

Australian Democrats minority report

The Australian Democrats will be voting against the Telstra (Transition to Full Private Ownership) Bill 2005, and will seek to amend the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005; the Telecommunications Legislation Amendment (Future proofing and other measures) Bill 2005; the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005; and the Appropriation (Industry Plans and Consumer Codes) Bill 2005.

The privatisation of the 51% of Telstra remaining in public ownership, according to surveys, continues to be opposed by between 60% and 80% of Australians. It is the second biggest company in Australia. Although the Government claims a mandate to sell Telstra by virtue of its re-election, the sale of the remainder of Telstra was not a feature in the Coalition election campaigns of either the 2004 or 2001 elections.

The Coalition Government commenced the privatisation process in 1996, shortly after coming to power, determining that the proceeds would be used to retire debt. This rationale no longer has currency with Australia's public debt levels now one tenth that of the OECD average and with the only remaining debt exists in the form of Treasury bonds which play an important role in the financial sector.

More recently, the Government has decided the proceeds would be put in a 'Futures Fund' from which would be paid the ongoing superannuation entitlements of Commonwealth Public Servants.

When the Telstra (Dilution of Public Ownership) Bill 1996 was introduced into the Senate in May 1996 it was referred to the Environment, Recreation, Communications and the Arts References Committee for inquiry and report three months later.

Even then, the committee found that there was no substantial empirical evidence to back the government's claim that the Australian economy and Australian consumers would benefit from the (then) partial sale of Telstra (one-third) and it was concluded that the decision to sell Telstra was driven by ideology, as were subsequent attempts to sell the remainder.

With a notional majority in the Senate, the Government has now moved quickly and arrogantly to realise its ideological position and, armed with a hastily cobbled together package of new sweeteners will divest itself of one of the most important public assets in the country, allowing the Senate inquiry just one day of hearing to scrutinize its efforts.

Witnesses at the senate hearing argued that aspects of the Bills could potentially have negative consequences for the telecommunications industry and ultimately consumers.

The package before the parliament was cobbled together at the last minute with little consultation. To discourage the National Party from backing down on their inadequate deal, the Government has embarked on an extraordinary process of ramming the legislative package through the parliament in a week, including a 1 day hearing and a reporting turnaround of 2 non-week days whilst forcing debate to commence in the Senate even before the hearing commenced. This process is manifestly inadequate for public and expert input, and for serious analysis to occur. Every witness that appeared at the hearing raised concerns about aspects of the package and said they needed more time to examine and sort out problems and potential unintended consequences. For example:

[Mr Havyatt from AAPT] That was an unintended consequence of a very minor change to the telecommunications legislation. For anybody to say that changes to this legislation are easy to understand, based upon the number of pages, is patently misleading and not in the interests of Australians.¹

[Mr Forman from Competitive Carriers Coalition] I start by saying that the CCC supports the aim of the legislation, but my remarks are qualified by the fact that we are still going through the detail of the bill. As we go through that, there become apparent more and more issues of grave concern to us.²

Most witness agreed that a four week review of the legislation would give adequate time to properly examine the legislation and sort out potential problems:

Mr Havyatt—In relation to the specifics of the operational separation plan, I can see a great deal of benefit in the government authorising the department to engage in a similar hot tub kind of discussion like this for the full exploration of the issues in relation to this piece of legislation. The department could then have the benefits of our observations about the drafting, whereas up until now they have only had the benefits of our observations about the principles. That would be a beneficial process, in my humble view.

Senator ALLISON—Do you think that that might be able to be done in four weeks?

Mr Havyatt—I believe it well and truly could be. There is plenty of time if we were prepared to conduct that kind of inquiry to just say, ‘Can we clarify what these proposals are?’ It may not mean we reach agreement, but it would certainly give a degree of comfort that all the issues that we could actually understand had been explored.³

Ms Corbin for the Consumers Telecommunications Network noted that there was inadequate time for consumer input:

I note that we are the only consumer organisation represented here today. That is a huge concern. I spent most of the day yesterday on the telephone, speaking to all those consumer organisations that will not have a chance to present to this hearing. So

¹ Mr Havyatt, *Committee Hansard*, 9 September 2005, p. 26.

² Mr Forman, *Committee Hansard*, 9 September 2005, p. 28.

³ *Committee Hansard*, 9 September 2005, pp 41-42.

there is definitely a need to have more time. Generally speaking, the rule is at least four weeks for consultation when you get a new bill or discussion paper or something like that, and generally speaking we hear cries from industry and consumer organisations that that is inadequate. So a bare minimum at this stage would be to follow previous practice.⁴

The Democrats argue that there is no reason for the package of Bills relating to the sale of Telstra to be rushed through the parliament, there is no impending sale and in fact if the share price continues at its current rate it may not be advisable to sell Telstra in this current term of Government. The Democrats urge the Government to delay the passage of the Bills and extend the inquiry to provide adequate time for examination, analysis and amendment.

However given that the Government appears determined to force a vote on the Telstra sale Bill in the coming week it is our duty to scrutinise and, where possible, amend the Bills in the time we have available.

Full Privatisation of Telstra - Telstra (Transition to Full Private Ownership) Bill 2005

While the terms of reference did not allow the Committee to inquire into the sale of Telstra, this is a critical issue for the majority of Australians. Poll after poll shows that the majority of Australians oppose the sale of Telstra.

Our 26 page minority report to the Telstra (Transition to Full Private Ownership) Bill 2003 (Telstra Bill 2003), which can be found at http://www.aph.gov.au/Senate/committee/ecita_ctte/completed_inquiries/2002-04/telstra_t3_2003/report/d02.pdf outlines our key reasons for opposing the sale of Telstra most of the information is still relevant. However a few points are worth iterating and updating here.

As stated in our minority report to the Telstra Bill 2003

Telstra provides a range of services that are absolutely vital to the national security and economic and social development of Australia. Australians are increasingly relying on e-commerce, e-health, and banking. For many businesses, especially small business, efficient and effective communication systems are critical. So for example high speed Internet is essential for successful engagement with the modern economy and society. A cost effective, reliable communications system is especially critical for Australians living in regional, rural and remote areas, where tyranny of distance, isolation and lack of services can be overcome⁵.

⁴ Ms Corbin, *Committee Hansard*, 9 September 2005, p. 44.

⁵ Senate Environment, Communications, Information Technology and the Arts Committee. *Telstra (Transition to Full Private Ownership) Bill 2003*, Minority report by the Australian Democrats, September 2003.

A privatised Telstra will be more likely to demand a commercial rate of return from all their assets – and so more willing to close down low return assets - as we have seen with many services (eg. banking, air services) withdrawing their presence in regional Australia.

The Democrats argue that telecommunications is as essential as decent roads and power, it should be treated as a critical part of our nation's infrastructure and therefore should remain in public hands.

Public Interest

In our minority report to the Telstra Bill 2003 the Democrats reproduced the Liberals and Nationals “Charter for the National Interest” noting that the Government has failed their own national interest test:

In the 1996 Liberal & National Parties Policy on “Privatisation: In the Public Interest and the Public Benefit”, the policy states:

The Liberal and National Parties believe privatisation should only occur where it is demonstrably in the public interest. We do not take the view that privatisation is an end in itself. Indeed there are many Government functions which public interest and accountability considerations demand remain in public ownership and control.

Under its “Charter for the National Interest”⁶, Liberals and Nationals argued that privatisation will be in accordance with principles, to safeguard the national interest, these included:

- evidence of a clear public benefit to be derived from the privatisation of a particular sector;
- focus on benefits to consumers, including protection of consumers interests;
- a commitment to maintain community service obligations, recognising the special needs of rural and regional Australians;
- proceeds of privatisation will not be used to fund recurrent expenditure.

In ignoring the anticompetitive behaviour of Telstra, the fact that they have been under-investing in infrastructure, the fact that they have been borrowing from reserves to pay the dividend for the one purpose of pushing up the share price and to make the sale of Telstra more attractive to the public and to potential investors, the Government has lost sight of these principles and clearly believes that privatization is a worthy end in itself.

⁶ Liberal & National Parties' Policy on 'Privatisation: In the Public Interest and the Public Benefit' 1996, p. 3.

Part-pregnant

The Democrats do not share the Governments view that part-public ownership is an insurmountable barrier to effective regulation, management or capital raising. The Democrats have instead long recognised that government has a significant role to play in the supply of telecommunications infrastructure because it is an essential service. As stated in the Democrat Minority report for the Telstra (Transition to Full Private Ownership) Bill 1998:

We do not see government ownership and regulation of the industry as incompatible or illogical. The Parliament is the maker of the laws and regulations under which the company operates not the Government of the day. To suggest otherwise is either to underplay the power and role of the Parliament, or overemphasize the government's regulatory functions⁷.

Other countries with part-pregnant telecommunications companies include, Austria, Belgium, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, the Netherlands, New Zealand, Norway, Poland, Portugal, Sweden and Switzerland⁸.

We only have to look closer to home, where Australia Post is owned and regulated by the Government, yet the Government has not made a case that this is difficult. What this demonstrates is that the Government's argument is ideological rather than practical.

Investment in Infrastructure

With ownership of both the copper wire and the HFC network⁹, lack of competition and a strategy to maximise shareholder value, there is no incentive for Telstra to invest in its infrastructure. Despite Telstra again posting record profits - the financial year ended 30 June 2005, with reported net profit increasing \$329 million or 8.0% to \$4.447 billion - Telstra continues to under-invest in infrastructure. Table 1 shows a steady decrease in infrastructure spending as a percentage of Telstra sales revenue, since privatisation.

⁷ Senate Environment, Recreation, Communications and the Arts Legislation Committee. *Telstra (Transition to Full Private Ownership) Bill 1998*, minority report by the Australian Democrats and Greens (WA), May 1998.

⁸ *Communications Outlook OECD 2005*.

⁹ The ACCC have argued that in protecting the revenue of both the copper wire and the HFC network, investment will not be made, or will be delayed, in services that would cannibalise the revenue of the other network.

Table 1. Telstra Capital expenditure as percentage of revenue (\$m)

	2004	2003	2002	2001	2000	1999	1998
Capital expenditure	3015	3261	3491	4368	4705	4274	3741
Total Revenue	21280	21,616	20,802	22,983	19,840	18,218	17,302
Capital expenditure as a % of revenue	14.1%	15.1%	16.7%	19.0%	23.7%	23.4%	21.6%

(Source: Telstra annual reports)

In the “secret” Telstra publication *The Digital Compact and National Broadband Plan* presented to the Government in August 2005, Telstra reveals that 14% of all lines have faults and states that what is required is “significant investment in the network for proactive maintenance. The document goes on to reveal that \$2-3 billion in additional investment (Opex and Capex) should have been spent over the past 3-5 years.

The Democrats argue that the reduced investment in infrastructure has and will continue to impact on innovation, new service development, and implementation and maintenance of infrastructure – especially to regional and rural Australia.

Further privatisation will only exacerbate the problem as the company will focus even more on shareholder return and less on investment.

At the Senate inquiry Telstra indicated that it would be reluctant to increase its investment in infrastructure under the conditions imposed in the Telstra sale package:

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? The regulations we face here increase our costs and hamper our ability to expand revenues. In fact, our ability to deliver the next generation of products and services for Australia is severely constrained by regulations that prevent us from earning a commercial return for our 1.6 million shareholders.¹⁰

Telstra is a commercial operation. We have to act in the best interests of our customers and our shareholders. If there is no money and we are not making any money, then it will not be there to invest.¹¹

Senator ALLISON—Coming back to your notes, which I took down because I thought they were interesting, you said that if Telstra has to give away value-added services then there would be little reason for you to invest in those circumstances.

Ms McKenzie—That is right.

Senator ALLISON—So you agree with that statement?

¹⁰ Ms McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 66.

¹¹ Ms McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 78.

Ms McKenzie—Yes.¹²

As will be discussed later, we do not think the Governments communications fund package will provide the level of funding needed over the next several years to upgrade our communications infrastructure and there is every reason to suspect that whatever public funds the Government provides will be offset by further decreases in infrastructure spending by Telstra. There is nothing in the package to oblige Telstra to do otherwise.

Competition and regulation

As stated in our minority report to the Telstra Bill 2003:

Telstra is not a typical private company - partly for historical reasons and partly because of the regulatory regime – it is one of the most vertically integrated telecommunications carriers in the world, retaining a near monopoly position over the formerly publicly owned Customer Access Network (the CAN), and, as a result, is in a market dominant position in most other sectors of the telecommunications market. It is particularly dominant in regional areas, being the Universal Service Obligation (USO) provider, and frequently the only provider of broadband links and CDMA mobile phone coverage.

Two years on little has changed. We also demonstrated in our minority report to the Telstra Bill 2003 that competition had slowed despite the Governments argument that privatisation will increase competition:

The Government has argued that privatisation will increase competition in the domestic markets¹³. Yet despite partial privatisation of Telstra in 1997 and 1999, the ACCC has concluded that:

While reforms implemented to date have been positive in terms of increasing competition in communications services and in increasing benefits to consumers.....competition has not developed as extensively as generally expected after full competition was introduced in 1997 and that various telecommunications markets are not yet effectively competitive.¹⁴

In its 2005 report on *Telecommunications Competitive Safeguards* the ACCC noted that little had changed with respect to competition:

In 2003-2004, however, the positive effects of the access based regulatory regime slowed, continuing a trend observed in the 2003-03 period.¹⁵

¹² Ms McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 80.

¹³ Liberal and National Parties Policy 1996, 'Privatisation: In the Public Interest and for the Public Benefit', p. 4.

¹⁴ ACCC (2003) *ACCC Telecommunications Reports 2001-02*, p. 7.

¹⁵ ACCC, *Telecommunications Competitive Safeguards for 2003-04*, report to the Minister for Communications, Information Technology and the Arts, March 2005, p. 1, letter to the Minister.

The Democrats are not confident that the bills before us go far enough to ensure an open, competitive telecommunications market. The Democrats are concerned that that a fully privatized monopolistic Telstra will be able to act anti-competitively driven by shareholder value and not what is in the best interest of Australians.

Regional Rural Australia and Future Proofing

While there is evidence to suggest that telecommunications in rural and remote areas have improved significantly in recent years, which advances in technology and a number of government initiatives have contributed to, there is further evidence that services are still inadequate.

As recently as July 2005, the NSW Farmers' Association released a survey into the state of telecommunication services in the bush, with more than half of respondents reporting major problems including unreliable land lines and mobile services.¹⁶

The Democrats minority report on Telstra Bill 2003 stated:

It has also been argued that market forces on their own can never provide rural Australia with the telecommunications services it needs. The National Farmers Federation (NFF) contend that it is the Government's responsibility to ensure that there are appropriate and adequate services in regional and rural Australia. In their submission the NFF stipulate that:

The Government should..... provide targeted Government funding necessary to 'future proof' the ongoing provisions of equitable telecommunication services as new technologies emerge.¹⁷

Telstra gave evidence at the Senate hearing that:

The funds that have traditionally subsidised rural and regional services are fast running out¹⁸

While many witnesses were satisfied about the establishment of the regular regional reviews there were still concerns that the funding attached to this is inadequate – an issue we will discuss later in this report.

There have also been reports in the media that senior Telstra executives have criticised the Government for forcing Telstra to service the bush, prompting concerns that despite a requirement for Telstra to remain in the bush, that a privately owned Telstra will treat consumers in the bush as second class citizens.

Given that Telstra is the major supplier of services to regional and rural Australia, and that many of these areas are subject to market failure, the Democrats are concerned

¹⁶ NSW Farmers Federation 'T3 Survey results', available at <http://www.nswfarmers.org.au/>

¹⁷ Senate Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2003, *Submission 155*, National Farmers Federation, p. 6.

¹⁸ Ms McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 66.

that a privatised Telstra will focus on competitive areas and will abandon country people.

Debt Retirement/future fund

A key argument that the Government presents in favour of the sale of Telstra is an economic one – that the sale will improve the financial state of the public sector. However, the Democrats question this assertion, and question the basis on which it is made. The Government told Australians that we need to sell Telstra to retire debt. This was untrue, Australia has one of the lowest debts on the OECD, in fact, Australia's Government debt is down to \$6.08 billion, and is estimated that by next year it will be non-existent. The Government then told us it was necessary to sell Telstra to establish the "Future Fund" to fund unfunded commonwealth superannuation contributions, when in fact we can continue to fund these retirement pensions through revenue. What the Government fails to tell the public is that they will be giving up \$2.4 billion a year that Telstra provides in revenue.

Opposing the Full Sale of Telstra

As we did with the Telstra (Dilution of Public Ownership) Bill 1996 and the Telstra (Transition to Full Private Ownership) Bill 1998, 2003, we will again be opposing the sale Bill because the Government again fails to make out a case that this Bill is in the public interest. On all key criteria, the Government has failed to make out a case that the sale is justified, whether it be on competition, service, legal or financial grounds.

Competition reform measures

Operational separation

While a vast majority of the witnesses supported the aims of operational separation, there was overwhelming concern, including from the ACCC, with the model in the legislation before parliament.

The process for establishing operational separation in Telstra was outlined by Mr Graeme Samuel, Chairman of the Australian Consumer and Competition Commission (ACCC):

The legislation requires Telstra to prepare a draft operational separation plan. The draft plan will be published for public consultation. If the draft is accepted by the minister it becomes the final plan. In the event that Telstra contravenes the final plan, the minister may give Telstra a written direction requiring it to submit a draft rectification plan. Again, if this is approved by the minister, it becomes a final rectification plan. The legislation specifies that Telstra comply with the rectification plan. If it does not comply, the ACCC can issue remedial directions.

Mr Samuel's was at pains to state that **if** certain things were done, then the model could meet the Governments aims. The ACCC were reluctant to say that they thought the model was good or that they were satisfied with the model:

Senator BRANDIS—Mr Samuel, to draw this together, may this committee take it that the ACCC's position and advice to this committee is that it is satisfied with the government's operational separation model?

Mr Samuel—I have indicated that there are about five outstanding issues that need to be developed. It would depend on the satisfactory development of those issues, which are quite significant issues, including compliance, investigatory powers and the like, before I could give an opinion on that.¹⁹

Instead, Mr Samuel clearly indicated the ACCC had concerns with the model and argued that the Government should further examine the model to ensure it would meet the Government's intended aims behind operational separation:

There are some process issues which may merit further examination by the government so as to ensure that the model reflects the government's intentions to have a robust set of equivalence obligations. 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.

These would appear to the ACCC to be the principal issues that will need to be resolved to determine if the operational separation provisions will deliver increased transparency and equivalence and thus make it easier for Telstra, its competitors and the ACCC to determine whether or not Telstra is engaging in anticompetitive conduct, which might then lead to the ACCC applying the telecommunications specific provisions of part XIB of the Trade Practices Act.²⁰

Other witnesses were able to be more straight-forward and criticised various aspects of the model. The following criticisms were made about the model:

- That Telstra is able to develop the plan themselves;
- That the Minister and not the ACCC will oversee the development and implementation of the plan;
- The operational separation plan is not a license condition. That enforcement of a breach of operational separation by the ACCC is not available until after a rectification plan has been developed;
- There is no requirement for the ACCC to be involved in the development of the draft plan, or an requirement that the Minister take advice of the ACCC with respect to the draft plan;

¹⁹ *Committee Hansard*, 9 September 2005, p. 9.

²⁰ Mr Samuel, *Committee Hansard*, 9 September 2005, p 4.

- That the legislation does not allow the Minister to designate new services
- The absence of a formal advisory role of the ACCC in the internal wholesale pricing and pricing equivalence regime;
- Possible length of time involved in setting prices; and
- The interaction between XIA and XIB and the operation separation plan

With respect to Ministerial determination, Mr Havyatt from AAPT made the following point:

The second example I have included is the example of accounting separation, where we had a process that looked very similar to the process in relation to operational separation, with recognition that something new needed to be done in the regime. No-one could quite agree on how it would be done. The end point was to agree that we would resolve it via ministerial direction. The minister is on record as saying that accounting separation has been inadequate. But all the requirements of accounting separation were introduced by a ministerial determination. So reliance upon operational separation regime that is introduced by ministerial determination is clearly inadequate, based upon our experience.²¹

The Democrats do not support the discretion being a Ministerial one and would prefer that the ACCC as an independent body with expertise in competition law has the discretionary powers. In addition, we believe that the Minister would be subject to lobbying by Australia's second biggest company and we think this is highly inappropriate given the monopolistic position Telstra still maintains.

Mr Amos a representative for ATUG raised the following concerns about the lack of involvement of the ACCC and the ability of the ACCC to adequately perform its role:

The model that would be introduced through a licence condition requires Telstra to produce, implement and adhere to an operational separation plan. If Telstra contravenes a final operational separation plan the minister may require it to prepare a rectification plan. Breach of that rectification plan would be a breach of Telstra's carrier licence and would enable enforcement action by the ACCC. We note that, the way the legislation is currently worded, the licence condition is only to produce the plan. It is like having a market plan for the USO—and we all know about that. We believe the contents of the operational separation plan should be a licence condition. How long can they spend producing the plan? That also needs to be defined. And would they ever get to a point of having something to implement and adhere to?

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 if there has been a breach?.....

.....I was talking about XIB of the TPA. This provision seems to override the existing ACCC powers to determine any competitive conduct. Since the plan is going to be developed by Telstra alone, as we see it at the moment, it seems ludicrous to us at ATUG that such a plan might be allowed to override the ACCC access pricing

²¹ Mr Havyatt, *Committee Hansard*, 9 September 2005, p. 26.

principles and the price squeeze determinations. From our end, that is a very important point at this moment.

Schedule 11 would also amend parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either XIB or XIC, to have regard to the conduct that Telstra engages in order to comply with the final operational separation plan. To that extent, that conduct is relevant to the functions being performed or the power being exercised. These amendments will provide linkages between the operational separation plan of parts XIB and XIC where relevant. Again, there seems to ATUG to be a possibility for delay, obfuscation or gaming, which is something that we have been quite concerned about in the past. Giving such a central role to the operational separation plan developed by Telstra alone is too broad and the implications still remain unclear and worrying.²²

Similarly, Mr Forman from the Competitive Carriers Coalition said:

As far as we can see, and I think this is the point that Mr Havyatt was making, compliance with the plan itself is not a licence condition. There is a licence condition to comply with a rectification plan. We also cannot see that there is any power for the ACCC to investigate a breach of the plan, so how a breach is established is open to question. The second issue is the interrelationship with, or what the explanatory memorandum refers to as the linkage between, the operational separation plan and parts XIB and XIC requiring the ACCC, in investigation of an XIB or XIC matter, to have regard to any conduct that may be relevant in the context of the operational separation plan. We are also well versed in the gaming that goes on in this industry, and that is the kind of change we fear that Telstra and the team of 180 lawyers that were referred to earlier will drive a truck through to the extent that the XIB and XIC processes may be fundamentally and profoundly altered to the point where they are no longer functioning.²³

The Democrats also share Mr Forman's concerns about the choice of model:

..... in the explanatory memorandum, explains why this model of operational separation was chosen and the ACCC's preferred model was rejected. It seemed that the premise was that this model was one which contained a lower level of implementation risk because it was one that related to the existing business arrangements inside Telstra and one that Telstra had been involved in the development of as opposed to the ACCC model, which it said was one that was going to be imposed upon Telstra.

We are concerned that there has been a fundamental change in the environment since that decision was made—that is, that Telstra have clearly indicated on a number of occasions that they intend to reorganise themselves internally. So the internal arrangements of Telstra upon which this model is based—which really is an attempt, as I understand it, to codify things that are already in place—are no longer supported by Telstra's management. In fact, Telstra's management have clearly indicated in a number of forums that they intend to significantly wind back, for example, their

²² Mr Amos, *Committee Hansard*, 9 September 2005, p. 25.

²³ Mr Forman, *Committee Hansard*, 9 September 2005, p. 28.

wholesale operation. That seems to me to suggest that the implementation risk around this model has become enormous over the course of the last month. There is a need for the thinking that sits behind this to be reconsidered before we get too far down the track and to understand what the choices are that are being made and the bases upon which those choices have been made.²⁴

The Democrats believe that there is enormous potential here for the Government's model of operational separation to be exploited. The Democrats will be moving amendments to address the issues, and will include an amendment to provide the ACCC with divestiture powers in case operational separation fails.

Amendments to the Trade Practices Act

There was general support for the amendments proposed to be made to the *Trade Practices Act 1974*. The Democrats support the increase to penalties and the provisions to enable the ACCC to make procedural rules.

However, concerns were raised by a number of witnesses that the amendment outlined in schedule 9 to the long-term interest of end users test could have unintended consequences and negatively impact on the industry and consumers:

Firstly, the schedule 9 amendment that ATUG have, unfortunately, said they support is another one of these minor amendments that are referred to as being a clarification of the LTIE test. It is not a minor clarification; it is fundamentally changing the basis on which that test will apply. It brings into play the consideration of what extra risk factors you would include in interconnection pricing. That amendment would mean that every interconnection agreement—every regulated service that is in place in the regulatory regime—would immediately be recontested by Telstra. They would take the issues to the Australian Competition Tribunal and they would be arguing for prices that are as much as twice the existing interconnection prices. It would take us back to all the issues that we were discussing in 2002 before the Australian Competition Tribunal. It is not a minor amendment; it has had no public consultation; there has been no advice from the ACCC about what they think the impact of that amendment would be.²⁵

It is our understanding that this amendment is meant to be a clarification amendment and is not consequential, therefore given it could have negative consequences; we will be amending the Bill to delete this provision.

The Democrats support the majority of the changes but feel they do not go far enough. The Democrats believe that the recommendations outlined by the Democrats-chaired Senate Committee in its report *The performance of the Australian Telecommunications Regulatory Regime* should also be implemented, and will be moving amendments to the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, accordingly.

²⁴ Mr Forman, *Committee Hansard*, 9 September 2005, p. 28.

²⁵ Mr Havyatt, *Committee Hansard*, 9 September 2005, p. 27.

The Democrats were pleased to note that the Government picked up at least one of the reports recommendations - to increase the funding of the ACCC. The Democrats were disappointed that the Government hasn't seen fit to appoint a full time Telecommunications Commissioner to the ACCC and we will also move an amendment to achieve this.

Consumer measures

The Democrats note that Bills package included a range of consumer measures that were welcomed by the majority of submissions and witnesses. The Democrats support additional enforcement powers for the ACMA; ACMA's new powers in relation to mass service disruption services; and the improvements of the effectiveness of the self-regulatory process and the development of industry codes of practice, in particular the funding to support code development and consumer participation (we note CTN's request for the provision to be amended so that CTN could access the funds).

The Democrats acknowledge the submissions made by *Women with Disabilities Australia* and *People with Disability*, and agree with the key issues raised in their submissions and the need to ensure adequate protections for people with disabilities are maintained and strengthened. Ms Corbin from CTN also noted at the hearing that while many Indigenous communities are in rural and remote areas (and would presumably be included in the future proofing measures), they may require some specific additional consumer protection in order to ensure that they get the protections. Unfortunately as a result of the short time available to us we were unable to explore these issues more broadly in this report.

Future proofing

Dealing with fears that less commercially profitable services will decline has been one of the key impediments in the Government's ability to sell its majority interest in Telstra. The Government's key response to the issue of 'future proofing' had been to establish a regional review committee which will undertake reviews every 3 years, establish a communications fund of up to \$2 billion from which recommendations from those reviews will be funded. The Government also pledged an additional \$1.1 billion to be spent on broadband and mobile coverage over the next few years, however it is not clear if the funding will be targeted only to regional and rural Australians. There was support from witnesses for the establishment of a regional review committee (RTIRC). However we note that the legislation excludes the Territories from the review. Given the Northern Territory would have many regional and rural users, we argue that they should be included as part of a regional review of telecommunications, and will amend the Bill accordingly. We were pleased to see that the Government has agreed to have the reviews every 3 years rather than every 5 years as previously indicated.

However, we think the package is woefully inadequate.

As outlined earlier in this report, infrastructure investment has dropped from 23.4% of total revenue in 1999 to 14.1% in 2004. The latest OECD figures for December 2004 show that Australia is now ranked 21st in broadband subscribers per 100 inhabitants, down from 18th in 2001. We do have a relatively high take up rate but this is because we started at a low base, years behind other countries. The Democrats are convinced that this package will not deliver modern telecommunications service in the short-term let alone the long-term.

As previously stated in our minority report to the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005:

The Democrats believe that the Government as major shareholder has been irresponsible in not investing adequately to meet both current needs and future telecommunications needs. We agree with SETEL's assertions that the focus on 'Standard Telephone Service' is no longer sufficient to meet the needs of Australians. Broadband is the future of communication transmission for the delivery of voice, data and video based service. The Democrats believe that Government leadership in facilitating and supporting all Australians to access affordable, fast, reliable, broadband is crucial if Australia is to flourish in the 21st century. Yet the Government has failed to invest wisely.²⁶

The Democrats support the comments made by Mr Cooper, Divisional President, Communications Division, Communications, Electrical and Plumbing Union (CEPU):

In putting forward this package, the government claims that it is future proofing regional and rural Australian communications services, presumably against those commercial forces which it itself unleashed through its own privatisation policies. The CEPU considers these claims ill-founded. While the specific measures proposed here may confer modest benefits on those who live in those areas, they cannot, in our view, provide the answers to the long-term investment needs of the community. Nor will the operational separation of Telstra do anything to help the bush. The chief beneficiaries of this measure will be the companies whose prime targets are high-spending commercial customers in the metropolitan mass market. Thin rural and regional markets will continue to hold few attractions for profit-driven firms, irrespective of the structural experiments of policy makers.²⁷

There has been criticism about the level of the funding. Mr Moore in his submission argued that the \$2 billion Future Fund should at least be doubled or quadrupled to \$8 billion to cater for this apparent oversimplification of the core backhaul network necessary for true broadband internet.²⁸

The Page Research Centre Limited to identified options of how to future proof the bush. Options A and B argued to use a large portion of the estimated \$33.8 billion

²⁶ Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005*, Democrat Minority Report.

²⁷ Mr Cooper, *Committee Hansard*, 9 September 2005, p. 29.

²⁸ Mr Malcolm Moore, *Submission 2*, p. 3.

revenue raised from the sale of Telstra to roll out either fibre optic cable or wireless to the majority of consumers in non-metropolitan areas.²⁹ The report cited a minimum \$7 billion to roll out the required infrastructure over 5 years. Telstra have previously argued it would cost \$30 billion over 20 years to provide fibre to the home. The reality is that the true costs is somewhere in between.

Ms McKenzie from Telstra argued that the Government's funding package was a second-best solution, and that it will not guarantee within the same time frame the same breadth of coverage as Telstra's \$5.1 billion proposal:

It is now matter of record that Telstra recently took to the government a plan to build a similar modern, high-speed network. It would have replaced ageing parts of the old copper network and at the same time connected 98 per cent of Australian homes and businesses to super fast broadband within five years. The government has chosen to take another path. We accept that decision—that is their right. Our job is now to consider what we can do using our own money—our shareholders' money—plus any funding made available under the mechanisms established by the sale bills. But we should be clear that we consider that that is a second-best solution, in our opinion it will not guarantee within the same time frame the same breadth of coverage as the solution we proposed.³⁰

Ms Eason from the CEPU offered these comments:

I think it is important that, when you listen to the statement that there is a large amount of money here and if it is used in a concentrated fashion over very few projects—as Optus said, a few projects might give you bang for your buck—it should give you and the other representatives of rural Australia food for thought, because that is not what is being proposed here. There is \$1.1 billion, which has already been allocated in terms of where it is going to go—the HiBIS fund and other kinds of allocations; that has all been specified. Then there is \$2 billion, which is supposed to last forever, to fund rural and regional needs. That is not a large sum if it is spread in perpetuity. It is a relatively small revenue stream, which is already tied under the mechanisms of this legislation.

...

I am still saying that it is a relatively small revenue stream. It is tied to regular reviews. It is not at the discretion of the department or the parliament in a simple way to say how it is going to be spent. The expenditure of that will be tied to the regional telecommunications infrastructure and services review fund—RTIC or whatever. The kind of image that Optus is inviting you to think about is perhaps where there is a very significant amount of investment—and the nature of telecommunications, if you want infrastructure, is lumpy and not small amounts of money dribbled out; it is big

²⁹ 'Future-proofing telecommunications in Non-Metropolitan Australia, A position paper from the Page Research Centre Limited', March 2005.

³⁰ Ms McKenzie, *Committee Hansard*, 9 September 2005, p. 66.

sums of money, which take a lot of time to recoup in terms of investment. That image is not what this fund is going to provide.³¹

Ms Corbin from the Consumers Telecommunications Network noted that the \$1.1 billion is a relatively small bucket of money to last potentially a long period of time:

The other thing that I am concerned about is the time line. Obviously such a large privatisation is going to take some time, but it will take until 2008 before the review committee can meet to consider how these funds might be allocated. Then, after that, we are looking at 2009 or 2010 before the community sees the benefits. That \$1.1 billion Connect Australia package has got to last the distance between now and then. Those are my concerns. The bucket is not big enough, but this is why the bucket is not big enough.³²

We also note that Ms Corbin correctly pointed out that the way the legislation is worded is that the \$2 billion fund could actually be less:

I would like to address those concerns first. We are concerned about the fact that some of it will likely be shares in Telstra and that, in actual fact, leaves the value of the fund open to question. We would like some clarification on the definitive nature of the amount. We are also concerned that in the legislation it does not specifically say that it will be \$2 billion, but rather that it could be up to \$2 billion and that it is up to the discretion of the minister to decide. Clearly that is dependent on when and how things get sold, but at the same time it does not give us a lot of comfort as far as the actual management goes.³³

We are also concerned that the Government's focus has been on telecommunications standards and services in regional and rural Australia and little attention has been paid to the fact the many metropolitan consumers cannot access broadband due to limitations of the copper wire and pair gains in exchanges.

In his submission to the Committee, Mr Morgan argued that competition cannot be sustained in parts of regional and rural Australia:

Because of skewed regulation the issues that now confronts Telstra in investing and innovating cannot be avoided. When Telstra innovates and invests it creates opportunities for others. Competitors, who by and large use Telstra's network to reach customers, can only innovate with services such as high speed broadband when Telstra upgrades its core network.

The issue for Telstra, as for any dominant (former monopoly) phone company, is whether the investments needed to offer new services on its own behalf are justifiable when competitors have legal rights to access the Telstra network at marginal cost i.e. at a cost which may fail to cover Telstra's 'commercial' cost of capital. The problem for Telstra is heightened by the fact that competitors using Telstra's network then

31 Ms Corbin, *Committee Hansard*, 9 September 2005, p. 50.

32 Ms Corbin, *Committee Hansard*, 9 September 2005, p. 54.

33 Ms Corbin, *Committee Hansard*, 9 September 2005, p. 53.

divert revenues from Telstra which are needed for network upgrades and most significantly cross subsidies to rural and remote areas.....

Telstra, like its predecessor Telecom, has to support high cost and consequently loss making rural and remote customers through a web of cross subsidies which have kept telecommunications costs uniform across Australia. Despite the arcane economic theory about contestability and tendering out loss making rural areas, these customers are of absolutely no interest to competitors and will remain Telstra's sole responsibility.

Since the network monopoly ended in 1991 no competitor has made or even attempted to make major inroads into the bush. Although there have been several short lived attempts to build alternative infrastructure in major provincial cities the major competitors to Telstra have stayed out of the country. With full liberalisation of the market in 1996 competitors have been free to use any technology they might chose but none have built a business case for market entry in the bush.

The behaviour of Telstra's competitors is completely rational. Why would they build infrastructure to enter loss making markets. The companies such as OPTUS, Primus and AAPT only really offer resale of the Telstra fixed network outside the capital cities although both Optus and Vodafone have built digital mobile networks that cover about 8% of the Australian land mass. These networks replicate the digital network built by Telstra but fail to match the coverage of the Telstra analogue network which was closed as a condition for Vodafone's entry to the market. ...

The question is why would a competitor seek to enter the rural and remote areas when the government's own conservative estimate of the cross subsidy to loss making rural areas is \$230 million a year. That figure is contested by Telstra who maintain the cross subsidy is in excess of \$650 million a year a figure confirmed by Bell Labs research ...

The reality is Telstra does not hold a rural monopoly. Any competitor has the right to install infrastructure and compete anywhere in Australia if they believe they can make money from entering the rural and remote area market. The fact that none have chosen to do so underlines the fact that providing rural service is a costly, loss making business.

The National party and its coalition partners have chosen to deny this fact. To the Page Centre, the National Party's think tank, the problem in the bush is Telstra rather than the cost structure of serving vast distances and sparse population densities.

Shortly before the release of the Page Centre report in March 2005, the then Leader of the National Party, the former Deputy Prime Minister John Anderson maintained that the answer to any shortfall in services in the bush was more competition.....

Once the network whether radio or fibre optic was established Telstra would wind up its existing copper based phone network in the bush and become one of a number of competitors using the new infrastructure which was government owned to deliver service.

Although it seemed to be a rather self defeating policy the report ignored the fact that they were merely recommending replacing one publicly owned network with another.

Clearly if competition is the answer in the bush then rural customers will have to await the arrival of the Mother Therese telephone company - someone willing to lose hundreds of millions of dollars a year competing with Telstra.

Sadly losing money isn't popular with shareholders and there's the rub for the National Party. Shareholders in a fully privatised Telstra will expect the board to maximise profits on their behalf and faced with intense, contrived competition in and between the capital cities, a rational Telstra board would have to turn to loss making rural services for cost savings and consequently sustained profits.

A simple commercial truth must be acknowledged. Regulation cannot protect rural consumers if Telstra does not have the money for loss making rural services.³⁴

The Government's package clearly ignores these issues and is clearly inadequate to ensure equitable access to modern telecommunications services in regional and rural areas.

The Committee report into *The Performance of the Australian Telecommunications Regulatory Regime* argued for a mapping exercise of optic fibre networks in Australia, to facilitate a national plan for infrastructure investment and deployment:

In regional NSW the Committee was told about the presence of unused telecommunications infrastructure in the form of 'dark fibre', that is, fibre optic cable which is not activated. As discussed in Chapter 4, Telstra asserted that dark fibre was laid to accommodate future demand or serve as a back-up if activated cable were damaged. In north Queensland, representatives from James Cook University referred to a separate fibre optic network which runs from Brisbane through to Townsville, a distance of over 1500 kilometres. The Committee formed the opinion that in populated corridors of Australia there is currently a range of optic fibre infrastructure. Much of this infrastructure is owned by State and Territory governments, government authorities, and local councils and utilities, and some of this infrastructure is still dark. Attempts by the Committee to seek a clearer national picture of this infrastructure were largely unsuccessful. The Committee believes that in order to stimulate infrastructure-based competition, an accurate national picture of what currently exists must be established.³⁵

Based on the evidence Democrats argue that the \$3.1 billion community fund is inadequate to provide fast modern broadband regional and rural Australia let alone all Australians. The Democrats argue that the Government should undertake a mapping exercise of current fibre networks including 'dark fibre', develop a national plan to roll

34 Mr Morgan, *Submission 19*, pp 5- 8.

35 Senate Environment, Communications, Information Technology and the Arts References Committee, *The Performance of the Australian Telecommunications Regulatory Regime*, p. 206.

out broadband, and establish an adequate fund to finance the roll out. The \$2 billion future fund could be used to maintain and upgrade services into the future.

Conclusion and recommendations

The Democrats acknowledge that there were other concerns raised from other witnesses and submissions. However, given the ridiculously short time given to us for this inquiry and reporting deadline, we were limited in the issues we could cover, and would defer to our previous minority reports on the Telstra sale Bills and recent Senate Committee reports into telecommunications chaired by the Democrats for more information on our position.

Based on the evidence before us, the Democrats argue that the Government needs to abandon ideology and step back and reassess what's in the national interest. The sale has serious implications for consumers and the industry, it is critical that the Government focuses on overcoming Australia's steady decline against world standards instead of proceeding with privatisation.

The Democrats make the following initial recommendations:

- 1) Oppose the Telstra (Transition to Full Private Ownership) Bill 2005; and
- 2) Provide an additional 4 weeks for the Senate Committee to properly inquire into the legislation.

Regardless of the outcome of this legislation and the ownership of Telstra, we make the following recommendations:

- 3) Give the ACCC divestiture powers.
- 4) Implement recommendations 6, 8, 9, 10, 13, 14, 15 and 16 from the ECITA report *The performance of the Australian telecommunications regulatory regime*, and strengthen the Trade Practices Act.
- 5) Amend the Operational Separation model to transfer direction and powers from the Minister to the ACCC. And other amendments relating to the operation of the model as identified in the evidence.
- 6) Amend provisions with respect to the long-term interest of end users test.
- 7) That one of the full-time commissioners of the ACCC be given specific responsibility for telecommunications, and that this person also be a member of the Australian Communications and Media Authority (ACMA).
- 8) Require the ACMA to undertake a mapping exercise of optic fibre networks in Australia and in consultation with the Department of Communication, Information Technology, and the Arts, industry, and consumer groups, develop a national plan to roll out fibre and satellite to ensure high speed broadband to ALL Australians.
- 9) Increase the Communications fund initial injection to \$7 billion to fund the national roll out of fibre and satellite over the next 5 years.
- 10) Include provision in the USO that broadband be available to all people at 512M/Bits speed and on equivalent terms by 2010.

- 11) Include broadband services in the CSG, and
- 12) Further strengthen consumer protection.

On the expectation that the Sale Bill will go ahead, we also make the following recommendations:

- 13) Require Telstra once it becomes majority private owned to divest its interest and control of Foxtel and the HFC cable.
- 14) Secure a minimum of \$2 billion into the communications fund rather than the 'maximum' currently in the bill which would leave it up to the Cabinet as to when and if the total amount promised would be deposited; and
- 15) Insist that the \$2 billion is in cash, not shares valued at whatever the Government might deem 'acceptable'.

Lyn Allison
Australian Democrats

