Labor Senators' dissenting report

Labor Senators do not support the recommendations in the majority report. Further, Labor Senators reiterate their view that this inquiry was a farce of the highest order and showed utter contempt for the Senate's legitimate role as a place of review.

Procedural failings of the inquiry

It is worth noting for the record a few pertinent facts about the conduct of this inquiry. Firstly, the fact that the Senate was holding this inquiry was advertised for one day, in one newspaper, on the day before the only day of hearings were held. The government's promotion of this inquiry was so rushed that it missed the advertising deadline for the *Australian Financial Review* and even misspelt the word 'Senate' in the first line of the advertisement.

Witnesses had less than 24 hours to prepare and submit submissions on 5 complex pieces of legislation dealing with arrangements surrounding the sale of $30 billion in taxpayers' assets. Given the limited promotion that this inquiry received and the ridiculously short time allowed for submissions, Australians in rural and regional Australia were effectively excluded from being able to have a say during the inquiry. Even if Australians in rural and regional areas happened to become aware of the inquiry, unless they had access to the internet or express post services they would have been physically unable to get their submissions to the committee before the deadline for submissions. In addition, the lack of time meant that 13 witnesses with a serious interest in the future of the Australian telecommunications sector were forced to give evidence simultaneously. These circumstances were clearly inadequate.

Further, the terms of reference for this inquiry were limited in an unprecedented manner. The fact that a Senate committee inquiring into the terms of five pieces of legislation designed to facilitate the privatisation of Telstra was prohibited from inquiring into the question of privatisation is high farce. Those witnesses who were lucky enough to hear about the inquiry, and dedicated enough to make themselves available at 24 hours notice, were surprised to find when they arrived at the hearing that Government Senators were prepared to prevent them from expressing their views on the question of privatisation. Senator Joyce expressed frustration at the hearing that witnesses were unable to say whether he should support the privatisation. The fact is that the terms of reference for this the inquiry prohibited them from speaking their minds on this issue.

On top of this, the rushed nature of the inquiry and the limited time allowed for the hearing of evidence significantly curtailed the ability of the committee to effectively inquire into those issues that it was permitted to consider under the terms of reference. It was clear during the hearing that many Government Senators and witnesses had not had a chance to finish reading the legislation, let alone give it serious consideration, by the time the inquiry had started. This was hardly surprising when it is considered

that the government did not release the bills that were the subject of this inquiry until the afternoon of the day before the hearing.

The fact that by the time the hearings commenced, a legal mind of the calibre of Senator Brandis did not have sufficient time to reach an understanding of even how the legislation would function, let alone the impacts it would have on the sector, started speaks volumes of the rushed nature of the inquiry.

Now the Committee is being forced to report after being allowed only the weekend to consider the evidence received during the hearings. Labor Senators have been given only hours to consider the Government Senators' recommendations and to decide whether their recommendations are worthy of support. Ultimately, the Committee has been required to receive and read submissions from witnesses, prepare for and hold public hearings, consider evidence, decide on recommendations and write a report in one working day.

The way that the government is trying to stifle debate on these bills shows utter contempt for the legitimate fears of the majority of Australians who oppose the sale of Telstra. The way in which this inquiry has been held vividly demonstrates that the government has no interest in external scrutiny of its legislation and clearly has no interest in allowing the Senate to be anything more than simply a rubber stamp.

Is this how democracy will function now that John Howard has control of the Senate?

It is the height of arrogance for this government to refuse outright to allow the Senate to conduct an inquiry into an issue that is opposed by 70% of the Australian public. Labor Senators can understand why the government is scared of an inquiry into the privatisation of Telstra. Labor Senators know what such an inquiry would find.

Since the government commenced its privatisation agenda in 1997 services have plummeted and prices have sky rocketed.

Since the partial privatisation of Telstra in 1997, consumer complaints have sky rocketed with the Telecommunications Industry Ombudsman receiving 26,794 complaints about Telstra in the last year alone. The ACCC has commented that since the government started pursuing its privatisation agenda it has received more complaints about the telecommunications sector than any other industry – even the banks. The National Farmers Federation has recently published survey results that show that Telstra line repair performance has been declining for the last five years.

Prices have also gone through the roof with line rentals increasing from $11.65 per month to as high as $30 per month today while Telstra has chased the big end of town. The ACCC has found that the average prices paid by residential and small business customers have increased by 1.4% and 3.1% respectively in the last year while at the same time the average price paid by large business consumers fell by 5.6%.

These facts have been well known for many years now, however in the last few days we have seen further damning evidence of the impact of the government's privatisation agenda from Telstra itself. In the last sitting week Labor revealed a secret briefing document that Telstra provided to the government on the state of Telstra's operations. This document is a damning indictment of the impact that the government's privatisation agenda has had on Telstra. The report outlined the fact that in the last two years, special dividends have stripped $1.9 billion out of Telstra while at the same time the company failed to make the investments necessary for its network.

The object of this policy was to encourage investors to buy Telstra shares, not because they thought that the long term earnings prospects of the stocks were good, but because they would receive a juicy dividend in the short term. The impact of this policy on Telstra's consumers and its long term share price has been disastrous.

As has been recognised in the past by the Minister for Finance, the pursuit of an extremely generous short term dividend policy undermines the capacity of the company to make capital investments. Telstra's briefing document confirms that the dividend policy implemented by Telstra in pursuit of the government's privatisation agenda has left it without the cash to invest in infrastructure and improve services to regional and rural Australia. The document concedes that over the past few years, Telstra "has failed to make the necessary investments" in its network and the consequences of this underinvestment have been dramatic.

The document reveals that as a result of this strategy, Telstra has received 14.3 million fault calls on its line. 14% of all of Telstra's lines have faults. In total, 1.4 million Australians currently have a faulty telephone line because Telstra has underinvested in its network as it has tried to prop up its share price in pursuit of the government's privatisation agenda.

While the short time frame and restrictive terms of reference of this inquiry prevented issues like these from being considered by the committee, Labor Senators believe that it is important to note that the way this inquiry has been conducted has prevented the Australian public from being able to have its say on this state of affairs.

Identified failings: legislative short-comings identified during the hearings

The Communications Fund

The establishment of the Communications Fund is proposed by the Telecommunications Legislation Amendment (Future Proofing and other Measures) Bill 2005.

The Minister’s second reading speech in the House of Representatives expressly stated that the Government will not appropriate any money to the fund unless Telstra is sold.

Labor Senators maintain that the best way to secure rural and regional telecommunications is to keep Telstra in majority public ownership.

There was a clear consensus from witnesses that appeared before the inquiry that telecommunications services in rural and regional Australia were in need of substantial improvement. In the words of the President of the National Farmers Federation, Mr Peter Corish when asked whether services in the bush were up to scratch:

> *"In our view they are not."*

Contrary to its rhetoric, the Howard Government has failed to ensure that telecommunications services in rural and regional Australia are up to scratch.

Documents released last week revealed that Telstra told the Government in August that 14 per cent of lines have faults, it has obsolete technology and has underinvested in its network by up to $3 billion.

Labor Senators do not believe that the quantum of the Communications Fund will be adequate to address these problems. Officials from the department made clear that no independent, needs based, modelling was done to determine the appropriate size of the fund. The touted $2 billion is just a number that the Government persuaded the National Party to accept. No evidence was presented to the inquiry to suggest that a $2 billion fund will be sufficient to address the future telecommunications needs of rural and regional Australia.

On top of this, Labor Senators hold serious concerns about the propriety of how the government proposes to administer the Communications Fund.

The Committee's hearing revealed a number of significant issues with the drafting of the legislation establishing the communications fund. The short reporting time frame did not permit the Committee to fully explore all of these issues.

158ZI Purposes of the Fund

The Communications Fund (the Fund) does not have to be used to implement the findings of the Regional Telecommunications Independent Review Committee (RTIRC). There is every chance that the Government will ignore the findings and instead implement a less extensive response to the recommendation. The Government is not compelled to do anything or to spend any funds from the Fund under s.158Q.

158ZJ Credit of amounts to the Fund Account – Ministerial determination

The Bill does not require the Government to put any money into the Communications Fund.

Ministerial determinations are not subject to the *Legislative Instruments Act 2003*. The effect of the provision is that once an amount is credited to the Fund Account from the main body of the Consolidated Revenue Fund, it renders that amount (up to $2 billion)

capable of being spent without further involvement of the Parliament.[1] Given the size of the potential funds the creation of a special appropriation in this way is a significant development. Such determinations should be tabled in the Parliament.

158ZK provides for the transfer of financial assets to the Fund

This provision provides for the core of the Communications Fund. The stated intention is that the total assets of the Fund (cash and investments) not exceed $2 billion. This provision allows there to be no cash in the Fund, with any balance made up of other financial assets, including Telstra shares. The Minister for Finance and the Minister for Communications are, by determination (presumably joint), able to 'dump' financial assets onto the Fund. DCITA officials agreed that the Government could tip in as little as $20 in the Fund while still complying with the legislation. It also appears that the Fund will be far from a 'locked box'. It appears that the Government can revoke a prior 158ZJ determination relating to cash, enabling it to withdraw cash from the Fund Account.

The proposed section also raises other questions about how financial assets are objectively valued. What is clear is that there can be a notional transfer of some Telstra shares to the Communications Fund, with ownership of the shares remaining with the Commonwealth until they were sold. This raises a number of important questions:

- At what price will Telstra shares be valued?
- When will the transfer to the Fund be effected?
- What are the projected earnings from the Fund?
- What is the basis of the mix of investments?
- What are the projections for the cash balance in the Fund by the time the RTIRC reports in 2008?
- Will there be any money in the Fund for the Government to respond to the RIRDC recommendations?

None of these questions are answered in the Explanatory Memorandum, nor were departmental officials able to give any guidance. The Government needs to clear up the confusion on whether it intends to place any cash in the Fund and the timeframe for that to happen. Departmental officials conceded at the Committee's hearing that no investment strategy for the fund has been developed. It is not clear what the projected earnings from the Fund will be or what mix of investments it will have.

1 Pursuant to the special appropriations in subsection 21(1) of the *Financial Management and Accountability Act 1997*; and subsections 158ZO(4), 158ZP(7) and 158ZQ(5) of the subject Act.

158ZQ dealings with derivatives

This section provides the potential for the Ministers for Communications and for Finance to be turned into market speculators, but with no apparent checks and balances on their investment decisions. This contrasts with the obligation imposed on a Chief Executive of an Agency under section 44 of the Financial Management and Accountability Act (FMA) – that the Chief Executive is to manage " … in a way that promotes the efficient, effective and ethical use of the Commonwealth resources for which the Chief Executive is responsible".

This also places Ministers in the perceived role of 'picking winners' in the market. It is not a huge step to the perceived role of 'creating winners' and/or 'saving losers' by manipulation of investments.

In addition, unlike interest-bearing deposits etc, for cash, investment in "financial assets" can result in actual losses, were markets to fall.

Finally, by uncoupling these provisions from section 39 of the FMA Act, it appears that the Communications Fund will be prevented from investing in Commonwealth securities.

Subsection 156ZO(2) stipulates that investments of the Fund are to be made "in the name of the Commonwealth", it appears to mean that the Commonwealth as the securities-purchasing entity would be precluded from 'contracting' with itself as the securities-issuing entity. Section 39 of the FMA Act overcomes this problem by declaring "The Minister for Finance of the Commonwealth" and "The Treasurer of the Commonwealth" to be corporations for the purpose of acquiring investments under that section.

Significant accountability implications

Apart from the apparent problems in the provisions specified above, there are broader issues of accountability raised by the Fund.

Stewardship of public money by the Executive Government is deliberately conservative in character – because governments have no money of their own, only what they extract from the governed, mainly by force of law. In keeping with that, governments are expected to act like trustees of the money they control.

The cornerstone law that deals with the proper use and management of public money – the FMAA enshrines that concept in its section 39 and constrains the Executive in the kinds of investments it could pursue. Yet this Bill expressly seeks to negate those constraints and allow investments at ministerial whim with minimal review.

The goal of "Future Proofing" the adequacy of telecommunications in regional, rural and remote parts of Australia by means of a Communications Fund is a fiction: this Parliament cannot even irrevocably commit itself, let alone future Parliaments, in

legislation. For example, it is conceivable that the Bill, with its reliance on ministerial determinations could allow a Government to access previously earmarked 'communications' funds without reference back to the Parliament.

Labor Senators believe that operation of the proposed communications fund raises many legal and policy issues that must be subjected to far more scrutiny than was possible in the farcical one day hearing that the Government imposed on the Committee.

The Government's Operational Separation regime

In addition to the serious issues of administration identified in the provisions governing the Communications Fund, it also became apparent during the hearings that the government's proposed Operational Separation regime was fundamentally flawed.

While Labor supports the stated objectives of the government's Operational Separation regime, the model that the government has adopted for Operational Separation is fundamentally flawed.

The first point to note about the Operational Separation regime outlined in the Bill considered by the Committee is that the Bill contains very little detail as to how the final Operational Separation model will operate. The Bill merely provides a very broad framework for the Operational Separation model and then allows Telstra three months to prepare a draft Operational Separation plan for approval by the Minister.

The fact that Telstra has been given the responsibility of writing the 'first draft' of the operational separation regime gives it the potential to significantly skews the operation of the regime in its favour. In the words of Mr David Havyatt from AAPT:

> *"Operational Separation as currently outlined in this legislation may never happen. ...Telstra is a mater of the art of gamin this kind of process."*[2]

Mr Paul Fletcher from Optus echoed these concerns:

> *"Firstly, Telstra gets to prepare the Operational Separation plan which gives it a huge opportunity to white-ant and undermine what is intended in the regulation."*[3]

Further, the legislation provides that the pricing principles that will govern the provision of wholesale services by Telstra will be determined at a future date by a committee comprising Telstra, the Minister and the ACCC. As such, at the time of the inquiry, crucial aspects of the government's Operational Separation regime remain incomplete. The fact that much of the detail of the government's plans is still yet to be

2 *Committee Hansard*, 9 September 2005, p. 27.

3 *Committee Hansard*, 9 September 2005, p. 32.

finalised leaves open the possibility that the final form of the Operational Separation regime that is developed by Telstra may differ substantially to even the watered down model currently proposed by the government.

As noted by the Chairman of the ACCC, Graeme Samuel, during his evidence:

> *"Issues for further examination as the operational separation plan is developed by Telstra and the government include the following: first, the precise details of the operational separation plan and Telstra's obligations in relation to that plan; second, the scope of services that will be subject to the operational separation plan; third, the enforcement regime associated with compliance or, more importantly, non-compliance with the operational separation plan; fourth, the powers to investigate whether or not compliance has occurred; and, fifth, the development by the working party proposed—that is, the working party of Telstra, the ACCC and the department—of the internal wholesale pricing and the pricing equivalence regime."*[4]

There is clearly still much work to be done before the full impacts of the government's Operational Separation model can be assessed.

The next flaw in the Operational Separation Model set out in the proposed Bill is the way in which the government has chosen to separate Telstra. Under the governments' model, Telstra would be separated into retail, wholesale and network businesses. Such a structure poses problems as it would institutionalise differential treatment of wholesale access seekers when compared with Telstra retail. Under the government's model wholesale access seekers would be forced to acquire services from the wholesale business unit while Telstra retail would be able to acquire services from Telstra network. The fact that wholesale customers would be acquiring different products from a different unit of Telstra when compared to Telstra retail gives Telstra substantial leeway to 'game' the regime and frustrate the intent of the Operational Separation model. A better approach to the way in which the Operational Separation model should be structured is that as originally proposed by the ACCC. Under this model, Telstra's network and wholesale operations are amalgamated and both Telstra's retail business and wholesale customers would be required to acquire like products from the same source. Such an approach would increase transparency by making third party comparisons of the services and prices offered to Telstra's retail business and Telstra's wholesale customers far simpler.

It became clear during the hearings that the government's model for Operational Separation falls well short of the requirements that the ACCC has previously publicly said would be essential in any Operational Separation regime. It was revealed in evidence that contrary to the ACCC's proposed model, the government's model:

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4 *Committee Hansard*, 9 September 2005, p. 4.

- Did not allow Telstra's wholesale customers and its retail business to obtain similar products through similar processes;
- Did not require the establishment of separate profit and loss accounts and balance sheets for the separated business units;
- Did not require the introduction of arms length trading and contracts between the separated business units on both price and non-price terms; and
- Did not allow for detailed oversight and enforcement by the ACCC.[5]

It is clear that many of the requirements identified as being essential to the successful operation of any Operational Separation regime by the ACCC, an independent expert regulator of the telecommunications sector have been rejected by the government. In fact, given the lack of any requirement for genuine reorganisation of Telstra's business units, the government's model bares more resemblance to a tweaked Accounting Separation regime than the ACCC's proposed model for Operational Separation.
The next flaw in the government's model is the effective sidelining of the ACCC from enforcement of the regime. Under the text of the Bill, the ACCC has no powers to investigate breaches of the Operational Separation regime. Further the ACCC would be precluded from taking enforcement action with respect to breaches of the Operational Separation regime until the Minister for Communications had first approved a 'Rectification Plan' with respect to the breach. Consistent with this policy of Ministerial involvement, the Bill also provides that responsibility for setting the pricing that would apply under the Operational Separation regime will be subject to negotiation by a committee comprising the Minister, Telstra and the ACCC.

Many witnesses expressed concern at the limited role for the ACCC. Mr Thomas Amos representing the Australian Telecommunications Users Group (ATUG) noted that:

> *"ATUG is worried that the ACCC does not come into the picture until the very end, after the event, and only to pursue breach of licence action. How will we know there has been a breach?...The Minister as enforcer is not a particularly good concept."*[6]

Mr Paul Fletcher from Optus had similar concerns:

> *"Secondly, the measures to ensure that Telstra complies with the plan are too weak."*[7]

The way in which this Bill sidelines the ACCC in favour of direct Ministerial involvement in these ways poses a real risk that the operation of the regime will become unacceptably politicised. In the words of Ms Kate McKenzie from Telstra:

> *"We think (ministerial enforcement) is actually a backward step and it is a very difficult position for the Minister to be placed in, with power*

[5] *Committee Hansard*, 9 September 2005, pp 7-8.

[6] *Committee Hansard*, 9 September 2005, p. 25.

[7] *Committee Hansard*, 9 September 2005, p. 33.

> *that broad and pressure then to be making calls on what might be quite detailed arrangements about the internal operations of Telstra. It does seem to be quite extraordinary."*

An indication of the seriousness of these concerns was that the ACCC shared Telstra's concerned with the Chair of the ACCC, Graeme Samuel, noting that:

> *"This is a relatively novel process in the context of regulation in Australia. It is difficult to point to any precedent."*

Labor Senators suggest that there are good reasons for there being little precedent for such an arrangement.

As a result of these flaws it seems likely to Labor Senators that the government's proposed model for Operational Separation is destined to fail to achieve its goals in the medium to long term. In the final analysis, it appears that the government has been able to develop a regime that will impose significant cost increases on both Telstra and the ACCC without producing any offsetting benefits as a result of increased competition. The government has managed to produce a model that is the worst of both worlds.

Conclusion

Labor Senators believe that this inquiry was a patently inadequate vehicle for considering the complex and controversial issues encompassed by the legislation subject to inquiry. The terms of reference, the time allowed to prepare to the inquiry, the time allowed for receiving submissions, the time allowed for hearing evidence and the time allowed for reporting were all far from sufficient to allow a serious consideration of the important issues at hand. During the short time allowed for the inquiry the committee was able to uncover numerous drafting errors and a series of questionable policy decisions in the Bills. The consensus from the witnesses who gave evidence to the inquiry was that the Bills could be significantly improved simply by allowing more time for the Senate to perform its function as a house of review. Unfortunately the government is clearly uninterested in improving the legislation in this way and is intent on forcing through the legislation as soon as possible whatever the result. The voters of Australia will be able to judge for themselves the results of this arrogance.

Senator Stephen Conroy **Senator Kate Lundy**

Senator Dana Wortley