Account; and
- the investments of the Communications Fund.

3.67 The Bill allows the Government to establish the fund either by a transfer of cash, or of shares, or a combination of the two. Proposed sections 158ZJ and 158ZK

60 *Committee Hansard,* 9 September 2005, p. 64.

of the Consumer Protection Act will empower the responsible ministers (currently the Minister for Finance and Administration and the Minister for Communications, Information Technology and the Arts) to credit a specified amount to the Communications Fund Special Account, or to determine that a specified financial asset or assets of the Commonwealth is taken to be an investment of the Communications Fund. As stated in the Explanatory Memorandum:

> This will allow for the notional transfer of some Telstra shares to the Communications Fund, with ownership of the shares remaining with the Commonwealth until they were sold.[61]

3.68 Proposed section 158ZO of the *Consumer Protection Act* will permit the two ministers to authorise the investment of money in the Communications Fund Special Account in any financial asset. This could, for instance, include shares, debentures, interests in a managed investment scheme, units of such shares, debentures or interests and other intangible assets.

3.69 The Bill ensures that the Government cannot siphon off the income earned by the Fund by making clear that income earned returns to the Fund. Income earned from an investment of the Communications Fund will be credited to the Communications Fund Special Account, and expenses associated with an investment of the Communications Fund are to be debited from the Communications Fund Special Account. Investments that are realised will be credited to the Communications Fund Special Account.

3.70 Proposed section 158ZL of the *Consumer Protection Act* will permit the Communications Fund Special Account to be debited in order to make a grant of financial assistance to a state or territory for the purpose of implementing the Commonwealth Government's response to recommendations of the RTIRC, or for a purpose incidental or ancillary to this purpose. Under proposed section 158ZM of the *Consumer Protection Act*, a grant of financial assistance can be made to a person other than a state, on the same basis.

3.71 According to the Minister's statement, *Telecommunications for the Future*, 'details of the structure, governance and operation of the Communications Fund will be developed throughout the rest of 2005.'[62]

Major issues

3.72 Witnesses largely welcomed the Communications Fund, but there were a number of contentious issues that came out of the inquiry.

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61 Explanatory Memorandum, p. 8.

62 *Telecommunications for the Future*, p. 10.

The adequacy of the fund

3.73 Some witnesses raised concerns as to the adequacy of the $2 billion Communications Fund. The CTN stated, for instance, that:

> The proposed size of the Fund would seem to us far too small to be effective, and we urge such calculations to be undertaken by government with the view to increasing the Fund allocation.[63]

3.74 However, the concerns do not take account of the Government's ability to leverage the Fund to generate additional investment from telecommunications companies as well as state and territory governments. On this point, Optus highlighted the importance of allocating funding on a competitive basis.[64] Mr Paul Fletcher of Optus stated:

> We think there is a terrific opportunity there to leverage that money to extract private sector investment to match it and in doing so get a real one-time change in the structure of telco in rural Australia but you could also have a significant pull through effect back into the metro markets as well, we believe.[65]

3.75 This was acknowledged by Mr Bryant, Acting Chief General Manager, Department of Communications, Information Technology and the Arts, when he said that attempts are made to leverage contributions:

> I think that goes back to the philosophy of how we have tried to approach providing targeted funding to rural and regional areas; that is to do it on a competitive basis to try to leverage up contributions, on the premise that in a lot of cases there is almost a business case but not quite. So carriers and service providers are prepared to invest if they get a bit of assistance.[66]

3.76 This point was made by Mr Stiffe, General Manager, Public Policy, Vodafone Australia Ltd, who said:

> Vodafone has received some government funding for the mobile phones on highways project. While each project will no doubt be different, I can say that Vodafone spent something like five times the amount of the subsidy that we received.[67]

3.77 Mrs Holthuyzen, Deputy Secretary, Department of Communications, Information Technology and the Arts, provided the Committee with an example of the leveraging of funding that has been achieved with other programs:

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63 CTN *Submission 5*, p. 8.

64 *Committee Hansard,* 9 September 2005, p. 55.

65 *Committee Hansard*, 9 September 2005, p. 49.

66 *Committee Hansard,* 9 September 2005, p. 95.

67 *Committee Hansard,* 9 September 2005, p. 56.

> Some particular projects have already been done called the National Communications Fund and the coordination communications fund, where the government has provided funding of $72 million for certain projects. In that area, for instance, we have delivered $242 million of additional infrastructure. So, with a range of projects that were undertaken in previous times, there has been a fair bit of leveraging of funding from state governments and the private sector.[68]

3.78 Mr Fletcher from Optus told the Committee that it is important that funds be allocated in a coordinated manner to a series of large projects in order to maximise 'bang for buck', rather than on a series of small projects:

> We have argued that government should consider very carefully how it allocates those funds and it should be calling for ideas from as many people as have good ideas as to what they might be able to do. It would be very sensible to aim to allocate those funds in a relatively small number of large projects rather than to some extent dribbling them away as has, unfortunately, been the characterisation of some funding to date.[69]

3.79 The Committee sees merit in this approach in terms of maximising the benefits of the Communications Fund to rural, regional and remote Australia.

The establishment of the Fund

3.80 The Bill provides the flexibility to establish the Communications Fund with cash, shares, or a combination thereof. A number of witnesses expressed concern that the transfer of shares would expose the Fund to the danger that they will depreciate in value, thereby reducing the overall value of the Fund.

3.81 The CTN, for instance, stated that:

> Any notional transferral of Telstra shares will obviously be valued at the time of transfer and therefore allow the Communications Fund's value to be partly contingent on share market oscillations.[70]

3.82 However, it should also be acknowledged that the converse is true. Shares can either go up or down, and it is conceivable that instead of depreciating in value, the shares will appreciate so that the Fund will, in fact, end up with a greater value than would otherwise have been the case with the simple transfer of cash.

3.83 A second related issue is that the Bill allows for the transfer of a sum of cash to the Communications Fund Special Account of less than $2 billion. As Senator

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68 *Committee Hansard,* 9 September 2005, p. 95.

69 *Committee Hansard,* 9 September 2005, p. 49.

70 CTN *Submission 5*, p. 7.

Barnaby Joyce determined, this could mean that the Government could transfer $20 and still be in compliance with the Act.[71]

3.84 However, the Bill is structured in this way so that if shares are transferred to the Fund their value can be considered in determining the amount of cash to transfer. This is evident from the Explanatory Memorandum which states:

> Under proposed section 158ZK, financial assets, including shares in Telstra, may be taken to be an investment of the Communications Fund if the responsible Ministers so determine. If this were the case, a lesser amount than $2 billion would be credited to the Communications Fund Special Account under proposed section 158ZJ, with the value of the financial assets taken to be investments of the Fund under proposed section 158ZK making up the balance of the $2 billion.[72]

3.85 The Department of Communications, Information Technology and the Arts has described it as a drafting matter:

> I think the issue is that this is a drafting exercise – how the Bills are drafted. The government's policy position has been quite clear in relation to the provision of $2 billion into the fund.[73]

3.86 It has been the Government's consistent policy position that the Communications Fund will have a value of $2 billion – irrespective of whether this is initially in cash, shares or a combination thereof. As late as 8 September 2005, the Minister for Communications, Information Technology and the Arts confirmed that the intention is to have a $2 billion Communications Fund:

> The Government will establish a $2 billion perpetual Communications Fund from the proceeds of the sale of the Government's remaining shareholding in Telstra or through the transfer of Telstra shares.[74]

3.87 Nonetheless, the Bill could provide for greater certainty that the Fund will be valued at $2 billion by requiring specifically that cash of that value be transferred to the Fund, rather than shares, or a combination of cash and shares.

Telstra's Network & Broadband Plan

3.88 Ms Kate McKenzie from Telstra told the Committee that the network and broadband plan it took to the Government had been rejected.[75]

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71 *Committee Hansard,* 9 September 2005, p. 92.

72 *Explanatory Memorandum*, p. 8.

73 Mrs Holthuyzen, Committee Hansard, 9 September 2005, p. 92.

74 Minister Coonan, *Telecommunications for the Future*, p. 9.

75 *Committee Hansard,* 9 September 2005, p. 67.

3.89 Telstra proposed to expend $3.1 billion of its own funds, but also expected a Government contribution of $2.6 billion. Significantly, it also required the Government to relax the regulatory regime.

3.90 The Department of Communications, Information Technology and the Arts outlined the shortcomings of Telstra's proposal:

- significant winding back of the competition regime;
- an effective access holiday for the new network;
- no commitment to pricing;
- effectively locking the Government into Telstra's technology choices;
- risk of further increasing Telstra's dominance;
- funding based on a significant Government contribution; and
- no leveraging of private sector investment.[76]

3.91 The Competitive Carriers' Coalition contended:

> Telstra has presented a plan that would result in the re-monopolisation of telecommunications in Australia.[77]

Recommendation 1

3.92 The Committee recommends that the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 be amended to specifically require that $2 billion in cash be transferred to the Fund Account.

Recommendation 2

3.93 Subject to the preceding recommendation, the Committee recommends that the bills be agreed to.

Senator Alan Eggleston
Chair

76 DCITA, answers to questions on notice, 9 September 2005 (received 9 September 2005).

77 Competitive Carriers Coalition *Submission 6,* p. 5.