The Senate

Environment, Communications, Information Technology and the Arts Legislation Committee

Inquiry into the Telstra (Transition to Full Private Ownership) Bill 2005 and related bills

September 2005

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Terms of Reference

On 6 September 2005, the Senate referred the following inquiry to the Environment, Communications, Information Technology and the Arts Legislation Committee for report by 12 September 2005.

(1) The Telstra (Transition to Full Private Ownership) Bill 2005;

The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005;

The provisions of the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005;

The provisions of the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005, and;

The provisions of the Appropriation (Regional Telecommunications Services) Bill 2005

to be referred at whatever stage the bills have reached at the end of the time available for the consideration of government business on 8 September 2005.

(2) In examining the bills, the committee consider only the following issues:

(a) the operational separation of Telstra;

(b) the role of the Australian Competition and Consumer Commission (ACCC), including:

(i) the requirement that it consider the costs and risks of new infrastructure investment when making access decisions, and

(ii) streamlining the decision-making processes, including the capacity for the ACCC to make procedural rules;

(c) the role of the Australian Communications and Media Authority, including:

(i) the provision of additional enforcement powers,

(ii) improvement of the effectiveness of the telecommunications self-regulatory processes by encouraging greater consumer representation and participation in the development of industry codes; and

(d) the establishment of a perpetual $2 billion Communications Fund.

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Recommendations

Recommendation 1

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 [para 3.92].

Recommendation 2

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

Abbreviations

ACCC	Australian Competition and Consumer Commission
ACIF	Australian Communications Industry Forum
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
Appropriation Bill	Appropriation (Regional Telecommunications Services) Bill 2005
ATUG	Australian Telecommunications Users Group
Carrier Licence Charges Bill	Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005
CCC	Competitive Carriers Coalition
CEPU	Communications Electrical and Plumbing Union
Competition and Consumer Issues Bill	Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005
CSG	Customer Service Guarantee
CTN	Consumers Telecommunications Network
DCITA	Department of Communications, Information Technology and the Arts
Estens Review	Regional Telecommunications Inquiry, *Connecting Regional Australia*, 2002
Future Proofing Bill	Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005
NFF	National Farmers' Federation
TCPSS Act	*Telecommunications (Consumer Protection and Services Standards) Act 1999* (Cwth)
Telecommunications Act	*Telecommunications Act 1997* (Cwth)

Telstra Bill	Telstra (Transition to Full Private Ownership) Bill 2005
TIO	Telecommunications Industry Ombudsman
TPA	*Trade Practices Act 1974* (Cwth)
VoIP	Voice over Internet Protocol

Chapter 1

Background

1.1 On 6 September 2005 the Senate resolved that the following bills and provisions of bills be referred to the Environment, Communications, Information Technology and the Arts Legislation Committee at whatever stage the bills had reached at the end of the time available for the consideration of government business on 8 September 2005:

- the Telstra (Transition to Full Private Ownership) Bill 2005 (the Telstra Bill);
- the Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005 (the Competition and Consumer Issues Bill);
- the provisions of the Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005 (the Future Proofing Bill);
- the provisions of the Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005 (the Carrier Licence Charges Bill); and
- the provisions of the Appropriation (Regional Telecommunications Services) Bill 2005 (the Appropriation Bill).

1.2 In examining those bills, the Committee was to consider only selected issues, as set out in the terms of reference on page v., and was required to report by 12 September 2005. Three of the bills were introduced in the House of Representatives on 7 September 2005. The remaining two bills, the Telstra Bill and the Competition and Consumer Issues Bill, were introduced in the Senate on 8 September 2005.

Conduct of the inquiry

1.3 The Committee advertised the inquiry in *The Australian* on Thursday 8 September 2005, calling for submissions by Friday 9 September. In accordance with its usual practice, the Committee also directly contacted approximately fifty relevant organisations and individuals to invite submissions.

1.4 Submissions were received from 24 organisations and individuals, as listed in Appendix 1. While most of these submissions addressed the specific terms of reference as required, some canvassed broader issues which were beyond the Committee's consideration. The Committee also received correspondence from a small number of individuals voicing opposition to the inquiry timeframe and to the privatisation of Telstra, and has listed these in Appendix 1.

1.5 The Committee held a public hearing in Canberra on Friday, 9 September 2005, including a roundtable of stakeholders. Details of the public hearing are in Appendix 2.

Outline of the bills

The Telstra (Transition to Full Private Ownership) Bill 2005

1.6 The Telstra Bill amends the *Telstra Corporation Act 1991* to repeal provisions that require the Commonwealth to retain 50.1% of equity in Telstra, thus enabling the corporation to become fully privately owned. The Bill sets out arrangements for the conduct of the sale of the Commonwealth's remaining equity in Telstra.

1.7 The Committee notes that a previous bill to achieve this objective, the Telstra (Transition to Full Private Ownership) Bill 2003, was the subject of a previous committee inquiry and report.[1]

1.8 Part 2 of Schedule 1 makes various consequential amendments to various Acts and regulations as a consequence of Telstra ceasing to be Commonwealth controlled. There are also various transitional provisions.

The Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005

1.9 The Competition and Consumer Issues Bill provides for a number of measures, one of which is operational separation of Telstra. The aim of operational separation is to provide equivalence and transparency of Telstra's wholesale and retail operations.

1.10 The Bill also makes changes to the telecommunications regulatory regime. The aim is to enhance the regime's capacity to respond to market developments and emerging networks, and changing consumer needs. It is intended that the Bill will:

- increase investment certainty;
- improve the operation of telecommunications-specific anti-competitive conduct regulation and access regulation;
- enhance the capacity of the Australian Communications and Media Authority (ACMA) to respond to consumer interests;
- revoke the requirements for carriers to have industry development plans; and
- other minor amendments.[2]

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1 Environment, Communications, Information Technology and the Arts Legislation Committee, *Provisions of the Telstra (Transition to Full Private Ownership) Bill 2003*, October 2003.

2 *Telecommunications Legislation Amendment (Competition and Consumer Issues) Bill 2005, Explanatory Memorandum*, p. 1.

The Telecommunications Legislation Amendment (Future Proofing and Other Measures) Bill 2005

1.11 The Future Proofing Bill contains four schedules:

- Schedule 1 inserts a new Part 9C into the *Telecommunications (Consumer Protection and Service Standards) Act 1999* (the TCPSS Act) to establish the $2 billion Communications Fund. This fund will resource the Commonwealth Government's response to independent reviews of rural, remote and regional services;
- Schedule 2 inserts a new Part 9B in the TCPSS Act relating to regular reviews of regional telecommunications;
- Schedule 3 inserts a new Division 6A into Part 6 of the *Telecommunications Act 1997*, which will provide that industry bodies and associations that develop consumer-related industry codes can be reimbursed by the ACMA for their costs in developing these codes;[3] and
- Schedule 4 amends the *Telstra Corporation Act 1991* to 'switch on' appropriations in sections 8AL, 8AS and 8BA of the *Telstra Corporation Act 1991* that will have been temporarily 'switched off' by the Telstra (Transition to Full Private Ownership) Bill 2005 for constitutional reasons.[4]

1.12 Schedule 2 allows for independent reviews, in order to assess the adequacy of telecommunications in regional, rural and remote areas of Australia. The Minister for Communications, Information Technology and the Arts (the Minister) will have the power to appoint an independent expert committee, the Regional Telecommunications Independent Review Committee (RTIRC). The RTIRC will undertake reviews and report its findings and recommendations to the Minister.

1.13 The Committee notes that Schedule 2 replaces the provisions of the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005 (the Regular Reviews Bill),[5] which was introduced into parliament earlier this year and was the subject of inquiry and report by this Committee in May 2005.[6] In that report, the Committee made several recommendations to improve the operation of

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3 See also the *Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005*.

4 *Explanatory Memorandum,* pp 2-3. Section 53 of the Constitution provides that a proposed law appropriating revenue or moneys shall not originate in the Senate.

5 See the Hon Peter McGauran MP, Minister for Agriculture, Fisheries and Forestry, *House of Representatives Hansard*, 7 September 2005, p. 3.

6 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Provisions of the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005*, May 2005.

the Regular Reviews Bill. The Committee notes that several key recommendations have been implemented in Schedule 2.[7]

The Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005

1.14 The Carrier Licence Charges Bill enables telecommunications industry bodies to recover costs incurred in the development of consumer-related industry codes of practice from all licensed telecommunication carriers.[8]

1.15 When enacted the Bill would:

- amend the *Telecommunications (Carrier Licence Charges) Act 1997* and the *Telecommunications (Carrier Licence Charges) Amendment Act 1998*;
- in combination with the Future Proofing Bill, enable the total amount of annual charges imposed on carrier licences to include an additional amount to reimburse industry bodies for costs incurred in developing consumer-related industry codes;
- complement Schedule 1 to the Competition and Consumer Issues Bill, which would remove the requirement for carriers to have a current industry development plan; and
- make minor changes to the *Telecommunications (Carrier Licence Charges) Act 1997* to mirror the *Legislative Instruments Act 2003* and remedy an error in an amendment to this Act.[9]

The Appropriation (Regional Telecommunications Services) Bill 2005

1.16 The Appropriation Bill appropriates sums out of the Consolidated Revenue Fund for the ordinary annual services of the Government in relation to regional telecommunications services and related purposes.[10]

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7 In particular, Recommendation 1 (that the maximum period of the review cycle be reduced from five to three years) has been addressed in proposed subsection 158P(4); Recommendation 2 (that the Bill provide that the first review is to be conducted within two years of the Bill obtaining Royal Assent) has been addressed by proposed subsection 158P(3), which states that the first review must start before the end of 2008 or such earlier time as the Minister determines) and Recommendation 3 (that the membership of the RTIRC be restricted so that no more than one service provider can be represented) has been addressed by proposed subsection 158T(5), which excludes carriers or carriage service providers from the RTIRC.

8 Department of the Parliamentary Library, Bills Digest No. 41 2005-06*, The Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005,* 8 September 2005, p. 2.

9 *Telecommunications (Carrier Licence Charges) Amendment (Industry Plans and Consumer Codes) Bill 2005, Explanatory Memorandum*, p. 2.

10 *Appropriation (Regional Telecommunications Services) Bill 2005*.

Acknowledgements

1.17 The Committee thanks all those who contributed to its inquiry by preparing submissions and by appearing at the hearing, including the roundtable, at short notice. The Committee also thanks all staff involved in this inquiry.

Note on references in this report

1.18 References in this report are to individual submissions as received by the Committee rather than a bound volume of submissions. References to Committee Hansard are to the proof Hansard: page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

The Operational Separation of Telstra

> Operational separation is simply designed to produce some transparency in the dealings between Telstra's wholesale division and its retail businesses, and then to ensure that there is some equivalence of dealing in those dealings between its wholesale and retail businesses and Telstra's other wholesale customers.
>
> ... the law has always said to Telstra you shall not behave anti-competitively, it is recognised that Telstra has a dominant position in telecommunications and a monopoly over the fixed line network .... All that this operational separation is designed to do is to make it easier for Telstra and for the ACCC to determine whether or not Telstra is behaving anti-competitively.[1]

2.1 The Explanatory Memorandum of the Competition and Consumer Issues Bill acknowledges the dominant market position of Telstra, and the need for its competitors to be able to access and interconnect with infrastructure owned by Telstra. The Explanatory Memorandum states that:

> Telstra's control of this infrastructure, combined with its market position, creates an incentive and ability for it to favour its own retail business in the provision of access to important services provided over this infrastructure.
>
> The current regulatory regime has enabled competition to develop in the telecommunications market, but it has not fully prevented Telstra from discriminating in favour of its own retail operations.[2]

2.2 The Competitive Carriers Coalition (CCC) submitted:

> Telstra continues to be vertically integrated such that it owns and controls the monopoly bottleneck elements of the network, most importantly the customer access network. It is also the most horizontally integrated telecommunications company in the world, according to the ACCC.
>
> Telstra's integration creates a powerful incentive and the ability for it to leverage the market power it derives from this monopoly asset ownership in such a way as to disadvantage competitors in retail markets.[3]

2.3 In the interests of enhancing competition in the telecommunications sector, the Government is determined to remedy this situation by ensuring that Telstra's competitors are treated fairly and transparently in comparison with Telstra's retail

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1 Mr Graeme Samuel, ACCC, *Committee Hansard*, 9 September 2005, p. 4.

2 *Telecommunications Legislation Amendment (Competition and Consumers Issues) Bill 2005, Explanatory Memorandum*, p. 2.

3 Competitive Carriers Coalition, *Submission* 6, p. 3.

business units. As the Minister set out in her statement to the Senate, *Telecommunications for the Future*:

> A major plank of the Government's competition reforms is a requirement on Telstra to introduce operational separation. The objective of operational separation is to provide equivalence and transparency to Telstra's wholesale customers. It is designed to fit within Australia's existing regulatory framework and to fit with Telstra's business arrangements.
>
> Operational separation will ensure and demonstrate that Telstra treats its wholesale customers fairly. The new arrangements include internal wholesale pricing mechanisms for Telstra which will ensure its retail businesses receive no more favourable treatment than its wholesale customers.[4]

2.4 Schedule 11 of the Competition and Consumer Issues Bill provides the framework under which the details of operational separation will be agreed and implemented by Telstra. The Bill sets out the aim and objectives of operational separation to which Telstra must give effect.

> The aim of operational separation is to promote the principles of transparency and equivalence in relation to the supply by Telstra of wholesale and retail services. To achieve this, the Bill requires that Telstra must prepare and comply with an operational separation plan. The plan must be directed towards achieving this aim and a series of stated objectives. The draft operational separation plan must be approved by the Minister before it becomes a final operational separation plan. If Telstra contravenes a final operational separation plan the Minister can require it to prepare a rectification plan. Breach of a rectification plan would be a breach of Telstra's carrier licence, and would enable enforcement action by the ACCC.[5]

2.5 Proposed section 54 of the *Telecommunications Act* gives the Minister the power to determine:

- the matters that must be addressed in an operational separation plan; and
- which services must be covered by operational separation.

2.6 Whilst the details will be finalised following consultation, there are key elements of the plan that the Government has insisted must be part of operational separation:

- Telstra must provide equivalent standards of service to its retail business units and its wholesale business units;

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4 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, *Telecommunications for the Future*, 8 September 2005, p. 6.

5 *Telecommunications Legislation Amendment (Competition and Consumers Issues) Bill 2005, Explanatory Memorandum*, p. 3.

- the services covered must include all the essential services relied upon by the company's competitors including the unconditional local loop, wholesale ADSL, and local call resale;
- Telstra must develop contractual arrangements for the supply of services from Telstra's network business units to Telstra's retail and wholesale business units;
- separate business units must have separate staff incentive programs, separate premises, and secure information systems; and
- Telstra is required to establish a Director of Equivalence to monitor and report to the Board on Telstra's performance against its operational separation obligations.

Comments on operational separation

2.7 Telstra representatives expressed concern over the operational separation provisions of the Bill. Ms Kate McKenzie, Managing Director, Regulatory, Telstra, told the Committee:

> The operational separation provisions in particular are complex, costly and uncertain—and anything that increases systemic costs decreases shareholder value … We support the sale bill. We certainly do not support the operational separation provisions; we think there are some major difficulties with them.[6]

2.8 However, this position was not widely supported, with most witnesses supporting enhanced transparency between Telstra's wholesale and retail units. Mr Tom Amos from ATUG said:

> ATUG supports the introduction of operational separation of Telstra. Operational separation in telecommunications has significant benefits for the industry and end users. ATUG believes operational separation is a positive step for better end-user services when it forms part of the further sale process of Telstra and when combined with the appropriate telecommunications policy and regulatory framework.[7]

2.9 The ACCC told the Committee that while it 'welcomes changes which would increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors',[8] there were some process issues which may merit further examination to ensure that the model reflected the Government's intention to have a robust set of equivalence obligations.

2.10 Similarly, Mr Paul Fletcher from Optus said:

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6 Ms Kate McKenzie, Telstra, *Committee Hansard*, 9 September 2005, p. 66; p. 72.

7 Mr Tom Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 24.

8 Mr Graeme Samuel, ACCC, *Committee Hansard*, 9 September 2005, p. 4.

> We consider that there is a lot of potential in the operational separation measures in this legislation, but the government, we believe, needs to do some more work to ensure that its policy intentions are realised.[9]

2.11 Mr Havyatt from AAPT claimed that the ACCC did not support the operational separation model outlined in the legislation:

> I do not know if everyone else in this room understands regulatory language in the way I do, but I heard Graeme Samuel today in this room say 'the ACCC does not support these amendments'. For him to have answered in the way that he did makes it abundantly clear, to me at least, that the ACCC does not support these amendments.[10]

2.12 The Committee notes that Mr Samuel did not say this and believes that Mr Havyatt misrepresented what Mr Samuel said. What Mr Samuel did say was that:

> The Government's proposed model for the operational separation of Telstra maintains the balanced approach of the existing regulatory regime. The proposal recognises that Telstra is in the unique position, through its monopoly over the local access network, of being able to stifle competition and innovation by frustrating its competitors investment plans. For this reason, the ACCC welcomes changes which would increase transparency and equivalence in the way Telstra provides key access services to its own downstream operations relative to those of its competitors.[11]

2.13 Furthermore, Mr Willett from the ACCC said that:

> The bottom line is that, subject to the resolution of the issues that Mr Samuel referred to, the ACCC believes this model can lead to an appropriate set of operation rules.[12]

2.14 Mr Samuel outlined five principal issues, which in the ACCC's opinion 'require further examination as the operational separation plan is developed by Telstra and government':[13]

- the precise details of the operational separation plan and Telstra's obligations in relation to that plan;
- the scope of services that will be subject to the operational separation plan;
- the enforcement regime associated with compliance or, more importantly, non-compliance with the operational separation plan;
- the powers to investigate whether or not compliance has occurred; and

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9 Mr Paul Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 32.

10 *Committee Hansard,* 9 September 2005, pp 25-26.

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

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

13 *Committee Hansard,* 9 September 2005, p. 6.

- 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.[14]

2.15 Several other witnesses also raised these issues during the hearing. Each of these issues is discussed in turn below.

Details of the operational separation plan

2.16 While the majority of witnesses supported the Government's proposal of operational separation, many were concerned that the Bill did not specify how operational separation should occur and that Telstra itself would primarily be responsible for the development of this plan.[15]

2.17 Proposed sections 51-58 provide for the process of preparation of the operational separation plan. Proposed section 51 deals with the contents of a draft or final operational separation plan. Under proposed section 52, it would be a condition of Telstra's licence that it provide a draft operational separation plan to the Minister within a certain timeframe. The draft operational separation plan must be approved by the Minister before it becomes a final operational separation plan (proposed sections 54-56).

2.18 Proposed section 53 requires Telstra to undertake a public consultation process in relation to a draft operational separation plan. In particular, it requires Telstra to publish a notice in newspapers in each state and territory inviting comments on the draft plan within 30 days. Telstra would also be obliged to make a copy of the plan available on its website. Under proposed subsection 53(2), when giving a draft operational separation plan to the Minister, Telstra would need to give the Minister a copy of any comments it has received in relation to the draft plan.[16]

2.19 Despite these requirements, the CCC submitted:

> The Bill places responsibility for the development of an operational separation plan primarily with Telstra. The CCC does not believe that Telstra can be expected to present a proposal that would be credible in circumstances where it has indicated that it plans to wind back its wholesale activities. Further, the CCC understands that those wishing to comment on the Telstra proposal would be required to provide its comments to Telstra, and that Telstra would be responsible for considering the comments and taking them into account in its final draft.
>
> The CCC submits that it is fanciful to believe that Telstra would give proper regard to the comments of competitors. Further, there is no formal

14 Mr Graeme Samuel, ACCC, *Committee Hansard*, 9 September 2005, p. 4.

15 Consumers' Telecommunications Network, *Submission* 5, p. 3.

16 *Explanatory Memorandum*, p. 90. Note that there are also requirements for public consultation on any variations of the final operational separation plan (proposed section 57).

> mechanism whereby those submitting comments to the Telstra plan can present those comments to the ACCC and the Minister and be sure that they will receive proper consideration and that valid criticisms of the Telstra plan contained therein will be incorporated in changes required by the Minister.[17]

2.20 Similarly, Optus in its submission argued that the arrangements gave too much discretion to, and relied too heavily on, the co-operation of Telstra.[18]

> Telstra gets to prepare the operational separation plan, which gives it a huge opportunity to white-ant and undermine what is intended in the legislation.[19]

2.21 While the detail is not set out in the legislation, the Explanatory Memorandum to the Bill does provide significant guidance on what the Government considers would be necessary in an operational separation plan to effectively meet the objectives of the legislation.

2.22 Further, the ACCC, appearing before the Committee, agreed that it would not expect the legislation itself to contain the precise details of a draft operational separation plan.[20]

Designated services

2.23 The Government has recognised that there are services that have not been declared, but which need to be embraced by the operational separation framework - both on price and non-price terms and conditions - in the interests of effective competition.[21] Proposed section 50A defines a 'designated service' for the purposes of proposed Part 8. Designated services are referred to in the objects of proposed Part 8 (in proposed paragraph 48(2)(a)).

2.24 A 'designated service' is defined as an eligible service that is specified by the Minister in a written determination under proposed subsection 50A(1). A designated service is a new category of service and is a subset of eligible telecommunication services. The Minister will determine an initial list of designated services. The Explanatory Memorandum suggest the following services should be included:

- unbundled local loop services;
- local carriage service;
- line sharing service;

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17 Competitive Carriers Coalition, *Submission* 6, p. 6.

18 Optus, *Submission* 16, p. 3.

19 Mr Paul Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 32.

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

21 Competitive Carriers Coalition, *Submission* 6, p. 4.

- wholesale ADSL (layer 2);
- public switched telecommunications network service originating service; and
- public switched telecommunications network service terminating service.[22]

2.25 Optus noted that these services all relate to residential services and that the proposed list of services should be extended to include access services to small business and corporate markets. As competitors rely on Telstra's infrastructure to enable them to provide end-to-end services in the business segment, Optus argued that additional services that should be included are:

- Access Transmission Leases which are declared;
- Business Grade DSL; and
- Data Access Radial (DAR).[23]

2.26 A representative from DCITA explained:

> I think we have an indication of some products in the explanatory memorandum, but we have not finally settled that list yet. The reason for that is that, in terms of the designated services, which are the services you are talking about, we have a focus on those key wholesale services that wholesale customers particularly rely on to compete effectively with Telstra. At the same time, we want to identify the retail services that are provided by Telstra's retail business unit to correspond to those wholesale services. While we have some initial ideas on that, Mr Fletcher from Optus stressed quite strongly that we have to have a very detailed matching process to make sure that we have those comparisons right and that we have got the proper wholesale and retail services that will enable an effective comparison and effective performance measures to be put in place. [24]

2.27 The CCC noted that the legislation does not allow for the Minister to designate new services, that are regulated by the ACCC through actions to ensure compliance with the competition rule. Rather, the CCC argued it allows Telstra to be provided with an 'effective veto on the Minister by requiring the Minister to seek and receive the written consent of Telstra'.[25] Mr David Havyatt from AAPT told the Committee:

> But the real concern is what happens after the first list, because after the first time the minister lists the designated services the provisions of the bill are that only active declared services can be designated by the minister, unless Telstra agrees. So, if Telstra were to introduce a new service—such as a higher speed ADSL service that they actually were even going to provide in the wholesale market but did not want to have the regulatory

22 Optus, *Submission* 16, pp 4-5.

23 Optus, *Submission* 16, pp 4-5.

24 Mr Simon Bryant, DCITA, *Committee Hansard*, 9 September 2005, p. 103.

25 Competitive Carriers Coalition, *Submission* 6, p. 4.

regime applied to—they could just say to the minister, 'No, it is not going to be a designated service.'[26]

2.28 The CCC submitted that the Minister should be able to act on the advice of the ACCC to add new services to the list of designated services,[27] and suggested that this a matter the Government may wish to give consideration to.

Enforcement action

2.29 Under Schedule 11 of the Competition and Consumer Issues Bill, proposed section 69A of the *Telecommunications Act* would give the ACCC the power to give Telstra a remedial direction where Telstra has contravened, or is contravening, a standard licence condition set out in proposed Part 8 of Schedule 1 to the *Telecommunications Act*.[28] However, under proposed subsection 55(3), compliance with a final operational separation plan (OSP) is not a carrier licence condition. As a result, the ACCC could not issue a direction to Telstra if Telstra did not comply with the OSP.[29]

2.30 Rather, if Telstra contravened a final OSP, the Minister could require Telstra to prepare a rectification plan under proposed clause 59. Under proposed clause 65, Telstra would be required to comply with the final rectification plan. By virtue of section 61 of the *Telecommunications Act*, breach of a rectification plan would be a breach of Telstra's carrier licence, and would allow for enforcement action by the ACCC.[30] If Telstra has contravened, or is contravening, the rectification plan, the ACCC would be able to direct Telstra (under proposed section 69A) to comply with the rectification plan. Alternatively, or after having issued a remedial direction, the ACCC, the ACMA or the Minister would be able to commence proceedings in the Federal Court seeking recovery of a civil penalty in relation to Telstra's failure to comply with a condition of its carrier licence. Therefore, the ACCC may only take action if Telstra is in breach of a rectification plan, rather than the OSP itself.[31]

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26 Mr David Havyatt, *Committee Hansard*, 9 September 2005, p. 35.

27 Competitive Carriers Coalition, *Submission* 6, p. 4.

28 Note that under proposed section 69B, Telstra could apply to the Australian Competition Tribunal for review of remedial directions issued by the ACCC under proposed section 69A.

29 *Explanatory Memorandum*, pp 78-79 and 91; DCITA, *Committee Hansard*, 9 September 2005, pp 85-86.

30 *Explanatory Memorandum*, pp 93-95; DCITA, *Committee Hansard*, 9 September 2005, pp 85-87. Note the rectification plan must be approved by the Minister: see proposed sections 59-62.

31 *Explanatory Memorandum*, pp 76 and 95; ACCC, *Committee Hansard*, 9 September 2005, p. 4.

2.31 Several submissions and witnesses expressed concern about these provisions, particularly that the OSP was not a licence condition and, therefore, not in itself enforceable.[32] For example, Ms Karen Lee expressed concern that:

> As a result, there does not appear to be any incentive to comply with the terms of the final plan or even prepare a draft plan. There is no possible application of a financial penalty for non-compliance. Failure to comply with the plan may result only in a direction from the Minister requiring Telstra to prepare a rectification plan … if the final operational separation plan is not treated as a condition then the powers given to the ACCC under clause 69A are meaningless. They apply only in relation to breaches of final rectification plans.[33]

2.32 Some suggested that the contents of the OSP should be a licence condition.[34] For example, law lecturer Ms Karen Lee suggested that:

> … clause 55(3) should be deleted and/or some penalty mechanism should be inserted if Telstra fails to comply with the terms of the final operation separation plan and/or rectification plan. The entire provision as drafted gives Telstra too much scope to play the system with negative consequences for competitors to Telstra.[35]

2.33 Mr Paul Fletcher, from Optus, highlighted the low penalty for failure to comply with the OSP:

> The action they can take is to seek the imposition of a civil penalty for Telstra's breach of its licence condition. The maximum civil penalty is $10 million. There may well be circumstances where Telstra considers that it is rational to simply accept that penalty.[36]

2.34 AAPT also raised the question of the role of the ACCC, saying 'the real question is: what is the role of the ACCC in all this?'[37] However, Mr Havyatt later said: 'I am more than happy to support the Government's decision to introduce operational separation in the Australian marketplace.'[38]

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32 Mr Havyatt, AAPT, *Committee Hansard*, 9 September 2005, p. 27; Mr Forman, CCC, *Committee Hansard*, 9 September 2005, p. 28; Mr Fletcher, Optus, *Committee Hansard*, 9 September 2005, pp 33 and 36-41; Mr Karen Lee, *Submission 13*, pp 5-6; Optus, *Submission* 16**,** pp 2-4.

33 *Submission 13*, pp 5-6.

34 See for example, Mr Thomas Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25; Mr Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 41.

35 *Submission 13*, pp 5-6; see also Optus, *Submission 16*, p. 3.

36 Mr Paul Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 34.

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

38 *Committee Hansard*, 9 September 2005, p. 39.

2.35 Optus proposed that Telstra should be legally required to comply with the OSP, and that the 'unnecessary and time-consuming step of the rectification plan' should be removed. Optus further suggested there should be a 'private right of action to sue Telstra to enforce its compliance with the plan so that Telstra's competitors can choose to take private legal action against Telstra to enforce a breach.'[39]

2.36 However, Telstra also expressed concern about the primary enforcement role being transferred to the ACCC, which is consistent with the fact that Telstra does not support operational separation at all.

2.37 Similarly, the CCC submitted their concern that under the Bill's regime, 'the Minister becomes responsible for making decisions that would be expected to be the responsibility of the independent regulator.'[40]

2.38 A representative from DCITA acknowledged that in the first instance responsibility for the enforcement of the operational separation regime rests with the Minister. However, the representative also pointed out that the ACCC would be involved in providing advice to the Minister in relation to those matters.[41]

2.39 Representatives from DCITA further explained that this enforcement regime was appropriate because it gave Telstra an opportunity to rectify its behaviour:

> The philosophy, if you like, is: 'This is about Telstra's internal operation, let's give them a chance to get it right in the first instance. If they don't get it right in the first instance then we can come in and be quite prescriptive about how they should do it, and then that will be a breach of the licence conditions if they do not get it right in that circumstance.'[42]

2.40 The Committee notes that the model of separation put forward in this legislation does seem to contain the critical elements necessary to the Government's intentions. While there is concern about where the enforcement powers lie, there is no doubt that the model is enforceable. However, the Committee notes that the arrangements are to be reviewed by 2009, and suggests that the effectiveness of the enforcement arrangements be considered as part of the review.

Powers to investigate

2.41 Key concerns raised during evidence relating to the ACCC's powers to investigate compliance included:

- the timing of the ACCC's role; and

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39 Mr Fletcher, Optus, *Committee Hansard*, 9 September 2005, p. 33; see also pp 37-38 and 41; and Optus, *Submission 16*, pp 3-4, 6.

40 *Submission 6*, p. 6.

41 *Committee Hansard*, 9 September 2005, p. 104.

42 *Committee Hansard,* 9 September 2005, p. 86.

- the relationship between the OSP and Parts XIB and XIC of the TPA.

2.42 Some were concerned that the ACCC only became involved in enforcement towards the end of the enforcement process. For example, Mr Tom Amos of ATUG observed 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 if there has been a breach? We believe that continuous in-confidence disclosure should be part of this. An annual report to the government is not enough. We believe that the existing ACCC and ACA reports are effectively reports tabled post event and do not achieve this. The minister as enforcer is not a particularly good concept.[43]

2.43 Similarly, Mr Forman of the CCC stated:

> We also cannot see that there is any power for the ACCC to investigate a breach of the [operational separation] plan, so how a breach is established is open to question.[44]

2.44 In relation to ACCC's powers to investigate breaches of the OSP, a representative from DCITA pointed out that:

> The key part of the bill which we intend to use to ensure the ACCC has adequate monitoring and investigation powers is 51(1)(d), which, in establishing the plan, requires Telstra to comply with the requirements that the minister determines, and we would expect that the minister would determine a range of measures to ensure that there is appropriate opportunity and power for the ACCC to investigate and be aware of all of the activities under the plan. Also, there is 51(3), which provides for the plan to give administrative decision-making powers to the ACCC.[45]

2.45 Another concern raised in this context was the relationship between the OSP and Parts XIB and XIC of the *Trade Practices Act 1974* (TPA).[46] The Explanatory Memorandum states:

> Schedule 11 also amends Parts XIB and XIC to insert provisions that would require the ACCC, when performing its functions or exercising its powers under either Part XIB or XIC, to have regard to Telstra's conduct in accordance with the licence condition relating to operational separation, to the extent that that conduct is relevant to the functions being performed or the power being exercised. These amendments provide a linkage between

43 Mr Thomas Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25.

44 *Committee Hansard*, 9 September 2005, p. 28.

45 *Committee Hansard*, 9 September 2005, p. 104.

46 Mr Thomas Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25; Mr Forman, CCC, *Committee Hansard*, 9 September 2005, p. 28; Ms Eason, CEPU, *Committee Hansard*, 9 September 2005, p. 30.

> the operational separation licence condition and Parts XIB and XIC where Telstra's conduct in accordance with the licence condition is relevant.[47]

2.46 Similarly, the ACCC pointed out that it would retain its powers under Part XIB of the TPA where it has reason to believe there is anticompetitive conduct.[48] In particular, Mr Samuel explained that:

> The role of the ACCC, of course, will be to administer part XIB and particularly the application of a competition notice in the event that the ACCC forms the view or has reason to believe that Telstra has engaged in anticompetitive conduct in any particular set of circumstances. The operational separation plan is designed to facilitate the ability of the ACCC to determine whether or not anticompetitive conduct has been engaged in.[49]

2.47 However, Mr Amos of ATUG expressed concern that the 'privately developed' operational separation plan could effectively overtake Parts XIC and 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 principles and the price squeeze determinations.[50]

2.48 Mr Amos also highlighted Telstra's ability to engage in regulatory gaming:

> …there seems to ATUG to be a possibility for delay, obfuscation or gaming …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. [51]

2.49 Similarly, Mr Forman of the CCC suggested that this:

> …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.[52]

2.50 However, a representative from DCITA felt that there had been 'some confusion, understandably, in the discussion today with the other carriers about how

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47 Proposed section 151CP; see also *Explanatory Memorandum*, pp 3 and 95; and DCITA, *Committee Hansard*, 9 September 2005, pp 86-87.

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

49 ACCC, *Committee Hansard*, 9 September 2005, pp 5-6, 11.

50 Mr Thomas Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25.

51 Mr Thomas Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 26.

52 *Committee Hansard*, 9 September 2005, p. 28.

this framework interacts with parts XIB and XIC and the competition framework.'[53] The representative argued that:

> It is not about replacing the access regime … It is about trying to get transparency and certainty about those retail prices and how Telstra operates at the retail level, and how that interfaces and compares with and is equivalent to what happens for wholesale customers.[54]

The internal wholesale pricing and the pricing equivalence regime

2.51 A price equivalence framework will be established under OPS to check that Telstra's retail business units face an equivalent cost of the use of core network services as those incurred by wholesale customers facing the same inputs. Telstra will retain its current flexibility to introduce, re-negotiate and vary its wholesale prices to its customers, but will be required to re-benchmark its internal prices to actual prices periodically.

2.52 The Committee understands that a working group consisting of Telstra, the ACCC, and the Department of Communications, IT and the Arts is being set up to resolve the issues that relate to the following components of the price equivalence framework:

- setting the benchmark price;
- technical issues surrounding the testing of anti-competitive conduct for the retail pricing protocol; and
- interaction of the framework with the regulatory regime.

2.53 The CCC highlighted the processes of the working group and the development of the plan as problematic primarily because the ACCC did not have a formal advisory role, and the Minister was not required to take note of the deliberations of the working group. Mr David Forman told the Committee:

> We do not see a legislative link in relation to the working group that develops pricing. We do not see a linkage between the output of that group and the ministerial decision process, which ultimately will be the mechanism by which the prices are set. In the absence of that, it is hard to see what regard the minister has to have to those deliberations or what is the basis upon which those decisions are made. More broadly, and this goes to the role of the ACCC, there seems to be an absence of a formal advisory role for the ACCC in a number of places where we would expect it to be in relation to the planning and in relation to the pricing issue that I just mentioned.[55]

2.54 Similarly, Mr Tom Amos from ATUG argued:

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53 *Committee Hansard*, 9 September 2005, p. 86.

54 *Committee Hansard*, 9 September 2005, p. 87.

55 Mr David Forman, CCC, *Committee Hansard*, 9 September 2005, p. 28.

> A group that includes the ACCC, DCITA and Telstra, with an expert facilitator, has been set to develop the principles for the establishment of an internal wholesale price. This group will also seek to establish formal understandings about the use of internal wholesale prices in assessing whether any competitive behaviour exists. This process will provide internal wholesale pricing that the ACCC has identified as important to the role of enforcing compliance under XIB of the TPA. To us, this provision seems to override existing ACCC powers to determine any competitive conduct.[56]

2.55 Mr Amos went on to raise further concerns over the reporting of equivalence. The Committee was told:

> We have an issue with equivalence between the internal wholesale price faced by Telstra's retail business units and the wholesale prices paid by Telstra's competitors for designated services. We ask: how would we ensure during the period that this is the case when it is post event reporting? Annual reporting, we believe, may be too late.[57]

2.56 Another concern raised with the Committee was the possible length of time involved in setting prices. It was noted that the ACCC had been engaged in discussions with Telstra for over two years in regard to access undertakings under Part XIC of the TPA.[58]

The Committee's view

2.57 The Committee notes that there are some concerns about the model of operational separation as outlined by Mr Samuel of the ACCC and expanded upon by some witnesses. However, to quote Senator Brandis, these may be false concerns:

> The first of them was the precise detail of the plan. There was always bound to be the development to an increasingly high level of sophistication of the detailed plan. That could hardly be expected to be legislated for in the statute with specificity. The scope of services, which was the second issue he identified, is essentially a definitional issue. The third, the enforcement regime—and this is the point of my questions—is that we would not expect that to be radically different from what is already provided for in different circumstances in the existing act. The same, I suspect, could be said about his fourth issue—that is, investigative powers. The fifth issue, which is specific to the operational separation model—that is, the development of wholesale pricing and a pricing equivalence regime—is provided for by the working party between Telstra, the ACCC and the department.[59]

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56 Mr Tom Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25

57 Mr Tom Amos, ATUG, *Committee Hansard*, 9 September 2005, p. 25.

58 Mr Ed Willett, ACCC, *Committee Hansard*, 9 September 2005, p. 8.

59 Senator Brandis, *Committee Hansard*, 9 September 2005, p. 17.

2.58 While there is a range of views on some aspects of the proposed model, it does allow the Government's objectives to be fulfilled. Mr Samuel confirmed that the legislation provides a 'framework within which an appropriate operational separation plan can be developed.'[60]

2.59 The Committee also notes that there was a strong view that operational separation would bring real benefits. The ACCC concluded that operational separation should bring benefits for competitors, the economy as a whole and consumers.[61] When specifically asked whether the ACCC believed operational separation would have benefits for Telstra, Mr Willett said:

> Yes, it believes it does because the commission considered that part of the good management of an organisation as large and as complex as Telstra is understanding the cost and appropriate terms and conditions for the supply of network services.[62]

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

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

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

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.

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

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

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[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 overcome[5].

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[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 functions[7].

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 Switzerland[8].

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 network[9], 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.

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[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 markets[13]. 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]

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[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 out[18]

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

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[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;

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[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

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[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.

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[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

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[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 it 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

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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 an 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

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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 and16 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

Appendix 1

Submissions, Answers to Questions on Notice,Tabled Documents and Correspondence

1.	Mr Graham Guy
2.	Mr Malcolm Moore
2A.	Mr Malcolm Moore (Supplementary Submission)
3.	Communications Electrical and Plumbing Union (CEPU)
4.	Small Enterprise Telecommunications Centre Limited (SETEL)
5.	Consumers' Telecommunications Network
6.	Competitive Carriers Coalition
6A.	Competitive Carriers Coalition (Supplementary Submission)
7.	AAPT
8.	Unwired Australia Pty Ltd
9.	Vodafone
10.	Telecommunications Industry Ombudsman
11.	Telecommunications and Disability Consumer Representation (TEDICORE)
12.	Mr Ross Kelso
13.	Ms Karen Lee
14.	Mr R V and Mrs P J Barbero
15.	Australian Communications Industry Forum (ACIF)
16.	Optus
17.	Meridian Connections Pty Ltd
18.	National Rural Health Alliance
19.	Mr Kevin Morgan

20. Mr David Booth

21. People with Disability Australia

22. Mr Loris Hemlof

23. Women with Disabilities (Australia)

24. Australian Telecommunications Users Group (ATUG)

Answers to Questions on Notice

1. Telstra

2. Department of Communications, Information Technology and the Arts

Tabled Documents

Letter to Mr Bill Scales, Group Managing Director, Regulatory, Corporate and Human Relations, Telstra from Dr Bob Horton, Acting Chairman, Australian Communications Authority dated 27 March 2004 tabled by Ms Kate McKenzie, Managing Director, Regulatory, Telstra.

*Telecommunications for the Futur*e, Minister for Communications, Information Technology and the Arts, Senator the Hon. Helen Coonan tabled by Mrs Fay Holthuyzen, Deputy Secretary, Department of Communications, Information Technology and the Arts

Correspondence

1. Ms Fay Lawrence

2. Mr Mark Byrne

3. Mr Paul Johnson

4. Mr Damian Quinn

5. Mr Stuart Davy

6. Mr John Davey

7. Ms Bronwyn Cropley

8. T.C. Madden

9. Western Australian Local Government Association

Appendix 2

Public Hearing

Friday, 9 September 2005 – Canberra

AAPT Limited

Mr David Havyatt, Head of Regulatory Affairs

Mr Kris Funston, Regulatory Economist

Australian Communications and Media Authority

Mr Chris Cheah, Acting Deputy Chair

Mr John Neil, Acting General Manager, Telecommunciations

Mr Paul White, Executive Manager TA

Australian Communications Industry Forum

Ms Anne Hurley, Chief Executive Officer

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chair

Mr Ed Willett, Commissioner

Mr Brian Cassidy, Chief Executive Officer

Mr Michael Cosgrave, General Manager, Telecommunications

Mr Joe Dimasi, Executive General Manager, Regulatory Affairs

Australian Telecommunications Users Group

Mr Tom Amos, Member

Communications, Electrical and Plumbing Union

Ms Rosalind Eason, Senior National Industrial Research Officer

Mr Colin Cooper, Divisional President

Competitive Carriers Coalition

Mr David Forman, Executive Director

Mr Brian Currie, General Manager, Regulatory Affairs, Hutchison Telecoms

Consumers Telecommunications Network

Ms Teresa Corbin, Executive Director

Optus

Mr Paul Fletcher, Director, Corporate and Regulatory Affairs

Mr Dean Smith, General Manager, Government Affairs

Vodafone

Mr Peter Stiffe, General Manager, Public Policy

Mr Paul Johnston, Manager, Economic Policy

National Farmers' Federation

Mr Peter Corish, President

Mr Ben Fargher, Chief Executive Officer

Telstra

Mr Douglas Gration, Company Secretary

Ms Kate McKenzie, Managing Director, Regulatory

Department of Communications, Information Technology and the Arts

Ms Fay Holthuyzen, Deputy Secretary

Mr Don Markus, General Counsel

Mr Simon Bryant, Acting Chief General Manager

Ms Carolyn McNally, General Manager, Regional Communications Policy, Telecommunications Division