The Senate

Environment, Communications, Information Technology and the Arts References Committee

The performance of the Australian telecommunications regulatory regime

August 2005

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(1) Whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable, with particular reference to:

(a) whether Part XIB of the *Trade Practices Act 1974* deals effectively with instances of the abuse of market power by participants in the Australian telecommunications sector, and, if not, the implications of any inadequacy for participants, consumers and the competitive process;

(b) whether Part XIC of the *Trade Practices Act 1974* allows access providers to receive a sufficient return on investment and access seekers to obtain commercially viable access to declared services in practice, and whether there are any flaws in the operation of this regime;

(c) whether there are any structural issues in the Australian telecommunications sector inhibiting the effectiveness of the current regulatory regime;

(d) whether consumer protection safeguards in the current regime provide effective and comprehensive protection for users of services;

(e) whether regulators of the Australian telecommunications sector are currently provided with the powers and resources required in order to perform their role in the regulatory regime;

(f) the impact that the potential privatisation of Telstra would have on the effectiveness of the current regulatory regime;

(g) whether the Universal Service Obligation (USO) is effectively ensuring that all Australians have access to reasonable telecommunications services and, in particular, whether the USO needs to be amended in order to ensure that all Australians receive access to adequate telecommunications services reflective of changes in technology requirements;

(h) whether the current regulatory environment provides participants with adequate certainty to promote investment, most particularly in infrastructure such as optical fibre cable networks;

(i) whether the current regulatory regime promotes the emergence of innovative technologies;

(j) whether it is possible to achieve the objectives of the current regulatory regime in a way that does not require the scale and scope of regulation currently present in the sector; and

(k) whether there are any other changes that could be made to the current regulatory regime in order to better promote competition, encourage investment or protect consumers.

(2) That the committee make recommendations for legislative amendments to rectify any weaknesses in the current regulatory regime identified by the committee's inquiry.

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Recommendation 2

6.66 The Committee recommends that if the Government decides to pursue operational separation of Telstra over structural separation, it should adopt as a minimum the framework and operating rules outlined by the ACCC in its proposed model.

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6.140 The Committee recommends that in order to clearly satisfy the Commonwealth's obligations under clause 6(4)(e) of the Competition Principles Agreement, the *Trade Practices Act 1974* be amended to include a provision that requires the owner of a facility that is used to provide a service to use all reasonable endeavours to accommodate the requirements of a person seeking access.

Recommendation 9

6.141 The Committee recommends that to clearly satisfy the Commonwealth's obligations under clause 6(4)(m) of the Competition Principles Agreement, section 152EF of the *Trade Practices Act 1974* be amended to prohibit conduct that has the effect—and not just the purpose—of preventing or hindering the fulfilment of a standard access obligation or an obligation imposed by a determination made by the ACCC under Division 8.

Recommendation 10

6.143 The Committee recommends that the Government consider expanding the class of 'core services' in relation to which the ACCC must determine model terms and conditions for access. In particular, the Committee recommends that for the purpose of improving services in regional areas, certain transmission (or backhaul) routes be specified in the regulations as 'core services' under section 152AQB of the *Trade Practices Act 1974*.

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6.148 The Committee recommends that the ACCC be granted powers to set prices in addition to, or instead of, developing pricing principles.

Recommendation 14

6.149 The Committee recommends that subsection 152AQA(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to its pricing principles when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

Recommendation 15

6.151 The Committee recommends that subsection 152AQB(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to any model terms and conditions when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

Recommendation 16

6.152 The Committee recommends that further amendments be made to the undertakings scheme to prevent or discourage their use to delay access and to bring more certainty to the market. In particular, the Committee recommends the imposition of shorter target timeframes in relation to access decisions.

Recommendation 17

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Recommendation 18

6.169 The Committee recommends that Telstra be required to divest its shareholding in Foxtel.

Recommendation 19

6.170 The Committee recommends that:

(i) if Telstra is fully privatised, it be a condition of the sale that Telstra be required to divest its HFC network; and

(ii) if Telstra remains in public hands, the Government direct the Australian Competition and Consumer Commission to provide further advice on its recommendations in its report *Emerging Structures in the Communications Sector* that Telstra be required to divest itself of its HFC network.

Recommendation 20

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Recommendation 21

6.180 The Committee recommends that the Government review the basis of funding for the Universal Service Obligation prior to setting the subsidies for the next three year cycle to commence from 2007-08.

Recommendation 22

6.185 The Committee recommends that the Government carry out a cost analysis of the Higher Bandwith Incentive Scheme (HiBIS) immediately to ascertain how equitable universal broadband access can be ultimately provided.

Recommendation 23

6.194 The Committee recommends that funding of the Higher Bandwidth Incentive Scheme (HiBIS) be broadened according to the following provider subsidy principles:

- **a higher subsidy for a broadband service that creates suitable and sufficient infrastructure for use by multiple consumers (taking into account immediate and**

future needs of consumers in an area), such as those using ADSL via cable or wireless; and

- **the existing level of subsidy for a broadband service delivered to individual consumers via satellite where other means such as ADSL and CDMA can not be utilised.**

Recommendation 24

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Recommendation 25

6.199 The Committee recommends that the Government consider simplifying the HiBIS application requirements in order to give regional broadband service providers more realistic opportunities to apply.

Recommendation 26

6.201 The Committee recommends that the Department of Communications, Information Technology and the Arts streamline the processing of applications from broadband service providers for registration with the HiBIS.

Recommendation 27

6.204 The Committee recommends that the Government fund local governments to develop business models that focus on delivering affordable local broadband services to regional and remote Australians.

Recommendation 28

6.207 The Committee recommends that the Government provide funding to ensure that deaf and hearing and speech impaired people have equal access to a suitable broadband service through HiBIS and through an independent disabilities equipment program.

Recommendation 29

6.209 The Committee recommends that the Government fulfil its promise to implement all 39 recommendations of the Estens Report. The Committee further recommends that an independent audit of the Government's implementation of the Estens Report recommendations be conducted prior to the introduction of legislation providing for the further sale of Telstra.

Recommendation 30

6.211 The Committee recommends that the Australian Communications and Media Authority give immediate and urgent consideration to adopting the recommendations in the ACA research report *Consumer Driven Communications: Strategies for Better Representation* so that the rights of consumers are better protected, as previously recommended by the Committee.

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6.213 The Committee recommends that Part 6 of the *Telecommunications Act 1997* be amended to require the ACMA to enforce the development of codes within set time-frames.

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6.217 The Committee recommends that the *Telecommunications Act 1997* be amended by inserting a new section 120A that requires annual reporting by suppliers or industry associations of compliance with industry codes and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA.

Recommendation 33

6.221 The Committee recommends that the *Telecommunications (Consumer Protection and Service Standards Act 1997* be amended in order to establish a single Communications Industry Ombudsman.

Recommendation 34

6.227 The Committee recommends that all carriage service providers make available a Basic Residential Package to households who want only a clear, cost-based package of local access services.

Recommendation 35

6.230 The Committee recommends that the Government give urgent consideration to the recommendations of the National Emergency Communications Working Group, particularly in regard to new technologies such as VoIP.

Abbreviations

ACA	Australian Communications Authority
ACCC	Australian Competition and Consumer Commission
ACIF	Australian Communications Industry Forum
ACMA	Australian Communications and Media Authority
ADSL	Asymmetric Digital Subscriber Line
CDC Report	*Consumer Driven Communications* Report
CEPU	Communications Electrical and Plumbing Union
CSG	Customer Service Guarantee
CSP	Carriage service provider
DCITA	Department of Communications, Information Technology and the Arts
DDSO	Digital Data Service Obligation
DSLAM	Digital Subscriber Line Access Multiplexer
Estens Report	Regional Telecommunications Inquiry, *Connecting Regional Australia*, 2002
FTM	Fixed-to-mobile
FttH	Fibre to the Home
HiBIS	Higher Bandwidth Incentive Scheme
ISDN	Integrated Services Digital Network
ISP	Internet Service Provider
LIMAC	Low Income Measures Assessment Committee
LSS	Line Sharing Services
MTAS	Mobile Terminating Access services
MTM	Mobile-to-mobile

NCP	National Competition Policy
PSTN	Public Switched Telephone Network
SDDS	Special Digital Data Service
SFOA	Standard Forms of Agreement
SMP	Standard Marketing Plan
STS	Standard Telephone Service
TCPSS Act	*Telecommunications (Consumer Protection and Services Standards) Act 1999* (Cwth)
Telecommunications Act	*Telecommunications Act 1997* (Cwth)
TIO	Telecommunications Industry Ombudsman
TPA	*Trade Practices Act 1974* (Cwth)
ULLS	Unconditioned Local Loop Services
USO	Universal Service Obligation
VoIP	Voice over Internet Protocol
WAP	Wireless application protocol

Chapter 1

Background to the inquiry

1.1 The Senate referred this inquiry to the Committee on 14 March 2005 for report by 23 June 2005. On 21 June 2005 the Senate granted the Committee an extension of time to report to 9 August 2005.

1.2 The full terms of reference for this inquiry are set out on page xi. In brief, the Committee was asked to examine whether the current telecommunications regulatory regime promotes competition, encourages investment in the sector and protects consumers to the fullest extent practicable, and to make recommendations for legislative amendments to rectify any identified weaknesses.

Conduct of the inquiry

1.3 In accordance with its usual practice, the Committee advertised details of the inquiry in *The Australian* (16 March 2005). The Committee also wrote directly to a range of organisations and individuals to invite submissions, and received 52 written submissions and numerous supplementary submissions, as listed at Appendix 1. Documents tabled in public hearings are also listed in Appendix 1.

1.4 In order to explore the issues in more detail, the Committee held public hearings in Canberra on 11 April, 9 May and 20 June 2005, Sydney on 13 April 2005, Perth on 29 April 2005 and Melbourne on 4 May 2005. In order to ensure that regional perspectives were explored, the Committee also held public hearings in Dubbo on 14 April 2005 and Townsville on 21 April 2005. A list of those who gave evidence at these hearings is at Appendix 2.

Outline of the report

1.5 The terms of reference for this inquiry were far-reaching. With the move from a government-owned monopoly service provider to a duopoly during the 1990s, a move towards open competition since 1997 and great technological change, there have been significant changes in the past two decades. There have also been numerous reviews of various aspects of telecommunications regulation and service provision, including the Productivity Commission's 2001 report.[1]

1.6 Thus the report begins in Chapter 2 with a description of the current telecommunications environment, giving a brief outline of the current regulatory regime and the need for a review. Key themes that emerged during the inquiry, including the recognition of telecommunications not only in terms of its economic

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1 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001.

benefits but its social implications, the pending full privatisation of Telstra, services in rural and regional areas and investment in infrastructure, are outlined.

1.7 Chapter 3 discusses competition issues in more detail. The current regulatory regime under Part XIB of the *Trade Practices Act 1974* (TPA) is outlined. The 2004 competition notice issued by the ACCC against Telstra is considered with an analysis of concerns raised about that process. Issues raised about Telstra's relationship with its wholesale customers are then discussed in some depth, including consideration of competitors' capacity to roll out infrastructure, aggressive pricing practices, 'churning' customers and other concerns.

1.8 Chapter 4 addresses Part XIC of the TPA which deals with the telecommunications access regime. Following an outline of the key elements of the legislative scheme, the chapter considers particular concerns that were raised during the inquiry, including declaration of services, inherent delays in the regime, regulatory gaming, impediments to access other than price, pricing issues and regulatory 'safe harbours'.

1.9 In Chapter 5 the Committee considers a wide range of consumer issues in some detail, including complaints about the Universal Service Obligation (USO), the Customer Service Guarantee, the operation of industry codes and standards, and dispute resolution, including through the Telecommunications Industry Ombudsman (TIO). Other issues relating to low income customers, remote indigenous communities and the Emergency Call Service are also discussed.

1.10 Finally, Chapter 6 presents the Committee's conclusions and recommendations for a blueprint for the future. Possible means of achieving greater transparency in Telstra's operations are discussed, followed by a brief examination of the Australian Competition and Consumer Commission's (ACCC) powers and resources. Concerns about the competition regime and the access regime under the TPA are discussed. The chapter concludes with discussion of the future of the USO and other consumer protection mechanisms.

Acknowledgements

1.11 The Committee wishes to express its appreciation for the cooperation of all witnesses to its inquiry, whether by making submissions, by personal attendance at a hearing or, as in many cases, by giving both oral and written evidence. In particular, the Committee thanks those who travelled some extensive distances to attend its public hearings in regional areas.

Note on references in this report

1.12 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 telecommunications environment

> Over the last seven years of open competition the telecommunications industry has developed from monopoly to duopoly to regulated competition, but has not yet achieved fully effective competition in any market due to the continued bottleneck nature of last mile access… Unhappily over the last 7 years of supposedly open competition, a number of companies who thought they were on this ladder of opportunity found themselves on a ladder of legal process, having to rely on the access and anti-competitive behaviour powers of the ACCC to go to the next rung.[1]

2.1 In 1997 major changes were made to the telecommunications regulatory regime in order to increase competition and promote economic efficiencies. However, it is apparent that open competition is yet to deliver the advantages across the board to consumers and industry participants that were envisaged.

2.2 This chapter briefly describes the current regulatory regime. It then discusses evidence the Committee received about whether there is a need for a comprehensive review of telecommunications regulation. Other issues outlined in this chapter and explored in greater detail later in the report are:

- the concept of telecommunications as an essential social service;
- the pending privatisation of Telstra;
- telecommunications services in rural and regional areas; and
- future infrastructure investment.

Regulatory overview

2.3 In previous reports, *The Australian telecommunications network*[2] and *Competition in broadband services*,[3] the Committee has outlined the development of telecommunication policy in Australia from 1901 to the present. The Committee does not repeat those discussions here but directs readers to those earlier reports. This report summarises telecommunications policy from 1997, when the current regulatory regime was established with the passage of the *Telecommunications Act 1997* (the Telecommunications Act) and major amendments to the *Trade Practices Act 1974* (TPA).

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1 ATUG, *Submission* 20, p. 29.

2 Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian telecommunications network*, August 2004.

3 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in broadband services*, August 2004.

2.4 The key objective of the 1997 reforms was to promote open competition in telecommunications by abolishing legislative barriers to market entry and service provision. Regulatory barriers to facilities-based competition were greatly reduced. There was a greater emphasis on general competition regulation rather than industry-specific regulation.[4]

2.5 Consistent with that policy, key competition regulatory functions for the industry were vested in the Australian Competition and Consumer Commission (ACCC). There are general access and competition provisions that apply to the economy at large (Parts IIIA and IV of the TPA). However, the TPA was amended by the introduction of the telecommunications-specific access regime (Part XIC) and anti-competitive conduct provisions (Part XIB). As Telstra outlined in its submission:

> From 1997, the focus shifted to the more general objective of promoting market entry and competition. The Trade Practices Act was augmented with two telecommunications-specific sections that were intended to facilitate a transition to full market competition. Part XIB of the Trade Practices Act was enacted to supplement the generic competition rules in Part IV of the Trade Practices Act that deter anticompetitive behaviour. Part XIC of the Trade Practices Act was enacted to supplement the rules in Part IIIA of the Trade Practices Act so as to provide competitors with access to key telecommunications services.[5]

The Productivity Commission in its Telecommunications Competition Regulation Report of 2001 noted that many of the differences between the general and telecommunications competition provisions in the TPA are in the threshold tests and processes:

> … rather than [in] policy instruments or other aspects of policy. Small and subtle differences in process and test thresholds for competition policy can make a large difference — 'the devil is in the detail'.[6]

2.6 However, it is apparent that those legislative changes have not achieved the desired result. As Mr Stephen Dalby from iiNet, a large national company which owns OzEmail, Chime Communications, iHug Ltd in Australia and New Zealand, and Virtual Communities and has over 700,000 customers, told the Committee:

> If you were to ask me what I think about the adequacy of the current regime, I would probably characterise it as the spirit is willing but the flesh is weak. I think that the ACCC, the ACA and people in the Department of Communications are all very keen to see change. The competition policy in this country is quite clear. It is not something that has been hidden from

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4 Holly Raiche, 'The Policy Context', p. 15; Alasdair Grant, 'Industry Structure and Regulatory Bodies', p. 23, *Australian Telecommunications Regulation* (3ed), Alasdair Grant (ed), UNSW Press, 2004.

5 Telstra, *Submission* 25, p. 10.

6 Productivity Commission, *Telecommunications Competition Regulation*, Report no. 16, September 2001, p. 21.

> view. It is quite clear that the government is trying to encourage competition because it provides benefits to end users, but when I say 'the flesh is weak' the tools do not seem to be there or the tools are being challenged by the people that hopefully they are being applied against. While the spirit is strong, the outcomes have not been what we would like to have seen, certainly from our perspective.[7]

Access

2.7 Access arrangements under Part XIC of the TPA are central to telecommunications regulation in Australia in providing a mechanism by which competitors can use infrastructure controlled or supplied by another provider when duplication of infrastructure would be uneconomic. The term 'access' refers broadly to:

> … the ability of carriers and service providers to pass and receive telecommunications traffic over each other's networks, in order to fulfil the imperative that all end-users of similar services be able to connect with one another, irrespective of the particular networks to which they are connected.[8]

2.8 Declarations of access to wholesale telecommunications services have permitted a range of carriers and carriage service providers to use Telstra's infrastructure to provide their own retail services. This has been seen as one of the main ways of introducing competition across a range of telecommunications services and has led to associated price, variety and service quality gains to consumers.[9] Chapter 4 discusses access issues in more detail.

Competition

2.9 Part XIB of the TPA provides mechanisms to address breaches of the telecommunications-specific 'competition rule'. Under the rule (section 151AK), a carrier or carriage service provider must not engage in anti-competitive conduct. A carrier or carriage service provider is said to have engaged in anti-competitive conduct if it has a substantial degree of power in a telecommunications market and either:

- takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market;
- takes advantage of the power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market; or

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7 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 38.

8 Alasdair Grant, 'Industry Structure and Regulatory Bodies', *Australian Telecommunications Regulation* (3ed), Alasdair Grant (ed), UNSW Press, 2004, p. 89.

9 ACCC, *Submission* 17, p. 3.

- engages in conduct in contravention of sections 45, 45B, 46, 47, or 48 of the TPA where that conduct relates to a telecommunications market.

2.10 The ACCC submitted that in introducing the telecommunications-specific regime, the Government considered that total reliance on the general provisions in Parts IIIA and IV of the TPA would not achieve its objectives as, among other things:

- telecommunications is a complex, horizontally and vertically integrated industry;
- anti-competitive cross-subsidies by the incumbent from non-competitive markets to markets in which competition exists or is emerging is a particular threat to the establishment of a competitive environment;
- due to the fast pace of change in the industry and the volatile state of the industry, anti-competitive behaviour can cause particularly rapid damage to competition; and
- there is considerable scope for the incumbent to engage in anti-competitive conduct because competitors in downstream markets depend on access to networks or facilities controlled by the incumbent.[10]

2.11 These issues are discussed in more detail in the following chapters.

2.12 Consistent with the deregulatory approach of the 1997 legislation, industry self-regulation was also heavily promoted. Section 4 of the Telecommunications Act clearly outlines the regulatory policy: 'The Parliament intends that telecommunications be regulated in a manner that…promotes the greatest practicable use of industry self-regulation…' Part 6 of the Telecommunications Act requires and encourages industry bodies to develop voluntary and mandatory codes of practice. These codes set out rules to govern the behaviour of the telecommunications industry, covering a range of consumer, network and operational issues.[11] The aim of industry codes was to meet important policy objectives without imposing undue financial and administrative burdens on industry participants. Codes of practice are discussed in detail in Chapter 5.

2.13 The complexity of the telecommunications environment and the intersection of regulatory powers and problems were articulated by the ACCC:

> It is important to note that competition regulatory powers are dependent on the nature of the regulatory problem that they are seeking to address. This, in turn, depends on a range of issues including the presence of market power, the existence of natural monopoly and the incentives of an incumbent firm to hinder access and restrict competition.[12]

10 ACCC, *Submission* 17, p. 3.

11 Telstra, *Submission* 25, p. 11.

12 ACCC, *Submission* 17, p. 2.

The need for a review

2.14 Mr Ewan Brown from the Small Enterprise Telecommunications Centre Ltd. (SETEL) told the Committee:

> We have been watching with great hope to see competition develop in the marketplace after nearly eight years since the introduction of the [Telecommunications Act]. We had been at odds with some of the larger users in terms of the extent of competition in the marketplace and always maintained that small business and residential users in particular were still being disadvantaged by the lack of real competition, particularly in non-CBD or outer metropolitan regional areas, and the fact that we were not seeing the expected new entrants into the marketplace being able to gain a foothold and thus provide an innovative range of services. So to all intents and purposes we have been stuck with the same old recipe for a long, long time.[13]

2.15 Certainly, over the past seven years technological developments have seen a shift in the competition landscape with voice over internet protocol (VoIP), wireless local loop and fibre to the home (FttH) offering the potential for greater competition in the market and lessen the need for regulation. However, for end-users this has been more rhetoric than reality.[14]

2.16 Several submissions and witnesses, including telecommunications expert Mr Paul Budde, argued that a comprehensive review of the competition regime was necessary given the lack of real competition:

> [Self-regulation] is not working properly in any case. Good things have come out of it, but in general terms it has not delivered what the government was asking for in the 1996 situation. We have seen competition going down. For example, in 1996 we had 11 telecommunications operators with $100 million-plus revenues and we now have only four or five. So you really can see that competition has gone backwards in that respect. On the other side, prices have come down, but I do not think regulation has anything to do with it. Prices have come down in Angola, Albania and North Korea where there is absolutely no regulation, so technology is looking after that.[15]

2.17 Telstra, on the other hand, have argued for further deregulation, stating that after eight years of self-regulation, it was appropriate to 'revisit the regulatory framework':

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13 Mr Ewan Brown, *Committee Hansard*, 11 April 2005, p. 50.

14 ATUG, *Submission* 20, p. 29.

15 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 44.

> … recognising that most markets are now subject to significant and sustainable competition; and that, as a matter of sound economic policy, regulation should only apply where there is manifest market failure.[16]

2.18 Telstra[17] pointed to the findings of the Productivity Commission's 2001 report which recommended a review of telecommunications competition regulation within five years 'because of the rapid pace of technological and market change'.[18] In particular, the Productivity Commission recommended that the anti-competitive provisions in Part XIB of the TPA should be reviewed within three to five years.[19] Mr Bill Scales on behalf of Telstra also told the Committee that a review was necessary, as Part XIB was aimed only at Telstra:

> Much of the current regulatory regime was drafted almost a decade ago. It was implemented in order to effect the transition from a monopoly-duopoly to competition. The intention, of course, as we all know, was that regulation would be reduced as competition developed. Unsurprisingly, as markets have matured and competition has intensified, many elements of the 1997 regime have really become outdated. Some of the regulatory measures were only ever intended as short-term measures while competition developed. A notable example of that—and we give quite a bit of detail of this in our submission—is part XIB of the Trade Practices Act. Part XIB, as you know, is primarily related to effectively addressing the abuse of market power and was really only aimed at Telstra. I do not think there is any other company in the country that has the same provision associated with it. But it was only ever intended as a transitional regulatory measure.[20]

2.19 The CEPU also argued that the Productivity Commission's recommended proposed review of telecommunications competition regulation should be completed before Telstra is privatised. The CEPU proposed some caveats:

- The review should be expanded to encompass inter-related elements of the current regime, such as the operation of the Universal Service Obligation.
- It should build on the work done by the Australia Communications Authority (ACA) and the Australian Communications Industry Forum (ACIF) on emerging technologies and related policy issues.
- Its timeframe should be extended beyond that currently set for the DoCITA review. It should aim (following the UK model) to produce

16 Telstra, *Submission* 25, p. 18.

17 Telstra, *Submission* 25, p. 2.

18 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, September 2001, p. xxii.

19 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, September 2001, p. xxix.

20 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 55.

a draft report/stage 2 document by, say, November this year with a final report by mid - 2006.

- Insofar as the recommendations of the Government's privatisation scoping study bear on matters of telecommunications policy, they should be offered as inputs into the review.
- Legislation to allow the full privatisation of Telstra should be held over until the completion of the review.[21]

2.20 The Government has acknowledged the need for a review, with the Minister stating in March 2005 that the current framework:

> … was introduced in 1997 to provide access to a monopoly owned network that was rolled out long before telecommunications competition was being contemplated. … While the framework will continue to serve us well, there are increasing calls for changes to deal with future network investments and ongoing transparency issues.
>
> The list of organisations calling for examination of the regulatory environment include industry, regulators, rural lobby groups and … ATUG. Each organisation has a slightly different focus. Some are concerned about the transparency and capacity of the current arrangements to deal with anti-competitive conduct. Others are more focussed on the question of regulatory certainty for major new network investments.[22]

2.21 A month later, the Minister announced the release of a Department of Communications, Information Technology and the Arts (DCITA) Issues Paper on *Telecommunications Competition Regulation*. The paper sought comment from the telecommunications industry and other interested parties about whether it would be appropriate or desirable to make further changes to the telecommunications competition regime at present.[23]

2.22 This inquiry into the telecommunications regulatory regime, initiated on 10 March 2005, is partly in response to the growing frustration felt by telecommunications industry participants towards a regulatory regime which is not sufficiently robust to deal with a range of problems caused by Telstra's continued market domination. The inquiry is also in response to consumer concerns that the supposed benefits of open competition have not materialised and that the range and cost of services are disappointing. In addition, with the Government planning to proceed with the full sale of Telstra, a comprehensive review is essential. The

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21 CEPU, *Submission* 40, p. 9.

22 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts Address to the Australian Telecommunications Users Group Conference, Sydney, Wednesday 9 March 2005, accessed on 16 April 2005, at: http://www.minister.dcita.gov.au/media/speeches/address_to_the_australian_telecommunications_users_group_conference.

23 Department of Communications, Information Technology and the Arts, *Telecommunications Competition Regulation, Issues Paper April 2005.*

Australian Telecommunications Users Group (ATUG)[24] pointed to the Productivity Commission's report on national competition policy, released in February 2005, which recommended that the Government bring forward the scheduled review of telecommunications regulation prior to the sale of Telstra, 'especially if it encompasses the full review of the anti-competitive conduct regime, currently scheduled for 2007'.[25]

2.23 The need for a review prior to the sale of Telstra was seen by some witnesses, including Mr Paul Budde, as an opportunity to revisit the regulatory regime:

> So a review is overdue, but at the same time we are pushed into this T3 situation that gives us an opportunity to focus on telecommunications issues at this particular point in time. So let us use that opportunity to have a really good look at those issues.[26]

2.24 From a consumer perspective, the Australian Consumers' Association's Senior Policy Officer, Mr Charles Britton, told the Committee:

> Self-regulation should not be abolished … [I]n our view it does need a lot of tweaking, not a little bit. It is difficult to see how the current regime and the operation over the last seven-odd years has actually enhanced consumer protection materially beyond what is in the general Trade Practices Act or what has been the commonsense approach of the Telecommunications Industry Ombudsman.[27]

Telecommunications as an essential social service

2.25 The reason for moving the telecommunications sector to open competition was to produce clear benefits for the community. Competition is a tool rather than an end in itself. As the CEPU submitted:

> The active fostering of the competitive process through such measures as access regulation and price controls can, in our view, only be justified if it produces clear benefits to the community, chiefly in the form of accessibility and affordability of services. More broadly, competition policy will be beneficial if it creates a framework that encourages an efficient and timely allocation of national resources and stimulates innovation and will be detrimental if it discourages investment or produces waste.[28]

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24 ATUG, *Submission* 20, p. 37.

25 Productivity Commission, *Review of National Competition Policy Reforms*, Report No. 33, p. 247.

26 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 44.

27 Mr Charles Britton, *Committee Hansard*, 13 April 2005, p. 60.

28 CEPU, *Submission* 40, p. 10.

2.26 In a sector driven by large profits it is easy to lose sight of the fact that telecommunications is a vital national facility, one that delivers an essential and basic service to almost every Australian.[29] As Mr Paul Budde stated:

> It is important for our economy; it is important for our lifestyle; it is important for our kids; it is important for poor people and rich people and everybody else. There is a national interest element to it.[30]

2.27 Ms Teresa Corbin from the Consumers Telecommunications Network told the Committee:

> … we are getting a clear message that telecommunications has to be declared an essential service in some way, shape or form and that this is actually necessary and separate from the universal service obligation.[31]

2.28 Ms Corbin argued that:

> In the end, access to broadband across the board for Australians does not just have a personal benefit; it has a huge social benefit as well. There are huge economic gains to be made. In Australia we used to be quite high up the table as far as people being wired, but we are creeping down further and further, and starting to really lose it as far as that is concerned.[32]

2.29 A departmental representative acknowledged the social dimension of effective telecommunications:

> There is a long list of reasons why in the past governments in general have discussed the importance of the telecommunications sector to the Australian economy. … It is obviously also important socially for Australian society. Communications networks are important for allowing communications in a very wide range of social interactions.[33]

2.30 Mr Paul Budde stressed that telecommunications was an essential element of good national infrastructure:

> It is important for everybody to have good telecommunications access, from phoning the doctor to doing a business deal in Boston, with everything else in between. So if you do not have a good national infrastructure then you do not have a good fundamental situation for your country, so there is a national interest in making sure that we have a nationwide network that is at least on equal terms with what countries around the world that we compete with or compare ourselves with have.[34]

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29 Australian Consumers' Association, *Submission* 16, p. 2.

30 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 53.

31 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 24.

32 Ms Teresa Corbin, *Committee Hansard,* 13 April 2005, p. 31.

33 Mr Christopher Cheah, Chief General Manager Communications, DCITA, *Committee Hansard*, 20 June 2005, p. 28.

34 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 46.

2.31 Similarly, telecommunications expert Professor Peter Gerrand told the Committee that telecommunications infrastructure was as important as road and rail infrastructure, and that the view that the development of telecommunications infrastructure could be left to private investment was an incorrect one:

> … it is just as important to Australia to have very good national telecommunications infrastructure as it is to have very good infrastructure for roads and for rail. Yet there is a mindset in Australia, perhaps more in the business pages of newspapers than elsewhere, that we can rely on the market alone to keep rolling out good national telecommunications infrastructure. That is no more likely than it is that you can rely on the market to keep rolling out good national roads or a good national rail system. Private sector investment in these three areas, including telecommunications, will only go where there is a very strong expectation of high traffic, as can be seen in the actual investment patterns of competitors to Telstra to date.[35]

2.32 The Australian Communications Authority (ACA) stated in its *Telecommunications Performance Report 2003-04* that in 2003–04, the Australian economy was over $10.4 billion larger in terms of total production than it would have been without the move to a less interventionist telecommunications regulatory regime.[36] According to the ACA, by 2003–04 the 1997 telecommunications reforms had resulted in:

- employment of around 30,000 additional employees in the Australian economy;
- private additional real consumption benefits of nearly $720 per household, or approximately $5.5 billion aggregated over all households;
- benefits to small business of over $2.1 billion; and
- the output from the telecommunications industry being around 96% greater than if the reforms had not occurred.[37]

2.33 The ACA stated that, taking all increases together, the welfare of Australian households on average was approximately $924 per household higher by 2003–04 than it would have been without the 1997 telecommunications reforms. This equated to a net benefit to Australian consumers of around $7.06 billion by 2003–04.[38]

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35 Professor Peter Gerrand, *Committee Hansard*, 4 May 2005, p. 1.

36 Australian Communications Authority, *Telecommunications Performance Report 2003-04*, November 2004, p. 1.

37 Australian Communications Authority, *Telecommunications Performance Report 2003-04*, November 2004, pp 33-39.

38 Australian Communications Authority, *Telecommunications Performance Report 2003-04*, November 2004, p. 36.

2.34 In its submission to the inquiry DCITA also noted the importance of telecommunications to Australian businesses and consumers:

> Telecommunications also provides a vital part of the infrastructure for all business operations both domestically focussed and export-oriented. Having access to internationally competitive telecommunications services is essential for Australian businesses to be able to compete in the global marketplace.
>
> Sustainable competition in telecommunications also ensures benefits of service and product innovation and competition are passed on to Australian consumers. This is most directly reflected in the price of services. Since 1997 the average price of telecommunications services has decreased by 21 per cent.[39]

2.35 Clearly, the benefits of effective telecommunications services to the Australian economy and community are substantial. During this inquiry the Committee heard many concerns that the sale of Telstra would undermine these gains. Telecommunications experts were critical that in proceeding with the sale the Government was failing to take sufficient account of the importance of regulation and competition in protecting a vital service, and was putting potential sale revenue ahead of the need to ensure a better telecommunications environment for consumers. Mr Paul Budde submitted:

> The stakes are very high, and regulatory and competition factors are very low indeed on the agenda of the Prime Minister and the Treasurer. Industry Minister, Nick Minch[i]n, couldn't have been more explicit about not wanting to see any regulations that would lower the T3 share price. In any case, it has become very clear that the government's position on T3 is certainly not geared towards the best interests of the country. The only issue is money – not a better telecoms environment; not more competition; not better services to regional Australia – none of these issues, which are high on the telecommunications agendas of the governments of our trading partners.[40]

2.36 ATUG also pointed to the Government's desire to maximise the share price of Telstra prior to sale as making it reluctant to tighten the regulatory framework:

> We recognise that, in the run-up to the sale, the government must provide as much certainty as possible regarding the ongoing regulatory environment in order for potential investors in Telstra to value the equity that has been put on the market … We anticipate plenty of advice coming from the financial community which would urge the government to go soft on competition so that the Telstra shares can not only 'maximise shareholder value' but also leverage Telstra's current market dominance even further, to the advantage of current and future shareholders but to the loss of the overall economy, represented through users and consumers. So we urge the

39 DCITA, *Submission* 50, p. 1.

40 Mr Paul Budde, *Submission* 1, p. 7.

committee to recommend that the government resist any temptation to maximise the sale price at the expense of competition.[41]

The pending sale and privatisation of Telstra

2.37 Telstra was partially privatised in 1997 with the sale of one third of the Government's equity for $14.2 billion, primarily to institutional investors. In October 1999 a further 16.6 per cent was sold for $16 billion. The Government has made clear its intention to sell the remaining 50.1 per cent of its equity.[42]

2.38 The current structure of Telstra is complex,[43] with the corporation owning or in joint venture partnerships with a number of media interests. Telstra currently owns two of the three major fixed telecommunications networks. Telstra's ownership of the HFC network and 50% ownership of Foxtel (the remaining shares are held by News Corporation (25%) and PBL (25%)) have been argued to be impediments to competition and are seen as a likely source of discord once Telstra is fully privatised. These issues are discussed in more detail in Chapter 6.

2.39 The Australian Consumers' Association expressed concern that an influential monopoly service provider would be privately owned:

> The sale will place into private hands an enormously influential player with monopoly dimensions, inherited from natural monopoly aspects of infrastructure and from the legacy of being the national service provider. Unleashing a private monopoly into an uncertain regulatory environment seems to us a dubious public service.[44]

2.40 Similarly, Mr Paul Askern from the Townsville City Council told the Committee:

> Once Telstra is completely privatised it has the potential to become the 'gorilla' in the marketplace. This could have a range of adverse implications for consumers, residential and commercial (ie. unfair competitive practices, using its dominant market position as a form of natural monopoly etc).[45]

2.41 The Committee heard evidence that Telstra was difficult to regulate effectively, and that once privatised Telstra may seek to enhance its media assets

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41 Mr Richard Thwaites, *Committee Hansard*, 11 April 2005, p. 41.

42 To date its plans have been rejected by the Senate, most recently in the Telstra (Transition to Full Private Ownership) Bill 2003 [No. 2] which was negatived by the Senate on 30 March 2004.

43 See Telstra, *Telstra Corporation Limited Legal Group Structure as at 31 December 2004*, accessed on 19 July 2005, URL: http://www.telstra.com.au/abouttelstra/corp/docs/groupstructure 311204.pdf.

44 Australian Consumers' Association, *Submission* 16, p. 1.

45 Townsville City Council, *Submission* 34, p. 2. See also Mr Paul Askern, *Committee Hansard*, 21 April 2005, p. 33.

making it an enormously influential privately owned company. Mr Paul Budde outlined in his submission:

> The ACCC and the PC [Productivity Commission] have indicated that Telstra is currently too large to regulate…
>
> Apart from all the anti-competitive aspects of such scenarios, I also would clearly like to flag the likelihood that the ability of Telstra, post-T3, to apply undue lobbying influence across its multiple media assets will undermine the democratic structure of the country and the diversity of the media. It would arguably make Telstra one of the most powerful vertically-integrated telecommunications and media companies in the world. I am not aware of any government in the western world that would allow such a concentration of communication and media power to reside in one company.[46]

2.42 Similar concerns were raised by Professor Peter Gerrand:

> Telstra privatised in its current form will be far too powerful to be able to be regulated effectively. It is already too powerful to be regulated effectively. The whole industry knows that. We can talk about the impact of providing operational separation to try to get at this problem. At least at the moment the government's majority ownership provides some constraint on the extent to which Telstra will lobby to look after its legitimate business interests. Once that constraint is removed, and particularly if Telstra is then free to improve its business synergies by buying first into a newspaper chain, which is pretty logical, and—only if parliament relaxes the rules for cross-media ownership—buying a television network as well, with the extra media at its disposal it will be the most powerful lobbying organisation in Australia. You do need to be aware of that looking forward.[47]

2.43 The Australian Consumers' Association argued that divesting Telstra of its continued ownership of the HFC network and 50 per cent shareholding in Foxtel was essential prior to full privatisation in order to restrain the company's potentially enormous power:

> In our view the requirement that Telstra to divest itself of the HFC cable network and the Foxtel service that it carries is an essential pre-requisite to privatisation, in order to curb the horizontal sprawl of the corporation into media, and the exercise of market power into both spheres in a mutually reinforcing way that will over time deliver significant monopoly benefits for the company and consequent detriment to consumers.[48]

The Committee deals with this issue in greater detail in chapter 6.

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46 Mr Paul Budde, *Submission* 1, p. 5.

47 Professor Peter Gerrand, *Committee Hansard*, 4 May 2005, p. 3.

48 Australian Consumers' Association, *Submission* 16, p. 11.

2.44 Many submissions raised concerns that a fully privatised Telstra would not only be more difficult to regulate but that the public interest would be diminished by Telstra's drive to maximise its economic returns:

> Unfortunately the market under the current settings for regulation and ownership is not delivering fully satisfactory outcomes. Regulators have had enormous difficulty curbing Telstra while it has been in majority Government ownership. There is little reason to believe circumstances will improve by virtue of the privatisation of Telstra. This raises considerable concerns that removing the role of Government as owner will also eliminate what lingering restraint there is over pure commercial pursuit of profitability in what is an essential service for all Australians.[49]

2.45 Telstra's ability to withdraw from thin markets once privatised is of most concern to those people living in regional and rural Australia:

> In many respects there is a fear that either a fully privatised Telstra will exercise their commercial decision-making power and say, 'We are pulling out of this market altogether,' or there will be the same slow progress as commercial viability is assessed or someone will decide that a risk is worth taking in a particular area.[50]

2.46 Mr Damian Kay, who owns a national retail telecommunications franchise company, highlighted the commercial non-viability of rural telecommunications services. Mr Kay told that Committee that due to both the size of rural markets and Telstra monopoly position he would not consider starting a business in rural areas:

> I split my business up into metro, regional and pastoral. I do not go into pastoral because it is a monopoly and I do not want to play in it because it is too hard. But I will play in regional, and I call Townsville and Cairns regional.[51]

Telecommunication services in rural and regional areas

2.47 One of the strongest messages the Committee received during this inquiry was that services to rural and remote areas are not adequate and that there is significant concern about the possible deterioration of services once Telstra is sold.

2.48 The Government has stated that Telstra's sale will be contingent on adequate telecommunication service levels in rural and regional Australia and appropriate market conditions. On 16 August 2002 the then Minister for Communications, Information Technology and the Arts, Senator Richard Alston, established the Regional Telecommunications Inquiry, chaired by Mr Dick Estens, to assess the adequacy of telecommunications services in regional, rural and remote Australia. The 39 recommendations of this inquiry, outlined in its report, *Connecting Regional*

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49 Australian Consumers' Association, *Submission* 16, p. 1.

50 Mr Ewan Brown, SETEL, *Committee Hansard*, 11 April 2005, p. 51.

51 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 28.

Australia (the Estens Report), are the benchmark by which the Government would measure the adequacy of regional services.

2.49 The inquiry examined three key areas of concern: mobile phone coverage, Internet reliability and fixed telephone service issues. While the Estens Report generally found these services to be adequate, it identified concerns about the availability and affordability of mobile services; the speed of internet access; and the reliability of the standard service.[52]

2.50 On 2 March 2005 the current Minister, Senator the Hon Helen Coonan, stated that 21 of the 39 Estens Report recommendations had been implemented.[53] Approximately two months later departmental representatives gave the Committee a revised figure of 29 implemented recommendations, and provided the Committee with an update on those outstanding:

> Two of the remaining 10 relate to implementing a local presence plan on Telstra and about five relate to passage of legislation through the parliament relating to regular reviews. Three others are more policy related issues. One of those relates to the issue around online access centres. That recommendation is that the states and the Commonwealth have formed a committee which is reviewing online access centres, and they are due to make a report by the end of this month. In relation to the network reliability framework, which is another outstanding recommendation, we are currently working with Telstra and the ACA to look at what the response is to a review that has been undertaken by the ACA, and we are expecting that that should be completed by the end of this month. The final outstanding recommendation relates to network extension and trenching, on which we have provided some advice to our minister. We are waiting to hear back on that advice.[54]

2.51 However, the National Farmers' Federation (NFF) put forward a more conservative estimate. Mr Mark Needham listed several outstanding recommendations that he said required attention. The NFF considered that telecommunications service levels and levels of service in rural and regional areas should be equivalent to those in urban Australia before considering the further sale of Telstra.[55]

> Recommendations that NFF considers require further work include recommendation 2.2 on the universal service obligation review; recommendation 2.6, on the consideration of network extension and

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52 Regional Telecommunications Inquiry, *Connecting Regional Australia*, November 2002.

53 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, *Bolstering Telecommunications Services in the Bush,* Media release, 2 March 2005, http://www.minister.dcita.gov.au/media/media_releases/bolstering_telecommunications_services_in_the_bush (accessed 9 June 2005).

54 Ms Caroline McNally, General Manager Regional Communications Policy, DCITA, *Committee Hansard*, 20 June 2005, p. 26.

55 Mr Mark Needham, *Committee Hansard*, 11 April 2005, p. 4.

> trenching costs; an important one is recommendation 2.10, on the Network Reliability Framework; a series of recommendations relating to pay phones and another on online access centres; service compliance and performance data analysis by the ACA; and recommendation 7.3, on clarity and certainty about regulatory enforcement. Also, there are recommendations that are subject to another inquiry: recommendation series 8 on telecommunications for Telstra local presence plans; series 9 recommendations on future-proofing and regular reviews; and some series 5 recommendations relating to remote Indigenous community services. You can tell by that list of issues that there are still a range of matters that need to be progressed in a timely manner.[56]

2.52 The main areas of discrepancy between DCITA's list of outstanding recommendations and that of the NFF are: recommendation 2.2 on the Universal Service Obligation review; a series of recommendations that deal with improving payphone access and services; and some recommendations relating to legislated consumer safeguards. The NFF suggests these areas require considerable further work.

2.53 On 16 June 2005, NFF President Mr Peter Corish reiterated his organisation's dissatisfaction with the Government's progress in enhancing services to rural and regional areas:

> Unfortunately, when it comes to basic telephone service improvements in the bush, the Federal Government is yet to deliver.[57]

2.54 The Committee notes that the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005 responds to recommendations of the Estens Report relating to:

- the need for Telstra to maintain a local presence in regional, rural and remote parts of Australia; and
- regular independent reviews into the adequacy of telecommunications in regional, rural and remote parts of Australia.

2.55 The bill was examined by the Senate Environment, Communications, Information Technology and the Arts Legislation Committee, which recommended various amendments.[58] The bill was passed with amendments in the Senate on 23 June 2005, many of which reflected the Committee's recommendations.[59] However, the House of Representatives had already risen for the winter recess and were unable to

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56 Mr Mark Needham, *Committee Hansard*, 11 April 2005, p. 2.

57 Mr Peter Corish, *Still Too Many Gaps In Rural Telecommunications*, Media Release, 16 June 2005, http://www.nff.org.au/pages/nr05/082.html (accessed 21 June 2005).

58 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.

59 The Government majority report made six recommendations for amendment, five of which were supported by Opposition senators, who called for another two changes.

deal with the amended bill. The Committee notes, however, that even in its amended form, the bill falls short of satisfying the recommendations of the Estens Report relating to regular reviews and future proofing.[60]

2.56 During this inquiry the Committee travelled to several regional centres. It was in regional Australia that concerns over the future of telecommunications services were most intense. While there were concerns about telecommunications services across the board, three key themes emerged:

- the poor quality or lack of services;
- the need for high-speed reliable broadband services; and
- future rural and regional services after Telstra is privatised.

2.57 These three themes are discussed below and are also canvassed later in this report. For people living in regional and rural Australia, debates over regulatory certainty to shore up the share price of Telstra are secondary to people's ability to produce livelihoods and support their chosen lifestyle. As the Committee heard:

> Remember that there are people involved in this decision—people's livelihoods and lifestyles are at stake here.[61]

Poor quality of telecommunications services

2.58 The Committee was frequently told about the inadequate level of telecommunications services in rural and regional Australia. Mr Michael Davis drove 500 kilometres to Dubbo to outline his concerns to the Committee:

> The government promised a 19.2 kilobit service on a dial-up. We still cannot get 19.2 on a dial-up. We can only get 10 or 11. I think that is approximately what they believe we have got. We have lost voice quality. We have unreliable connections, where the people on the other end think they have faxed, and the fax doesn't come through. If we go to dial up someone and then want to send a fax, we have to hang up because we have to put the prefix number 12622 on every fax we send.[62]

2.59 Mrs Tess Le Lievre who lives on a property near Bourke in western New South Wales described the problems in her area:

> To send faxes people end up going to our neighbour, Liz Murray, who has a satellite. The couple we had living in the cottage would go to put a fax through, they would dial the number, one page would go through and then it would cut out. Then they would have to dial again. That was how they sent faxes. If they had a lot of big, important faxes, they used to go up to our neighbour to get them through. When talking to them on the phone,

60 The additional comments by ALP Senators in the report highlight these concerns (pp 27-30).

61 Mr Joe Knagge, KNet Technology Pty Ltd, *Committee Hansard,* 14 April 2005, p. 15.

62 Mr Michael Davis, *Committee Hansard,* 14 April 2005, p. 54.

> which is on the other side of the river, it was as though we were talking to somebody in England years ago, and there was also a terrible noise.[63]

2.60 Similarly, the Mayor of the Narromine Shire Council told the Committee:

> Every three months we send our stuff to our accountant. It takes me over half an hour to email my little bit of info to the accountant, yet it takes a few seconds at the ADSL in Narromine and I suppose it takes even less on broadband; I do not know. I punch it in and go and make a cup of tea and have a sandwich and come back 20 minutes later and it is still whirring away, sending the email. That is the level of service we have.[64]

2.61 In Western Australia, the Committee was told of internet speeds of 9.6kbs:

> There are particular councils across the state—and the one I refer to is in the Great Southern region—which have described to me access to some of these telecommunication services; for example access to internet at speed which are inadequate for their purposes. They tell me they are achieving practical speed in some of their offices of around about 9.6.[65]

2.62 Mr Christopher Hill on behalf of the Western Australian Local Government Association argued:

> … in the vast majority of cases, if you look at the dial-up speeds achieved from rural areas, it is extremely rare to achieve 28k on the back channel. It is seeing perhaps 24 or 19.2 kilobits per second as the back channel, and 40 kilobits per second or 33.6 on the forward channel.[66]

2.63 For many in regional Australia the only service available is dial-up, which the Committee was told was both inefficient and costly due to the large drop-out rate of the service.

> … they suffer multiple drop-outs using dial-up. I go through it in my own home. One of the last things I ever want to do is get onto the computer when I go home, but I do do it at times. You are not aware of those drop-outs. The machine will basically drop out, redial and reconnect—it is seamless in a way until you get your account.[67]

2.64 Mr Caldbeck from the Dubbo City Development Corporation told the Committee that ISDN was too expensive for many families:

> I can tell you that one particular client, a family, would wait until Saturday and then the whole family would do half an hour of internet. Basically it is a case of 'do not touch the internet' for the rest of the week because of the

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63 Mrs Tess Le Lievre, *Committee Hansard,* 14 April 2005, p. 49.

64 Mr Robert Barnett, *Committee Hansard,* 14 April 2005, p. 35.

65 Mr Alden Lee, WALGA, *Committee Hansard*, 29 April 2005, p. 3.

66 Mr Christopher Hill, *Committee Hansard*, 29 April 2005, p. 4.

67 Mr Jeffery Caldbeck, *Committee Hansard,* 14 April 2005, p. 5.

> high charges because they are on ISDN. As such, they sort of splurge on Saturday and that is it.[68]

2.65 The Committee heard repeatedly that people in the bush were entitled to the same access to reliable, equitable telecommunications services as urban users.[69] Mr Mark Needham on behalf of the NFF told the Committee:

> … services in rural and regional Australia need to be adequate from the perspective that what services can be and are delivered in metropolitan areas also need to be delivered in rural and regional areas on the same basis—that is, the same price, the same parameters relating to service quality, the same parameters relating to installation and restoration et cetera.[70]

2.66 The NFF's submission stated:

> This equitable service requirement should not be reliant on the actions of any particular provider. It is the responsibility of Government to implement appropriate legislative and regulatory mechanisms to guarantee ongoing equitable telecommunications services and service quality for all Australians in an appropriate competitive environment.
>
> Farmers and communities in rural Australia do not receive the same level of telecommunications service or services as urban Australians. NFF acknowledges that significant progress continues to be made to rectify these inequities; however the opportunity exists to provide greater equity and certainty to the marketplace and consumers.[71]

2.67 Similarly, the Committee heard from Mr Alden Lee, a program manager for the Western Australian Local Government Association, who argued that the same level of service should be available regardless of geographic location and that this requires legislative mechanisms:

> We consider the telecommunications regulatory regime is an enabling mechanism only and a control factor towards delivering affordable access to advanced telecommunication services, proportionate with the ongoing needs of the Australian populous, irrespective of location.[72]

2.68 Mr Knagge from KNet Technologies argued:

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68 Mr Jeffery Caldbeck, *Committee Hansard,* 14 April 2005, p. 5.

69 Ms Liz Murray, *Submission* 29. See also: Consumers' Telecommunications Network, *Submission* 30, p. 3; Meridian Connections Pty Ltd, *Submission* 41, p. 23; Mr Michael Davis, *Submission* 43; Australian Consumers' Association, *Submission* 16, p. 15, Mr Alden Ping Kit Lee, Program Manager, Western Australian Local Government Association, *Committee Hansard*, Perth, 29 April 2005, p. 2.

70 Mr Mark Needham, *Committee Hansard*, 11 April 2005, p. 11.

71 NFF, *Submission* 15, p. 2.

72 Mr Alden Lee, *Committee Hansard,* 29 April 2005, p. 1.

> While we are seeing the roll-out of ADSL services, say, in country towns and regional centres such as Dubbo, in capital cities like Adelaide, Melbourne and Sydney they are talking about ADSL2 and ADSL2+— speeds 10 times faster than ADSL.[73]

2.69 However, the Committee heard from the Liberal Party MP for Herbert, Mr Peter Lindsay, who argued that the cost of technology roll-out to more remote regions of Australia was a significant inhibiting factor to equity of services. Nonetheless, he argued that the sale of Telstra could provide the necessary funds to implement better regional and rural services:

> Telstra should not have one hand tied behind its back when it operates in one of the most globally competitive industries … in the demand for more and more technology and the availability of technology, meeting those demands is capital intensive. If we want to see those services rolled out as quickly as possible, the service providers, and particularly Telstra, need the capital. Where are they going to get the capital from? It is not going to come from the government, because as soon as Telstra say: 'We want to do a whole lot more. Please give us some money,' the constituents say, 'No, we want that money spent on health, not on Telstra.' So the only way Telstra are going to have access to that lick of capital they need to really roll out the services is to go to the open market.[74]

2.70 The Committee notes that some people in regional and rural Australia considered that higher costs for some services or a slightly lower level of service were understandable. As the Orana Development and Employment Council submitted:

> It is unreasonable to expect the same level of service in remote areas of NSW as is available in George Street, Sydney. It is also unreasonable to expect the cost to be at the same pricing level. People make choices to live in these areas. However, in this age of modern technology it is reasonable to expect a reasonable service at a reasonable price.[75]

2.71 The poor quality or lack of services in regional and rural Australia is having a detrimental effect on regional and rural communities. The Committee was told that rural communities were finding it increasingly difficult to attract and keep people:

> We have large areas out here. A lot of areas are depopulating. We are finding it hard to attract and retain youth in our regions. Regional people need e-options more than people in metropolitan areas do. We need to be able to access our banking because we cannot just go down the road. There is no bank there and sometimes there is not even an ATM. We need to be

73 Mr Joe Knagge, *Committee Hansard*, 14 April 2005, p. 10.

74 Mr Peter Lindsay MP, *Committee Hansard*, 21 April 2005, p. 3.

75 Orana Development and Employment Council, *Submission* 8A, p. 1.

> able use those options because it might be a couple of hours drive to a bank. The bank is not just down at our corner mall.[76]

2.72 Similarly, the Mayor of Narromine Shire Council asked:

> How do you attract to or retain young people in small western towns when all their peers have access to these services that they do not have access to? Their curiosity is enough for them to say, 'Gee, I want to try this out.' They go to the bigger towns and the cities, they find the services that we do not have are there and they do not come back. The danger of that is that the desert will be deserted: it will be deserted of people. Our towns are ageing. Our populations in many of these western towns are diminishing.[77]

2.73 For small communities the inability to run and expand businesses is devastating:

> It is incredibly damaging because very good reactive and innovative companies located in the country regions of Australia are being forced to either go to Sydney or give up and not expand because Telstra is delivering neither reliability nor value and is cost prohibitive in its delivery of communications. … It also drives the confidence out of a community.[78]

2.74 In Dubbo the Committee heard several small regional telecommunication businesses argue that in order to remain viable they need access to the same technology as metropolitan areas enjoy, or they would have to consider relocating their businesses. Mr Joe Knagge from KNet Technologies, an IT company with offices in Dubbo and Orange, stated:

> I can see that, in five to 10 years, if I do not have access to the very latest technology, then I will no longer be able to compete in the marketplace I play in, which includes the Sydney market, and I will need to move my business to Sydney. I just do not want to do that. I have always lived in regional Australia. I love regional Australia and so do all of our staff. I do not want to be faced with a move to the city, and that is why I am here today.[79]

2.75 Ms Juliet Duffy from the Orana Regional Development Board supported these views:

> Communications is the basis of any business and I definitely think it has a severe impact on the economic development out here. It has an impact on us trying to attract industries out here and it has an impact on us trying to get people to relocate. Those services are not available. They look at that in

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76 Ms Juliet Duffy, Orana Regional Development Board, *Committee Hansard*, 14 April 2005, p. 41.

77 Mr Robert Barnett, *Committee Hansard,* 14 April 2005, p. 32.

78 Mr Arthur Hissey, *Committee Hansard,* 14 April 2004, p. 22.

79 Mr Joe Knagge, *Committee Hansard*, 14 April 2005, p. 10.

> relation to education and setting up home businesses and e-things as well. It really does affect us.[80]

2.76 Another witness in Dubbo described one example where relocation had occurred:

> It was a home based business that really needed fairly substantial bandwidth to operate. Because of the inability for ADSL services to be provided, this family—both husband and wife worked in the business—relocated to Wollongong. It was not only because of the inability to access broadband services—but it was a contributing factor—that the two of them made the decision to actually relocate to Wollongong and set up there in a suburb where they received broadband.[81]

The need for high speed telecommunications

2.77 As Australia increasingly competes in international markets the need for reliable high-speed telecommunications is vital. In regional areas, access to high speed broadband services has had a positive impact on business exporters:

> … we are well aware of the issues with exporters or potential exporters needing access to not only the Australian market but also to the world market as such. … One example is the mining community in Lightning Ridge. … Without the broadband widths and service delivery there, a lot of the miners would not have the opportunity to promote and market their products on the web. Obviously there is a need to provide written statements or statements that indicate the value of the gems that they are selling et cetera, and that all takes bandwidth. It tends to muzzle their operations as such. Whilst Lightning Ridge does have ADSL, there is a limit to that, as you are aware.
>
> The new generations of technology are obviously of paramount importance to people who wish to market and promote their product on the web.[82]

2.78 Similarly, in north Queensland the Committee was told of the growing reliance of regional businesses upon international markets and e-commerce via the internet:

> We will find it very difficult to compete as a region with other regions that have those services. Communications technology is absolutely crucial to all businesses—to sales, to marketing, to interaction, to ordering. With e-commerce, your businesses are almost integrated, and our council is no different. Our suppliers are on an e-commerce basis, as are our purchasers, and we get all our financial transactions off an electronic bank statement. If you do not have the bandwidth that can support that sort of environment,

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80 Ms Juliet Duffy, *Committee Hansard*, 14 April 2005, p. 43.

81 Mr Jeffery Caldbeck, Dubbo City Development Corporation Ltd, *Committee Hansard,* 14 April 2004, p. 4.

82 Mr Jeffery Caldbeck, *Committee Hansard*, 14 April 2005, p. 2.

> people just do not want to deal with you in this modern age. It is just too hard and too expensive.[83]

2.79 Agribusiness is another area which has become highly technological and where producers deal directly with customers in overseas markets. As Ms Juliet Duffy from the Orana Regional Development Board told the Committee:

> The biggest part of industry out here is agriculture, and agriculture is increasingly dependent on the global economy. … That is really important on a national scale, because agriculture is part of a global trend. We all know that in about 50 years the leading economies will be America, China and India. Australia will be a supplier nation. We rely heavily on agriculture and we really need to support the agricultural industry.[84]

2.80 Yet for many businesses in regional and rural Australia, telecommunications services are unreliable or non-existent. Mr Robert Barnett, the Mayor of Narromine Shire Council in western New South Wales, described the difficulty of running a rural business without access to broadband. Mr Barnett said that he drove 30 kilometres from his property each evening to get a broadband connection:

> I am a wheat farmer and I am a cattle producer. In the wheat industry now, every day when wheat is delivered we download those loads and we try to market it. I cannot do that at home. I do a day's work and come home at night, then I go into town to my daughter's place to access the information, because I can do there in 10 minutes what I cannot do in an hour at home. The National Livestock Identification System is coming online in the cattle industry as of 1 July. We will be required to record through the internet the movements of these cattle but we do not have the infrastructure to do it, so we are really getting in a bind.[85]

2.81 Similarly, in Western Australia Mr Gary Chappell from the Peel Development Commission told the Committee about the reliance by dairy farmers on access to the internet:

> When I was at Waroona, a farmer gave me an example. He has little electronic readers and the cows have things on their ears. He downloads information off the internet to upgrade his software—to do all those sorts of things—and to enter statistical information, but he is on dial-up so he sits there and if it does not go through the scanner, I suppose, he is missing one somewhere and he will go hunting for it. The technology is there in the farming sector as well as in all the other sectors.[86]

2.82 Mr Barnett, Mayor of Narromine Shire Council, also noted that the internet was becoming more important for people in rural Australia, not only for

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83 Mr Paul Askern, Townsville City Council, *Committee Hansard*, 21 April 2005, p. 38.

84 Ms Juliet Duffy, *Committee Hansard*, 14 April 2005, p. 39.

85 Mr Robert Barnett, *Committee Hansard,* 14 April 2005, p. 28.

86 Mr Gary Chappell, *Committee Hansard*, 29 April 2005, p. 70.

communication but because it had become a primary information source for farmers and other business people:

> The internet is now where business is done, and our services in this area are less than adequate. The township of Narromine only received ADSL services at the beginning of 2004. This has been a positive step. But, as I am sure you all know, ADSL is only available to those premises that are within 3.5 kilometres of the exchange. Out here in the bush that restriction alone excludes more than half of our shire's population. In many cases even those inside this area find that the service is unavailable due to the age of the copper cabling that exists in areas of our towns. Farmers that have to use dial-up services are also totally frustrated with the enormous amount of time it takes just to connect to the internet, let alone to try to download information. This, I would like to emphasise, is probably the worst problem we are facing—the slowness and inefficiency of the internet.[87]

2.83 Mr Mark Needham from the NFF also made this point:

> Rural and regional people—farmers in particular, small businesses, family farms et cetera—do have a requirement for a range of services. The main characteristic they want is quality—a reliable and affordable service. From a bandwidth perspective, it does vary depending on the activities of the particular farming enterprise, whether it is a large farming business or a family farm, with the family oriented activities that go on as well. In relation to high bandwidth, we have made it clear that 256K is certainly our minimum. … Again, it comes back to the services that, in general, are required in metropolitan areas are available in rural and regional areas on an equivalent or a similar availability, that they are on a par.[88]

2.84 One business operator stated:

> Internet access, can be essential for businesses located in country towns to compete with those businesses located in capital cities and competing in the same marketplace. … Our business is now dependent on access to information, ordering of products, communication with suppliers and customers, and all forms of electronic commerce, to conduct our day to day activities. It is essential that we remain as effective as our competitors in these activities and to achieve this we require data access speeds equivalent to, or close to, our competitors.[89]

2.85 Several witnesses noted that as the cost of traditional forms of telecommunications such as international telephony was prohibitive, new technologies would provide significant benefits for small businesses wanting to access export markets:

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87 Mr Robert Barnett, *Committee Hansard*, 14 April 2005, p. 28.

88 Mr Mark Needham, *Committee Hansard*, 11 April 2005, p. 12.

89 KNET Technology Pty Ltd, *Submission* 10, p. 1.

> If you said to someone at Lake Cargelligo who makes hospital beds that they need to be able to ring Hong Kong, they will say: 'The cost to ring Sydney is bad enough. I'm not going to ring Hong Kong.' So email and internet services become so critical because of the high cost of offshore phone calls. But the introduction of technology such as VOIP would provide a whole new service for those people, which would be quite remarkable if it can happen.[90]

2.86 In Perth the Committee was told:

> … we have a lot of people who work from home. We have a lot of alternative lifestyle people, particularly in the northern part of Peel. We have people that work in the metropolitan area but live outside because they want that rural type of lifestyle. They are happy to live out there, but they need to have the same sorts of services that they would have if they were in the city, because they work for big businesses and they want access to email and they want to be able to download files. All those sorts of things are very important to them.[91]

2.87 As rural industries become more technologically complex, those who operate in these industries can no longer survive without access to high-speed telecommunications services. However, as discussed in Chapter 5, the cost of broadband services for rural customers is still prohibitive.[92]

2.88 Despite the importance of broadband services for the economy, Australia's take up of broadband services is slow compared to other OECD countries, and Australia's OECD ranking is in decline. 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.[93] The Committee also notes that Australia's accepted internet access and download speed of 256 kbps is low compared with international standards.

2.89 However, from this extremely low base the March 2005 ACCC Broadband figures showed that broadband take-up has risen significantly—up 1,839,700:

- Broadband take-up has increased by 1,010,400 or 121.8 per cent, from the March 2004 figure of 829,300.
- The take-up of ADSL services is now at 1,298,100.

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90 Mr Jeffery Caldbeck, *Committee Hansard,* 14 April 2004, p. 7.

91 Mr Gary Chappell, Peel Development Commission, *Committee Hansard*, 29 April 2005, p. 66.

92 Mr Michael Davis, *Committee Hansard,* 14 April 2004, p. 54.

93 Organisation for Economic Co-operation and Development, *OECD Broadband Statistic*, December 2004, accessed on 29 June 2005: http://www.oecd.org/document/60/0,2340,en_2825_495656_2496764_1_1_1_1,00.html. The OECD broadband penetration rate in 2004 was 10.2 subscribers per 100 inhabitants: Australia's rate was 7.7 per 100 inhabitants, compared with Korea (the highest at 24.9), Canada (17.8), the USA (12.8) and the UK (10.5).

- Total quarterly growth in broadband was at 18.8 per cent for the March 2005 quarter.[94]

2.90 The need for mobile phone coverage to maintain a business was also an issue. The Mayor of Narromine, NSW, told the Committee:

> The use of mobile phones is now a communications norm, yet our shire does not have full service coverage. This is a significant disadvantage to people on the land who cannot receive adequate, cost-effective phone services while working their properties. Those with whom we do business on a daily basis expect to be able to make contact with us as and when required. This is something city people take for granted until they travel west and are suddenly isolated because they cannot use their mobile phones.[95]

2.91 Similarly, in a submission from the Orana Development and Employment Council, Mr Warren explained that in an attempt to stay in contact:

> … I take three mobiles, Telstra digital, Telstra CDMA and Optus Digital and program them to forward to each other in the hope one will be in range when I am at the 750 acre property.[96]

2.92 The Committee accepts that once a business case is established, Telstra or any other telecommunications carrier may seek to develop the necessary infrastructure to deliver services to regional and rural Australia. However, the Committee is concerned about the future deployment of telecommunications infrastructure and services in regional and rural Australia if a business case for the deployment of services cannot be readily made. As discussed above, telecommunications is a vital service with significant social and economic benefits to the community, and decisions based purely on business considerations will not necessarily promote the public good.

Future services to rural and regional areas

> It is obvious that no-one, or very few people, in the bush want to see Telstra sold. I made the point earlier: why is that when it is so dismal now? It is because they fear it will be even worse.[97]

2.93 The Committee heard of the high level of fear in regional and rural Australia about the upcoming sale of Telstra. Central to those apprehensions was that in the debate leading up to the sale, the concerns of those most affected are not heard, and that once Telstra is privatised the regulatory regime will no longer be able to compel a

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94 ACCC, *Snapshot Of Broadband Deployment As At 31 March 2005*, accessed 29 June 2005; http://www.accc.gov.au/content/item.phtml?itemId=611699&nodeId=file42c0bdf86730a&fn=Snapshot%20of%20broadband%20deployment%20(31%20Mar%2005).pdf.

95 Mr Robert Barnett, *Committee Hansard*, 14 April 2005, p. 27.

96 Orana Development and Employment Council, *Submission* 8A, p. 1.

97 Mr Robert Barnett, *Committee Hansard*, 14 April 2005, p. 34.

private company to service small rural populations where there is little or no profit to be made. The Mayor of Narromine, Mr Robert Barnett, told the Committee:

> Our concern is that, if the government cannot deliver adequate telecommunications services to country people under the current regime and as a major shareholder, what chance have country people of receiving ongoing quality telecommunications services under a fully privatised Telstra? The government has recently stated in a letter to council dated 22 March 2005 that it believes that 'in a modern telecommunications environment, it is a combination of competition and regulation that delivers people lower prices and new services'.
>
> It is statements like that which cause country people to worry. Which privately owned company, you would have to ask, would invest in the necessary infrastructure, either now or in the future as new technology emerges, to service a small population of people in the bush? … It is our belief and the belief of many others that a fully privatised Telstra, without an appropriate regulatory regime, would focus even more strongly on the lucrative high-population density market and that regional people would lose the weapon of political pressure to lobby for adequate services.[98]

2.94 The Committee heard concerns that a privatised Telstra could no longer be compelled to provide unprofitable services to rural areas:

> How do you force a private company to put in services where they cannot hope to make any money? You are not coming to my company and telling me to go out and sell a computer at 50 per cent below my cost. I am not going to do it—I would have to shut the doors. I do not believe that any government organisation can do it to any great extent to any private company. I believe that Telstra and their staff are dedicated at the moment because they still are offering a public service and they still are public servants. I believe that it is in the interests of business in regional Australia that that is how it remains.[99]

2.95 Mr Paul Askern from the Townsville City Council also expressed concern about the privatisation of Telstra and the possibility that regional telecommunications services will fall behind capital cities:

> We needed assurances that Townsville would not be disadvantaged in the future with regard to the standard of services and the roll-out of new technology compared to the rest of Australia, particularly the capitals. The potential sale of the government's remaining stake in Telstra was of grave concern without some form of checks and balances or regulatory regime.[100]

98 Mr Robert Barnett, *Committee Hansard*, 14 April 2005, p. 28.

99 Mr Joe Knagge, *Committee Hansard*, 14 April 2005, p. 12.

100 Mr Paul Askern, *Committee Hansard*, 21 April 2005, p. 33.

2.96 The Townsville Chamber of Commerce welcomed the sale of Telstra provided that legislation ensures that the privatised company would not be so powerful as to ride over the top of competitors:

> If the safeguards are not drafted very well, they will have a significant impact on the other telco businesses, and in particular on the emergence of the local telcos.[101]

2.97 Many people in rural Australia view the sale of Telstra as the Government giving up its obligation to ensure communications services for all Australians.

> I see that this is very disadvantageous to all of us. I feel that it is the government who has to dictate the outcomes for these. Telstra will not do it. If Telstra becomes fully privatised it will only look at its bottom line. I know that, where I live, we are not viable as far as our phone connection is concerned. … Yet it seems to me that we have lost sight of communication contact for us in the bush as being a responsibility of the government.[102]

2.98 The CEPU argued that it remained 'firmly opposed' to privatisation of Telstra as its sale would mean a decrease of services to people living in regional and rural Australia:

> No persuasive arguments have been advanced to show that full privatisation will produce public benefits. On the other hand, it involves clear risks. While the government remains the majority shareholder of Telstra, it can exert leverage over the company over and above that provided by regulation. The community understands this well, especially those living in regional and rural areas. Majority public ownership also guarantees that the company remains predominantly in Australian hands.[103]

2.99 The Committee endorses the argument of the Australian Consumers' Association that:

> … rural and regional telecommunications policy must find a horizon beyond the next round of privatisation. We regard it as an enduring necessity to ensure that consumers in regional areas can plug in to the communications advantages of today and the network necessities of tomorrow and the days that follow.[104]

2.100 The Australian Consumers' Association also argued that in order to ensure the supply of services in rural and regional centres, the Government should establish a statutory body to oversee the supply of telecommunications services because of 'the constant risk, perhaps certainty, of market failure in some regional areas':

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101 Mr John Bearne, *Committee Hansard*, 21 April 2005, p. 53.

102 Mr Michael Davis, *Committee Hansard*, 14 April 2005, p. 54.

103 CEPU, *Submission* 40, p. 3.

104 Australian Consumers' Association, *Submission* 16, p. 15.

> Australia requires a statutory body to oversee and in the final case supply telecommunications services to regional and rural consumers appropriately comparable to urban services on a sustainable basis. This requirement will become more urgent when Telstra is finally and fully privatised.[105]

2.101 The Committee favourable notes the views expressed by the Hon John Anderson at the recent National Party Conference in Gunnedah, New South Wales on 17 June 2005:

> We cannot leave this future in the hands of one monopoly provider that can manipulate the market and roll out services in accordance with its interests rather than the interests of regional Australia. … We need real competition in telecommunications, where every provider in the market operates its wholesale arm in genuine separation from its retail arm. Real competition also requires that the competition regime is backed up by a strong regulatory regime so that competition rules can be enforced. …
>
> So The Nationals need to secure three core outcomes from the current telecommunications debate:
>
> - The genuine and robust operational separation of Telstra's wholesale and retail arms, and the similar separation of all carriers and providers in the market.
> - A strengthened regulatory regime, so that both the telecommunications industry regulator and the ACCC as the broader competition regulator have the power to enforce competition properly; and
> - The security of knowing that future governments will continue to fund the provision of services in non-commercial markets.
>
> Our responsibility, though, is to the national interest and the interests of regional Australia - and we will only serve their interests if we can create a 21st telecommunications system for Australia.[106]

Future investment in the telecommunications network

2.102 The Committee was told that during the 1980s under full government ownership of Telstra, 70 to 80 per cent of the annual surplus was reinvested in the network.[107] Since that time the level of capital investment by Telstra appears to have been in long-term decline. The forthcoming sale of Telstra has done little to reverse this process.

2.103 The ACCC noted that:

> To date, neither Telstra nor any other party has indicated to the ACCC that it has firm intentions in relation to investment in technologies such as fibre-

105 Australian Consumers' Association, *Submission* 16, p. 15.

106 The Hon. John Anderson MP, Deputy Prime Minister, NSW Nationals Conference Speech, Gunnedah, 17 June 2005, accessed 28 June 2005: http://www.ministers.dotars.gov.au/ja/speeches/2005/AS11_2005.htm.

107 Professor Peter Gerrand, *Committee Hansard*, Melbourne, 4 May 2005, pp 4-5.

> to-the-home. Indeed, Telstra admits it actually has no current plans for any significant investment in fibre-to-the-home and claims the existing copper network has another 15-20 years of useful life in front of it.[108]

2.104 The ACCC's *Telecommunications Infrastructure in Australia 2004* report, released in June 2005, found that:

> During 2003-04, carriers invested around $872.1 million in local access network infrastructure. Approximately one fifth of this investment was undertaken by carriers other than Telstra.
>
> Telstra and other carriers have planned modest levels of investment in local access network infrastructure for 2004-05. While some of this investment involves asset replacement and upgrade, there are plans to expand copper, optical fibre and satellite networks.[109]

2.105 The report set out the level of investment in the local access network as follows:

Table 1: Investment in local access networks 2003-04

Network type	Total ($m)
Copper	600.8
Optical fibre	127.1
HFC	35.9
Microwave, LMDS, MMDS and fixed wireless	37.6
ISM spread and modified spread spectrum -Satellite	70.7
Total	872.1

† Investment in USD was converted to AUD using an average exchange rate for 2003-04 ($AUD = $0.7140 USD).[110]

2.106 The ACCC also sought information about the level of investment planned for 2004-05. Both Telstra and other carriers planned to undertake modest levels of investment in their copper, optical fibre and satellite networks. The ACCC noted that while this involves network expansion and deployment, no large scale deployment appeared to be planned and the level of investment in local access networks was about 50 per cent lower than in 2001-02. The Committee is concerned that most of the investment is in old technology copper rather than optical fibre.

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108 ACCC, *Submission* 17, p. 8, referring to Mr Bill Scales's evidence to the Environment, Communications, Information Technology and the Arts Legislation Committee, *Additional Estimates Hansard*, 14 February 2005, p. 114.

109 ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005, p. 23.

110 ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005, Table 8, p. 23, accessed 29 June 2005 at: http://www.accc.gov.au/content/item.phtml?itemId=610432&nodeId=file42ae708289350&fn=Telecommunications%20infrastructure%20in%20Australia%202004%20(released%20Jun%2005).pdf.

2.107 The report also found that during 2003-04, $142.3 million was invested in xDSL infrastructure.[111] However, not all carriers provided information about their investment in ISDN and xDSL. With respect to xDSL infrastructure, the carriers who did provide information valued their total investment at $772.7 million. The ACCC noted that the level of investment in xDSL networks was about the same as in 2001-02.[112]

2.108 During 2003-04, carriers invested $348.7 million in transmission infrastructure, as outlined in Table 2. Not all carriers were able to disaggregate their investment in transmission infrastructure from the investment in local access network infrastructure. Where the investment covered both transmission and local access network infrastructure, this is presented in Table 1.

Table 2: Investment in transmission routes 2003-04[113]

Network type	Total ($m)
Optical fibre	222.2†
Microwave	61.1†
Satellite	65.4†
Total	348.7†

† Investment by some carriers is aggregated with local access network investment, presented in Table 1.

2.109 The ACCC noted that the level of investment in transmission networks was about 50 per cent lower than in 2001-02.

2.110 During 2003-04, mobile carriers invested $1.1 billion in their GSM, CDMA and W-CDMA networks and all had plans for significant network expansion or upgrade beyond this period. The ACCC notes that the level of investment in mobile networks is about 70 per cent higher than the level for 2001-02. Approximately 25 per cent of investment in 2003-04 was in 3G mobile networks.[114]

2.111 Mr Steve Wright, Director, Stakeholder Relations for Hutchison Telecommunications (Australia) Ltd, told the Committee that the mobile market in Australia was very competitive.[115] The Committee notes that in the markets where there is competition—for example, in the mobile market—there is a higher level of infrastructure investment.

2.112 *The Telecommunications Carrier Industry Development Plans Progress Report 2003-04*, based on data received directly from licensed carriers as part of their

111 xDSL is a term used to describe various forms of digital subscriber line technologies that can provide very high speed service using existing copper lines.

112 ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005, p. 39.

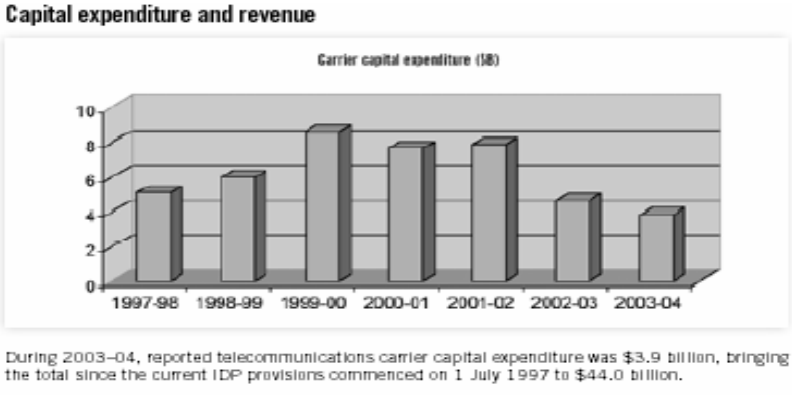
113 ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005, Table 24, p. 49.

114 ACCC, *Telecommunications Infrastructure in Australia 2004*, June 2005, p. 58.

115 Mr Steve Wright, *Committee Hansard*, 14 April 2005, p. 68.

reporting obligations under the Telecommunications Act, reported that $3.9 billion of capital investment in network facilities was spent during 2003-04, bringing the total in the seven years since the current Industry Development Plan provisions commenced to $44.0 billion.[116] However, the overall level of capital investment in network facilities is in clear decline.

Figure 1: Capital investment in network facilities 1997/98 – 2003/04[117]



2.113 Telstra provided the Committee with an outline of its capital expenditure from 1998 to 2004. The table shows a decline in Capital Expenditure (capex) from a high in 2000 of $4,051 million to $2,918 million in 2004.

Table 3: Telstra Capital Expenditure[118]

YearEnded30June ($M)	2004	2003	2002	2001	2000	1999	1998
Switching	298	376	661	735	647	626	756
Transmission	378	378	416	429	693	602	584
Customer access	844	959	929	1,004	1,315	898	778
Mobile telecommunications networks	416	449	255	390	628	616	340
International telecommunications infrastructure	192	193	233	172	125	138	143
Capitalised software	452	583	559	737	599	502	237
Other	507	426	553	677	722	926	986
Operating capital expenditure	**3,087**	**3,364**	**3,606**	**4,144**	**4,729**	**4,308**	**3,824**
Less Non Domestic Capex spend	169	187	172	93	70	70	70
Core Domestic Operating Capex (incl Cap Interest)	**2,918**	**3,177**	**3,434**	**4,051**	**4,659**	**4,238**	**3,754**

116 DCITA, *The Telecommunications Carrier Industry Development Plans Progress Report 2003-04,* p. 6.

117 DCITA, *The Telecommunications Carrier Industry Development Plans Progress Report 2003-04,* p. 8.

118 Telstra, *Submission* 25d, p. 1.

2.114 The Committee is concerned that the level of capital investment in network infrastructure and the quality of the network are in decline. The Committee acknowledges that many carriers invested heavily in the last decade and are yet to see a return on that investment. However, Telstra's decline in network investment is to be criticised in light of its monopoly ownership of an established network and its high annual profits.

2.115 The Committee heard an assessment that the Government had not used its ownership of Telstra wisely as it has not reinvested the revenue Telstra provided back into the network. Further, Professor Peter Gerrand cautioned that in selling its remaining share in Telstra the Government will lose $2 billion per year in revenue and its ability to reinvest in telecommunications infrastructure:

> The pressures on Telstra are such that, as you know, it is delivering 80 per cent of its profit each year to its shareholders. The shareholders benefit, but the customers do not. The government at the moment gets somewhat more than $2 billion per year in dividends from Telstra. There is a potential mechanism there for reinvestment of that $2 billion a year back into telecommunications. I do not see it happening at the moment. It would be possible to use the money from the sale of the final 51 per cent of Telstra as part of a fund and to earmark that fund for continual reinvestment in telecommunications. Unless that happens, Australia has lost that natural mechanism for reinvestment in very important national telecommunications infrastructure.[119]

2.116 In March 2005, the Page Research Centre released a report titled *Future-Proofing Telecommunications in Non-Metropolitan Australia*[120] in which the Centre argued that the roll out of an optic fibre network was a viable option. Baulderstone Hornibrook produced preliminary costing of $7 billion to roll out the infrastructure, with a view to project completion in five years. This figure is in stark contrast to the $30 billion over 20 years argued by Telstra. The Committee heard from Professor Gerrand that, assuming that the figure lay somewhere between these two, an optic fibre roll-out was possible over a 10 year period:

> There is good reason for thinking that the construction engineers are perhaps underestimating the cost and that Telstra is overestimating the cost. I think a safer estimate would be about the $20 billion figure, which basically would be achieved by the federal government reinvesting that $2 billion a year over 10 years. So it is not a figure to appal one; it is really quite a reasonable figure in the context of the overall revenue stream from organisations like Telstra and the normal reinvestment levels.[121]

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119 Professor Peter Gerrand, *Committee Hansard*, 4 May 2005, p. 2.

120 Page Research Centre, *Future-Proofing Telecommunications in Non-Metropolitan Australia*, March 2005.

121 Professor Peter Gerrand, *Committee Hansard*, 4 May 2005, p. 5.

2.117 The complex issue of infrastructure investment is discussed in more detail in Chapter 4. However, in Melbourne the Committee heard from Mr Paul Fearon, Chief Executive Officer with the Essential Services Commission. Mr Fearon outlined a range of initiatives which monitor the adequacy of infrastructure investment in the energy sector:

> We have … comprehensive auditing and performance monitoring framework. We send out technical auditors to see that the various codes and procedures are being complied with, we have performance reporting, and we put out a comprehensive performance report once a year, which is quite detailed. It goes to issues of performance down to an individual level, and that would be measuring minutes off supply, interruptions and a range of other service parameters.
>
> Ultimately, accountability for the delivery of infrastructure is probably the biggest challenge we have. In addition to the performance reporting, we need to rely on the incentives and rewards that I mentioned previously, which revolve around S factors and the payment of GSLs. Basically that means the business has quite a level of discretion within the periods on how much it spends and where it spends, but at the end of the day if it does not deliver the performance it is going to get penalised… and businesses put the investment in to avoid having to make explicit payments to customers. So that has been a very valuable mechanism to ensure that accountability.[122]

Conclusion

2.118 The Committee has heard significant evidence throughout this inquiry which questions the effectiveness of the current telecommunications regulatory regime to deal with structural issues within the industry. As one witness submitted:

> Based on numerous reports from the ACCC, PC, [ACA], OECD, other Senate Inquiries – and basically everybody else in this country with the exception of Telstra and the government – it is a clear that we have reached the end of the road in relation to the current self-regulatory environment.[123]

2.119 If indeed we have reached the end of the road in relation to the current self-regulatory environment, what alternatives are open to Government, industry players and the wider community?

2.120 The Committee acknowledges the point made by Mr Bill Scales, Group Managing Director, Corporate and Human Relations in Telstra, that competition in sectors of the telecommunications market has increased since 1997:

> … the Australian telecommunications market is now highly competitive. We have been monitoring many of the submissions that have been put to you. You would be surprised, if you looked at only those submissions, to think that we actually do have a highly competitive telecommunications

122 Mr Paul Fearon, *Committee Hansard*, 4 May 2005, p. 42.

123 Mr Paul Budde, *Submission* 1, p. 1.

> market because that does not come through in many of the submissions you have. [124]

2.121 However, if the market incumbent is still able to secure such a large proportion of the sector's profits, questions clearly still need to be asked about the effectiveness of the current regulatory regime. As Mr Errol Shaw from PowerTel noted:

> After 13 years of deregulation and 'competition', I think Telstra take[s] home 90 per cent plus of the sector's profit from 70 per cent of the sector's revenue base. I guess in industry you are after profits more than revenue, so after 13 years Telstra has 90 per cent of the profit base.[125]

2.122 The issue of competition in the telecommunications sector is discussed in the next chapter.

124 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 56.

125 Mr Errol Shaw, *Committee Hansard*, 11 April 2005, p. 19.

Chapter 3

Competition

> Competition is not really working because of the structure of the industry—not because the ACCC or the ACA or ACIF are not working. They are all good people, but the structure of the industry is not correct… We have one big elephant and 12 mice playing on the soccer field and then we say, 'Okay, this is self-regulation.' Now, who wins? Obviously, if you have a self-regulatory regime linked to an industry or market structure where you have one big company dominating, then it is a furphy to believe that you can create competition in the market.[1]

3.1 During this inquiry the Committee has heard from telecommunications industry participants, commentators and consumer groups which claim that market structures give rise to a range of anti-competitive practices. This chapter discusses Parts IV and XIB of the *Trade Practices Act 1974* (TPA) and the regulatory mechanisms which deal with anti-competitive behaviour, and considers whether those mechanisms are effective. By way of illustration, the protracted recent ACCC case against Telstra in relation to the broadband competition notice is discussed. The chapter also highlights a variety of problems faced by industry participants who must compete with a powerful vertically integrated owner of monopoly infrastructure.

The current regulatory regime

3.2 The ACCC is the Commonwealth's statutory authority which administers the economic and competition aspects of telecommunications regulation, primarily under the TPA. Its functions include:

- administering the general restrictive trade practices regime in Part IV and the telecommunications-specific competitive safeguards regime in Part XIB, which addresses anti-competitive conduct by carriers and carriage service providers as well as allowing the ACCC to issue tariff filing directions and record-keeping rules;
- administering the telecommunications-specific regime in Part XIC for facilitating access to the networks of carriers. This includes declaring services for access, approving access codes, approving access undertakings, arbitrating disputes for declared services and registering access agreements; and
- administering other legislative provisions, including those relating to price control of Telstra's retail services, international conduct rules, number portability, electronic addressing, interconnection standards and arbitration of disputes about access to network information, access to

1 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 45.

facilities, operator services, directory assistance services, provision of number portability, preselection and emergency call services.[2]

Part XIB - anti-competitive conduct

3.3 As noted above, the anti-competitive conduct and record-keeping rules in Part XIB apply specifically to telecommunications markets. Section 151AK states that a carrier or carriage service provider must not engage in anti-competitive conduct. A carrier is deemed to have engaged in anti-competitive conduct if it has a substantial degree of power in a telecommunications market and either:

- takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market;
- takes advantage of the power, and engages in other conduct on one or more occasions, with the combined effect, or likely combined effect, of substantially lessening competition in that or any other telecommunications market; or
- engages in conduct in contravention of sections 45, 45B, 46, 47, or 48 of the TPA where that conduct relates to a telecommunications market.[3]

3.4 On receipt of evidence of anti-competitive behaviour the ACCC initiates an investigation. If it determines that anti-competitive conduct has occurred or is occurring, the ACCC may issue a competition notice. There are two types of competition notices, Part A and Part B. Part A notices are issued when the ACCC has reason to believe that:

- a carrier or carriage service provider has or is engaged in an instance of anti-competitive conduct (under section 151AKA(1))
- a carrier or carriage service provider has or is engaged in at least one instance of anti-competitive conduct of a kind described in the notice (under section 151AKA(2)).

3.5 Part A competition notices are designed to fulfil a 'gatekeeper' role by acting as a precondition to private action under Part XIB. They are flexible instruments, which at the ACCC's discretion can be revoked or modified in minor ways without the need for a new investigation. Competition notices issued under subsection 151AKA(2) do not require the ACCC to specify a particular instance of anti-competitive conduct. This allows the ACCC to investigate where precise evidence has not yet come to light.[4] Part A notices were introduced in 1999 in response to criticisms that detailed particulars of the contravention were required under the existing notice regime.

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2 ACCC, website at 29 April 2005, http://www.accc.gov.au/content/index.phtml/itemId/269239.

3 TPA, subsections 151AJ(2) and (3).

4 David Stewart, 'Anti-competitive Conduct', *Australian Telecommunications Regulation (3ed.)* Alasdair Grant (ed.), UNSW Press, 2004, p. 173.

3.6 The ACCC may also issue a Part B notice under section 151AL, stating that a carrier or carriage service provider has contravened or is contravening the competition rule. Unlike a Part A notice, a Part B notice must set out particulars of the alleged contravention.

> A Part B competition notice could therefore be used to consolidate the results of an ACCC investigation into a single document for use by litigants alleging loss or damage resulting from the anti-competitive conduct.
>
> Section 151AN provides that a Part B competition notice is prima facie evidence of the matters set out in that notice….The avowed purpose of the Part B competition notice is to facilitate parties taking private legal action to enforce the competition rule or to recover loss or damage arising from anti-competitive conduct.[5]

3.7 While the notices are separate, in practice a Part B notice is unlikely to be issued unless the alleged conduct has been the subject of a Part A notice.[6]

3.8 Telstra's submission noted that the arrangements in Part XIB are the legacy of a compromise that was struck at the end of the duopoly period. Telstra argued that as with most forms of regulation, these provisions had beneficiaries with vested interests (in this case mainly Telstra's competitors), and that this has resulted in strong opposition to repeal. Telstra argued that Part XIB was a policy compromise which was 'never intended to be permanent':

> Rather, Part XIB was only ever intended as a transitional measure to assist the telecommunications sector during the early years of deregulation. The intent was always that Part XIB would be repealed, followed by greater reliance on the generic economy-wide competition laws.[7]

3.9 In 2001, the Productivity Commission's report on Telecommunications Competition Regulation expressed several concerns about Part XIB and considered whether Part XIB should be repealed or amended to modify its undesirable features. The Productivity Commission initially recommended in its Draft Report[8] that Part XIB should be repealed.

3.10 The Draft Report noted that the following concerns supported the repeal of Part XIB:

- enhanced opportunity for regulatory error and overreach;

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5 David Stewart, 'Anti-competitive Conduct', *Australian Telecommunications Regulation (3ed.)* Alasdair Grant (ed.), UNSW Press, 2004, p. 174.

6 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, 2001, p. 159.

7 Telstra, *Submission* 25, p. 21.

8 Recommendation 5.1.

- many of the cases considered under Part XIB have been minor - not usually involving circumstances where lack of speedy regulatory action could lead to market foreclosure;
- relevant action can be pursued under Part IV (including the seeking of injunctions by firms that consider themselves adversely affected by the anti-competitive conduct of others), Part XIC or in a number of other ways;
- progress under Part XIC, together with further improvements to the access provisions reduce the need for specific anti-competitive conduct regulation in telecommunications markets;
- a strong case exists that the issues under Part XIB for which competition notices have been issued would more appropriately have been dealt with under other provisions of the Trade Practices Act, particularly Part IV;
- telecommunications competition has increased substantially since 1997 and should be more self-sustaining in the longer term, even with less regulation;
- given the other remedies available, removal of the anti-competitive conduct provisions of Part XIB is likely to have no significant effect on competition; and
- in the Productivity Commission's view, repeal of the anti-competitive conduct provisions of Part XIB would not be inconsistent with Australia's international obligations.

3.11 However, in its final report in 2001, the Productivity Commission altered its position, noting that its recommendation for repeal had attracted widespread industry criticism and strong opposition from the ACCC. The Commission instead adopted its second option of proposing amendments to Part XIB, with various reservations and conditions.[9] The Commission summarised its conclusion on Part XIB as follows:

> On balance, the Commission supports retention of Part XIB pending the development of more sustainable competition in telecommunications. This support is conditional on the introduction of an appeal mechanism intended to enhance procedural fairness. As Part XIB should only be a transitional measure, it should be further reviewed in three to five years.[10]

Part IV – anti-competitive conduct

3.12 Part IV of the TPA sets out general provisions relating to anti-competitive conduct. Section 46 relating to general misuse of market power prevents a corporation with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market, or deterring or preventing competitive conduct in a market.

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9 Telstra, *Submission* 25, p. 22.

10 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, September 2001, p. 151.

The Productivity Commission described the 'purpose' test in section 46 and compared it with Part XIB:

> In section 46, purpose stands alone — there is no requirement for any effect or likely effect before regulatory/legal action can be taken against the alleged anticompetitive conduct. Nevertheless … purpose can be inferred from a firm's conduct or other relevant circumstances — this means that purpose can possibly be established from effect.[11]

3.13 The Committee heard during this inquiry that the 'purpose test' is 'notoriously difficult to establish'.[12]

Comparison of Part IV and Part XIB

3.14 As the Productivity Commission noted in its report on *Telecommunications Competition Regulation*,[13] 'both Part XIB and Part IV are judicial enforcement models that prescribe general rules of conduct that are enforceable by the courts'. The Productivity Commission also noted:

> Many of the steps necessary under a Part IV investigation also apply under Part XIB: ie defining markets, assessing market power, and assessing whether advantage was taken of that power.[14]

3.15 However, there are several important differences:

- unlike Part IV, Part XIB prohibits a use of market power that has an anticompetitive effect or likely effect rather than purpose;
- proceedings (other than for an injunction) cannot be instituted under Part XIB unless the ACCC has issued a Part A competition notice and the alleged conduct is of a kind dealt with in the notice;
- the evidentiary burden is reversed (a Part B competition notice under Part XIB is prima facie evidence of the matters in the notice);
- a competition notice places greater public pressure on the recipient to modify its conduct; and
- the maximum pecuniary penalty in Part XIB ($10 million plus $1 million per day) is greater than in Part IV ($10 million).[15]

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11 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, September 2001, p. 157.

12 Unwired Australia, *Submission* 48, p. 2.

13 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, September 2001, p. 162.

14 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, September 2001, p. 157.

15 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, September 2001, p. 162, referring to the ACCC's submission to its inquiry.

3.16 In addition, the Commission noted that court action 'is more likely to be required under Part IV to stop alleged anti-competitive conduct than under Part XIB'. Action under one part does not necessarily prevent action under the other in relation to the same incident of anti-competitive conduct, but a person is not liable for more than one pecuniary penalty. While in Part IV penalties and damages can reflect the entire period of anti-competitive conduct, under Part XIB they can only relate to the period after the issue of a Part A competition notice.[16]

Accounting separation and record-keeping rules

3.17 Under Part XIB the ACCC has certain information gathering powers:

- tariff filing directions, which require a carrier or carriage service provider with a substantial degree of market power to file certain tariff (price list) information with the ACCC. Additional tariff filing arrangements are imposed on Telstra; and
- record keeping rules that require selected carriers (namely, Telstra, Optus and Vodafone) to report quarterly to the ACCC. Record keeping information is used to scrutinise anti-competitive cross-subsidisation by vertically and horizontally integrated companies.

3.18 Under measures in the *Telecommunications Competition Act 2002* and in conjunction with the ACCC's Regulatory Accounting Framework (RAF), Telstra is required to provide accounting separation of its wholesale and retail operations.[17]

3.19 Accounting separation aims to address competition concerns arising from the level of vertical integration between Telstra's wholesale and retail services and to improve the provision of costing and price information to the ACCC, access seekers and the public. The framework ensures that:

- Telstra prepares current (replacement) cost accounts (as well as existing historic cost accounts) to provide more transparency to the ACCC about Telstra's ongoing and sustainable wholesale and retail costs;
- Telstra publishes current cost and historic cost key financial statements in respect of 'core' interconnect services but not underlying detailed financial and traffic data which is regarded as commercially sensitive;
- the ACCC prepares and publishes an 'imputation' analysis (based on Telstra purchasing the 'core' interconnect services at the price that it charges external access seekers) which will demonstrate whether there is any systemic price squeeze behaviour;

16 Sections 151BY and 151CC.

17 Grahame O'Leary, *Enhancing Competition in Telecommunications: Accounting Separation of Telstra's Operations*, Research Note No. 39, Parliamentary Library, March 2004.

- Telstra publishes information comparing its performance in supplying 'core' services to itself and to external access seekers in relation to key non-price terms and conditions. (These will include faults/maintenance, ordering, provisioning, availability/performance, billing and notifications); and
- the ACCC prepares and publishes a six monthly report on competition in the corporate segment of the market.[18]

3.20 Accounting separation was implemented through the *Telecommunications Competition Act 2002* which gave the Minister power to direct the ACCC to prepare or publish reports using its existing broad record-keeping rule powers under Part XIB. In June 2003 the Minister directed the ACCC to implement an enhanced form of accounting separation of Telstra's wholesale and retail accounts. The ministerial direction introduced:

- current cost accounting as well as the historical costs used in the RAF;
- key performance indicators on non-price terms and conditions that compare service performance between retail and wholesale supplied services; and
- imputation analysis (imputation testing) of core telecommunications services supplied to access seekers.[19]

3.21 Telstra's submission outlined the requirements of the Accounting Separation Direction:

> - One requirement of the direction is for Telstra to update its regulatory accounting records from historic to current cost. Regulatory accounts for the core PSTN services of PSTN interconnection, local call resale and unconditioned local loop will provide a basis for comparison in relation to any existing regulated prices for these products.
> - An additional requirement under the accounting separation rules is for Telstra to publish imputation test results for various PSTN services including basic access, local calls, national long distance, international long distance and fixed to mobile services. An imputation tests measures whether an efficient competitor of Telstra can compete against Telstra's retail product offering, based on Telstra's retail price and an assessment of the efficient wholesale and retail costs to the competitor of providing the service. In the context of the accounting separation obligations, these costs are determined by the information in Telstra's regulatory accounts.
> - A further requirement relating to the accounting separation obligations is for the ACCC to publish a series of metrics that

18 DCITA, *Accounting Separation*, http://www.dcita.gov.au/tel/competition_policy_and_framework/accounting_separation (accessed 2 June 2005).

19 ACCC, website, accessed on 8 April 2004, URL: http://www.accc.gov.au/content/index.phtml/itemId/333799.

> compare Telstra's performance in terms of new service connections and fault rectification for both wholesale and retail customers.[20]

3.22 Telstra argued that the accounting separation requirements are extensive and significant resources have been dedicated to updating regulatory accounts and undertaking the specified tests. Mr Paul Budde also criticised the cost and effectiveness of accounting separation:

> We are wasting millions of dollars of the ACA's and the ACCC's by asking all sorts of questions. It takes an enormous bureaucratic effort to actually create these accounting separation reports and all sorts of other reports, but what is that actually going to add to the regulatory environment we are in? Absolutely nothing. So we have to make the resources of the regulators available for more sensible things to do rather than having them writing these bureaucratic reports.[21]

3.23 Mr David Forman on behalf of the Competitive Carriers Coalition (CCC) argued that the telecommunications industry had limited faith in the benefits of accounting separation given the time and resources spent on compliance:

> In terms of outcomes in the marketplace, it has resulted in no benefit that I am aware of. It has absorbed an enormous amount of time and energy and the resources of not only the competitors but the regulator, who has repeatedly said that it is a waste of time. This is by Telstra's own account also.[22]

3.24 Telstra also criticised the ACCC's limited confidence in the results of accounting separation, which Telstra argues is only because the ACCC cannot find evidence of anti-competitive behaviour:

> However, this does not mean that all the results published so far should be discredited. To date, the information published under the accounting separation rules has failed to demonstrate any systemic discrimination by Telstra in relation to its service connections and fault rectifications for wholesale and retail customers, a fact regularly confirmed by the ACCC. Nor have the accounting separation reports revealed any margin squeeze by Telstra concerning Telstra's wholesale and retail prices. Rather than being taken to be evidence of Telstra's competitive (or benign) behaviour, the ACCC has regularly downplayed the value of the information published under the accounting separation rules, largely disregarding it in their calls for further evidence of the need for greater regulation and transparency.[23]

3.25 Telstra argued that the fact that the accounting separation rules have not provided evidence to substantiate allegations of anti-competitive behaviour is not

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20 Telstra, *Submission* 25, p. 32.

21 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 45.

22 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 19.

23 Telstra, *Submission* 25, p. 33.

because accounting separation has failed, but rather because Telstra has not engaged in such behaviour.

3.26 However, this view is not shared by many of Telstra's competitors (as discussed later in this chapter), or on occasion by the ACCC which has issued several competition notices against Telstra. On 28 May 1998 a competition notice was issued to Telstra in relation to the terms and conditions on which Telstra provided wholesale internet services to other internet access providers. Another competition notice was issued to Telstra on 10 August 1998 in regard to the churn of customers from one carriage service provider to another. More recently, in 2004, the ACCC issued Telstra with a competition notice in regard to its ADSL services, as discussed in more detail below.

Anti-competitive behaviour: a case study

3.27 The use of market power to engage in alleged anti-competitive behaviour is illustrated in the 2004 broadband pricing matter. The Committee's report on *Competition in broadband services*, tabled in August 2004, included a detailed case study of the ACCC's actions against Telstra in regard to its pricing of ADSL broadband services. Resolution of this matter was protracted, taking nearly twelve months. As this incident is relevant to the analysis of the effectiveness of the regulatory regime, a revised case study is set out below. Many witnesses to this inquiry cited this incident as an indication of flaws in the regulatory regime.

3.28 On 15 February 2004, Telstra Bigpond announced it would offer an ADSL 256Kbps retail service for $29.95 per month. This price was claimed to be lower than the wholesale price that Telstra was offering to some of its competitors. Telstra defended its action by claiming that the reduction in price was to stimulate the retail broadband market - which had been declining - and competition more generally. In response to Telstra's new ADSL retail prices, Optus and a number of smaller ISPs announced cuts to their broadband plans to bring them into line with Telstra. However, smaller operators claimed that these prices were unsustainable and Telstra's 'pricing squeeze' was an attempt to manipulate the market.

3.29 In a submission to the Committee's previous inquiry, the CCC argued:

> The CCC members believe that these price changes represent a wilful and calculated attack on the integrity of the wholesale ADSL market. It is clear that Telstra is engaged in manipulating the development of the ADSL market by forcing too-high wholesale prices on independent service providers and by favouring its own retail arm to the detriment of other providers.[24]

3.30 Telstra's competitors went to the ACCC claiming that Telstra was engaged in anti-competitive behaviour. On 5 March 2004 the ACCC issued Telstra with a

24 CCC, *Submission* 50, p.3, to the Committee's inquiry into competition in broadband services.

consultation notice. On 9 March 2004 the consultation notice was extended by two days when Telstra requested more time to respond.

3.31 In line with requests from the ACCC to reduce its wholesale prices to competitive levels, Telstra lowered its wholesale price. However, as Mr Simon Hackett, the Managing Director of Internode, argued:

> It's a myth that $29.75 is the wholesale access price compared to the Telstra $29.95 retail price…. The $29.75 charge is EX GST. When you remove the GST from $29.95, it becomes $27.23 – or $2.52 BELOW the tail circuit charge. Also, that tail circuit charge is only one component of the full cost to mount a working ADSL service. When you add the other necessary costs in, you are up at more like $35 as a minimum underlying cost.[25]

3.32 On 19 March 2004 the ACCC issued a Part A Competition Notice to Telstra in relation to the pricing of Telstra's broadband internet services. The ACCC noted that it had reason to believe that Telstra had engaged and was engaging in at least one instance of anti-competitive conduct and was using its substantial market power to lessen and hinder competition.

3.33 The ACCC noted that since at least 15 February 2004:

> Telstra has supplied, and continues to supply, wholesale Broadband Services to its Wholesale Customers at wholesale prices set at a level whereby there was and is only a small positive or negative difference between those wholesale prices and the retail prices; and
>
> Telstra has refused, and continues to refuse, to supply wholesale Broadband Services to its Wholesale Customers at prices other than wholesale prices set at a level whereby there was and is only a small positive or negative difference between those wholesale prices and the Retail Prices.[26]

3.34 The Part A Competition Notice against Telstra opened the way for a Part B Competition Notice to be issued with a possible fine of $10 million - rising by $1 million a day - and legal action from Telstra's competitors.

3.35 On 23 March 2004 Telstra's strategy was commented on in the following terms:

> At this stage it appears Telstra's strategy is to defuse the threat of the competition notice by commercially agreeing on deals on wholesale prices. Presumably it believes the potential volume gains, and the potential to

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25 Simon Hackett, Managing Director Internode, Opinion from Australian IT.com.au readers, Broadband price squeeze, 22 March 2004, URL: http://australianit.news.com.au/common/print/0,7208,897342361542566nbv6,00.html.

26 Australian Competition and Consumer Commission, ACCC issues competition notice to Telstra over broadband internet pricing, 19 March 2004, URL: http://www.accc.gov.au/content/item.phtml?itemId=490779&nodeId=file405a5f8237919&fn=Competition%20notice.pdf.

> migrate entry-level customers to higher-capacity, higher-margins plans, will still offset the loss of wholesale margins.[27]

3.36 On 31 March 2004 Telstra announced two new wholesale access packages aimed primarily at addressing the competition notice and the concerns of Telstra's wholesale customers:

> 'Protected Rates' Option.
>
> This option provides wholesale prices at a 40 per cent discount to retail access and connection prices across all plans. Wholesale prices will be tied directly to BigPond's pricing plans by taking BigPond's effective starting retail prices and deducting a 40 per cent discount for retail costs and further deductions to cover other wholesaling costs. This will suit customers who want certainty over wholesale/retail pricing relativity.
>
> 'Growth' Option.
>
> This package will assist broadband ISPs to drive profitable growth across the spectrum of retail pricing. It will offer attractive price reductions for higher speed plans, on the basis that sustainable industry outcomes can be achieved via migration of retail end-users from lower value plans. It will suit those ISPs who see the commercial opportunity to upgrade their customers to higher-speed plans; and who want full flexibility over their retail pricing options.[28]

3.37 It was reported that Telstra's price reductions appeased the ACCC's concerns with ACCC Chairman, Mr Graeme Samuel, stating that Telstra's new offer 'appears to be a victory for commonsense'.[29] However, many of Telstra's competitors were critical. Some of Telstra's largest wholesale customers claimed that Telstra had not consulted with them on the new pricing arrangements and that they had heard of the new pricing arrangements via the media. Additionally, it was claimed that the options available to Telstra's wholesale customers tied them into Telstra's retail structure. It was argued that the 'Protected Rates' Option introduced a third variable cost for ISPs and the 'Growth' Option had not dropped the cost of 256k port pricing despite the fact that this was the area in which the current price squeeze existed.[30]

3.38 Some argued that the new pricing structure was largely an attempt to deflect ACCC intervention:

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27 Stephen Bartholomeusz, 'Telstra strung up by its broadband plan', *The Sydney Morning Herald*, URL: http://www.smh.com.au/articles/2004/03/22/1079939582767.html.

28 Telstra, 'Low broadband prices preserved', *Media Release*, 1 April 2004, URL: http http://www.telstra.com.au/communications/media/mediareleases_article.cfm?ObjectID=31526.

29 Kate Mackenzie, 'Telstra BigPond Backflip', *The Australian*, 1 April 2004, URL: http://australianit. news.com.au/common/print/0,7208,9146732^15318^^nbv^15306,00.html.

30 Phil Sweeney, *Whirlpool News*, 6 April 2004, URL: http://whirlpool.net.au/article.cfm/1257.

> Telstra appears to have attempted to move focus away from that by introducing bizarre wholesale offerings on the side, which appear to be ultimately unattractive to their customers.[31]

3.39 On 9 June 2004 it was reported that the Competition Notice was still alive and as of that date Telstra had accumulated $91 million in possible fines. An article in *The Australian* referred to a seeming hesitancy by Mr Samuel to act and Telstra's propensity to:

> Fight the case in court, but the fabulously paranoid telco never ever makes it past the courthouse steps, preferring always to let a large sack of shareholders' cash do the talking.[32]

3.40 Mr Bruce Akhurst, Telstra's group managing director for wholesale, defended Telstra's action as merely stimulating the market and providing broadband at affordable prices. The discounting had led, over a five-month period, to a 46% increase in broadband subscriptions. The action led Telstra to forecast that it would sign up its millionth broadband customer by July 2004, six months ahead of earlier forecasts.[33]

3.41 On 25 June 2004 the ACCC warned that the Competition Notice still remained in force and that a number of potential options were open to the Commission in relation to the notice.[34] On 19 July 2004 the ACCC issued another media release stating that it still had reason to believe that Telstra was engaged in anti-competitive conduct of a kind described in the Competition Notice. Consequently, the ACCC had decided to keep the notice in force.[35]

3.42 On 21 February 2005 the ACCC revoked the Competition Notice, ending the long-running dispute. As part of the settlement Telstra agreed to rebate $6.5 million to its affected wholesale customers. While many of Telstra's competitors had urged the ACCC throughout the period that the Competition Notice was in force to pursue legal redress, and despite the ACCC's continued claim the Telstra was 'likely to have been in breach of section 151AK of the TPA', no action was taken against Telstra by the ACCC. While the ACCC issued a statement saying they were pleased with the outcome, many of Telstra's competitors were not.

3.43 Some submissions argued that the application of Part XIB required improvement, both in terms of transparency of the process and the size of the penalties

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31 Phil Sweeney, *Whirlpool News*, 6 April 2004, URL: http://whirlpool.net.au/article.cfm/1257.

32 Michael Sainsbury, 'Telstra taunts the watchdog', *The Australian*, 9 June, 2004.

33 Blair Speedy, 'Broadband cuts "altruistic"', *Weekend Australian,* 12 June 2004, p. 35.

34 ACCC, *Challenges in Telecommunications Competition and Regulation*, p. 3. Accessed on 30 June 2004, URL: http://www.accc.gov.au/content /item.phtml?itemId=518743&nodeId =file40dbc06cdfb57&fn=20040625%20SPAN.pdf.

35 ACCC, *'ACCC leaves competition notice in force'*, 19 July 2004, URL: http://www.accc.gov.au/content/index.phtml/itemId/524972/fromItemId/ 2332.

that the ACCC could impose. Additionally, it was noted that Part XIB was a reactive tool for the regulator and as such its use involved greater uncertainty and risk for market participants.[36]

Part XIB: lessons learnt

3.44 The 2004 ADSL competition notice against Telstra offers an opportunity to examine the anti-competitive mechanisms of the current regulatory regime and asses whether such mechanisms are successful in addressing anti-competitive behaviour. During this inquiry the Committee has received substantial evidence from industry participants, commentators and consumer groups which argued that the 2004 ADSL competition notice clearly illustrates the inadequacy of the current regulatory tools in dealing with anti-competitive behaviour. Several weaknesses identified with the Part XIB process are discussed below.

Defining abuse of market power

3.45 Several participants in the inquiry considered that the lack of clarity in the definition of anti-competitive conduct in Part XIB made it difficult for the ACCC to contest the 2004 broadband issue. AAPT argued that the number of complaints made versus the number of actions brought showed 'a great deal of confusion':

> There is no doubt that there is a lack of clarity of what constitutes anti-competitive conduct. This is complicated by the fact that existing case law in the area is related to markets that are initially competitive being preserved, whereas the telecommunications market is initially uncompetitive and we are trying to promote competition.[37]

3.46 Mr Paul Budde stated:

> Telstra can undercut the wholesale price with their retail price. What more evidence do we need that this is anticompetitive? It is obvious. Why does it take a year to say, 'Yes, perhaps it was anticompetitive,' because of some technicalities that lawyers can always find if you throw enough money at them.[38]

3.47 Mr David Spence representing Unwired Australia stated that they considered there was 'a lack of clarity on what constitutes abusive market power':

> We are concerned that companies practising tactics that could be seen as an abuse of market power are not being penalised enough or quickly enough. We believe the government needs to clearly and specifically define what constitutes an abuse of market power under the *Trade Practices Act*.[39]

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36 Optus, *Submission* 12, p. 22.

37 AAPT, *Submission* 13, p. 5.

38 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 54.

39 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 109.

3.48 Mrs Dianne O'Hara from TransACT told the Committee:

> I think part of Telstra's conduct is anticompetitive, but it does not fit neatly within the anticompetitive components of the Trade Practices Act.[40]

Proving decreased competition – the effectiveness of accounting separation

3.49 Central to concerns about Part XIB is the requirement to demonstrate that competition has been lessened. The Committee heard arguments that Telstra was able to act in such a way as to make it difficult to prove instances of the lessening of competition.[41] Dr Walter Green from the Communications Experts Group stated:

> The one thing that comes out in all the submissions is that the ACCC have one hand tied behind their back. Not only do they have to prove that the action that is taken by a carrier is unethical or against competition but they then have to prove that what they did is of such significance that it would damage the community.[42]

3.50 The Communications Experts Group also pointed to the lack of clear methodology in establishing a case:

> There is no clear methodology or process for proving abuse of market power. In many cases the ACCC have asked for evidence to support a claim, however there is no outline or description as to what evidence is acceptable or what evidence will assist the ACCC in preparing a sound legal case. This makes it both expensive and difficult for all concerned in collecting and analysing evidence.[43]

3.51 Optus argued that often lessening of competition was very subtle and difficult to prove, especially with respect to non-price terms:

> In many cases Telstra can get away with giving resellers like Optus poorer connection times and repair times, and higher prices, than to its own retail operations because it judges that we would not be able to show to a court that the particular instance involved a substantial lessening of competition.[44]

3.52 The practices outlined by Optus and other wholesale customers, also discussed later in this chapter, cannot be captured by accounting separation and record-keeping rules. As the Committee heard:

> It is not only Telstra's wholesale rates that are hindering competitors from obtaining sustainable margins. Perhaps equally important are the numerous 'conditions' Telstra can use to make life miserable – from access to local

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40 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 9.

41 For example, Optus, *Submission* 12, p. 22.

42 Dr Walter Green, *Committee Hansard*, 29 April 2005, p. 17.

43 Communications Experts Group, *Submission* 26, p. 2.

44 Optus, *Submission* 12, p. 22.

> exchanges (the key is lost) to uncertainty regarding investment from the competitors. Telstra can change the rules as it wishes – for example, in relation to its future network upgrades (wholesale conditions only apply to copper networks, not to HFC or FttH networks).[45]

3.53 This weakness of the analytical tools used to provide transparency of pricing was raised by Dr Walter Green:

> If you now start trying to put an econometric model together which will model those total costs, you suddenly find that there are sufficient vagaries and inconsistencies that you cannot create a sound legal argument. Even if you had all the information, the econometric modelling tools that you have today cannot deliver the ACCC with the tools to defend or propose adequate pricing.[46]

3.54 The ACCC also argued that Part XIB and accounting separation did not provide the appropriate mechanism to act more decisively:

> In the case of the recent Part XIB broadband pricing matter, the lack of genuine internal pricing by Telstra created substantial difficulties for the ACCC in establishing anti-competitive conduct by Telstra. As such, the ACCC was forced to rely on imputation testing, a much more limited analytical tool to infer an implicit price at which Telstra is supplying wholesale services to itself.[47]

3.55 Some submissions were concerned that the regulator itself had little faith in accounting separation and in its ability to deal with anti-competitive behaviour. Mr Ian Slattery from Primus, referring to the 2004 anti-competition notice, told the Committee:

> I am fairly confident in saying that the ACCC itself admitted that the accounting separation regime was of little, if any, use with regard to its investigation into that allegation of anticompetitive conduct. There is an absolutely critical issue of alleged anticompetitive conduct in which the accounting separation regime was of no assistance. If it cannot deal with the most fundamental of issues, then it is obviously a failure.[48]

3.56 Similarly, the Australian Consumers' Association noted that:

> The Accounting Separation framework devised by the Government accepts that Telstra vertical integration is an issue. However it is disturbing, if not entirely unexpected, to hear from the ACCC as custodian of the regulatory operation and analysis of that framework say:

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45 Mr Paul Budde, *Submission* 1, p. 1.

46 Dr Walter Green, *Committee Hansard*, 29 April 2005, p. 19.

47 ACCC, *Submission* 17, p. 6.

48 Mr Ian Slattery, *Committee Hansard*, 11 April 2005, p. 20.

> We have repeatedly made clear our view that the current accounting separation regime has not been successful in giving us the kind of transparency we need in order to develop a satisfactory understanding of the way Telstra operates its businesses.

The ACCC further states in submission to the PC:

> The ACCC's experience in administering the accounting separation arrangements suggests that the extent to which they facilitate the identification of anti-competitive behaviour is marginal at best. In most cases, investigations into allegedly anticompetitive conduct require the ACCC to collect very detailed, specific data which cannot be captured through periodic accounts reporting.[49]

3.57 In its submission to this inquiry the ACCC argued:

> The ACCC has previously noted some specific concerns regarding the effectiveness of the current enhanced accounting separation arrangements. Specifically, the current accounting separation is nominal in that it only requires Telstra to collect and report information. It does not require the carrier to reorganise its internal affairs and operate as if it were running two or more discrete businesses.[50]

3.58 The ACCC went on to argue that:

> The accounting separation regime was originally intended to provide greater transparency in the way Telstra conducts its retail and wholesale operations, thereby enabling the ACCC to easily identify any discriminatory behaviour towards rivals seeking access to its network.
>
> However, information provided by Telstra under these arrangements is highly aggregated, which can hide specific instances of anti-competitive behaviour requiring more detailed analysis. It is significant that the ACCC has relied on the existing accounting separation arrangements to only a very limited extent in relation to its imputation testing analysis of specific cases.
>
> More importantly, the primary limitation of the accounting separation arrangements is that they require only a notional allocation of costs across the wholesale and retail businesses.
>
> As noted above, the arrangements do not require the carrier to reorganise its internal affairs and operate as if it were running two or more separate discrete businesses.[51]

3.59 Further, the reliance of the ACCC upon Telstra to provide only notional allocation of costs across the wholesale and retail businesses ensures that it is difficult

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49 Australian Consumers' Association, *Submission* 16, p. 5.

50 ACCC, *Submission* 17, p. 4.

51 ACCC, *Submission* 17, p. 4.

if not impossible to establish a true indication of wholesale and retail costs. Mr Ian Slattery from Primus told the Committee:

> We talk about transparency and all the rest of it, but it is really all about ensuring, to the fullest possible extent, in the absence of structural separation, which removes all incentives to behave inappropriately, that Telstra Wholesale treats its retail and competitive arm in the same way as it treats competitors. This is where accounting separation dramatically falls down in terms of wholesale pricing to retail arms. It is not reflective of an internal transfer pricing regime within Telstra. It is just a notional allocation of costs. It does not identify what Telstra retail is purchasing wholesale upstream inputs for.[52]

Difficulty in mounting a legal case

3.60 During Additional Estimates hearings in February 2005, Mr Graeme Samuel noted the complexity of the imputation and margin testing modelling and the difficulty in establishing a case for prosecution based upon these tests:

> … the real issues in relation to the matters that we have had to deal with on this competition notice have been in two areas. The first area is the complex imputation and margin testing modelling that we have had to do. That is always not only complex but also uncertain because it relies upon assumptions as to future conduct and future behaviour in the marketplace which can be the subject of much debate and that will lead to uncertainties in outcomes.[53]

3.61 ATUG argued that the lack of information transparency and the reliance of wholesale customers upon Telstra services were detrimental in resolving the competition notice:

> Information asymmetry, resource asymmetry and input dependence mean the real effectiveness of protective tools such as s46 or Part XIB is in practice doubtful – as we saw with the 2004/2005 Broadband Competition Notice. The inability of the ACCC to obtain court robust evidence from competitors who depend on Telstra services for their business is not surprising.[54]

3.62 Similarly, the fact that the ACCC requires material held by Telstra and upon Telstra's wholesale customers to provide evidence against the carrier is of concern. Dr Walter Green from the Communications Experts Group noted:

> A key failure in the current regulatory regime is the assumption that it is possible to construct a sound legal case based on econometric modelling to prove abuse of market power. This assumption is flawed because all the key

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52 Mr Ian Slattery, *Committee Hansard*, 11 April 2005, p. 22.

53 Mr Graeme Samuel, ACCC, Senate Economics Legislation Committee, *Additional Estimates Hansard*, 17 February 2005, p. 15.

54 ATUG, *Submission* 20, p. 10.

> data to prepare a legal argument is held by the carrier, and it is impossible to remove the effects of other transactions to enable a clear and unambiguous case to be presented.[55]

3.63 AAPT pointed out that the ACCC had difficulty in obtaining witness statements to support the process:

> The ACCC spent considerable resources in continually reviewing each new wholesale price offer made by Telstra and whether to lift the notice instead of dedicating them to construct the full case. As a consequence the ACCC found it hard to get quality witness statements as they came to it very late in the whole process.[56]

3.64 During Additional Estimates hearings in February 2005, ACCC Chairman, Mr Graeme Samuel, outlined the difficulty in obtaining evidence from wholesale customers alleging anticompetitive conduct:

> The second area is the gathering of evidence from those who might be affected by the alleged anticompetitive conduct. While there are many wholesale customers of Telstra that are quick to make very broad statements as to the impact of anticompetitive conduct, when one has to proceed through a process of obtaining detailed evidence that would be satisfactory for admission in a court of law that can take a lot more time and on some occasions there can be some reticence on the part of those wholesale customers to say anything more than they might have otherwise said, either anonymously or even on the record through the media.[57]

3.65 The Committee was told that some of Telstra's wholesale customers were reluctant to go to the ACCC for fear of possible retribution:

> In many cases the persons who can assist the ACCC are dependent on Telstra for revenue and connections to customers, so there is a reluctance to antagonise Telstra by lodging a complaint to the ACCC.[58]

3.66 The reluctance to antagonise Telstra was clearly felt by a number of ISPs who rely on Telstra for wholesale services. One witness likened it to 'standing on the dragon's tail':

> We do not take it to the ACCC; we take it to our account manager at Telstra and we jump up and down… I do not want to go to the ACCC about it, for the exact same reason I talked about before—that I want to focus on building my business rather than get involved in legal issues and ACCC issues and all the rest of it. The second reason is I feel it is like standing on

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55 Communications Experts Group, *Submission* 26, p. 2.

56 AAPT, *Submission* 13, p. 6.

57 Mr Graeme Samuel, ACCC, Senate Economics Legislation Committee, *Additional Estimates Hansard*, 17 February 2005, p. 15.

58 Communications Experts Group, *Submission* 26, p. 2.

> a dragon's tail: step on the dragon's tail and it turns around and bites you. It is just not worth it.[59]

3.67 However, the Committee also heard from representatives of the CCC who argued that their members did provide witness statements to the ACCC.[60] Similarly, Mr David Havyatt from AAPT told the Committee:

> We volunteered a witness statement to them in April 2004, long before they even asked for one, so we are still confused by this suggestion that there was a lack of support from the affected parties. What you did not notice, though, was anybody bringing an action for their own damages claims under the competition notice provisions, which, I think, is one of the issues that the ACCC were surprised by.[61]

3.68 While the Part A Competition Notice opened the way for affected parties to take legal action against Telstra, this did not occur. The Committee was told that Telstra's wholesale customers did not have the necessary resources to pursue an issue against Telstra:

> The issue as far as we are concerned is that, by definition, when you are dealing with anticompetitive conduct against someone with market power you are in a very asymmetric situation to begin with—the ability of the other party to commit resources to the legal matter is significantly greater than yours. When you are undertaking consideration of a claim you look at the potential outcomes; one of the outcomes could be that you wind up having to pay the other party's costs.[62]

3.69 Similarly, Mr Stephen Dalby from iiNet argued that smaller ISPs did not have the necessary financial resources to take civil action against Telstra and therefore looked to the larger international corporations like Optus, Primus and AAPT to do so:

> It would be a question of the finance and resources rather than necessarily the number of names on the roster … What tends to happen is a lot of the smaller players will sit back and look to see how Primus or AAPT or iiNET or somebody else goes and then ride on the shirt tails of that decision. I know there was a call from a Sydneysider or someone from Brisbane saying, 'Let's put a class action together,' following the announcement on the competition notes, but I do not know whether it ever got off the ground. In Western Australia the internet community here talked about getting a class action together right at the beginning of that competition notice. We declined at that stage and I do not think it got any further. In theory it is quite a possibility but I have not seen it happen.[63]

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59 Mr Damian Kay, Telcoinabox, *Committee Hansard*, 21 April 2005, p. 29.

60 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 25.

61 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 31.

62 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 31.

63 Mr Stephen Dalby, *Committee Hansard*, 29 April 205, p. 48.

3.70 However, industry participants considered that it was the ACCC who should have pursued legal action and were critical of its decision not to do so. Mr Forman stated:

> We wanted the ACCC to go to court if it believed that there had been a breach of the law, to establish that it was willing to take that step against Telstra; that the law, when breached, was taken all the way to the court; and that it was willing to go through the processes of establishing the breach before the courts. I think the ACCC made judgements by taking what it considered was a pragmatic view that a settlement was a more cost-effective way of bringing the matter to a close. That goes to how you perceive this competition notice mechanism. Is the mechanism a lever to drive Telstra to settle with its customers or to settle with the ACCC, in which case the judgments that you make about it are dynamic—they continue to change, based on Telstra's behaviour? We did not take the attitude that it was that kind of mechanism. We thought: you break the law, you pay a fine. We thought that needed to be established.[64]

Flaws in the process

3.71 Some submissions raised concerns that the ACCC had resolved the ADSL competition notice behind closed doors with little or no industry involvement:

> There is little transparency into the details of the arrangement reached between the ACCC and Telstra in dealing with the matter. Further, there has been little consultation with industry about the new measures the ACCC has agreed with Telstra.[65]

3.72 Due to the lack of details of the settlement, some submissions sought more clarity from the ACCC on its position. Mr Paul Budde told the Committee:

> I think that it would assist everybody involved if this Inquiry clarifies the regulator's position on issues like this. Either the Regulator made a mistake and Telstra was attacked by malicious competitors who wanted a free ride on Telstra's network, or Telstra is 'gaming' the regulatory system and utilising the weaknesses in that system that prevent the ACCC from acting effectively.[66]

3.73 The length of time that the ACCC takes to issue a competition notice was also of concern to many, as outlined above. During recent Budget Estimates hearings, Mr Graeme Samuel acknowledged that the ACCC should act more quickly in future:

> [I]n the event that there was an apparent engaging in of anticompetitive conduct by a party that fell within the specific provisions of the telecommunications act in the future, we would probably find ourselves acting a little faster than we did this time around. This was done very

64 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 24.

65 Optus, *Submission* 12, p. 22.

66 Mr Paul Budde, *Submission* 1, p. 6.

> quickly, but we would find ourselves acting somewhat faster. We might cut out some of the processes that we adopted this time around, other than those that are compulsory processes under the [A]ct.[67]

3.74 Mrs Dianne O'Hara from TransACT noted that engaging with the ACCC is not, at times, a viable path to take:

> As a small organisation, though, we do find it difficult to use the ACCC in order to achieve outcomes. TransACT's view is that with a lot of the ACCC processes you need time and resources to achieve an outcome, and those are things that TransACT generally does not have a lot of. … One example of that is the heat loading issue. Looking at the practicalities of it, we wanted to get to Gungahlin as quickly as possible, part of that is you settle and a practical outcome of that settlement is that you just get the extra rack space and you wear that additional cost. If we had gone through some sort of ACCC process we would not be as far down the track with the Gungahlin exchange as we are now.[68]

3.75 During recent Senate Estimates hearings the Committee also became aware that Telstra had lodged a 'Freedom of Information' request with the ACCC in regard to statements made by ACCC Chairman, Mr Graeme Samuel, on the frequency of complaints from some of Telstra's competitors about getting access to Telstra exchanges for installing new broadband equipment. The Committee is concerned that this action may act as a deterrent to competitors from using the ACCC regulatory process and 'stepping on the dragon's tail'.[69]

Financial penalties

3.76 Industry participants were particularly critical about the compensation agreement between Telstra and the ACCC. They argued that the $6.5 million payment to Telstra's wholesale customers would not act as a deterrent for future anti-competitive behaviour. As Mr David Spence from Unwired Australia stated:

> … it is also clear to the industry that the ACCC has been ineffective when it comes to ensuring companies do not abuse market power. To take a recent example, the $6½ million fine issued to Telstra this year in response to its retail price drop almost a year previously was seen by the industry as a slap on the wrist—certainly not something that would prevent Telstra from doing the same again.[70]

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67 Mr Graeme Samuel, Senate Economics Legislation Committee, *Estimates Hansard*, 31 May 2005, p. 57.

68 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 9. The Gungahlin example is discussed in more detail below.

69 Senate Economics Legislation Committee, *Budget Estimates Hansard*, 31 May 2005, p. 62.

70 Mr David Spence, *Committee Hansard,* 13 April 2005, p. 110.

3.77 Many others such as Mr Damian Kay considered the payment was inconsequential compared with the huge market gain Telstra had made while it was subject to the competition notice:

> Even if it was $1 million a day and they did it for 60 days—$60 million—with all those people coming on signing 12- to 24-month contracts, it is well worth it. Call it a cost of acquisition… They just build it into their marketing fund. Sixty million dollars is not a lot of money when you are signing 100,000 people up to a service because it is the cheapest in the market and you are not providing those tail circuits—whatever you want to call them—such as access to DSLAMs at a more expensive price than they are retailed.[71]

Impact on smaller players

3.78 During this inquiry the Committee became aware that many small ISPs were hit hard by both Telstra's actions and the Part XIB process itself. As one regional ISP explained to the Committee:

> Telstra clearly knew and understood that the ACCC would find them guilty. ... They also knew that in the time it took to drag them, kicking and screaming and shuffling feet, to the ACCC they would effectively destroy the market for people like us. The consumer would be driven over to their services, and the consumer is not likely to come back, whether it be a business consumer or an everyday consumer, because there is a lock-in effect. You have identities. When you set up business technology systems there are these things called internet protocol addresses and network addresses et cetera, so there is that lock-in effect. Telstra, quite cannibalistically, understood that very well. … I found that the ACCC was quite a toothless tiger.[72]

3.79 Consequently, it appears that small telecommunications businesses believe that Part XIB does little to protect them from anti-competitive behaviour and protects only large businesses with deep pockets and the ability to ride out the protracted process:

> … it protects large operators in the sense that it is a cumbersome and effective reactive arrangement, it has a long gestation period and it is subject to the court's determination on whatever remedy. From a small operator's viewpoint, part XIB…seems to be so far away and part XIC seems to have no teeth, so we believe that we are essentially unprotected.[73]

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71 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 27.

72 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 24.

73 Mr Thomas Amos, *Committee Hansard*, 13 April 2005, p. 88.

The ACCC's powers

3.80 Mr David Spence from Unwired Australia told the Committee he considered that the ACCC did not have adequate powers to gather evidence:

> … it takes a long time to collect evidence and get Telstra to respond to the collection of evidence in a way that can be utilised by the ACCC. It is not just Telstra; it is others too. [The ACCC] should have the power to go in and investigate inside telecommunications companies.[74]

3.81 However, Mr Bill Scales, Telstra's Group Managing Director, Corporate and Human Relations, told the Committee:

> The ACCC has the power to effectively subpoena every document inside Telstra and to subpoena every executive inside Telstra. In this particular case the ACCC took nearly 12 months trawling through a whole range of documents. We provided complete access to any document the ACCC wanted… Remember that literally thousands of documents were asked for and literally thousands of documents were provided. They were also, under the so-called 155 notices, able to in fact subpoena executives, and they did. They were able to question them at length, and they did. And they found no evidence of anti-competitive behaviour. The ACCC can say whatever they like. All I can say to you is: if they had that power available to them—and they did—and they could find no evidence—and they did not—why do they keep saying that?[75]

3.82 Evidence to this inquiry suggests that Part XIB did not provide the ACCC with adequate legislative mechanisms to gather the necessary information to support their claim of a section 151AK breach. Industry participants told the Committee that they felt the ACCC's power was more in their persuasive rather than litigious powers:

> We get the strong feeling from them that they have limited powers in what they can do. Their biggest strength perhaps is persuasive power rather than litigious power. Litigation is very expensive—we know that—and the large telecommunications companies are very large and have many lawyers working for them. Our understanding is that, if they did have more power and if they did have bigger funds, it is likely that there would be earlier settlements and faster settlements than what has happened in the past.[76]

3.83 Mr Doug Coates submitted that the effectiveness of Part XIB was as much in its potential threat as any real weapon:

> This is the 'big stick' of the regime and its effectiveness relies as much in being a potential threat as an actual regulatory weapon. As such it should generally be reserved for critical situations and not applied excessively to

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74 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 117.

75 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 71.

76 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 116.

> relatively trivial disputes. The ACCC seems to know how to wield this stick, as was demonstrated quite recently.[77]

3.84 ACCC Chairman, Mr Graeme Samuel, had this to say during the Senate estimate hearings in 2005:

> [W]e have a number of processes available to us to deal with what we believe is a breach. Those processes will range from reaching a negotiated administrative settlement to producing court enforceable undertakings, all of which are provided for under section 87B of the act, through to proceeding to court to obtain various remedies. They are a suite of processes that are part of what is known as the compliance or enforcement pyramid. They are a normal part of every regulator that enforces the law.[78]

3.85 He went on to argue:

> I think it is clear in every approach and every analysis that has been undertaken of enforcement processes that there is a pyramid. It is known as the enforcement or the compliance pyramid. The foundation stone of that pyramid, the very base of it, is preventing breaches of the law in the first place. Then it moves up through various levels, through administrative settlements and court enforceable undertakings and through to the sharp point of the pyramid, which is litigation. The sharp point, the litigation process, is the powerful weapon, the powerful tool.[79]

Telstra's response

3.86 While the many witnesses to this inquiry felt that the 2004 competition notice issued against Telstra was ineffective, Telstra had a different view. Mr Bill Scales criticised the ACCC's handling of the process and claimed that it had indeed affected Telstra's dealings with the market throughout the period the notice was in force:

> The way that [Part XIB] is currently administered gives us a significant amount of uncertainty about what might be the actions taken by a regulator—in this case the ACCC—when we take any action to operate what we would regard as relatively normal in the marketplace. The most recent Big Pond competition notice was a very good example of that. From our perspective, we saw ourselves operating simply to meet the competition. There is no doubt that throughout that whole period we became risk averse in making what would have been normal business investment decisions. While it will not show up in any statistic, I can tell you without doubt that that affected the way by which Telstra thought about some of its investments over that whole period. Simply the operation on a

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77 Mr Doug Coates, *Submission* 2, p. 1.

78 Mr Graeme Samuel, Senate Economics Legislation Committee, *Budget Estimates Hansard*, 31 May 2005, p. 64.

79 Mr Graeme Samuel, Senate Economics Legislation Committee, Budget *Estimates Hansard*, 31 May 2005, p. 64.

> day-to-day basis of that particular section of the act is an impediment to the way we think about ongoing investment and the level of investment.[80]

3.87 Mr Malcolm Moore, telecommunications consultant, told the Committee that Part XIB was punitive against Telstra and should be repealed as it was not necessary.[81] This view was shared by Dr Mitchell Landrigan from Telstra, who argued that:

> Our position quite consistently for a number of years has been that the measures within part IV of the Trade Practices Act are, and have been demonstrably shown to be, sufficient to regulate the telecommunications sector and that the powers within part XIB are not necessary.[82]

The Committee's view

3.88 The Committee does not share the view that Part XIB is redundant. The 2004 broadband pricing episode demonstrates the need for a mechanism to address the issue of the abuse of market power, and it also demonstrates that Part XIB, the current mechanism, has a number of flaws. As Mr Richard Thwaites representing ATUG told the Committee:

> We believe that the anticompetitive behaviour provisions in the Trade Practices Act in several places need strengthening.[83]

3.89 In the final chapter of this report, the Committee proposes various amendments that may address these weaknesses. The Committee notes the Minister's comments of 9 March 2005:

> It is only more recently that the effectiveness of the competition rules has been seriously tested. For example the recently settled Competition Notice on Telstra in relation to ADSL pricing. While the framework will continue to serve us well, there are increasing calls for changes to deal with future network investments and ongoing transparency issues.[84]

Telstra's relationship with its wholesale customers

> In my industry we all see ourselves not in competition with each other but in competition with Telstra. I have 20,000 customers. My collective businesses turn over $25 million a year, and I am not a big player. I would

80 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 58.

81 Mr Malcolm Moore, *Committee Hansard*, 13 April 2005, p. 95.

82 Dr Mitchell Landrigan, *Committee Hansard*, 4 May 2005, p. 57.

83 Mr Richard Thwaites, *Committee Hansard*, 11 April 2005, p. 40.

84 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts *Address to the Australian Telecommunications Users Group Conference*, Sydney, 9 March 2005, accessed on 16 April 2005 at: http://www.minister.dcita.gov.au/media/speeches/address_to_the_australian_telecommunications_users_group_conference.

> not even rate. I am a drop in the ocean—and I am happy to stay under the radar.[85]

3.90 During this inquiry the Committee heard from several of Telstra's wholesale customers who claimed that Telstra engaged in a range of anti-competitive practices that undermine the long-term competitive aspects of the market. Mr Arthur Hissey from Computer and Research Technology in Dubbo told the Committee:

> Telstra's behaviour in the market place is sometimes duplicitous and misleading – it purports itself to be a flexible commercial provider of communications technologies. In fact, it exerts unfair market pressures by virtue of its size – position – and infrastructure ownership. Then unlike real world businesses that are forced to either live or die by their true performance in a market place - they then hide behind a curtain of bureaucracy and government protection as and when the need suits them.[86]

3.91 Mrs Dianne O'Hara from TransACT told the Committee that Telstra adopted a range of practices that stifled competition, in effect favouring Telstra's retail services:

> TransACT is very operationally centred. It is fairly small and it has defined resources that it commits to certain things. What we come up against most is the dominance of Telstra and the various processes—'tactics' is perhaps not the right word—that are employed to slow, delay or make difficult effective competition at that level. From TransACT's point of view what we and other carriers would like is to be treated equally by Telstra wholesale. We want Telstra retail to be treated in exactly the same fashion as Telstra wholesale treat us without giving them additional information … [T]here is a range of non-price issues … be it information sharing or decision-making processes, and quite often it is those sorts of things that impact more on us than just the straight-out pricing issues.[87]

3.92 The number of Telstra's wholesale customers who have come forward during the course of this inquiry with allegations of anti-competitive conduct is of concern to the Committee. While these cases are disturbing and the Committee is sympathetic towards the many individuals whose livelihoods depend on fair commercial dealings, it is the regulatory regime which allows such behaviour, and the inadequacies of the regulatory tools to deal with this behaviour, that are of most concern.

3.93 The Committee notes that while there has been significant criticism of some aspects of Telstra's conduct in the pursuit of business gains, many submissions and witnesses were at pains to distinguish their comments about local Telstra employees. For example, Mr Joe Knagge from KNet Technology stated:

> … I worked for Telecom for 18 years. I am not here to bag Telstra. They are a very good organisation. They have extremely dedicated staff. I think

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85 Mr Damian Kay, Telcoinabox, *Committee Hansard*, 21 April 2005, p. 19.

86 Computer Research and Technology, *Submission* 27, p. 3.

87 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 7.

> they are somewhat under-resourced, especially in relation to the uniqueness of regional Australia. … At the moment, the Telstra staff that I know in regional Australia still have that same dedication. They will go out there and they will try to get the very best service for their customers.[88]

3.94 In Perth, Mr Stephen Dalby from iiNet told the Committee that their experience with Telstra was bipolar. At the commercial level, agreements are one-sided, delays are common, choice is limited and very little is negotiable. At the technical level, performance is usually excellent and staff make every effort to co-operate.[89]

> So commercially, Telstra suck. Technically, they are great. That is a thread that runs through all of our relationships with Telstra. At a commercial level we do have nightmares. … Every decision has to be approved by at least seven managing directors as far as we can figure out. The only thing that Telstra has more of than managing directors is lawyers. It is unbelievable. Every decision has to be made a dozen times. That is at the commercial level. Once you get through that and you have signed an agreement and that has been propagated throughout the organisation, which is a story of its own, often things happen really well. We have had some great experiences. We take their technical guys out for a drink because they do such a great job. But that is after the heartburn of getting to that point in the first place.[90]

3.95 The cases of alleged anti-competitive behaviour which were brought to the Committee's attention have been grouped into the following key areas:

- competitors' capacity to roll out infrastructure;
- Telstra's deployment of services into regions once a competitor has rolled out infrastructure;
- aggressive pricing practices;
- 'churning' customers from the Telstra network;
- the unrecoverable costs of dealing with Telstra;
- managing customer problems on the Telstra network; and
- ADSL on Telstra lines.

3.96 Each of these issues is discussed below. Due to time constraints the Committee was unable to talk with as many ISPs as it desired. However, the problems outlined below and the experiences of dealing with Telstra commercially appear indicative of the issues faced throughout the country. In fact, the Committee notes that

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88 Mr Joe Knagge, *Committee Hansard*, 14 April 2005, p. 11.

89 Mr Stephen Dalby, *Committee Hansard,* 29 April 2005, p. 46.

90 Mr Stephen Dalby, *Committee Hansard,* 29 April 2005, p. 46.

there was a striking similarity of the complaints made by ISPs throughout the country. As one ISP representative stated:

> I have had discussions with other ISPs. The difference between the ISP industry and the telco industry is that ISPs talk to each other and share information quite well even though they are in competition. Talking to other ISPs, they have similar issues.[91]

Competitors' capacity to roll out infrastructure

3.97 Representing TransACT, a company that provides wholesale and retail services in the Canberra-Queanbeyan region, Mrs Dianne O'Hara gave examples of the difficulties an infrastructure competitor of Telstra faced:

> When you start doing work throughout the TEBA [Telstra Exchange Building Access] processes, you apply online and get an access pass to these exchanges. That is what we did. They are issued to each individual person.
>
> In the case of the Gungahlin exchange, the access pass was acquired and used. Telstra then started constructing a fence around the exchange. At a certain point, they padlocked the gate, so when you went to use your pass at the exchange you could not get in because you could not get through the gate. Effectively, that meant that TransACT personnel who had been granted access passes using Telstra's processes could not get access to that exchange. In order to access the exchange, our staff member had to then call the Telstra area manager, who would then issue them with the key to the padlock so they could get through the fence to get into the exchange.
>
> They did that on every separate occasion. They did, I suppose, attempt to make some effort to allow you to get in. At the same time as that, we had to apply for a key to the padlock—which we did—but that took some months to arrive.[92]

3.98 Mrs O'Hara went further:

> We have rolled out currently to six Telstra exchanges throughout the ACT; we did that from late 2003 until the first half of 2004. We again applied for TEBA space at the Telstra exchange at Gungahlin, when it was constructed. At that time there was a new change in the process that had been followed quite uniformly with the previous six exchanges. At the preliminary design study stage, TransACT was informed that the heat loading within the TransACT racks that we proposed to put in at that exchange was too high. That same heat loading requirement had not been imposed previously. TransACT was informed that their study would not be approved, as the heat load in the racks exceeded Telstra's policy guidelines.
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> We asked about what the policy guidelines were because we were not able to reference them either in the facilities access agreement or in Telstra

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91 Mr Stephen Dalby, iiNet, *Committee Hansard,* 29 April 2005, p. 42.

92 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 4.

> TEBA design documentation. TransACT was referred to a web site. We were unable to reference the web site so we went back to Telstra again and were given a password. The password did not work and ultimately, after a delay of some weeks, we were faxed a hard copy of a working draft—marked 1997—on heat load. That is what has been applied since. The practical result of that is that TransACT has to rent additional space at the exchange to meet the heat load requirements. The other thing is that at the same stage as the Gungahlin exchange preliminary study went in, the same preliminary study went in for the Mawson exchange and that was approved without reference to the same heat load study.[93]

3.99 Mrs O'Hara explained that while these delays might appear to be negligible, the effects on business could be very damaging in such a fast-paced market.[94] Retail customers typically commit to term contracts. As a result, time is of the essence in installing infrastructure in exchanges to enable the provision of services. Delays such as these would have led to many potential customers being signed up by Telstra during the period that these delays were happening.

3.100 The Committee is concerned that when perpetuated across the industry these practices have an accumulative and substantially negative impact.

Telstra's deployment of services into regions once a competitor has rolled out infrastructure

3.101 The Committee was told that Telstra often invests in infrastructure shortly after a competitor has rolled out its own infrastructure in a region. Optus, with its cable pay-TV roll-out; Yless4U, a wireless broadband company in Bungendore near Canberra; and GMTel, a broadband company in Shepparton[95] are all companies which are claimed to have been affected by Telstra's aggressive behaviour. The Committee heard a substantial amount of evidence suggesting that Telstra's decision to deploy services to a regional area was often only in response to a competitor moving into that market:

> The evidence in North Queensland suggests that Telstra has been reluctant to make significant changes in investment in regional network infrastructure, except in reaction to a third party market. From our perspective, the major contenders to move into the marketplace are IQ Connect, Macquarie and trtel. They are the predominant players. They are altering the climate in Townsville, which is forcing Telstra to make changes.[96]

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93 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 3.

94 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 4.

95 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 110.

96 Mr Anthony Wilson, Townsville City Council, *Committee Hansard*, 21 April 2005, p. 35.

3.102 Telstra's preparedness to make non-commercial investments to protect its markets acts as a deterrent for many smaller telecommunications companies. These investments, often made only after competitor investment, are difficult to see as being anything but anti-competitive. If a business case for infrastructure investment did not exist in a market prior to a competitor's infrastructure roll out, it is unlikely to be improved by the presence of a new entrant. However, there is almost an expectation in the industry that once a competitor deploys infrastructure and services into a region, it will be closely followed by Telstra, which will use significant resources to out-market any competition.

> The issue for us in going into any region is really what happens once you have deployed the network… Once you go into that region, [Telstra] roll out on a Saturday morning their tables and chairs and start promoting their service. They do a lot of advertising and outmarket you in that area for a while to make it unsustainable.[97]

3.103 Telstra's marketing may also pre-empt competitors' movements into particular new markets by rolling out excess capacity. Again it was claimed that Telstra was able to use its significant resources to undermine any possible competition. As Mr David Spence from Unwired Australia told the Committee:

> In the McDonald's at Lithgow Telstra are running out hotspots. They are doing that round the country at the moment, with big posters saying, 'Get unwired.' That is before we roll out our service to these places.'… What they are offering is not a service that is anything like ours. It is a WiFi service, which means you take your laptop in with your Centrino chip and you get a little WiFi access in the McDonald's in Lithgow. They get into areas before we can roll out our network, in order to confuse the marketplace. So when we come with our brand Unwired, the market is already thinking, 'Get unwired, get Telstra'.[98]

3.104 The Committee notes that any near monopoly organisation when threatened with competitive action would work in a similar way to protect its markets. Mr Stephen Dalby from iiNet argued:

> The clear message that we have from dealing with incumbents over regulatory matters is that it is very obvious to us that some of the behaviour is designed to protect their market. It is not because they do not understand or that they do not have enough people; it is deliberate, it is a protective tactic and we believe that in many case they are aware of where the endgame is. They are not stupid. They understand that at some point this change will be effected, but they want to manage typically a decline in their revenues and manage that at as slight a slope as they possibly can. They do not want a rapid drop-off in revenues. You do not need to be Einstein to figure that out.[99]

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97 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 113.

98 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 114.

99 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 36.

3.105 Mr Bill Scales, from Telstra, argued that the corporation responded to demand in the same way that its competitor did. Thus it was unsurprising that Telstra went into an area at roughly the same time as its competitors:

> In some ways it is not surprising that companies like us will look for where there is likely to be increased demand and that we will all go into that area roughly at the same time. So there is nothing surprising about people trying to anticipate where demand is and accommodating it. … You could imagine, again, a sort of cause and effect. You could see a situation where people register on the broadband register at the same time other people in other sectors of the industry are saying, 'It looks like there's a demand.' Then they go in and we go in at roughly the same time. But certainly we are not influenced at all by whether a competitor is going in. What we are doing is chasing customers where we can observe them.[100]

Aggressive pricing practices

3.106 The goal of competition policy is to drive prices down as service providers compete for market share. The Committee heard evidence of aggressive pricing practices being a major obstacle for competitors in the retail broadband market. Such practices in themselves are positive in that they result in lower prices, and the Committee has no issue with them. It is the unethical practice of price squeezes which is of concern to the Committee. Consequently the Committee distinguishes between the situations where Telstra's competitors are seeking some competitive advantage for their services and where they are subjected to price squeezing, as in the ADSL wholesale issue of March 2004.

3.107 Mr David Spence from Unwired Australia told the Committee of Telstra's aggressive pricing practices:

> A few months before we launched, Telstra dropped their prices dramatically and quite substantially, and we had to change our business case and what we did about how to go to the market. Recently, a month ago, I brought in some fast internet speeds of 64K and 128K for the dial-up market, which is in broadband. It is always on at these speeds. My blow-in price was pitched directly at Telstra's dial-up blow-in price of $15.95. A week later they dropped their price to $2.95 for the first six months of any new customer coming on in dial-up.[101]

3.108 Telstra's competitors argued that Telstra's ability to lower its prices in response to moves in the market ultimate disadvantages long term competition, as it is difficult for competitors to raise capital and invest sufficient funds in new services and infrastructure. This issue is discussed in detail in the following chapter.

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100 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 61.

101 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 112.

3.109 The 2004 ADSL competition notice discussed above indicates that Telstra has the motivation to provide some wholesale products at higher rates than the equivalent retail product. The Committee heard that Telstra prices certain retail products below their wholesale cost, for example, in wireless access in Townsville.[102] Mr Damian Kay, Telcoinabox, said:

> The AirCard is over the CDMA network. I went to a Telstra shop and bought an AirCard—the cards retail for around $560. We looked at all the plans then went back to the office and met with our Telstra account rep and said, 'Can you give us the pricing for wholesale to buy the per kilobit download or MEG—whatever you want to call it—for that?' And the retail pricing was cheaper than the wholesale. So I use the retail service—it is cheaper.[103]

3.110 Similarly, he told the Committee about retail versus wholesale prices of ADSL:

> When we were first putting together Telcoinabox we sat down with Telstra. We had an arrangement with them and we were looking at what provider or network we would use to provide ADSL services to the franchisees, to universals and directly to the customer. So we went and saw Telstra. They had a product called vISP in-a-box, funnily enough. We went through the whole thing and it was great; it was sensational. There were some really good systems that backed it. It is more than price, of course; it is system support and all the rest of it. So we went through that and we said, 'Great! Show us the pricing.' 'Bang!' I had all their retail pricing ready, because I had a gut feel. I said, 'Your wholesale is more expensive than your retail.' They said, 'That's our pricing.' I said, 'Well, how do I compete, again?' It was quite a bizarre situation.[104]

Churning customers from the Telstra network

3.111 Some small to medium ISPs expressed concern about the prices charged by Telstra for the provisioning of exchanges and for enabling the transfer of the service from Telstra to another customer network. The Committee was told that Telstra charges its wholesale customers $90 for a technician to transfer a single customer off the Telstra network onto their own network, and that there is no variation in the price for mass migrations from the Telstra network:

> To churn a DSL service from Telstra Wholesale onto your own DSLAM … is $90 per service. If you do the maths quickly, if you have 200 or 300 services in an exchange area and you want them migrated to your network, Telstra is charging up to $20,000 for you to migrate those customers onto your network. If you know the rate that is being charged retail for a DSL service—that is, $29.95—it takes a long while to get back that $20,000. In

102 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 17.

103 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 27.

104 Mr Damian Kay, *Committee Hansard*, 21 April 2005, pp 26-27.

> other words, the cost of actually putting your infrastructure in place is not the issue. It is the cost of migrating it from Telstra's network to your network that is the issue. It just stops it from happening.[105]

3.112 Representatives from some national carriers also raised the issue of transfer costs, arguing that Telstra offers no discounts for economies of scale for mass migrations onto non-Telstra networks. Mr Ian Slattery from Primus said:

> I will add a slightly different dimension to this issue of Telstra's connection charge, which is over and above all the other capital costs. As a 'back of the envelope', when we look at the mass migration that Primus is intending to undertake to move its customers off a Telstra resale service onto our own DSLAM network, the total cost that we will be up for, given this $90 connection charge, will come in at around the same amount as our total capital costs and infrastructure.[106]

3.113 Similarly, Mr Paul Broad from PowerTel Ltd told the Committee:

> The thing about that is that it costs you, say, 90 bucks for one and 20 bucks for a hundred. There is no economy. Blokes are out there changing them and the up-front costs of getting there are the same. In effect, he gets in his car, drives away and comes back 90 times to redo it. Give me a break! It is an exploitation of monopoly power.[107]

3.114 Mr Graeme Samuel recently reported that the ACCC has noted industry concern over the cost of churning, and is investigating the matter:

> And one of the areas of considerable dispute in the industry is the prices Telstra is charging to have competitors' DSLAMs connected to the local copper loop - $90 to have somebody go to the exchange and physically change the connection from a Telstra DSLAM to the competitor's. This is one of the matters the ACCC is currently considering in relation to Telstra's ULLS and LSS undertakings.[108]

3.115 Mr Bill Scales from Telstra argued that the calculation of the cost of 'provision services' is complex and does not simply involve moving a single cable in an exchange. The cost depends on a variety of factors:

> When our wholesale business looks at these issues and negotiates with our wholesale customers, there are a range of prices for the delivery of certain services. They range from the complete provisioning, which is the establishing of a DSLAM and doing all of the work associated with that, where we are virtually providing the whole service for a wholesale customer so that to all intents and purposes they become a reseller of our

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105 Mr Errol Shaw, PowerTel Ltd, *Committee Hansard*, 11 April 2005, pp 23-24.

106 Mr Ian Slattery, *Committee Hansard*, 11 April 2005, p. 24.

107 Mr Paul Broad, *Committee Hansard*, 11 April 2005, p. 24.

108 Mr Graeme Samuel, 'The Telecommunications and Media Revolution', speech at the National Press Club, 27 April 2005, p. 5.

> business. Then we go right the way through to where some of our wholesale customers buy their own DSLAMs and do their own work, and all we do is the sorts of things that you might be describing here—relatively simple services—and each of them has a different cost.[109]

3.116 Telstra representative Mr Denis Mullane, General Manager Integrated Network Planning, told the Committee during the 2005 Budget Estimate hearings that the process was extensive:

> So we lock in these resources 20 days from the cut-over point. We require the provider to provide Telstra with a list of all the telephone services or the customers that are going to be migrated, and their cable pair details. That has to come into Telstra. … Then the work is programmed; it is confirmed. ... From between day 15 and day 3, Telstra go on site at the exchanges and they pre-jumper the work. … But they leave the service in situ as it is. Then, on the day of cut-over, they go back on site, they pull out the existing jumpers and they connect the new jumpers, so there is only a minimal outage period for the customer. … Then the records have to be updated. That is a very critical part. It requires considerable time, effort and resources. … And on top of that there is a project management that Telstra needs to put around its side of all of this business. We do project manage every job that has more than 50 end users. … But we do not count those in the cost. For all of that, the cost is not $90.
>
> In summary, it is very complex. It requires lots of preparation, very tight coordination across a wide group of people. We cost that work in line with the ACCC guidelines. For these mass migrations we do not charge a standard price, we negotiate a price and so on, where we can do that.[110]

3.117 Similarly, Mr Christopher Hill, a telecommunications consultant representing the Western Australian Local Government Association, told the Committee:

> There are some other impediments to them rolling out their network. To actually move a copper wire from over here to six feet to the left, it needs to be ordered in batches of 100 or 500 copper wires to be moved at a time and the work can occur many weeks out, so, although they have access to the copper and they can send signals down that copper, they cannot move the customer across from Telstra's infrastructure to their own in practical terms at this point in time. Once again, that is probably due to the situation sneaking up on the incumbent, but right now we still have a little bit of progress to make before we have a workable, fair and equitable access to that existing copper infrastructure in the ground.[111]

3.118 Concerns were raised with the Committee about the time that provisioning and churning processes take. The facility or exchange is Telstra's, and while Telstra

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109 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 66.

110 Mr Denis Mullane, Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Budget Estimates Hansard*, 24 May 2005, p. 73.

111 Mr Christopher Hill, *Committee Hansard*, 29 April 2005, p. 12.

allows technicians from other companies to enter, only Telstra technicians are authorised to undertake this work, so as to ensure that it is done in a way that does not threaten Telstra's capability or the capability of its other wholesale customers.[112]

3.119 The Committee heard that it could take up to six weeks to transfer a customer from the Telstra network onto a competitor's network. As Mr Damian Kay from Telcoinabox told the Committee:

> On many occasions Universal Telecom and Telcoinabox service providers have had to phone Telstra because they are so frustrated with requests for orders—we call them 'orders' in the LOLO system, or linx online ordering system. Whether it be an ad move or change order, customers have been delayed, put on hold or cancelled—they just disappear out of the system. Appointment times have been moved and so forth, and the person on the other end of the phone says—I do not know whether this forms part of their training when they start customer service 101 at Telstra—'If you had been with Telstra we would have done it for you straightaway'.[113]

3.120 Delays were also reported by Mrs Dianne O'Hara from TransACT. Mrs O'Hara explained that there were several steps in churning a customer from the Telstra network to TransACT:

> You have to ask whether there is a vacant line there. If there is not, you have to make other arrangements. They come back. You then put in a request to use that line. You then book an appointment for a Telstra technician to go out there and do whatever they need to do, both at the customer's house and at the exchange. You need our own contractors to then follow up and hook up our equipment at the house.[114]

3.121 However, Mrs O'Hara noted that this already lengthy process was intermittently prolonged due to missed appointments by Telstra technicians. The problem recurred in spite of efforts to secure a more reliable service from Telstra:

> We have had issues before with appointments and missing appointments, and that is one of the ongoing issues that this working level committee is trying to address and at various times has addressed, and then it seems that something slips again.[115]

3.122 The Committee considers that Telstra's failure to provide provisioning and churn services in a prompt, reliable and cost-effective manner is a substantial inhibitor of competition, and that immediate action is required.

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112 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 68.

113 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 19.

114 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 12.

115 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, p. 12.

The unrecoverable costs of dealing with Telstra

3.123 Several small ISPs told the Committee of the enormous cost they incurred in securing services from Telstra for resale to retail customers. These costs are largely unrecoverable and have the effect of discouraging Telstra's wholesale competitors from taking on customers. As Mr Arthur Hissey stated in Dubbo:

> It probably cost our company tens of thousands of dollars and hundreds of lost man-hours that we cannot recover. We are squeezed into a no-win situation. We cannot engage with or do our job for our customers until Telstra have done theirs. We are often in the situation where we become the go-between. I know that many of our colleagues in the industry are forced to go to Telstra as a negotiator, a facilitator, someone who understands the language but are not in a position to charge the customer. It is ridiculous to say to a customer, 'Look, I'm going to charge you $50,000 up front just to argue with, fight with and knock down Telstra so that we can engage a business solution for your particular business.[116]

3.124 Similarly, in north Queensland the Committee heard about a woman whose service was temporarily disconnected for not paying her account. In attempting to have this service reconnected, the ISP incurred costs from the Telecommunications Industry Ombudsman (TIO):

> On payment of her account we put in a request to have her line reconnected, and that took seven days from the time of request. In the midst of that Samantha lodged a complaint with the Telecommunications Industry Ombudsman, which subsequently cost us $1,000 to the TIO for something we had no control over. Again, that line has now been churned away from our provider to Telstra.[117]

3.125 The problem of unrecoverable service costs for line rentals was also raised with the Committee. The Committee heard that there is practically no wholesale margin on the supply of local line rental to the end user. Therefore a service provider can only re-bill the local line rental to the end customer. The local line rental pricing from Telstra for a business line customer on their Business Line Complete plan, is $31.77, and $24.50 for a residential home line. Hence the cost of customer care for a Telstra line is not recoverable, as one ISP told the Committee:

> The biggest issue here is that we have to support that, and that is a huge cost. There is general customer care; ads, moves and changes; monthly billing of the local line rental; collection of the local line rental, so we have to hold the debt of the end customer; and logging of line faults and so forth.[118]

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116 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 19.

117 Mr Jeremy Moffat, *Committee Hansard*, 21 April 2005, p. 21.

118 Mr Damian Kay, Telcoinabox, *Committee Hansard*, 21 April 2005, p. 18.

3.126 Mr Damian Kay told the Committee that as a Telstra wholesale customer the cost to him of servicing a Telstra business line is $4.70 per month.

> Keeping this in mind, in supporting a typical line—for instance, I have used a business line in my submission—the approximate cost of billing, including the bill processing, the bill printing, the billing system and the postage, is $2. Collection, which includes anything like Australia Post, BPay, credit cards and so forth, is 60c. Total customer support is around $1.50. I have made a bad debt provision of two per cent of roughly $30, which is 60c. So the approximate total cost of just servicing every line is $4.70 per line per month.[119]

Managing customer problems on the Telstra network

3.127 Several regional ISPs told the Committee that, in their experience, Telstra frequently denied out of hand that service and supply faults experienced by wholesale customers originated on the Telstra network. Mr Arthur Hissey of Computer Research and Technology in Dubbo argued that Telstra's approach was irrational:

> … whenever you go to Telstra with a problem, on your own behalf or on your customer's behalf, Telstra's response is almost inevitably the same: 'There is no problem.' If I could draw an analogy with your car: imagine you went to a motor mechanic and said, 'I have a problem with my brakes,' and he immediately said to you, 'No, you don't.' You would think that was pretty bizarre—you are suggesting that you are having trouble stopping and have an unsafe vehicle and you are being told that it is fine. After you argue for a while, he says, 'Prove to me that it is not something else to do with your car—the suspension, steering or driving—and that it is not the road conditions. In fact, exclude every other possible factor that might be affecting a braking situation.' You would say, 'This is an absolutely ludicrous situation.' It is so bizarre as to be a Monty Python sketch.[120]

3.128 Mr Hissey stated that his company spends huge amounts of time and money convincing Telstra that the source of the problem is on the Telstra network and not with the ISP's equipment:

> Inevitably, by way of excluding all the other factors that might affect things, we will change equipment, pull equipment down, dismantle it and test it. We exclude every event and we go to Telstra and say, 'There is a problem' and they say, 'It is your computer' and we say, 'No, it's not' and they say, 'It is your router' and we say, 'No, it's not; it is proved and tested.' In the end there is nothing else it can possibly be other than the Telstra link. We have spent months—three, four and five months in some situations—where our businesses cannot connect to the internet in a reliable fashion, and Telstra has absolutely and vehemently denied there was a problem. Then a new business will come in next door, Telstra will be forced to run some new lines and the problem dissolves and disappears.

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119 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 18.

120 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 20.

> Months and months, hundreds of man-hours and tens of thousands of dollars are involved in trying to solve problems at an IT level and when one of our customers moves to Sydney the problem just disappears.[121]

3.129 Mr Hissey gave another example:

> That is your response when you go to Telstra: 'There is not a problem.' I think three or four days later we proved to some extent that there was a problem and they said they would check the lines. We were, for all intents and purposes, forcing them to check the lines. They said they had. I can only assume that that is a lie because one of my colleagues—one of our managers—accosted one of the Telstra field engineers and said, 'Please come in on a friendship basis and check our line.' When he did he said, 'Yes, of course it is not working; it is disconnected.' It is a death sentence to an ISP—an internet service provider—to have their service offline for one week, especially in a growing demand market. That random sampling shows events that are far from uncommon.[122]

3.130 In Perth, Mr Stephen Dalby from iiNet argued that regulation could not necessarily address the issues faced by wholesale customers who sought and were denied information from Telstra. Mr Dalby suggested that a paradigm shift within the organisation maybe more effective:

> They are very unresponsive to queries. These are all things that I do not think a regulatory regime is really going to do much about. It needs a paradigm change rather than regulation, but I bring it up in this context anyway. They are very unresponsive to queries, so that when you ask for more information or ask for an alternative, often you get no answer.[123]

ADSL on Telstra lines

3.131 During hearings in regional areas, some local ISPs claimed that Telstra would obstruct the reselling of wholesale ADSL services to non-Telstra customers. In Dubbo, Mr Jeffery Caldbeck from the Dubbo City Development Corporation told the Committee that Telstra were unwilling to provide ADSL availability information unless the customer signed on with Telstra:

> The problem was that he could not find out from Telstra whether there was a service delivery to his new house. So we took the matter on board for him. I personally rang Telstra and they asked for the street number and the telephone number, which I gave them. I asked whether a service delivery was available. I was told, 'We believe it is.' I said, 'Does that mean a yes or a no?' They replied, 'If you are willing to continue with this call and sign up, we will tell you whether it is available.'[124]

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121 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 20.

122 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 20.

123 Mr Stephen Dalby, *Committee Hansard,* 29 April 2005, p. 38.

124 Mr Jeffery Caldbeck, *Committee Hansard*, 14 April 2005, p. 3.

3.132 Similarly, in north Queensland the Committee heard accounts of customers being told that they would have to churn to Telstra in order to receive ADSL services. The Townville City Council were particularly concerned as they felt that local residents were being deceived by this practice:

> It is from our experience of trying to install broadband services that we were told by Telstra that customers who have non-current Telstra accounts will have to move their churn to Telstra Country Wide to get ADSL BigPond. Further, customers with Duet lines were also being bluffed into adding additional lines at a cost of $209. The council have successfully disputed this with Telstra Country Wide, but it is of concern to ordinary individual consumers who may be deceived by this process.[125]

3.133 The Committee heard from Mr Damian Kay from Telcoinabox who suggested that Telstra ability to offer ADSL services to retail customers, once they sign up with Telstra, amounts to corporate bullying:

> Telstra owns the exchanges. … a large majority of the connections are through the Telstra exchanges and via the Telstra DSLAMs. So when we buy what we might call a 'circuit' or 'tail'—or whatever term you want to use in the industry—which is the ability for us to be able to pump it down the copper wire, we use a system that Telstra gives us called LOLO. If you put a number into LOLO it tells you what services are available on it. It is a simple access to the system that Telstra gives you, and if it says no we believe the answer is no—it is either too far from the exchange to be able to provide that service or it is a bad line or the copper wire needs replacing—or whatever the reason is. But we have had examples where the customer then rings up Telstra and says, 'Can I get DSL?' and Telstra says yes and it is connected. It is corporate bullying; it is ridiculous.[126]

3.134 When questioned about this practice, Mr Bill Scales from Telstra argued:

> The general point that I would make about this, given that this is a review of the regulatory framework, is that there are remedies for this now. The ACCC could ring us at any time about any of these issues. It can investigate any of these issues at any time. It can determine at any time, under the existing regulatory framework, whether we are acting anti-competitively. None of this is new. There are remedies, and they are available to the ACCC and to people who make complaints right at this very moment.[127]

3.135 Witnesses also raised the issue of full line forcing where they were being forced to buy other Telstra products in order to purchase key ADSL Telstra services:

> I think the structure of the pricing for ADSL is still anticompetitive… When you buy a tail—that is, the service between the telephone exchange and the customer's premises—Telstra also obliges you to buy other

125 Mr Anthony Wilson, *Committee Hansard*, 21 April 2005, p. 35.

126 Mr Damian Kay, *Committee Hansard*, 21 April 2005, p. 20.

127 Mr Bill Scales, *Committee Hansard,* 4 May 2005, p. 70.

> products that you could buy elsewhere on the market but you are not free to. They refer to them as AGVCs—aggregated virtual circuits—and they aggregate all those tails from those customers from a single point back to us, as the ISP. That is just basic stuff. It does not have to be compatible with anything.[128]

3.136 In its defence, Telstra argues that the availability of ADSL services is not an exact science and the information that wholesale or retail customer receives depends on who answers the query:

> … when somebody rings up at front of house and asks whether they can get ADSL in their home or premises, the person on the line then has to go and look at our provisioning capability. They have to decide, on the basis of the information that may be available online, whether it is close enough to the exchange to say that we will be able to continually provide that service at the standard that is required.
>
> … we have talked about the fact that roughly about 3½ kilometres from the exchange is where we begin to get a query about whether we can or cannot guarantee to a customer that they can get a high-quality broadband service on that line. In some circumstances, we have found that if, for example, a person rings you up, Senator Conroy, and you look at what is in front of you and say, 'I don't think you are going to be able to get it because you are not 3½ kilometres from the exchange; you are five,' and you might then ring up Senator Cherry, Senator Cherry would look at the same document and say, 'I just happen to know that I had somebody yesterday who rang me. While it's technically 3½ kilometres, I happen to know that it's actually not 3½ kilometres but it's flat…and so on and it might be four, and therefore I think we can provision you.'[129]

3.137 Mr Peter Lindsay MP also came to Telstra's defence, telling the Committee that he has received complaints from constituents about their inability to receive ADSL. However, on investigation he found that other ISPs had misled potential customers:

> I will get a complaint like, 'I cannot get ADSL connected.' …The customer will always tell you that it is a Telstra problem, but when you get to the bottom of it, it is not Telstra. What the customer has done is that they have gone to another ISP—there is a myriad of ISPs these days—and the ISP will say, 'No, you cannot get ADSL at your location.' As soon as I contact Telstra and say, 'Here is the phone number; here is the address; is ADSL available?' Telstra says, 'Of course it is.' You have to wonder why that happens.[130]

3.138 Speculating on the reasons for that result, Mr Lindsay said:

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128 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 42.

129 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 69.

130 Mr Peter Lindsay MP, *Committee Hansard*, 21 April 2005, p. 2.

> … I do not know whether some of the smaller ISPs have the capacity or the wherewithal to get the information and to get things connected. I do not know whether they have a shortage of capital and so, to allow their business to work within their capital limits, they tell the customer, 'Sorry, we can't connect you to ADSL' until whenever it is, while they wait till they get some more money in to buy the modems, do the installation, pay for the installation or whatever. I do not know what is going on there, but something is going on. When you come back to the customer and say, 'Look, I've checked with Telstra; your ADSL service is available now and you can connect now,' I can tell you it does not do the ISP that they contacted initially much good.
>
> Telstra is getting the blame for things that are not its problem.[131]

3.139 However, Mr Lindsay's views were not widely shared. Throughout this inquiry the Committee has been impressed by the high level of service and innovation provided by small and medium businesses in the telecommunications sector. Small regional businesses, as discussed in Chapter 2, depend for their survival on their ability to offer effective and efficient services. These small businesses also rely upon Telstra. It is this dependence which causes problems when Telstra does not share service and infrastructure information with wholesale customers. Mr Hissey, of Computer Research and Technology, described a recent example:

> … recently an organisation—I think it has about 230 banking branches in 75 different countries—wanted to come to Australia. It engaged us to set up its telecommunications and communications infrastructure. We went to Telstra and asked, 'What are the existing services that you provide to this company now, because they want to move and expand into Australia?' Eventually, after weeks and weeks of trying to access the right person, we were given the answer, 'We don't know; can you go and ask the customer for us?' We said, 'Hell, no, go and ask them yourself'—and they would not and they did not, and they did not care.
>
> But why would it bother Telstra? It is huge; it is monopolistic. It bothers us because we are engaged to provide a service that Telstra are key and critical in the delivery of—not the most expensive and not even the most technical. But, without Telstra linch-pinning it, the whole thing does not happen.[132]

3.140 The Committee acknowledges that Telstra takes every opportunity available to it to protect its market share. However, situations such as this which may potentially develop international business links present an opportunity for Telstra to work in partnership with its wholesale customers to the benefit of both. Mr Hissey argued:

> But, instead of Telstra being a proactive telecommunications organisation, one that comes to us and says, 'Let us assist you in setting up a rather

131 Mr Peter Lindsay MP, *Committee Hansard*, 21 April 2005, p. 2.

132 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 23.

> important migration of companies into Australia,' it is obstacle driven the entire way.[133]

3.141 The Committee believes that the conduct referred to throughout this chapter reflects an apparent reluctance on Telstra's part to develop its wholesale business at the expense of its retail business. It also appears that post hoc regulatory intervention is unable to deal with these numerous smaller issues. As such the Committee suggests that the possible separation of these activities to allow Telstra to develop two independent businesses should be considered more closely.

Conclusion

3.142 In this chapter the Committee has canvassed various issues raised by telecommunications sector service providers who have claimed that Telstra uses its monopoly infrastructure to engage in a range of anti-competitive behaviour. The March 2004 ADSL episode illustrates that while there is currently specific regulatory provisions aimed at dealing with such behaviour, Part XIB of the TPA, appears inadequate.

3.143 The weaknesses of the current regulatory regime lie in the ability of Telstra to mask where the delineation between its wholesale and retail prices occur; the ACCC's limited capacity to prove anti-competitive conduct; the ACCC's limited ability to identify and respond to a myriad of non-price discriminations; and ultimately the fact that the ACCC's power to impose only financial penalties is not an adequate deterrent to anti-competitive behaviour. Consequently Part XIB of the TPA does not appear to provide the regulator, the industry or the wider community with confidence in the anti-competition regime.

133 Mr Arthur Hissey, *Committee Hansard*, 14 April 2005, p. 23.

Chapter 4

Access

> What I see is that you have this network there that Telstra has already built and it is there serving the community. Why can't the other carriers have access at a fair price to that same infrastructure? Why go and duplicate it? It is crazy economics. If it is there and it is in the ground, why not let them have access to it but at a good price?[1]

Introduction

4.1 A firm that wants to provide telecommunications services can do so either by accessing existing upstream services or infrastructure or by investing in its own infrastructure, which must then interconnect with or access other networks.

4.2 There are barriers to both courses of action, however. The magnitude of the costs of building alternative infrastructure can operate as a significant impediment. This is particularly so in relation to certain parts of the network like Telstra's ubiquitous local access network which is commonly regarded as a natural monopoly.

4.3 Although there has been some alternative deployment of infrastructure at this level—and the limited potential for technology to enable more—it remains true that those seeking to compete with Telstra (as an owner of a bottleneck facility) must, at a minimum, rely on some sort of access to Telstra's local access network.

4.4 Without regulation, there is little incentive for an infrastructure owner to provide third party access to its network. Further, even when obligations to provide access exist, infrastructure providers have an incentive to frustrate access on equal terms. This may result in the owner discriminating in favour of its downstream business, delaying access or permitting access on uncommercial terms. As one witness observed, 'Why would a fully commercial operation want to open up a world-class network for their competitors to use?'.[2]

4.5 The Hilmer Report on national competition policy observed:

> … where the owner of the "essential facility" is vertically-integrated with potentially competitive activities in upstream or downstream markets – as is commonly the case with traditional public monopolies such as telecommunications, electricity and rail – the potential to charge monopoly

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1 Mr Gary Chappell, Peel Development Commission, *Committee Hansard*, 29 April 2005, p. 73.

2 Mr Christopher Hill, WA Local Government Association, *Committee Hansard*, 29 April 2005, p. 14.

> prices may be combined with an incentive to inhibit competitors' access to the facility.[3]

4.6 It is because of this tendency that access regimes have been implemented in previously vertically integrated infrastructure industries such as telecommunications, gas, electricity and rail.

The legislative framework

4.7 As outlined in Chapter 2, Part XIC of the TPA sets out the access regime in relation to the telecommunications industry. The regime was intended to work alongside the sanctions for anti-competitive conduct in Part XIB. The regime requires owners of monopoly elements of what is generally the former public network to give access to wholesale customers on equitable and competitive terms.

4.8 A key monopoly element is the local fixed network. In fact, the ownership by Telstra of the local loop was identified by the Productivity Commission in 2001 as the 'single most important factor underlying the need for regulation in telecommunications'.[4] Although it was once thought that the copper network would dwindle in importance due to the development of competing technologies such as wireless, it is now, perhaps, more important than ever because of advances in copper-based DSL technologies that are increasingly capable of extracting higher speeds out of the network.

The policy intention

4.9 The policy intention behind the access regime was that it would enable competing service providers to make effective decisions about whether to invest in facilities or buy services from existing providers. The downstream service providers which can build a customer base and a profitable business might then be in a position to contemplate investing in infrastructure. The development of alternative infrastructure and effective facilities-based competition would, in turn, reduce the need for access regulation because competitive alternative sources of upstream services would provide a commercial incentive for negotiated access.

4.10 Part XIC, therefore, purports to underpin the goal of promoting services-based competition, at least in the short term, while encouraging efficient facilities-based competition in the longer term. Competition at the facilities level should in turn reduce the need for access regulation over time.

4.11 The legislation expressly sets out this aim in section 152AB. The object of Part XIC is to promote the long-term interests of end users. In determining whether a

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3 Independent Committee of Inquiry into National Competition Policy, *National Competition Policy – Report by the Independent Committee of Inquiry*, AGPS, Canberra, 1993, pp 240-241.

4 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001, p. xxiii.

particular activity does so, regard must be had to the objective of encouraging the economically efficient use of, and investment in, infrastructure to promote competitive service delivery in the markets for listed services.[5] Competition in the services market – and the attendant drive for innovation, lower prices and better customer service – is the key policy goal but this can only be achieved in the longer term with continued efficient use of, and investment in, infrastructure.

Declaration of services

4.12 In general terms, Part XIC obliges providers of 'declared services' to provide access to those services. The ACCC may declare certain eligible carriage services and related services (such as billing data, billing services and conditional access equipment) to be 'declared services'. To date the ACCC has declared basic PSTN, mobile, cable, digital data, trunk and ISDN services, and local loop services.

4.13 Any carrier or carriage services provider that provides declared services (access provider) is required to comply with 'standard access obligations' in relation to the provision of those services to those seeking access (access seekers).

Standard access obligations

4.14 In very general terms, the standard access obligations[6] (SAOs) require the access provider to give access of an equivalent technical and operational quality to others as it provides to itself, and to make available additional services like fault detection, handling and rectification of technical and operational problems of the declared service.

Conditions of access

4.15 The terms on which the access provider must satisfy the standard access obligations in dealings with an access seeker—including price and non-price terms—are subject to commercial agreement between the parties.

4.16 If the access seeker and access provider cannot reach agreement, the following consequences apply. An access provider may give an 'access undertaking' to the ACCC setting out the terms and conditions on which access will be given to active declared services.[7] The terms and conditions of access will be those set out in the undertaking.

4.17 If the undertaking does not specify terms and conditions about a particular matter, the terms and conditions relating to that particular matter will be as determined

5 Paragraph 152AB(e).

6 Section 152AR.

7 To be operative, the undertaking must be accepted by the ACCC.

by the ACCC in an arbitration. If there is no access undertaking, the terms and conditions will be as determined by the ACCC in an arbitration.[8]

4.18 Any determination by the ACCC must not be inconsistent with the SAOs or any access undertaking.

Model terms – core services

4.19 Following amendments to the TPA in 2002, the ACCC must determine and publish model terms and conditions of access for specified declared services.[9] The 'core' services are:

(a) the domestic public switched telephone network (PSTN) originating and terminating access services;

(b) the domestic public switched telephone network terminating access service;

(c) the unconditioned local loop service (ULLS);

(d) the local carriage service (LCS); and,

(e) any additional core service specified in regulations by the minister.[10]

4.20 The ACCC may take into account any model terms and conditions when conducting arbitrations.

Price of access

4.21 The price of access is commonly the key commercial term in access negotiations. Failure to agree on price means that negotiations fail and no access is provided. As this would not be in the interests of end users, the TPA provides for the ACCC to resolve the issue of price if there is no agreement.

4.22 Furthermore, the ACCC is required to determine and publish principles relating to the price of access to declared services.[11] The ACCC must have regard to these principles in any arbitration about terms of access to a declared service.

Ordinary and anticipatory exemptions from SAOs

4.23 Part XIC had always allowed carriers—both individually or as a class—to seek exemption from any or all of the standard access obligations in section 152AR.[12]

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8 Section 152AY.

9 The ‘core services’ are the domestic PSTN originating and terminating access services; the unconditioned local loop service (ULLS); the local carriage service (LCS); and any additional core service specified in regulations by the Minister.

10 Section 152AQB.

11 Section 152AQA.

12 Sections 152AS, 152AT.

4.24 In 2002, in response to the report of the Productivity Commission on telecommunications,[13] the TPA was amended to include mechanisms that would give investors in infrastructure certainty about the conditions that would apply to their investments.[14]

4.25 The ACCC is now able to exempt carriers and carriage service providers—either individually or as a class—from any or all of the standard access obligations in relation to services which have not been declared and may not be built.[15] In order to encourage the prompt assessment of applications, the ACCC is taken to have made an exemption order if it does not make a decision within 6 months.[16] The decision-making period may be extended by up to three months if the ACCC provides reasons for the delay.[17]

Special access undertakings

4.26 The other mechanism that was inserted by the 2002 amendments to provide certainty for investors in facilities was the creation of special access undertakings.[18]

4.27 This mechanism enables a business that is contemplating an investment in infrastructure to lodge 'access undertakings' with the ACCC. Such undertakings set out the terms and conditions on which the facilities owner is willing to permit access to the infrastructure or services when they are built.

Key issues

4.28 The operation of the access regime has been criticised by both access seekers and access providers. In general terms, access providers argue that the scheme operates as a disincentive to investment in infrastructure. This is, they say, because of the uncertainty about whether, and on what terms, new infrastructure may be declared by the ACCC and on what terms access may be provided, factors which would impact upon calculations of return on investment.

4.29 On the other side, the concerns of access seekers arise out of the difficulty of competing against vertically integrated service providers—particularly Telstra, which owns and operates the local loop, the key bottleneck facility. Access seekers argue that the access regime fails to curb the incentive and ability of vertically integrated operators to favour themselves by such means as:

- actions designed to resist or delay declaration;

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13 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001.

14 The *Telecommunications Competition Act 2002* amended the *Trade Practices Act 1974*.

15 Section 152ATA.

16 Subsection 152ATA(10).

17 Subsection 152ATA(14).

18 Part XIC, Division 5, Subdivision B.

- regulatory gaming in relation to the undertakings and exemptions mechanisms;
- deferring agreement as to terms of access;
- favouring themselves in relation to price and the extent, nature and quality of services that are made available to wholesale customers;
- by negotiating access on uncommercial terms; or
- by physically restricting or delaying access to facilities needed for access or interconnection.

4.30 The CCC told the Committee, for instance, that:

> The ACCC, the Productivity Commission, the National Competition Council and many others have consistently identified Telstra's structure and the incentive for it to favour itself over competitors when providing access to bottleneck facilities as the core problem.[19]

4.31 These observations accord with the general observations of the OECD in 2001:

> An integrated firm, in contrast to a separated firm, benefits from any action which delays the provision of, raises the price or lowers the quality of access. An integrated firm will therefore use whatever regulatory, legal, political or economic mechanism [is] in its power to delay, restrict the quality or raise the price of access. Furthermore, the integrated firm has strong incentives to innovate in this area, constantly developing new techniques for delaying access. Although the regulator can address these techniques as they arise, it is likely to always be "catching up" with the incumbent firm. Regulation, despite its best efforts, is unlikely to be able to completely offset the advantage of the incumbent.[20]

4.32 In addition to the difficulties outlined above, access seekers argue that access prices do not provide an incentive for investment in infrastructure. They argue that because prices are too high they are not able to build a profitable business which would justify—and pay for—investment in infrastructure.

4.33 Specific concerns are addressed in turn below:

- the process of declaring services;
- inherent delays in the regime;
- regulatory gaming;
- impediments other than access price;
- facility sharing; and

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19 CCC, *Submission* 14, p. 5.

20 OECD, *Restructuring Public Utilities for Competition*, OECD, Paris, 2001, p. 17.

- pricing issues.

The process of declaring services

4.34 There is no general right of access to telecommunications until a service is declared. As noted above, the declaration of a service must promote the long term interests of end users and the ACCC must have regard to certain objectives:

- promoting competition in markets for listed services;
- achieving any-to-any connectivity in relation to carriage services; and
- encouraging the economically effective use of, and the economically efficient investment in, the infrastructure by which listed services are supplied.[21]

4.35 The ACCC must also conduct a public inquiry into a proposal to declare a service.

4.36 Many services have been declared: domestic PSTN originating and terminating access, domestic GSM originating and terminating access, domestic transmission capacity service, Digital Data Access Service, conditioned local loop service, unconditioned local loop service, ISDN originating and terminating service, Local Carriage Service, Local PSTN Originating and Terminating Service, Analogue Subscription Television Broadcast Carriage Service, line sharing service and the mobile terminating access service.

4.37 However, the process can be slow and not all services that are arguably critical have satisfied the criteria for declaration. The Communications Experts Group, for instance, submitted:

> There are some services which are critical for competition or delivery of Telecommunications services that are not declared, and the ACCC have stated clearly that under the current regime they cannot be declared.
>
> In many cases it is impossible to get access to data that will be acceptable to a court of law, and that can be used to construct a sound economic or legal argument to declare a service.[22]

4.38 Where services are not declared, there is no requirement to provide access or to ensure equivalent quality of access. In some circumstances, there is little commercial incentive for services to be made available to competitors. Mr Christopher Hill from the Western Australian Local Government Association (WALGA) gave the following explanation for Telstra's apparent reluctance to offer ADSL services in markets where it already had an ISDN customer base:

> There is a subtle difference between having a vested interest and slowing something down versus just lacking interest in promoting something or

21 Subsection 152AB(2).

22 Communications Experts Group, *Submission* 26, p. 5.

> ensuring something happens. Things get prioritised down the list. I was describing the risk of cannibalisation of existing lucrative cash flows when moving ISDN customers over to ADSL services. Take it to an extreme. Why would a fully commercial operation want to open up a world-class network for their competitors to use?[23]

4.39 The Committee heard criticism that certain other wholesale services were not available. It is not clear from the evidence whether it was agreed that these services should be declared, but there was a general view that the services should be made available. Telstra's business grade DSL service was mentioned in evidence by two witnesses as a service that had neither been declared nor made widely available by Telstra to other customers. The CCC observed that:

> … often, the infrastructure that is available to Telstra retail is different, and superior to that available to Telstra's wholesale customers. An example is business grade DSL which is available to customers of Telstra Wholesale in far fewer locations (enabled exchanges) as it is to Telstra retail customers.[24]

4.40 Similarly, Mr Paul Fletcher from Optus told the Committee that access to Business Grade DSL was difficult to obtain:

> We have been seeking to get that service to be able to resell to our own customers for many months—probably 12 months. Telstra's initial position was, no, you cannot have it, and the reason given was that the retail business did not want us to have it. Telstra's more recent position is that they are studying the matter, and they are looking to see whether they can provide a wholesale service, but one might expect that it is going to be studied quite thoroughly.[25]

Inherent delays in the regime

4.41 The processes involved in the access regime are inherently time consuming. In 2001, the Productivity Commission observed that the decisions about declaration alone took from 2 to 22 months[26] and the process of assessing Telstra's undertakings had taken about 18 months on average.[27] The assessment of requests for exemptions from the standard access obligations can also take considerable time. Further delays are likely where the ACCC is asked to arbitrate a notified dispute.

4.42 Most declarations were made some time ago in relation to services which use the local loop, and the rate at which declarations have been made has declined

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23 Mr Christopher Hill, *Committee Hansard*, 29 April 2005, p. 14.

24 CCC, *Submission* 14*,* Attachment 1, p. 11.

25 Mr Paul Fletcher, *Committee Hansard*, 4 May 2005, p. 102.

26 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001, p. 229.

27 Productivity Commission, *Telecommunications Competition Regulation,* Report No. 16, 2001, p. 234.

markedly since. There is now less scope for further declarations to be made in relation to such services. Nonetheless, further declarations remain a possibility, particularly in relation to new services operated over so-called next generation networks. Delays at the declaration stage will therefore remain an issue. Similarly, the Committee considers that the assessment of undertakings will remain a continuing source of delay, notwithstanding Telstra's avowed reluctance to use this device following the rejection of its first four undertakings. It is more likely, however, that future delays will occur later in the access process, such as in the ACCC's consideration of exemption applications or arbitration of disputes.

4.43 Telstra argued that the ACCC's process of assessing undertakings is still too protracted despite the 2002 amendments to the TPA which allow for anticipatory exemptions. Telstra observed:

> While it might have been possible to attribute delays with the ACCC's assessment of Telstra's original PSTN undertaking to the ACCC's unfamiliarity with the access regime, such regulatory delays have continued in relation to other undertakings lodged by Telstra.[28]

4.44 For instance, in November 2003, Telstra lodged a revised undertaking for domestic PSTN originating and terminating access services, the Unconditioned Local Loop Service and the Local Carriage Service, but:

> … it was not until nearly one year later (October 2004) that the ACCC released its draft decision proposing rejection of Telstra's undertaking with respect to the Unconditioned Local Loop Service and gave some qualified acceptance of Telstra's undertakings in relation to the domestic PSTN originating and terminating access services and the Local Carriage Service.[29]

4.45 A decision on Telstra's Unconditioned Local Loop Service undertaking had not been made at the end of June 2005.[30]

4.46 While these timeframes seem unacceptable and not conducive to bringing about commercial certainty in a timely way, the Committee considers that the accumulation of knowledge and expertise by the ACCC—in relation to pricing, for instance—with each successive assessment is likely to create efficiencies. In any case, the Committee is not convinced that these delays are entirely the fault of the ACCC, as discussed in the next section.

Regulatory gaming and delay

4.47 In addition to the inherent time lags, the access regime presents opportunities to resist and delay access through regulatory gaming. These opportunities exist at all

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28 Telstra, *Submission* 25, p. 27.

29 Telstra, *Submission* 25, p. 27.

30 Telstra, *Submission* 25, p. 27.

steps of the access process: declaration, the granting of exemptions, the giving of undertakings, the development of model terms and conditions by the ACCC, negotiation over access terms and in dispute and arbitration processes. Furthermore, decisions at many of these points are appellable either on their merits or on questions of law. It is not surprising that many of these opportunities are taken and that the Productivity Commission identified delay as an issue.[31]

4.48 The Productivity Commission's report gave a good example of the potential for delay. Notwithstanding that access providers may have given access undertakings to the ACCC, they will commonly continue to seek commercial resolution of access requests. If those negotiations are unresolved and lead to a notified dispute requiring arbitration, the ACCC will be faced with the concurrent consideration of both the undertaking and the dispute. The ability of access providers to lodge amended undertakings adds another layer of complexity to the situation. The Productivity Commission's report outlined a dispute between AAPT and Telstra:

- in November 1997, Telstra lodged a PSTN undertaking with the ACCC;
- in December 1998, AAPT notified the ACCC of a PSTN dispute with Telstra;
- in June 1999, the ACCC rejected Telstra's PSTN undertaking and in doing so estimated 'efficient' access prices;
- in September 1999, the ACCC made an interim determination for the AAPT– Telstra dispute;
- in September 1999, Telstra lodged a revised PSTN undertaking with the ACCC;
- in April 2000, ACCC released a draft assessment of the revised undertaking, updating its estimate of 'efficient' access prices;
- in June 2000, the ACCC revised the interim determination between AAPT and Telstra;
- in July 2000, the ACCC rejected Telstra's revised undertaking, further refining its estimate of access price; and
- in September 2000, the ACCC made a final determination for the AAPT– Telstra PSTN dispute.[32]

4.49 The Committee did not receive detailed evidence about more recent episodes of this kind, but notes that changes were made to the TPA in 2001[33] and 2002[34] to

31 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001, p. 217.

32 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001, p. 235.

33 *Trade Practices Amendment (Telecommunications) Act 2001.*

34 *Telecommunications Competition Act 2002.*

expedite the process of resolving access issues. These include powers to determine pricing principles,[35] and non-binding model terms for 'core services'.[36]

4.50 Nonetheless, the Committee heard criticism of continued sluggishness in the access regime. A typical comment was that of the CEPU:

> The declaration process has resulted in protracted inquiries and even more protracted considerations of carrier undertakings. It must be admitted that, as a result, it has not produced timely outcomes or provided access seekers and access providers the degree of certainty that they reasonably require. It has also presented all parties with ample opportunities for regulatory gaming. These circumstances have provided the ACCC with the incentive to find short-cuts in the determination of access pricing issues. Part XIB and now the retail price controls have provided the means.[37]

4.51 Similarly, Mr Paul Budde observed:

> True, the worry remains that the incumbent – be it BT, Telstra or whoever – will continue to play regulatory games; undermining the process through their armies of lawyers, lobbyists and spin-doctors.[38]

4.52 Mr Graeme Samuel, Chairman of the ACCC, noted that:

> … on a broader level, there are disturbing signs that the undertaking process has become increasingly subject to regulatory game playing. In some cases, there have been lengthy delays between the lodgement of an undertaking and the provision of the supporting documentation. In others, undertakings have been lodged that are simply inconsistent with the underlying costing information. This type of behaviour does not appear to indicate a genuine commitment to the undertaking process, which is intended to achieve more timely industry outcomes.
>
> It is important to note that the consideration of an undertaking need not stop the Commission in the meantime from conducting an arbitration, if required, and issuing an interim determination. In this regard, the undertakings currently before the Commission won't necessarily delay the consideration of current or potential access dispute notifications regarding the services in question.[39]

4.53 Specific examples of regulatory gaming were identified by the CCC, which pointed to the scheme relating to undertakings as a substantial source of difficulty. The submission of undertakings can be used as a tactic to delay the resolution of a

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35 Section 152AQA.

36 Section 152AQB.

37 CEPU, *Submission* 40, p. 19.

38 Mr Paul Budde, *Submission* 1, p. 10.

39 Mr Graeme Samuel, speech to Australian Telecommunications Users Group, 10 March 2005, http://www.accc.gov.au/content/item.phtml?itemId=591603&nodeId=file422f9e9581125&fn=20050310%20ATUG.pdf.

pricing issue and the submission of amended undertakings that varied only slightly but which tied up the resources of the ACCC and industry by requiring individual assessment.[40] The CCC referred to the ability of access providers to 'systematically frustrate competition by denying equitable access through a wide variety of mechanisms, including inaction and regulatory "gaming" activities'.[41] The CCC also stated:

> The CCC has contended previously that the undertakings process in telecommunications has been systematically gamed by Telstra as a means of delaying the resolution of pricing concerns in relation to core services. For example, through 2004 and 2005, the ACCC and industry was forced to respond to three different sets of undertakings in relation to Unconditioned Local Loop (ULLS) and Line Sharing (LSS) services. Telstra withdrew the first two sets of submissions just before the ACCC published a final determination, and replaced them with new undertakings, requiring the whole process to start again from scratch. Similar abuses of the process occurred in relation to PSTN interconnect.[42]

4.54 Mr Stephen Dalby from iiNet gave another example:

> We believe [Telstra] quite deliberately use delaying tactics to minimise the impact of competition. I can give some examples. When negotiating with us—and this sort of stems back to having this clash with the supplier who is supplying your services at an almost retail level, to then asking them to supply our services on a more honestly wholesale level—it is very much a take-it-or-leave-it approach. 'Yes, you can have that product. There are the terms and conditions.' They will supply it to you as a draft for discussion, but there is no discussion.[43]

4.55 Others made similar observations. ATUG, for instance, stated:

> … the ACCC reports unwelcome gaming of the undertakings process (both in the fixed and mobile parts of the market) and the increased number of access disputes on the mobile termination issue suggest to ATUG that the philosophy of light touch regulation may not be adequate to the realities of this industry.[44]

4.56 The same point has been made in other countries with integrated incumbents, such as the UK.[45]

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40 CCC, *Submission* 14, Attachment 1, p. 15.

41 CCC, *Submission* 14, p. 5.

42 CCC, *Submission* 14, paper 3, pp 6-7.

43 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 40.

44 ATUG, *Submission* 20, p. 12.

45 OFCOM, *Strategic Review of Telecommunications Phase Two Consultation Document*, November 18 2004.

Impediments other than access price

4.57 Access price is only one way in which access may be impeded or effectively denied. The Committee heard of other behaviours from which it could be inferred that access is being impeded. There were many reports of competitors attempting to roll out alternative facilities, only to have Telstra engage in strategies which appear designed to sabotage those efforts. This has had a detrimental effect on investment. The Chairman of the ACCC explained the position in a recent speech:

> Since the ULLS was declared in 1999, rival telcos have predominantly used the service to compete with Telstra in the business markets in inner city areas. To compete for customers in the residential market, on the other hand, access seekers have largely relied on Telstra's wholesale ADSL service.
>
> Broadband take up has now reached the point, however, where it is becoming increasingly viable for access seekers to roll-out their own DSL infrastructure into a larger number of Telstra's exchanges.
>
> Increased infrastructure roll-out would allow competitors to provide a much higher quality, and more diverse range of broadband and other services than is possible by simply reselling the Telstra wholesale ADSL service. There is clear potential, for example, for full video services to be provided over DSL technologies. It is imperative, therefore, that Telstra's competitors have timely and efficient access to exchanges in order to enable them to roll-out services to the mass market.
>
> A number of commentators have pointed out the potential for an incumbent to engage in non-price discrimination or 'sabotage' to kill off this competition before it even gets a foothold by, for example, raising the costs of accessing essential inputs. The potential for sabotage is especially pertinent in light of recent concerns raised by competitors contemplating the mass roll-out of ULLS/LSS based services.
>
> Some of these complaints raised directly with the Commission include the prospect of significant delays and associated costs in gaining access to Telstra exchanges. The Commission notes that the current ULLS provisioning processes are ill-suited to addressing these concerns within the context of a rapid mass-market DSLAM deployment.
>
> To date, Telstra has been slow to improve processes to enable large-scale roll-outs and has not demonstrated a real commitment to changing its systems to meet these needs.[46]

4.58 Mr Samuel noted that the ACCC's views 'appeared to be supported by comments attributed to the Telstra CEO at the time of Telstra's half-yearly results':

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46 Mr Graeme Samuel, speech to Australian Telecommunications Users Group, 10 March 2005, at http://www.accc.gov.au/content/item.phtml?itemId=591603&nodeId=file422f9e9581125&fn=20050310%20ATUG.pdf.

> According to the AFR of 14 February 2005, the CEO noted that Telstra had developed 'mitigating strategies' to address the increasing prospect that competitors will seek to roll-out their own DSL networks. This reference to 'mitigating strategies' could potentially be interpreted in a sinister fashion.
>
> However Dr Switkowski has assured me that what Telstra had in mind was the launch of more attractive products for its wholesale customers. It remains to be seen which interpretation is ultimately proven to be the correct one.
>
> I can assure you the Commission will not look lightly on any attempts by Telstra to impede or hinder competition, for example by slowing the roll-out of DSLAMs, and is prepared to deal accordingly with any such behaviour.[47]

4.59 While this sentiment from the ACCC may be welcome, in light of its inability to respond to widespread frustrating tactics in the past (as discussed earlier) there are real doubts as to whether the ACCC is able to deal with such behaviour.

4.60 As discussed in the previous chapter, a number of witnesses gave evidence of the commercial impediment created by Telstra's DSL churn price. Mr Shaw from PowerTel, for example, explained that migrating customers from Telstra's network could be prohibitive.[48]

4.61 Mr Ian Slattery from Primus made similar observations:

> As a 'back of the envelope', when we look at the mass migration that Primus is intending to undertake to move its customers off a Telstra resale service onto our own DSLAM network, the total cost that we will be up for, given this $90 connection charge, will come in at around the same amount as our total capital costs and infrastructure.[49]

4.62 Telstra explained its pricing structure in an answer to questions on notice:

> Where the migration of multiple services is involved, the physical exchange work that needs to be done to complete each transfer is the same as the work for one service, i.e the disconnection of the existing copper path from its own equipment, followed by reconnection of it to the Telstra Wholesale customer's equipment, followed by the jumpering of an additional cable back to the Telstra equipment to ensure the underlying voice PSTN service operates – making the work required to transfer a number of services a simple multiple of that done for one. Where efficiencies from performing multiple orders in a particular exchange are realised (such as reduced travelling times for field staff), these cost savings are passed on to the Access Seeker.

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47 Mr Graeme Samuel, speech to Australian Telecommunications Users Group, 10 March 2005.

48 Mr Errol Shaw, *Committee Hansard*, 11 April 2005, p. 23.

49 Mr Ian Slattery, *Committee Hansard*, 11 April 2005, p. 23.

> Although the jumpering work is manual, and cannot be automated, Telstra Wholesale does enter into commercial arrangements based on volumes, where it passes on the benefits of the efficiencies gained. Actual pricing for the service, when part of a commercial deal, is bound by customer confidentiality arrangements.[50]

4.63 In addition to disincentives created by high churn costs for DSL, the Committee heard evidence about other actions or strategies which delay access to exchanges. The Productivity Commission's 2001 report alluded to submissions it had received about Telstra's actions, which had the effect of delaying physical access, including 'losing the keys to the exchange'.[51] Mr Paul Budde's submission to this inquiry also referred to this phenomenon.[52]

4.64 As outlined in Chapter 3, TransACT gave evidence of more recent experiences of a similar kind. At a greenfield development in Gungahlin where it was attempting to get customers for its DSL service in competition with Telstra, TransACT encountered several hurdles that delayed its capacity to sign up customers.[53] In a fast moving market, access delays can have a significant anti-competitive effect.

Facility sharing

4.65 The complaint that Telstra impedes or delays access to exchanges points to a related issue which some submissions addressed, namely, access to facilities. Although not an access issue under Part XIC, access to the facilities of other carriers can nonetheless operate as an impediment to the operation of the access regime and to competition more generally. Part 5 of Schedule 1 to the Telecommunications Act gives carriers rights of access to certain facilities (not including exchanges) of other carriers.

4.66 The Committee heard that there is a case for the introduction of regulations to facilitate the sharing of Common User Telecommunication Infrastructure to reduce costs and increase competition.

> The current regulatory [regime] has no provision for the sharing of infrastructure and the current ACA guidelines for sharing radio masts are easily nullified by legal and contractual debates.

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50 Telstra, *Submission* 25A, p. 1.

51 Productivity Commission, *Telecommunications Competition Regulation*, Report No. 16, 2001, p. 22.

52 Mr Paul Budde, *Submission* 1, p. 1.

53 Mrs Dianne O'Hara, *Committee Hansard*, 20 June 2005, pp 3-4.

> In many cases the "first provider or user" can block and delay other carriers from access to the infrastructure, even though totally different (or non-competing) services are being introduced.[54]

4.67 The Communications Experts Group called for the introduction of Common User Telecommunication Infrastructure and for amendments to the legislation to prevent infrastructure being built which is capable of use by a single user or for a single purpose. It also calls for a strengthening of the facilities access legislation.[55]

4.68 In Dubbo, the Committee heard of the poor level of service people in rural areas receive. The need to share facilities to reduce cost was raised as a possible solution by Mr Tom Warren:

> There are quite a large number of other issues. I suppose one solution would be to share towers. Too often we see several towers in the same vicinity: one for Optus, one for Telstra and one for someone else, yet we still do not seem to be able to get services.[56]

4.69 The facility sharing model was also proposed by Mr Peter Lindsay MP in Townsville where a similar arrangement exists for the sharing of television antenna:

> There would be a multiuser base station in areas where it is not economic for all carriers to provide 3G base stations. The technology is there to do it—the one transmitter, the one antenna and the one building can link into the various networks—but there would have to be some legal framework and some agreement between the carriers to allow that to happen. There is a possibility that whichever entity does this could negotiate with the local shire council, who might provide the water tower or whatever to get the services into their town. This model is not too different from that of Broadcast Services Australia, who maintain many of the television transmitters around. They maintain the WIN television network, the SBS network and the ABC network all from the one site. The one operating company maintains it for a multiplicity of users.[57]

4.70 The Committee notes the recent 3G network facility sharing agreement between Hutchison and Telstra and sees this as an encouraging development in the sector. The Committee sees merit in consideration being given to a strengthening of facilities access regulation and its extension to other facilities to which access has become more critical, such as local exchanges.

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54 Communications Experts Group, *Submission* 26, p. 5.

55 Communications Experts Group, *Submission* 26, p. 5.

56 Mr Tom Warren, Orana Development and Employment Council, *Committee Hansard*, 14 April 2005, p. 50.

57 Mr Peter Lindsay MP, *Committee Hansard*, 21 April 2005, p. 5.

Pricing issues

4.71 A key term in access arrangements is price, since without agreement on price, there will be no access. The assessment and determination of price is one of the most vexed issues in the regime.

4.72 The two key concerns appear to be that price takes too long to be established—due to the timeframe inherent in the system and the consequent gaming of the scheme (discussed earlier)—and that prices are too high (according to access seekers) or too low (according to access providers).

4.73 As noted above, the CCC identified the gaming of the undertakings process as a key flaw in the scheme and argued that the process has not achieved the 'clarity and certainty in pricing on an industry wide basis' that was intended:

> The introduction in 2002 of the process requiring the ACCC to determine indicative price terms and conditions for core services both demonstrates the failure of undertakings to prevent access disputes and makes the undertakings regime even more of an uncomfortable fit with the rest of the regime.
>
> Further evidence that undertakings are incompatible with the effective management of competition in communications has been their use (the CCC would argue, clear abuse) by Vodafone and Optus in an attempt to prevent the ACCC's efforts to regulate the prices for fixed to mobile termination services to a cost reflective basis.
>
> Clearly, if the mechanism is being used to prolong the process of providing pricing certainty, it is achieving the opposite of what was intended.[58]

Price and the efficient use of, and investment in, facilities

4.74 As noted above, in administering Part XIC the ACCC must have regard to the extent to which the economically efficient use of, and the economically efficient investment in, the infrastructure by which listed services are supplied is encouraged.[59]

4.75 The Productivity Commission concluded that this consideration should be elevated to the object of Part XIC, in place of the promotion of the long term interests of end users.[60] The Government has agreed to insert a variation of this formula in the object of Part IIIA of the TPA, which is the general access scheme for other industries.[61]

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58 CCC, *Submission* 14, attachment 1, p. 15.

59 Subsection 152AB(2).

60 Productivity Commission, *Telecommunication Competition Regulation*, Inquiry Report, Recommendation 9.1, p. xxxviii. The Commission suggested the object be changed to the promotion of 'the economically efficient use of, and investment in, telecommunications services'.

61 Trade Practices Amendment (National Access Regime) Bill 2005, proposed section 44A.

4.76 As noted earlier, the efficient use of, and investment in, infrastructure is encouraged by an access regime which aims to encourage sound decisions about whether to build new facilities or buy access to existing facilities and services.

4.77 The original policy goal of the Part XIC access regime was, in the short term, to enable access to publicly owned infrastructure—predominantly, the fixed local loop—in order to encourage competition in new and innovative services. If this enabled those access seekers to build a sufficiently profitable customer base, they may have both the incentive and capacity to invest in their own facilities, which would reduce their dependence on upstream providers. The Committee heard that this was indeed the intention of competitors. Mr Errol Shaw from PowerTel for instance, endorsed this view:

> You would normally set your business up by wholesaling Telstra's DSL product, getting a customer base, then putting your infrastructure in place so you can make money out of it.[62]

4.78 Mr Stephen Dalby from iiNet said:

> We have taken the approach that once we have sufficient scale we will then examine building our own infrastructure. We use somebody else's infrastructure, we buy their gear, we buy their wholesale products and resell them and, when we reach a point where the business case is good enough, we then build our own infrastructure.[63]

4.79 It is clear that an important factor in the profitability of access seekers is price. Low prices clearly favour access seekers, but they may damage investment in infrastructure. Telstra explained:

> An artificially low access price has two damaging effects on investment.
>
> A low access price discourages efficient investment by infrastructure owners as they will not be able to attract sufficient investment funds to finance a network roll-out relative to competing investment opportunities. They may also decide that the risk-adjusted return exceeds any benefits, or that their money is better allocated to other, more profitable, investment opportunities.
>
> A low access price discourages efficient investment by market entrants - as they will have the ability to free-ride on the infrastructure of existing infrastructure owners, therefore reducing the costs of market entry.[64]

4.80 Low prices may also assist inefficient access seekers to remain in business.

4.81 On the other hand, high access prices may discourage or prevent the entry of alternative service providers into downstream markets or, at least, make it difficult for

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62 Mr Errol Shaw, *Committee Hansard*, 11 April 2005, p. 23.

63 Mr Stephen Dalby, *Committee Hansard,* 29 April 2005, p. 39.

64 Telstra, *Submission* 25, p. 56.

them to build businesses profitable enough to justify investment in alternative infrastructure.

4.82 That access prices are too high is clearly a view held by service providers acting in their capacity as access seekers. The Committee notes, however, that a carrier or provider may simultaneously be both an access seeker (in relation to, say, fixed line services) and an access provider (in relation to mobile terminating access) and may therefore hold the view that prices are too high and too low. While different considerations prevail, this does illustrate the intractability of the problem.

4.83 Telstra argues that there is a low-price bias in the access regime and its administration:

> … in practice, in setting access prices, the ACCC has regularly failed to recognise the efficiently incurred costs of providing access to declared services. As a result, infrastructure owners are unable to be assured of secure sustainable returns on their investment.[65]

4.84 Furthermore, Telstra argued that low access prices deter investment by access seekers:[66]

> If the access regime is designed to maximise the long-term interests of end users, then competitors must be provided with a price signal that will encourage efficient investment by both entrants and the incumbent.[67]

4.85 One reason that this is so, according to Telstra, is that 'the ACCC has been preoccupied with promoting short-term competition without properly focussing on the need to promote long-term investment'.[68]

4.86 This accords with the view of the CEPU, which observed that the present position reflects 'a policy and regulatory bias that since 1992 has kept access, and more recently resale, prices low to encourage competitive entry'.[69]

4.87 However, this view is not universally shared. Mr Chris Hill on behalf of the Western Australian Local Government Association (WALGA) observed:

> The Australian public has invested over the last several decades in building an infrastructure that is, in fact, world class at the core. There is a world-class backbone, world-class infrastructure at the exchanges, world-class access methods, but unfortunately the pricing regimes are such that no-one can afford to access them.[70]

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65 Telstra, *Submission 25*, p. 3.

66 Telstra, *Submission* 25, p. 25.

67 Telstra, *Submission* 25, p. 56.

68 Telstra, *Submission* 25, p. 25.

69 CEPU, *Submission* 40, p. 15.

70 Mr Christopher Hill, *Committee Hansard*, 29 April 2005, p. 5.

4.88 Optus views access pricing as an impediment to facilities-based competition, arguing:

> Broadband is the key area where policy and regulatory focus is needed. Development of the broadband market has reached a crucial point and Telstra has recently shown its intent to stymie competition in this market. With the right regulatory settings, competitive players like Optus are on the verge of building competitive access networks. But a key impediment is resale interconnect pricing, which acts as a dampener to competitors building their customer base which in turn hampers the speed and scale of possible network builds.[71]

4.89 Optus outlined its 'Bridge to Broadband' proposal in response.[72] Optus stated that it was 'poised for major roll out of competition infrastructure', but that the speed and scale of the proposed roll out depended on its capacity to grow its resale customer base. This is currently hampered by the poor returns in providing customer resale services. Optus proposed that a more attractive local call resale service (LCR) should be offered to competitors who commit to significant DSL build:

> The essence of the "bridge to broadband" proposal is that competitive carriers and service providers are given a more favourable LCR interconnect rate in return for making commitments in relation to a large scale DSL build. This would be for a build that is of a greater scale and is rolled out more quickly than would be feasible for Optus under current scenarios.[73]

The cost of backhaul

4.90 One aspect of access pricing which attracted much comment during this inquiry was transmission pricing (sometimes called backhaul), particularly in regional areas. *The Australian* newspaper reported on 7 June 2005 that the ACCC had 'received complaints over the past month from a number of internet service providers over backhaul pricing in non-metropolitan areas':

> There is evidence that high backhaul pricing is reducing broadband competition in non-metropolitan areas. Perth ISP iiNet complained to the ACCC about regional backhaul. iiNet chief executive Michael Malone said 30 per cent of the ISP's customers were in non-metropolitan areas, but the cost of backhaul pricing was too high for it to consider installing high-speed equipment in some towns.

71 Optus, *Submission* 12, p. 3.

72 Optus, *Submission* 12, p. 7.

73 Optus, *Submission* 12, p. 7. Specifically, Optus proposed that Government fix the LCR wholesale price at 10 cents per call and the monthly line rental at $25 for a limited period of time. Optus, in return, would enter into a network development deal.

> "In the metropolitan areas we have alternative suppliers we can talk [to], but elsewhere you've only got Telstra," Mr Malone said.[74]

4.91 These and other comments prompted the Committee to seek the views of witnesses. Mr Stephen Dalby from iiNet stated:

> As has been mentioned a number of times this morning by other witnesses, the ongoing costs, the recurring costs of backhaul, kill the business plan for us to put a DSLAM or a broadband facility into a country town. We could run a service for two years on the subsidies and after that we would run in the red and we would leave town.[75]

4.92 Dr Walter Green from the Communications Experts Group described the cost of backhaul as 'the killer' which has 'a huge impact on quite a number of areas' particularly in northern Western Australia.[76]

4.93 The Western Australian Department of Industry and Resources (WADIR) also observed that the manner in which backhaul tariffs were calculated led to high backhaul prices in regional areas:

> A major structural issue inhibiting the effectiveness of the third party access regime to the telecommunications network is the widespread practice of imposing distance-based tariffs on regional backhaul (long-distance cable) routes. The Government of Western Australia believes that removing distance-based tariffs associated with backhaul (long-distance cable) routes would create a substantial shift in commercial incentives. Indeed, the impact is likely to force wholesale backhaul providers to consider applying volume-based tariffs. In turn, a volume-based tariff regime would require a substantial increase in transit traffic created by the accelerated introduction of new innovative services, thereby creating considerable benefit and opportunity for regional communities.
>
> Maximising the speed of new service deployment in regional Australia calls for change through regulation to:
>
> - eliminate distance-based tariffs; and
> - create a National Internet Protocol Network.[77]

4.94 Expanding on these comments, WADIR stated:

> The difficulty with the current distance-based tariff structure is that backhaul routes carrying relatively little traffic become punitively expensive. The viability of providing downstream services to regional communities is undermined, as all service charges have to recover costs

74 http://australianit.news.com.au/articles/0,7204, 15532088%5E15318%5E%5Enbv%E15306,00.html.

75 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 41.

76 Dr Walter Green, *Committee Hansard*, 29 April 2005, p. 19.

77 WADIR, *Submission* 32, p. 5.

> imposed by distance-based tariffs. The result is severely reduced transit traffic with end-users in effect paying for substantial idle capacity.
>
> The effectiveness of the market in dealing with this has been limited. Along certain backhaul routes competition through infrastructure duplication (facilities-based competition) has been effective at reducing distance-based tariffs, e.g. the main routes between Australia's capital cities. In other cases, where backhaul routes serve smaller population centres, facilities-based competition is unlikely to be effective because the value of traffic transiting regional backhaul routes is often insufficient to support infrastructure duplication. In these cases, some form of regulatory intervention may be warranted.[78]

4.95 Dr Walter Green referred to calculations of the profitability of certain backhaul links and concluded that there is a 'substantial scope within the backhaul prices to reduce the prices' and that 'controlling the backhaul price is the biggest inhibitor to providing services in the rural areas'.[79]

4.96 Regional Internet Australia (RIA) observed that competition had been effective in driving down transmission prices in many metropolitan areas and on some inter-city routes, but argued that Part XIC had not led to facilities competition in many regional areas or resulted in reasonable access conditions:

> Part XIC … has operated effectively to encourage new entrants in the major metropolitan areas. The ACCC has found that certain services no longer need to be declared in or between state capital cities as competition has been introduced effectively.
>
> However, RIA is concerned that the access regime provided in Part XIC has not been proved effective in the supply of services which are essential to the roll out of regional broadband services. Specifically, the transmission service declared under Part XIC provides access to Telstra's fibre and is expressed to be priced based on the long run incremental cost. That is, the selling price should reflect the cost incurred by an efficient operator in supplying the service (and allowing for a return at the weighted average cost of capital).
>
> RIA has found that it is cheaper to construct microwave radio based links than to acquire access to optical fibre from Telstra. This is an indication that the access regime is not working and that there is duplication of capital intensive infrastructure deployment in regional areas which can least afford it. This issue is compounded by the duty and goods and services tax payable on this capital equipment which is referred to below.[80]

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78 WADIR, *Submission* 32, pp 5-7.

79 Dr Walter Green, Communications Experts Group, *Committee Hansard,* 29 April 2005, pp 19-20.

80 Regional Internet Australia, *Submission* 35, pp 1-2.

4.97 In response to questions about the possibility of a wireless broadband service provider, Unwired Australia, rolling out in regional areas, Mr Caldbeck from Dubbo City Development Corporation said:

> … the big issue there has been—and we have had contact from several operators in the wireless field—the backhauls out of remote areas to Sydney and the availability of alternative supplies on backhaul. It is only just recently, with the introduction of companies such as SPTel with backhaul, that wireless operators are getting their confidence level up that they are not going to be subjected to any issues by having an alternative choice.[81]

4.98 That backhaul prices are widely regarded as too high does not mean that they have fallen outside the regulatory net. As the CCC explained, backhaul services had been declared on most main transmission routes where there is no competing infrastructure. The problem, Mr David Forman said, is not that key services have not been declared, but that the access process is not workable in a timely way:

> … I think backhaul is one of these issues that erupt when people see examples of clear pricing or behavioural discrimination. What they are really talking about is transmission and transmission is declared. The difficulty is that, in order to move from the point of declaring the service to controlling the price of the service, you need to go through the negotiate-arbitrate arrangements that exist in this industry. So a customer wishing to acquire backhaul from Telstra goes to Telstra and says, 'Can I please buy some?' They say, 'Yes, you can buy this transmission product.' But, lo and behold, the customer is on a route where there are no competitors, so Telstra say, 'You can have transmission in one colour and it is black, and you can have it at one price and it is this.' That customer has a choice of saying, 'Sorry; I want it in yellow and I want it at a tenth of the price.' Telstra will say, 'Do you? You can have it in black and you can have it at that price. We will go off and have an argument in front of the commission, if you like.' Now, you can go off and have an argument in front of the commission, if you have very deep pockets and a couple of years to wait, and you might get a result that is worth the wait or you might be out of business.[82]

4.99 Mr Errol Shaw from PowerTel made similar observations:

> Probably the most significant demonstration of transmission prices changing was when PowerTel first was formed. What we were going to do was fibre up CBD businesses—we were talking real broadband for Australian business. We tried to acquire intercapital transmission and were stunned at the rates that were being asked. The going rate in the wholesale market when we built our fibre network was about $1.2 million per SDN1 between Sydney and Melbourne. We built our own network and we wholesaled that at $600,000 per annum. We were very happy with the

81 Mr Jeffrey Caldbeck, *Committee Hansard*, 14 April 2005, p. 6.

82 Mr David Forman, *Committee Hansard*, 11 April 2005, pp 22-23.

> margins we were making out of it. Today you can buy that same link for $100,000. That will give you some idea of the change it makes when there is actually a third network owner in place. That goes to the regional transmission and the backhaul, as you call it. There is only one provider of backhaul of any note in this country, and that is Telstra. So if you wanted to negotiate, for parties to negotiate, both parties have to be able to gain something out of it. I am not quite sure what it is that Telstra would see they would be gaining if they negotiated a cheaper price with one of the ISPs. Then, to arbitrate, there is no way that they can challenge the cost base that Telstra can put together and say, 'Here is the cost that we are doing it at.' There is no competition in place. So it is a very murky process that they need to go through.[83]

4.100 It is only a partial solution that backhaul has been declared on most monopoly routes. The problem is not that key backhaul routes have not been declared but that it is difficult to agree on an acceptable price. Speaking of a particular transmission route, Mr Stephen Dalby from iiNet explained:

> … it is declared. There are a few routes that are excised from the declaration but, generally speaking, it is declared. I have had the discussion with the ACCC because, as I said, the [HiBIS] scheme for us disqualified itself because of the ongoing costs associated with backhaul. It is longhaul backhaul, not just the short distance stuff. We can justify the costs of the short distance stuff, it is once you go outside the metropolitan area there is no competition typically. I know there are a few examples where there is but, generally speaking, outside the metropolitan areas there is no competition for backhaul, so you have only one person you can go and see and that is your friendly Telstra account exec. They have a fixed set of prices. It is declared, so the process is you argue with him for six months, because you have to be seen to at least attempt a commercial negotiation, you get absolutely nowhere. You then have to seek a mediator to discuss the matter with which you both mutually agree to and you seek a mediation on the dispute. Sorry, I missed a step. You have to formally lodge a dispute with Telstra, in that case, and you give them X number of days and then they respond—10 minutes before it expires—saying, 'No progress.' Then you seek a mediator. That takes time. You have to engage a mediator and go through a process with the mediator[84]

4.101 Telstra pointed out that competition in backhaul routes including those to some regional areas has increased:

> The level of competition in the wholesale transmission market, in particular, led the ACCC in April 2004 to further de-regulate the inter-capital routes and 14 major capital-to-regional routes.[85]

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83 Mr Errol Shaw, *Committee Hansard*, 11 April 2005, p. 23.

84 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, pp 47-48.

85 Telstra, *Submission* 25, p. 16.

4.102 The Committee acknowledges that this is correct but notes that it is generally not prices on the competitive transmission routes that have attracted criticism. Rather, it is pricing on transmission routes where there is less competing infrastructure that has generated concern.

4.103 When asked if Telstra's prices for backhaul services were representative of the cost Telstra incurs when it uses those backhaul services itself, Telstra went to some length to point out the complexities of setting prices:

> Elements of the infrastructure used to deliver the Wholesale Transmission service are common to the infrastructure that is used to deliver a broad range of wholesale and retail products.
>
> The costs of the common product delivery infrastructure, as determined by Telstra's management accounting systems are used by both wholesale and retail business units in setting prices for products. The cost inputs for the common infrastructure are consistent for both wholesale and retail products.
>
> Of course different products have differing utilisation of the common infrastructure and also have product specific infrastructure components. In addition, the cost base of every product includes a range of operational, sales, marketing and overhead costs, depending on the nature of the product and the market segments to which it is sold.
>
> Cost inputs are one of many inputs to the final price at which a product is sold. Other inputs include the size of the current and future market for the product, the geographical spread of demand for the product, the nature of the customer segments to which the product is sold, the maturity of the product and the sales channel used to deliver the product to market.
>
> The costs underpinning the provision of Wholesale regional transmission services, while based on complex calculations, are broadly determined by the length of the route, and the bandwidth of the link or links involved.
>
> Costs for the combinations of these factors are the main input, but requirements for all transmission links are also assessed in the context of the existing available capacity on the route coupled with the growth rate of bandwidth consumption, and the need to bring forward additional investment because of the new requirement at hand.
>
> In the case of specific geographic wholesale requirements, additional factors such as committed growth rates in the route bandwidth, other associated current and future committed transmission requirements, additional non-transmission business, and term of the contract can also influence the pricing.
>
> When calculating the cost both retail and wholesale traffic volumes are taken into account. Therefore prices for regional transmission particularly on long routes that carry relatively little traffic are very significantly higher than on routes that carry high volumes of traffic.
>
> Telstra Wholesale usually offers access to transmission at route specific prices – so that its customers benefit from lower prices on offer on shorter haul, high volume routes, but also so that its prices reflect the cost of servicing a specific region.

> Telstra BigPond offers broadband ADSL services, where they are available, at the same price to city, metropolitan, regional and rural customers, irrespective of where they live, delivering tangible benefits to people living across Australia, and particularly in rural and regional Australia. Importantly, Telstra Wholesale provides a wholesale ADSL service at a consistent price across regional Australia, which means that ISPs wishing to service a region have the choice of reselling Telstra ADSL where available, at an affordable price to all regional end users, and at a price which enables them to compete with Telstra's retail ADSL service.[86]

4.104 The Committee is not in a position to question Telstra's calculation of the cost of backhaul. However, it is revealing that, notwithstanding the claimed high cost of providing these services, Telstra has been able to substantially reduce its wholesale prices in response to competition on some transmission routes. It would seem that if Telstra's backhaul prices were not excessively high in relation to its costs, it could not maintain such a reduction and remain profitable on those routes. That it is apparently able to do so on some routes raises at least a suspicion that it is exploiting its monopoly position by charging wholesale prices which are out of proportion to its costs.

4.105 The Committee notes that the ACCC has commenced work to determine if it should provide further pricing guidance on the issue of backhaul and the form this guidance could most usefully take.[87]

4.106 Representatives from James Cook University in northern Queensland told the Committee of their development of their own infrastructure to help them achieve their broadband connection with rural and regional northern Australia:

> [W]ith Queensland government assistance and federal money, we have rolled out a separate fibre optic network. It runs from Brisbane through to Townsville, which is over 1500 kilometres. Goodness knows what the real cost of that is. Not many parties use that network at the moment really, and the very fact that it was cost effective for Powerlink to do that says something about the costs of Telstra over these long hauls—the fact that it is cheaper for someone to build their own network rather than using a preexisting network that is in the ground and for which there is technology freely and easily available to light it up at any capacity. That really seems to me to not be the best way for the country to invest its resources. It indicates that perhaps there is a lack of top-level planning of how the country uses these strategic resources and again there are issues with the market power of the large-scale incumbent.[88]

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86 Telstra, *Submission* 25A, p. 2.

87 Mr Michael Cosgrave, General Manager Telecommunications, ACCC, *Competition and the Need for Regulation,* Speech at the Regional Cities Telecommunications Forum, Sydney, 21 June 2005, at: http://www.accc.gov.au/content/index.phtml/itemId/611729/fromItemId/142.

88 Associate Professor Ian Atkinson, *Committee Hansard*, 21 April 2005, pp 42-43.

4.107 That Telstra's pricing in this instance appeared to have been calculated to impede access to its facilities is demonstrated by its reaction to the competition. Professor Atkinson explained:

> As soon as we had completed that roll-out, Telstra's pricing dropped to where, if it had been at that level initially, perhaps we would not have even considered this five-year endeavour. It has cost goodness knows how much money, in terms of the time it has taken people's staff to write proposal upon proposal and in terms of the actual technical roll-out. Of course, we are relying on further state and federal subsidies to continue with the roll-out, based on the current model.[89]

Mobile termination access prices

4.108 Mobile terminating access service (MTAS) prices attracted some comment during hearings, largely because of the apparent inconsistencies between the wholesale prices that access providers levied on other access seekers and the prices that they appear to charge themselves for wholesale services.

4.109 The ACCC noted in 2004 that MTAS providers have bottleneck control over access to an essential input in the provision of the fixed to mobile (FTM) and mobile to mobile (MTM) calls.[90] Furthermore, providers of mobile terminating access are not constrained in their pricing decisions for the MTAS and have both the ability and incentive to raise the price of this service above its production cost. The ACCC considered that providers of the MTAS are not constrained by the existence of alternatives to the service.[91]

4.110 As part of its review of whether existing mobile originating and terminating access declarations should be extended, the ACCC also determined pricing principles for mobile services. The ACCC assessed current MTAS costs at 12 cents and concluded that wholesale prices should be reduced from 21 cents per minute at 30 July 2004 to 12 cents by 1 January 2007.[92]

4.111 At the same time as mobile carriers were charging 21 cents per minute for wholesale terminating access, they were offering fixed to mobile and mobile to mobile services at retail prices below these charges and, indeed, below 12 cents: that is, at a price lower than only one component of the wholesale cost, suggesting that the cost may be considerably lower than 12 cents. During this inquiry, Hutchison Telecommunications provided the Committee with a Telstra advertisement that listed fixed to mobile calls at 4c per minute when the wholesale cost to competitors of the

89 Associate Professor Ian Atkinson, *Committee Hansard*, 21 April 2005, pp 42-43.

90 ACCC, *Mobile Services Review: Mobile Terminating Access*, June 2004, p. v.

91 ACCC, *Mobile Services Review: Mobile Terminating Access*, June 2004, p. v.

92 ACCC, *Mobile Services Review: Mobile Terminating Access*, June 2004, p. 221.

terminating component alone was 21c per minute. Hutchison confirmed that the cost of terminating access according to the ACCC is 12c per minute.[93]

4.112 Explaining what AAPT perceives as the difficulty in negotiations over pricing of mobile terminating access, Mr David Havyatt said:

> This has been an extremely long, drawn-out process. The ACCC first looked at mobile termination prices in the year 2000. It undertook a review and confirmed that they should continue to be regulated but came out with a very weak pricing principle. It was going to link mobile termination prices to retail price movements, which completely ignored the question: if there were rents there already, how would that eliminate them? Surprise, surprise—we saw retail prices held up so that there was not pressure put on mobile termination prices. So the commission had another look at the question of mobile termination prices, once again concluded there was market power by the mobile operators in the setting of the prices, undertook an analysis primarily using benchmarking but also looking at some of the accounting data they had from the regulatory accounting framework and reached a conclusion that 12c was the top of a cost based price range that they should consider. They thought that moving from the then existing market prices, which were of the order of 21c—and we are talking about before June last year—in one step to 12c would be overly disruptive to the businesses of the mobile networks.[94]

4.113 Mr Havyatt stated that 'Twelve cents was without doubt at the very top end of what a cost based price would be.'[95] He thought that the bottom of the range was about six cents, stating that the ACCC considered the correct range was between six and twelve cents. However, he noted that the ACCC's decision on pricing principles that introduced a staggered reduction had met with opposition:

> It was meant to apply from 1 January 2005 with 3c declines each year. Since that point Vodafone has seen fit to take administrative law action over the pricing principles issue, arguing the commission did not have the power to issue the pricing principle in that way. Optus and Vodafone have each provided undertakings to the commission that are priced significantly above the prices that the commission has indicated are reasonable. I think four parties have notified disputes against Vodafone, and three against Optus.
>
> Meanwhile, we do know that Telstra has certainly made commercial agreements with some parties, including us, about termination prices. Both the Vodafone submission and the Optus submission actually argued that their costs are below 18c but they are not yet prepared to pass on 18c. They are both arguing that, because the commission said there should be a three-year glide path, now the glide path should be at a lower point. As for what

93 Mr Brian Currie, *Committee Hansard*, 13 April 2005, pp 71-72.

94 Mr David Havyatt, *Committee Hansard*, 11 April 2005, pp 36-37.

95 Mr David Havyatt, *Committee Hansard*, 11 April 2005, pp 36-37.

> the consequences are for AAPT, there are specific markets where the integrated players compete for business and we have got evidence that they are competing for that business by quoting a fixed mobile price that is below the price we face with termination. They are able to do so on the basis of the cross-subsidies they get from their mobile business. The ACCC's effective response to that has primarily been to say, 'We understand the nature of the problem, we need to get termination down to cost based prices and this is what we are trying to do for you.' So at the moment you are looking at a marketplace in which integrated players get to internalise these above-cost prices to selectively get to compete below cost in other markets.[96]

4.114 ATUG was critical of the ACCC's limited power in making pricing decisions:

> We agree with some of the other submitters who have concluded that the recent decision on the termination of mobile phone traffic has been an example of the limitations of the powers that are currently available to the ACCC in that it has provided an extremely modest response to an outstandingly well-proven, substantiated and long-term problem which does not affect only one incumbent but is an industry-wide issue. One would have hoped it would have had a much more robust response from a regulator with those responsibilities.[97]

4.115 AAPT claimed that disputes over pricing were delaying the uptake of new services:

> The opportunity to provide voice-over IP is a great development in the industry. It is a service that still resides over the same existing infrastructure but provides the capacity to provide more services over the same infrastructure. To be competitive in the provision of voice-over IP you need to be competitive in the provision of all the voice services. As we are seeing today, the providers who are integrated voice, fixed line and mobile operators face a competitive advantage in the provision of fixed and mobile call prices. While you cannot match that pricing in fixed mobile it is very hard to justify making any investment in call services where you cannot get access to the same input costs on mobile termination. At the moment we believe that voice-over IP has got great potential to transform competition in the fixed line market but is being impeded by the inability of access seekers to get access to mobile termination at cost based prices.[98]

Declaration, investment and regulatory 'safe harbours'

4.116 A recurring argument is that the possibility of new services being declared deters investment in new infrastructure. This is not just because of the pricing constraints that may be imposed, but also because the Part XIC regime mandates

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96 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 37.

97 Mr Richard Thwaites, *Committee Hansard*, 11 April 2005, pp 41-42.

98 Mr David Havyatt, *Committee Hansard,* 11 April 2005, p. 33.

access where it may not otherwise have been given, undermining the business case for investment, and imposes compliance costs and delays on providers. The possibility of declaration of a service, therefore, makes the assessment of the return on investment in infrastructure difficult and uncertain.

4.117 This concern has been pressed predominantly by Telstra which, as the owner of the fixed local access network on which the majority of declared services are provided and the company widely seen as the most likely to make further investments, is the provider most affected by declarations.

Regulatory safe harbours

4.118 The original access regime introduced an access undertaking scheme which was intended to increase the certainty for both access seekers and providers about the terms on which access was given. However, in 2001, the Productivity Commission considered that 'mandated regulatory access still presents formidable regulatory risks to investors'.[99] As discussed above, this led to changes to the TPA in 2002 to provide mechanisms that would clarify in advance the regulatory setting for new infrastructure, so as to give potential investors certainty.[100] Telstra outlined the operation of these provisions:

> These mechanisms included:
>
> - **exemption procedure**: a carrier may apply for an exemption from the standard access obligations and the ACCC may grant this, subject to conditions and limitations, if the ACCC is satisfied that the exemption promotes the long term interests of end users;
> - **special access undertaking (SAU) procedure**: a carrier may offer an SAU to the ACCC on various terms and conditions. The ACCC will decide whether to accept the SAU based on whether the terms and conditions are reasonable and consistent with obligations to provide access.
>
> In this manner, significant amendments have been made to Part XIC to provide infrastructure owners with greater certainty so as to promote greater infrastructure investment. Telstra believes these amendments are useful in principle.[101]

4.119 The Committee heard conflicting views about the effectiveness of these amendments. While supporting the amendments in principle, Telstra still saw problems, as illustrated by its experience with the digitisation of HFC cable television network used by itself and Foxtel:

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99 Productivity Commission, *Telecommunication Competition Regulation*, Report No. 16, 2001, p. 294.

100 See paragraphs 4.27 to 4.29.

101 Telstra*, Submission* 25, p. 28.

> An exemption order [in relation to the digitisation of the HFC cable television network] was granted by the ACCC on the basis of an extensive access undertaking. Significant time was spent negotiating that undertaking with the ACCC, including in the context of addressing concerns arising from market inquiries. Digitisation proceeded on the basis of this exemption order at considerable cost. However, the ACCC's decision to grant an exemption was subsequently overturned on appeal, well down the track after digitisation had occurred - exposing the parties to considerable regulatory risk[102]

4.120 As Telstra noted, the Productivity Commission in 2001 used the Telstra/Foxtel digitisation to illustrate the need for increased regulatory certainty.[103] The uncertainty which still exists in the administration of the access regime, according to Telstra, leads to a 'continuing significant regulatory risk in relation to infrastructure investment in Australia'. Telstra argued that improvements were needed.[104]

4.121 While recognising the need for certainty, ACCC Chairman Mr Graeme Samuel stated that the ACCC considers that existing mechanisms are capable of ameliorating this type of uncertainty:

> Regulatory certainty means that they need to be able to know the regulatory rules under which they will operate prior to undertaking investments. That is a perfectly understandable requirement of business. Amendments to the telecommunications provisions in the Trade Practices Act, provide a mechanism for regulatory certainty, and that is by the process of anticipatory undertakings and/or exemptions. Approaches can be made to the commission for those sorts of processes to be put in place and then we will consider those in the context of broad public interest consideration. Public interest considerations will take account of the need for investment certainty, reasonable investment returns and, ultimately, the long-term interests of end users.[105]

4.122 Expanding on this general view, the ACCC referred to the three available mechanisms in the TPA (described above), which provide certainty in cases where investment in infrastructure is being contemplated:

> … we would need to have a look at the case that Telstra brought to us in making the investment. So, in a sense, it would be up to Telstra to choose from the mechanisms that currently exist in the Act. The mechanisms are to seek an anticipatory undertaking—in other words, to basically offer to provide access to competitors on terms and conditions which we would then have to assess—or, alternatively, to seek an exemption. Again, that

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102 Telstra, *Submission* 25, p. 28.

103 Productivity Commission, *Telecommunication Competition Regulation,* Report No. 16, 2001, p. 287.

104 Telstra, *Submission* 25, p. 28.

105 Mr Graeme Samuel, Senate Economics Legislation Committee, *Additional Estimates Hansard*, 17 February 2005, p. 7.

> exemption would have to be in the long-term interests of end users, so we would have to look it against the criteria of the Act. The third possibility is that we could set up an inquiry, which is a normal process, to determine whether that service should be declared.[106]

4.123 The argument that regulatory uncertainty inherent in the access regime impedes investment has led to calls for 'access holidays'. The manner in which such access holidays are implemented was not made clear to the Committee, but the Committee takes it to mean a non-discretionary statutory exemption from access obligations for a pre-determined period.

4.124 Mr Stephen Dalby from iiNet told the Committee that an access holiday for fibre to the home 'is a bit of an ambit claim':

> Telstra has floated that. Optus have their own version of an access holiday. It clearly would be disastrous for competition. From 1990 until now we have been going through this process of slowly getting more and more access to the core network infrastructure to the next size out. The whole next generation for however long—10, 15, 20 years—will mean you can probably pack your bags and go home.[107]

4.125 Mr Ross Kelso, a consultant, also argued that access holidays should not be given to an access provider that was dominant or likely to become dominant:

> [T]he ACCC has granted Telstra and Foxtel anticipatory exemption from access declaration on the basis that they would convert their analogue pay television network and systems to digital working. Not surprisingly, Telstra and Foxtel had previously threatened not to invest in such upgrading and had successfully delayed access for third parties by many years of litigation.
>
> Although that case is now history (with third party access to the Telstra/Foxtel network unfortunately rather unlikely to ever occur), we must re-examine the fundamental objective behind the Telecommunications Competition Act 2002 (No. 140) and ask the question – should every access provider gain benefit (by way of greater investment certainty) from such amendments to the telecommunications regulatory regime?
>
> On the premises that:
>
> • Effective competition between telecommunications carriage and service providers needs to be facilitated by the government as the highest priority;
>
> • As a dominant access provider of core infrastructure, Telstra has a long track record of lessening competition by inhibiting access for other providers;

106 Mr Joe Dimasi, Senate Economics Legislation Committee*, Additional Estimates Hansard*, 17 February 2005, p. 7.

107 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 51.

> • Any threat by Telstra not to invest in new infrastructure that exploits its existing areas of dominance (eg. in the customer access network, involving cables, pipes and pits; and in the rural trunk network) runs directly counter to the interests of its shareholders in the long term and should not be taken seriously;
>
> I submit that the [2002] amendments to Part XIC … should not apply to any access provider deemed to be dominant, or likely to become dominant, with regard to creation of the facilities or services in question.[108]

4.126 Mr Kelso went on to state:

> In contrast, competitive telecommunications carriage and service providers would remain able to take advantage of any exemptions from access declarations and approvals of undertakings granted by the ACCC for facilities or services not yet declared or supplied. In so doing, the competitive 'playing field' would be made more level for non-dominant players in the Australian telecommunications industry by denying dominant players an unnecessary 'free kick'.[109]

'Dark fibre'

4.127 Another issue which was raised with the Committee was the presence of infrastructure which is not being used in the form of 'dark fibre', that is, fibre optic cable which is not activated. Witnesses at the Dubbo hearing were concerned that they believed dark fibre was laid through the centre of Dubbo and nearby Narromine. Given the difficulties reported in that region in terms of broadband access, the Mayor of Narromine Shire Council stated:

> That represents an enormous opportunity for our local residents and businesspeople to access high-speed internet and communication services. Why does what is essentially a taxpayer owned company invest huge amounts of money in infrastructure and then not make it available to the very people who pay for it? Where is the regulatory power to ensure that infrastructure such as this fibre-optic cable is switched on and made available to communities and other telecommunications providers so that adequate services can be delivered?[110]

4.128 The general manager of the Narromine Shire Council stated that 'We have asked questions from a regional basis and Telstra have no answer'.[111] The Committee sought clarification from Telstra and was given only very general information in response.

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108 Mr Ross Kelso, *Submission* 31, pp 2-3.

109 Mr Ross Kelso, *Submission* 31, pp 2-3.

110 Mr Robert Barnett, *Committee Hansard*, 14 April 2005, p. 29.

111 Mr Paul Bennett, *Committee Hansard*, 14 April 2005, p. 31.

4.129 Mr Bill Scales explained that the presence of cable does not necessarily mean it is ready to be activated. Dark fibre is cable that has been laid to accommodate future demand or serve as a back-up if activated cables are damaged:

> It is really redundancy built into the system for future need. … It is effectively a line of fibre, it is not activated and it will be used at some point in the future.[112]

4.130 Mr Scales went on to explain that other vital infrastructure may be missing, which would require significant additional investment:

> [L]aying of cable is not where the largest part of the cost will be. Often it will be the provisioning of other elements of the network.[113]

4.131 In response to a question on notice on this issue, Telstra provided very little additional information:

> Telstra has over 3.6 million kilometres of optical fibre in its network connecting the majority of population centres, and these contain varying degrees of dark fibre, from none or very little in some cables to fairly large proportions in other cables.[114]

4.132 While there may be legitimate infrastructural and/or commercial reasons for not opening up dark fibre in these areas, Telstra's inability or unwillingness to provide more information is disappointing in light of the complaints from those living in rural and regional areas.

Conclusion

4.133 The Committee has queried how successful the access regime has been in promoting competition in services markets and encouraging the efficient use of, and investment in, infrastructure.

4.134 The Chairman of the ACCC recently observed that:

> … the competition that has emerged from this initial process [of regulation] continues to be heavily dependent on access and re-sale arrangements with competitors simply buying space on the Telstra network and competing on price rather than building their own facilities and offering different products and better performance.
>
> In the absence of any significant national roll out of competing infrastructure, it has not been possible to fully realise the benefits of more sustainable competition across the entire telecommunications sector. As a result, maintaining competition has required an even greater reliance on

112 Mr Bill Scales, Group Managing Director, Corporate and Human Relations, Telstra, *Committee Hansard,* 4 May 2005, p. 74.

113 Mr Bill Scales, *Committee Hansard,* 4 May 2005, p. 76.

114 Telstra, *Submission* 25A, p. 3.

> access regulation – instead of the winding back that was envisaged when telecommunications was opened up to full competition.[115]

4.135 The evidence the Committee has received suggests that most of the competition at the services level has been in metropolitan areas: there has been far less in outer metropolitan and regional areas.

4.136 While there has been some competition at the facilities level, this has largely been in access networks in some business districts and in transmission infrastructure between major metropolitan markets. There is also emerging competition in ULLS services as some firms install their own equipment in Telstra exchanges.

4.137 Some of these outcomes might be expected. Some infrastructure is regarded as having natural monopoly characteristics and is therefore less likely to be efficiently duplicated. Facilities based competition might be expected to be more prevalent in markets without that characteristic. However, there is evidence of under-investment in facilities where it might be expected and overbuilding of infrastructure in others.

4.138 That widespread facilities competition has not emerged may simply be the outcome of commercial considerations. However, evidence before the Committee suggests that deviations from what is expected may reflect deficiencies in the regulatory environment and impediments created by owners of bottleneck facilities. In the Committee's view, infrastructure investment by competitive carriers in the Australian telecommunications sector has been inhibited by the shortcomings of the current regulatory regime.

115 Mr Graeme Samuel, speech to Australian Telecommunications Users Group, 10 March 2005.

Chapter 5

Consumer issues

> Existing consumer safeguards are based on the lowest common denominator, the standard telephone service, and this is no longer relevant to most small, micro and home based businesses and to a large proportion of residential consumers.[1]
>
> I do not believe it is acceptable to have a data service in remote parts of our region where you can go and boil the jug and drink half the coffee before the data is downloaded.[2]

5.1 An important focus of this inquiry was the extent to which the current regulatory regime protects consumers. Specifically, the Committee was asked to inquire into the extent to which the Universal Service Obligation meets the increasing consumer demand for reasonable telecommunications services (paragraph 1(g)); whether consumer protection safeguards in the current regime provide effective and comprehensive protection for service users (paragraph 1(d)); and whether other changes could be made to the current regulatory regime to protect consumers (paragraph 1(k)).

5.2 As noted in Chapter 4, the Telecommunications Act provides that one of the main objects of the regulatory regime is to promote the 'long term interests of end users'.[3] However, there has been significant criticism in recent years from consumer groups such as the Australian Consumers' Association, which claims that there is a 'crisis of consumer confidence'[4] in the telecommunications market caused by the self-regulatory regime that has failed to protect consumers.[5]

5.3 This chapter looks at whether the consumer protection measures in the current regime are working, particularly in relation to whether Australians receive adequate and reasonable telecommunication services. The following issues are discussed in turn:

- the framework for consumer protection;
- the DCITA Review 2004;
- the Universal Service Regime;

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1 Mr Ewan Brown, SETEL, *Committee Hansard*, 11 April 2005, p. 50.

2 Mr Tom Warren, ODEC, *Committee Hansard*, 14 April 2005, p. 49.

3 Telecommunications Act, section 3.

4 Australian Consumers' Association submissions to Environment, Communications, Information Technology and the Arts References Committee 2002 Inquiry into the *Australian Telecommunications Network* and the Legislation Committee's 2003 Inquiry into the *Provisions of the Telstra (Transition to Full Private Ownership) Bill 2003.*

5 Australian Consumers' Association, *Submission* 16, p. 12.

- the Customer Service Guarantee (CSG);
- industry codes and standards;
- the Telecommunications Industry Ombudsman (TIO); and
- other issues.

The framework for consumer protection

5.4 The framework for consumer protection in telecommunications matters has been described, in an understatement, as 'not elegantly ordered', due to:

> … having to incorporate an accumulated pastiche of legislative obligations inherited from past licence obligations, general consumer protection laws, ministerial powers and new requirements to develop and adhere to industry-specific codes, within a regime whose policy is to promote 'the greatest practicable use of self-regulation'.[6]

5.5 A range of bodies has responsibilities in consumer issues, including:

- the ACA, which is responsible for registering industry codes and making industry standards, monitoring and reporting on consumer issues and public information;
- the ACCC, which administers the general consumer protection provisions of the TPA and has a role in price monitoring and reporting, as well as being required to be consulted about industry codes and standards;
- the Telecommunications Industry Ombudsman (TIO), an independent complaint-handling body;
- ACIF, the peak industry self-regulatory body which is primarily responsible for developing industry codes;
- the Telephone Information Services Standards Council (TISSC), which regulates Australian telecommunication services with the prefix 190 in relation to message content and advertising; and
- the Office of the Federal Privacy Commissioner, which must be consulted in the development of industry codes and standards concerning privacy issues.

Universal Service Regime

5.6 The universal service regime, set out in Part 2 of the *Telecommunications (Consumer Protection and Services Standards) Act 1999* (the TCPSS Act), consists of the Universal Service Obligation (USO) and the Digital Data Service Obligation (DDSO). The regime is funded by an industry levy imposed under the *Telecommunications (Universal Service Levy) Act 1997*.

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6 Holly Raiche and Alasdair Grant, 'Consumer and Community Issues', *Australian Telecommunications Regulation* (3ed), Alasdair Grant (ed), UNSW Press, 2004, p. 240.

Universal Service Obligation

5.7 The USO requires certain services to be provided by the Universal Service Provider, which is currently Telstra. The ACA has not approved any competing universal service providers to date. Telstra is compensated through the Universal Service Levy imposed on all carriers.

5.8 The USO ensures that all people in Australia, wherever they reside or carry on business, have reasonable access, on an equitable basis, to:

(a) standard telephone services (STS);

(b) payphones; and

(c) prescribed carriage services (none have yet been prescribed).

5.9 The ACA defines the STS as the basic fixed telephone used to speak with people in other locations. Telephone companies are required to provide features which include access to:

- local, national and international calls;
- 24 hour access to the emergency call service number;
- operator assisted services;
- directory assistance; and
- itemised billing, including itemised local calls on request.[7]

5.10 As the Universal Service Provider, Telstra must supply a telephone service to places of residence and businesses upon request, including a suitable handset where requested. The service is subject to normal commercial charges and to government price caps where these apply. Comparable services must also be provided for people with disabilities (discussed further below). The USO does not include mobile services, the Internet or other enhanced telecommunications services.

5.11 Telstra is also obliged to have a policy statement and marketing plan, approved by the ACA, which outlines how Telstra intends to fulfil its obligations as the universal service provider, including its obligations to people with a disability, those with special needs and eligible priority customers.

5.12 A central object of the USO is that any losses resulting from supplying the required services will be compensated by subsidies determined by the Minister upon advice from the ACA.[8] USO subsidies are available for the supply of services in a universal service area up to three years in advance.

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7 ACA website, 31 May 2005, at: http://www.aca.gov.au/consumer_info/fact_sheets/consumer_fact_sheets/fsc08.htm.

8 Subsidies are determined according to sections 16, 16A and 16B of the TCPSS Act.

Digital Data Service Obligation (DDSO)

5.13 The DDSO is the obligation placed on a digital data service provider to ensure that digital data services are accessible, on an equitable basis, to all people in Australia, wherever they reside or carry on business. The DDSO consists of two obligations:

- the general DDSO for people in general digital data service areas (approximately 96% of the population); and
- the special DDSO for people in special digital data service areas (approximately 4% of the population, usually living or working at a distance of more than 4.5 kilometres from their local telephone exchange).

5.14 The special and general digital data service provider is obliged to have in place a special and a general digital data service plan that sets out how it will fulfil its obligations within each area.[9] Telstra is currently the sole digital data service provider.

5.15 Digital service is generally an ISDN service with a data transmission rate of 64 kbits per second, which is higher than generally available over the ordinary telephone network.[10]

Customer Service Guarantee

5.16 Another consumer safeguard is the Customer Service Guarantee (CSG), an instrument of the *Telecommunications (Customer Service Guarantee) Standard 2004 (No. 1)*.[11] The object of the CSG Standard is to encourage improvements in service and guard against poor service.

5.17 The CSG is a legal requirement that all telephone service providers meet specified timeframes to connect services, repair reported faults and keep appointments, subject to limited exceptions. The CSG is designed to encourage improvements in services from carriage service providers, such as timeliness of supply and to safeguard residential and small business consumers against poor performance.[12]

5.18 Carriage service providers have an incentive to comply with the CSG Standard since compensation payments must be paid to customers if standards are not

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9 ACA website, 17 March 2005, at: https://www.aca.gov.au/telcomm/universal_service_regime/universal_service_obligation/overview/usointro.htm.

10 ACA website, 20 June 2004, at: https://www.aca.gov.au/consumer_info/fact_sheets/consumer_fact_sheets/fsc62.htm.

11 As amended by sections 115, 117 and 120 of the *Telecommunications (Consumer Protection and Service Standards) Act 1999.*

12 DCITA, *FAQ*, website, 5 May 2005 at: http://www.dcita.gov.au/tel/faqs/consumer_rights_and_benefits/faq_-_telephone_service_consumer_safeguards_for_all_australians.

met, unless an exemption applies, for example, with the roll-out and development of some new services.[13] In cases of systemic breaches, the ACA can issue remedial directions.[14]

5.19 The CSG complements the USO by setting a standard for timely connection and repair of services that a primary universal service provider needs to maintain when fulfilling its minimal service obligation.[15]

DCITA Review 2004

5.20 In late 2003, the Minister for Communications, Information Technology and the Arts asked DCITA to review and report[16] on the operation of the USO and the CSG, and whether the contestability regime and alternative telecommunications services had resulted in improved technologies and services for rural and remote Australia compared with metropolitan areas.[17]

The CSG

5.21 The DCITA review, released in April 2004, concluded that the CSG arrangement is 'currently promoting the objects of the Act' in that it has proven to be an 'effective mechanism for providing timely connection and repair of fixed telephone services across Australia'.[18] The review also stated that any adverse effects compliance has on competition and industry efficiency continue to be outweighed by benefits to consumers. The review concluded that no changes to the CSG Standard were required, but the situation should be monitored.[19]

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13 See below, and Ms Corbin, CTN, *Committee Hansard* 13 April 2005, p. 31.

14 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 199, website 5 May 2005, at: http://www.dcita.gov.au/__data/assets/pdf_file/10103/Review_of_the_Operation_of_the_Universal_Service_Obligation_and_Customer_Service_Guarantee.pdf.

15 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 200.

16 In accordance with section 159A of the TCPSS Act.

17 DCITA, *Universal Service Obligation and Customer Service Guarantee Review,* June 2004, accessed 17 April 2005, at: http://www.dcita.gov.au/tel/fixed_telephone_services/industry_issues/the_universal_service_obligation_uso/universal_service_obligation_uso_and_customer_service_guarantee_review_csg/universal_service_obligation_and_customer_service_guarantee_review/contents/executive_summary.

18 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 221.

19 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 221.

The USO

5.22 In relation to the USO, the DCITA review considered that the existing regulatory arrangements broadly met, but did not best promote, the objects of the Telecommunications Act and Part 2 of the TCPSS Act. The review stated that the primary obligations - that the STS and general digital and special digital data services are 'reasonably accessible to all people in Australia on an equitable basis' - were appropriate and worked well. The review also found that the ministerial powers of determination and the requirement that universal service providers have an approved policy statement and an approved standard marketing plan (SMP) were both appropriate.[20]

5.23 However, the DCITA review found difficulties in the definition of the STS, the costing model and the funding arrangements. The review also found that the needs of people with disabilities and Indigenous Australians were not well met and required further attention, and suggested that some specific changes to Telstra's current SMP should be made. The review stated that 'some practical and emerging difficulties are evident with the current definition of, and provisions for, the STS', and advised that a review appeared warranted.[21]

5.24 The review reported that many stakeholders considered the current USO cost model was no longer viable.[22] The funding arrangements also appeared problematic, in that they reduced the incentive for market entry by other providers, inhibited the development of advanced services in regional, rural and remote areas, impeded the development of competition in non-metropolitan Australia and had little direct effect on Telstra's investment decisions about where and how it meets its USO obligations.[23]

DDSO delivery arrangements

5.25 The DCITA review considered that the DDSO arrangements did not need change. The DDSO was being supplied on a reasonable and equitable basis[24] and Telstra had displayed high rates of performance in connecting and repairing services

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20 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 56.

21 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 56.

22 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 99.

23 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 129.

24 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, pp 47-48.

under the DDSO. The review found that the need to fund the DDSO, therefore, was less significant than the need to fund the STS provision under the USO.[25]

5.26 The Special Digital Data Service Obligation (SDDSO), however, is subject to an industry funded equipment subsidy that is paid to subscribers to help with the additional expense purchasing equipment required to access the SDDS.[26]

Criticism of services under the USO

5.27 During this inquiry the Committee heard repeated criticism of the USO, particularly in rural and regional areas, in terms of services currently being provided, the limited range of the USO and the funding arrangements.

The standard telephone service

5.28 Several witnesses in rural Australia argued that the STS offered to them is not 'reasonable and equitable' compared with similar services in metropolitan Australia. Many argued that the STS should include mobile phones. For example, Mr Tom Warren from the Orana Development and Employment Council (ODEC) in western New South Wales stated:

> … in this age of modern technology, it is reasonable to expect a reasonable service at a reasonable price to be delivered under accepted universal service obligation provisions. My board believe that at this point in time the telecommunications companies are not delivering according to their obligations.[27]

5.29 A particular concern is safety in rural areas when there is no access to mobile telephones in emergencies. Mrs Tess Le Lievre from Louth in outback NSW gave an example:

> I cannot get through to anybody if something goes wrong. My son once tipped over the four-wheeler. He was upside down. I do not know what happened but they rang the Broken Hill flying doctor and for some reason—it has never happened before or since—they did not get through. They ended up ringing Bourke and the ambulance came down … It was a very slow trip up. It is the accidents that frighten me. I feel we are an accident waiting to happen.[28]

5.30 Others expressed concern about untimed local calls. All service providers offering standard telephone services are required to offer an untimed local call option

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25 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 104.

26 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 104.

27 Mr Tom Warren, *Committee Hansard*, 14 April 2005, p. 49.

28 Mrs Tess Le Lievre, *Committee Hansard*, 14 April 2005, p. 52.

in standard zones.[29] However, the practical effect of this obligation is different in rural areas. One witness told the Committee at the Dubbo hearing:

> I get an area with a 32-kilometre radius of approximately 3,000 square kilometres where I can make untimed local calls. In Gadooga there are three seven-digit prefix numbers, which means that I can contact only 300 people. If I was in the same 32 kilometres in the electorate of Grayndler [in Sydney] I could dial up approximately three million people on the Sydney charge point for the same price.[30]

Costing and funding of the USO

5.31 The DCITA review in 2004 considered three options for improving the USO subsidy scheme:

- developing a new costing scheme for the USO (payphones and the STS), accommodating the SDDS in the funding and planning 3 to 5 years in advance;[31]
- retaining the policy of Telstra receiving subsidies from industry, and setting a minimum threshold for 'eligible revenue', with all carriage service providers above a set 'eligible revenue' contributing to USO funding;[32] or
- requiring Telstra to fund all costs associated with fulfilling the historic telephony USO.[33]

5.32 The DCITA review concluded that the third option, funding by Telstra, was preferred:

> … because it would resolve many of the contentious issues that have surrounded the USO funding scheme since its inception, is administratively efficient, would have few major negative effects, and equity concerns with this approach can be addressed in other ways.[34]

5.33 The Committee notes, however, that the Government has made no changes to the costing and funding regime since the DCITA Review. The Committee notes that USO subsidies have been steadily reduced from $240m in 2001-02 to $211,335,923 in

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29 TCPSS Act, Part 4.

30 Mr Michael Davis, *Committee Hansard*, 14 April 2005, p. 54.

31 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 100.

32 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 129.

33 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 158.

34 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 159.

2004-5.[35] On 31 August 2004 the Minister sought advice from the ACA on USO subsidies for the next three years, and announced those subsidies on 30 June 2005.[36] The subsidies are $171,403,872 in 2005-06, $157,691,562 in 2006-07 and $145,076,237 in 2007-08.

5.34 During this inquiry the Committee heard various criticisms of the costing regime. Optus argued that the industry subsidy should end in 2007-08 when the then current subsidies ended:[37]

> Telstra should fund the USO itself; it should no longer receive a cross subsidy from its smaller less profitable competitors. Telstra obtains significant advantage from being the USO provider which means it is highly unlikely that USO services are loss making at all. Further, it is anti-competitive for smaller, less well resourced providers to have to pay a subsidy for Telstra's rural and regional services. This is a significant impediment to rural and regional telecommunications infrastructure investment.[38]

5.35 AAPT expressed a similar view,[39] as did ATUG:

> Our economic analysis suggests that there is no sustainable case for a cross-subsidy of the USO. Where you have such a strongly entrenched incumbent, with so many benefits that it gains from incumbency, we think it is quite a reasonable trade-off for the USO to be simply an unfunded licence condition.[40]

5.36 The Committee notes that arguments that Telstra should fund the USO often referred to overseas experience where the incumbent bears the costs:

> In the UK, for instance, British Telecom provides USO services without compensation, because the regulator has found the intangible benefits are greater than the actual USO costs. … The Nordic countries provide a particularly interesting comparison. They face challenges in the delivery of ubiquitous telecommunications services similar to those we face in Australia: large geographic land masses; dispersed populations; and

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35 DCITA, website, 31 May 2005, at: http://www.dcita.gov.au/tel/fixed_telephone_services/industry_issues/the_universal_service_obligation_uso#1.

36 See: http://www.minister.dcita.gov.au/media/media_releases/uso_subsidies_set_for_next_three_years.

37 Optus, *Submission* 12, p. 4.

38 Optus, *Submission* 12, p. 4; pp 8ff, also cites the DCITA Review in support of Telstra funding the USO.

39 AAPT, *Submission* 13, p. 10.

40 Mr Richard Thwaites, *Committee Hansard*, 11 April 2005, p. 40.

> extreme climatic conditions. In these countries the incumbent bears the cost of the USO in full.[41]

5.37 The Committee notes also that the DCITA review discussed above concluded that Telstra should fund the USO.[42]

5.38 Telstra, however, expressed concerns about the current funding arrangements, stating that it was 'continuing to under-recover its costs of providing service to rural areas', that the current payments from industry were not sufficient and that Telstra bore 'a disproportionate burden of these costs'.[43] Telstra also pointed to Australia's international obligations:

> … as set out in the WTO Regulatory Reference Paper which forms part of the WTO Agreement on Basic Telecommunications. The Reference Paper contains the following obligation, emphasising the principle that the cost burden of a USO is to be spread on a non-discriminatory basis between industry participants so that one participant (i.e., Telstra) does not bear a disproportionate burden of the costs:
>
> > "Universal Service: Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member."[44]

5.39 The NFF also argued strongly for all providers to continue to fund the USO, and even suggested that not only should an obligation 'be placed on those who share in the benefits of this minimum universal service to actually provide such a service', but that:

> All providers must contribute to the provision of services, infrastructure and the costs related to the fulfilment of the USO, recognising the benefits, both tangible and intangible that all providers receive from the existence of the USO.[45]

5.40 Telstra argued that if the USO were expanded (as discussed below), it should be fully funded, as there would be substantial additional costs of rolling out services in rural and remote areas:

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41 Optus, *Submission* 12, pp 13-14.

42 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 158, website 5 May 2005, at: http://www.dcita.gov.au/__data/assets/pdf_file/10103/Review_of_the_Operation_of_the_Universal_Service_Obligation_and_Customer_Service_Guarantee.pdf.

43 Telstra, *Submission* 25, p. 5.

44 Telstra, *Submission* 25, p. 45.

45 NFF, *Submission* 15, Appendix "A", note 13, p. 7.

> The USO is essentially a means by which Australian consumers living in lower-cost CBD and metropolitan areas cross-subsidise the higher costs of providing telephony services to Australian consumers living in high-cost rural and remote areas of Australia. … Indeed, in some instances it is simply not economic to roll-out a fixed line network (hence consumers are provided with services such as satellite phones). The majority of the costs of meeting these requirements are ultimately borne by Telstra's shareholders.[46]

5.41 Telstra called for 'careful policy consideration' if any decision were made by to increase the scope of the USO, stating:

> The benefits to rural and regional consumers will need to be balanced against the costs to the remainder of Australia.
>
> Furthermore, much of the cost of an extended USO would never be recovered. … Given that the USO is a Government social policy, any non-recoverable rollout costs should be appropriately funded from general taxation revenue or via consumer or industry levies in relation to USO funding, consistent with the practice of almost every other industry subject to community service obligations.[47]

5.42 A submission from Mr Doug Coates, private citizen, warned the Committee about Telstra's predicament as the universal service provider:

> The Committee needs to be aware of the Magic Puddin' syndrome. The way this syndrome works is that politicians and their constituents seek to increase the standard of service, thus raising its cost, whilst at the same time reducing the allowable USO cost so as to limit the cost burden on the industry. Telstra is the magic puddin', which by some unknown miracle is able to provide higher-level services at lower costs.[48]

5.43 The Committee notes that the Minister has recently announced that the Government does not intend to change the current USO costing and funding arrangements.[49]

Contestability arrangements

5.44 Under the contestability regime developed in 2002, pilot programs were designed to encourage service providers to bid for the right to be the universal service provider in specific areas. The regime was developed in response to claims that:

- the net cost of USO delivery was not accurate;

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46 Telstra, *Submission* 25, p. 45.

47 Telstra, *Submission* 25, p. 45.

48 Mr Doug Coates, *Submission* 2, p. 5.

49 Senator the Hon Helen Coonan, 'Telecommunications safeguards to remain', *Media release*, 086/05, 28 July 2005.

- Telstra was not responsive to rural and remote consumers in respect of the quality and timeliness of USO services;
- there was a lack of choice for consumers; and
- there were no incentives for carriers to enter regional areas.[50]

5.45 The DCITA review found in 2004 that it was hard to draw firm conclusions about the contestability arrangements. The review pointed out that there was no competitive entry due to Telstra's substantial economies of scale in the pilot areas, and subsidy levels being too low to attract any new competition.

5.46 The review concluded that the contestability regime should remain in place in case of renewed commercial interest, and an approved telecommunications service as an alternative to the STS should be retained because it has potential in supplying services to Indigenous communities. However, the review stated that:

> … the lack of interest in contesting USO subsidies suggests little value in continuing pilots after 30 June 2004.[51]

5.47 ATUG's submission to the DCITA Review, which ATUG presented to the Committee, noted the failure of the contestability pilot program, stating that it indicated 'that there is no role for the USO scheme in developing competitive infrastructure'.[52] Telstra used the lack of interest in the pilot program to support its claims about the cost of fulfilling the USO.[53]

5.48 While the DCITA review could not reach firm conclusions about the contestability arrangements, it did point out that:

> As a result of this lack of interest, there is no evidence indicating that the contestability regime, and the ability to offer alternative telecommunications services, has resulted in an improvement in technologies and services available to people in rural and remote Australia compared with what is on offer in metropolitan Australia.[54]

5.49 The Committee notes that it appears other measures are required to foster competition in regional areas.

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50 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 73.

51 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, pp 75-76.

52 ATUG, *Submission* 20, p. 17.

53 Telstra, *Submission* 25, p. 43.

54 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, pp 75-76, website 5 May 2005, at: http://www.dcita.gov.au/__data/assets/pdf_file/10103/Review_of_the_Operation_of_the_Universal_Service_Obligation_and_Customer_Service_Guarantee.pdf.

Expanding the USO

5.50 The Committee heard differing views about the effectiveness of the current USO in providing 'reasonable and equitable access' to telephones and payphones in regional and remote areas. The Committee also heard different views on what should be done to improve access to the developing technologies such as internet, mobile phone services and broadband.

5.51 The Estens Report in 2004 concluded that the USO was not an effective mechanism for providing broad consumer access to an increased range of services, and that other more appropriate policy options such as government-funded incentive schemes were available to achieve future equity objectives.[55]

5.52 Service providers like AAPT and Optus supported those views, claiming that the USO is sufficient as it stands.[56] For example, AAPT argued that the USO regime is effective in what it set out to do - preserving an existing level of service - but that it is not adaptable for delivering new services. Furthermore:

> AAPT continues to believe that new access infrastructure should be developed in regional areas separately from the activities of any service provider. It should not require any direct funding, but may need protection from overbuild from Telstra.[57]

5.53 AAPT also argued that the USO regime creates the perception that, unless services are subsidised, they will not or should not be delivered.[58]

5.54 Similarly, Optus supported a separately developed broadband infrastructure scheme, such as through the Higher Bandwidth Incentive Scheme (HiBIS)[59] and the Cooperative Communications Infrastructure Fund. Optus argued that funding 'should be directed to support competitive broadband platforms (DSL, wireless and satellite)'.[60] ATUG also stated:

> Given the requirement for Government funding for many of these projects and general agreement that the USO should not be extended to mobiles or broadband provision, ATUG believes carriers building competing infrastructure should not be required to contribute to the USO funding scheme.[61]

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55 Regional Telecommunications Inquiry, *Connecting Regional Australia*, 2002, Finding 7.3, p. 263.

56 Optus, *Submission* 12, p. 4; AAPT, *Submission* 13, p. 10.

57 AAPT, *Submission* 13, pp 10-11.

58 AAPT, *Submission* 13, pp 10.

59 HiBIS is discussed in detail below.

60 Optus, *Submission* 12, pp 14-15.

61 ATUG, *Submission* 20, p. 17.

5.55 By contrast, some organisations that deliver programs to people in rural and remote areas strongly supported expansion of the USO to include new technologies.

Support for the inclusion of broadband in the USO

5.56 The Committee heard from many witnesses that the USO should contain broadband.[62] Indeed, it was pointed out that the current obligation to provide universal telephone connection to all residents is something that a country like Bangladesh would now be considering.[63] It was argued that Australia's universal obligation should at least include access to the Internet and mobile phones.[64]

5.57 As noted at the start of this chapter, Mr Ewan Brown from SETEL told the Committee that the STS:

> … is no longer relevant to most small, micro and home based businesses and to a large proportion of residential consumers. SETEL believes that a higher universal service benchmark would enable much greater competitive supply of services commensurate with economies of scale.[65]

5.58 As outlined in Chapter 2, particularly strong concerns were expressed in regional Australia by small businesses that rely on broadband in order to remain competitive with business in the capital cities.

5.59 Mr Lee of the Western Australian Local Government Association (WALGA) stated that the USO, the DDSO and the special DDSO should be rewritten to be more technologically indexed, so as to ensure that the service to people in regional areas is up to date and compatible with that in metropolitan areas. He argued that the convergence of voice and data technologies needs to be considered in the context of making such special provisions.[66]

5.60 The WALGA, as 'a major service provider to, and custodian of community interests across the state, especially in the rural and remote context',[67] presented a clear case for expanding the USO. Stating that the USO and the DDSO were central 'pillars' in meeting consumers' telecommunications needs, WALGA claimed that the

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62 Ms Teresa Corbin, CTN, *Committee Hansard,* 13 April 2005, p. 31; Mr Peter Knox, ACE, *Committee Hansard,* 13 April 2005, pp 104-105.

63 Mr Paul Budde, *Committee Hansard,* 13 April 2005, p. 50.

64 For example, CTN, *Submission* 30, pp 6-7.

65 Mr Ewan Brown, *Committee Hansard*, 11 April 2005, p. 50.

66 Mr Alden Lee, *Committee Hansard*, 29 April 2005, p. 9.

67 WALGA, *Submission* 22, p. 1.

Western Australian government's Telecommunications Needs Assessment (TNA)[68] provides empirical support for the view that the STS effective minimum throughput of 19.2kbps is insufficient for consumer needs. WALGA supported a bi-annual review of the USO, a minimum equivalent data transmission requirement in the USO of 28.8kbps and incremental raising of the data transmission requirement over time.[69] A regular review should compare the level of technology to metropolitan and regional areas, so that services in regional areas could be maintained at a higher technological level.[70]

5.61 Other submissions called for an annual review of the USO. For example, Mr Malcolm Moore stated:

> The USO has been partially effective in ensuring that all Australians have some access to reasonable telecommunications services, but the USO needs to be regularly (annually) amended to reflect the respective changes in technology requirements to be in line with those in major capital cities.[71]

5.62 However, the Communications Electrical and Plumbing Union (CEPU) warned that the issue of whether broadband should be included in the USO could not be considered in isolation from 'the other policy issues (retail price regulation, access pricing, structural arrangements)'. The CEPU argued 'Contrary to the wishful thinking of the Page Report, there are no short cuts to an equitable broadband future'.[72]

5.63 The Townsville Council also supported regular reviews of telecommunication services across the country in order to deliver equitable services, and specifically supported the views of the WALGA.[73] However, the Townsville Council stated that the Estens Report recommendations on regional services:

> … assume that future governments (even when strapped for cash!) will fund such community service obligations. This is not a safe or sensible assumption from the perspective of regions such as North Queensland. It is

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68 Released in July 2003 by the Western Australian Department of Industry and Resources, the TNA is a comprehensive examination of access to, and satisfaction with, communications services across regional Western Australia, It focused on standard phones, mobile phones, internet and high speed data (broadband), broadcasting (radio and television), and access to communications support services (training, sales, support) for regional Western Australians. WADIR website, accessed 23 May 2005 at: http://www.doir.wa.gov.au/businessandindustry/78014A8643AD499E9504C8F1B0951AE3.asp.

69 WALGA, *Submission* 22, p. 3.

70 Mr Alden Lee, *Committee Hansard,* 29 April 2005, p. 9.

71 Mr Malcolm Moore, *Submission* 6, p. 10.

72 CEPU, *Submission* 40, p. 30.

73 *Regional Telecommunications Inquiry Report* (Estens Report), 2002, Recommendations 9.1 and 9.6.

> preferred that part of the proceeds from T3 be allocated for a pool of funds sufficient to cover a CSO of this nature.[74]

Voice over internet protocol (VoIP)

5.64 IP is a standards-based packet switched network protocol, initially adopted as the main network protocol for the Internet and able to be used to transport not only data but also voice and video across all types of networks. The Australian Consumers' Association stated that the use of IP to transport voice traffic is now becoming commercially viable.[75]

5.65 Some submissions and witnesses to this inquiry agreed that the USO should include VoIP facility. However, there was concern about how this should be achieved and how the VoIP roll-out is currently being managed. Ms Corbin from CTN stated:

> … the current practice is that, while the new service is rolling out and being developed, [new service providers] can apply to the authority for exemptions on some regulation, and one of them is the CSG. We have asked for more transparency, consultation and accountability about these exemptions because we are really concerned about them undermining the customer service guarantee in the long run.[76]

5.66 The Australian Consumers' Association also commented on VoIP, explaining that:

> Using IP packets to transmit voice is much more efficient as there is no concept of dedicated point-to-point circuits. This should allow much cheaper voice services to consumers, as well as integration of voice services into other data application. However, key challenges remain in maintaining quality of service (QOS) and coping with the disruptive challenges the approach poses to traditional voice telephony regulation – such as price controls. [77]

5.67 Telstra owns the major cable network and the traditional copper voice telephony wires. Thus while Telstra is rolling out test VoIP services and smaller providers are piggy backing on existing broadband services, the lack of infrastructure prevents VoIP competition. The Australian Consumers' Association stated:

> We fear this could mean delay in making this technological development [VoIP] available to Australian consumers [which has the] potential to dramatically lower prices.[78]

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74 Townsville Council, *Submission* 34, p. 2.

75 Australian Consumers' Association, *Submission* 16, p. 9.

76 CTN, *Submission* 30, p. 4; Ms Teresa Corbin, *Committee Hansard,* 13 April 2005, p. 31.

77 Australian Consumers' Association, *Submission* 16, p. 9, footnote 19.

78 Australian Consumers' Association, *Submission* 16, p. 9.

5.68 The Committee recognises the importance of VoIP on broadband for regional and remote Australia in the near future as the means of carrying voice. Mr Paul Budde made specific reference to the limited future of voice through copper wire. In referring to the successful competition that currently exists between service providers with voice, he argued that:

> Voice, of course, is on the way out—it is a dead product. You can try to milk it as long as possible, of course, but, as I indicated, over the next five to 10 years it is only 10 per cent of total telecommunications revenue.[79]

5.69 The Committee heard that voice through copper wire is best provided at present in tandem with other services. iiNet, for example, claims continuing success with telephony through the standard wire network when bundled with other products:

> We are reselling another carrier's telephony products at the moment, and that has grown quite substantially. The marketplace seems to cry out for bundled products, so it is probably not viable these days in Australia to just be an internet provider, to just be a dial-up provider or to just be an ADSL provider. You seem to have to offer the whole bundle in order to compete with the major carriers.[80]

Hearing and speech impaired customers

5.70 The Australian Communication Exchange[81] (ACE) supported the inclusion of broadband in the USO on the basis that the universal service provider must ensure that visually and hearing impaired people are able to be looked after better by the National Relay Service (NRS). ACE provides the NRS under contract to DCITA. The NRS provides people who are deaf or have a hearing and/or speech impairment with access to an STS on comparable terms to those enjoyed by other Australians.[82]

5.71 The Committee notes ACE's concerns about the erosion of equal telecommunications access, including emergency calls on mobile phones, for people who are deaf or have a hearing or speech impairment, since the closure of the analogue mobile phone network in 2000, and the introduction of digital and Internet Protocol (IP) networks.[83] A DCITA survey in 2004 of 911 respondents revealed that 74% of impaired people could not access TTY away from home, that the most popular options for communications were TTY, SMS and mobile phone, and that almost half those people lived in households with income less than $30,000 per annum.[84]

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79 Mr Paul Budde, *Committee Hansard,* 13 April 2005, p. 50.

80 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 37.

81 ACE, *Submission* 7, p. 5.

82 As defined by section 95 of the TCPSS Act. See ACE, *Submission* 7, p. 1.

83 ACE, *Submission* 7a, p. 1.

84 ACE, *Submission* 7a, p. 2.

5.72 ACE also raised the definition of the STS, referring to the importance of having:

> … a more flexible and forward looking definition of a Standard Telephone Service and the significant benefits available to deaf, hearing impaired and speech impaired Australians from the availability of appropriate broadband technologies.[85]

5.73 Since 2001, various inquiries into the needs of speech and hearing-impaired people in Australia have made a range of recommendations. These have included calls to provide hearing impaired people with mobile telephones compatible with hearing aids, portable wireless devices that can use the NRS and video compression and transmission technology for video communication using sign language.[86] Others have suggested DCITA should develop costing models and funding arrangements for deaf people using Auslan to be able to afford videotelephony[87] and the requirement for an industry-wide, carrier independent, telecommunications disability equipment program, for people with disabilities.[88] This Committee's report in 2004 on the Australian telecommunications network also recommended an equipment program and a consultative planning process for the introduction of new telecommunications technology.[89]

5.74 Mr Peter Knox on behalf of ACE argued that, if broadband were provided through the NRS as part of the USO, speech and hearing impaired people would be able to use internet telephony, which is more suited to text than voice, to their great and lasting benefit.[90] He also pointed out that the cost of providing appropriate broadband technologies for access by the speech and hearing impaired is not great, particularly when seen in the light of getting such people into useful employment.[91]

5.75 The Australian Association of the Deaf Inc (AAD) also raised the issue of pricing regimes for the deaf in Australia, claiming that the efficient use of the

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85 ACE, *Submission* 7, p. 2.

86 House of Representatives Standing Committee on Communications, Information Technology and the Arts, *Connecting Australia: Wireless Broadband*, November 2002, p. 47, Recommendation 12 [para. 6.25].

87 HREOC, *When the Tide Comes In: Towards Accessible Telecommunications for people with Disabilities in Australia,* 2003, Recommendation 21.

88 ACE, *Submission* 7, p. 3. The principles for the provision of such equipment were identified at an ACIF forum in 2001 and published in the ACIF *Alert newsletters,* Autumn, Winter and Spring, 2001.

89 Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian telecommunications network*, August 2004, Recommendations 14 and 15, p. 147.

90 ACE, *Submission* 7, pp 4-5.

91 Mr Peter Knox, *Committee Hansard,* 13 April 2005, p. 104.

broadband videophone requires minimum bandwidth speeds of 384/384 upload/download with unlimited download capacity:

> Also required is a fixed Internet Protocol (IP) address. Current broadband pricing regimes that provide the required service are priced at premium rates thereby reducing Deaf consumer participation. As Broadband Videophones are widely used in the US and UK, it would seem reasonable to look at this technology as the acceptable voice equivalent means of communication for Deaf people. It is only fair that IP providers make their services accessible to all and that these services are affordable.[92]

The HiBIS model

5.76 The Higher Bandwidth Incentive Scheme (HiBIS) is part of the National Broadband Strategy, which commenced in 2003 with $107.8 million available over four years. On 7 July 2005, the Minister for Communications, Information Technology and the Arts, Senator the Hon Helen Coonan, announced a further $50 million in HiBIS funds for broadband in rural and regional Australia.[93] As at 15 April 2005 HiBIS had 12,843 customers, and provided the incentive for Telstra to upgrade 260 exchanges to ADSL.[94] It was suggested to the Committee that HiBIS should become an integral part of the USO and could be used to explore future opportunities.[95]

5.77 The DCITA website outlines the HiBIS scheme, stating that it:

> … offers an opportunity for people in regional Australia to access broadband services at prices comparable to those available in the cities. HiBIS registered Internet service providers (ISPs) receive incentive payments from the Australian Government for providing eligible people in regional Australia with higher speed broadband access in line with city prices.
>
> Providers must use these incentive payments to reduce the price of existing services or to help fund the cost of providing new services to regional areas. The most consumers need pay for a HiBIS broadband service, including all equipment, setup and connection charges, is $2,500 over three years for an ADSL service (equivalent to $69 per month), or $3,000 for a non-ADSL service (equivalent to $83 per month). HiBIS providers can offer services below those prices.

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92 AAD, *Submission* 45, pp 4-5.

93 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, *Media Release*, website, 7 July 2005 at: http://www.minister.dcita.gov.au/media/media_releases/$50_million_in_extra_hibis_funds_for_broadband_in_the_bush

94 Senate Environment, Communications, Information Technology and the Arts References Committee, *Provisions of the Telecommunications Legislation Amendment (Regular Reviews and Other Measures) Bill 2005*, May 2005, p. 10.

95 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 47.

> Generally, regional, rural or remote residential customers, small business owners and not-for-profit organisations in regional areas who did not have access to a metro-comparable service at the start of the scheme in April 2004 are eligible to receive a HiBIS service.[96]

5.78 Several witnesses were concerned that HiBIS does not provide the expected incentive. For example, Mr Gary Chappell from the Peel Development Commission in WA stated:

> The general consensus of people within the regions is that the HiBIS is too expensive, so HiBIS, as an alternative to a person who lives outside the ADSL technical range, is not a viable solution. The ongoing monthly costs are the things they fear—$79 for a two-way satellite, or roughly $80. So that 70 or 80 dollars per month for the life of the service is a cost they really do not want to commit to.[97]

5.79 In outback NSW, similar concerns were expressed about the cost of HiBIS which, according to Mr Michael Davis from Narromine, is beyond the reach of most middle income earners in regional Australia.[98] Mr Davis stated:

> I have gone on to the HiBIS scheme under the satellite for my internet connection, because I just did not have enough time in my life to put up with dial-up. It costs me $70 a month to be provided with something that in the city is provided for approximately $25 a month. I am not criticizing the satellite broadband—it is very good. We need it for our business. We sell sheep over the internet, and we bank. I am 200 kilometres from my bank. I don't just jump in and go and cash a cheque. We transfer money via the internet and try to operate that way.[99]

5.80 For others, particularly service providers, HiBIS presents other problems. Mr Stephen Dalby from iiNet Ltd, one of the largest ISPs in the country, argued that as a result of the high ongoing costs of acquiring backhaul services HiBIS does 'nothing more than provide subsidies to Telstra':

> We have found that the HiBIS program is of no value to us and we have not registered for it. We would love to be providing services to country customers and we say, 'What can we do to provide broadband services to country customers without running at a loss?' The HiBIS program would not allow us to do that. It is not the capital cost—that is not an issue—it is the recurring costs. [100]

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96 DCITA website, 13 May 2005, at: http://www.telinfo.gov.au/HiBIS%20page.htm.

97 Mr Gary Chappell, *Committee Hansard*, 29 April 2005, p. 67.

98 Mr Michael Davis, *Committee Hansard*, 14 April 2005, p. 54.

99 Mr Michael Davis, *Committee Hansard*, 14 April 2005, p. 54.

100 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 39.

5.81 Optus, which provides the HiBIS service to customers eligible for the special subsidy only,[101] supports the broadband incentive scheme, stating:

> … the HiBIS model in broad terms has been an appropriate vehicle to facilitate affordable broadband in rural and regional Australia. All Australians now have reasonable access to broadband services at around the same price whether by DSL, satellite or wireless. Optus believes there should be a continuation of HiBIS, and the allocation of further funding – should demand be evident.[102]

5.82 The Committee notes that the 2005-2006 Federal Budget contained $50m for the Metropolitan Broadband Blackspot Program (MBBP) - a program based on HiBIS that will give incentives for providers to invest in networks where metropolitan broadband services were unlikely to be commercially affordable without Government support.[103] Optus claims that the $50m should be part of their proposed Bridge to Broadband package, in which the funds should be isolated for competitive providers of broadband to develop new competitive technologies (such as wireless broadband), and not to fund Telstra to give it a competitive advantage.[104]

Evidence about the CSG

5.83 The Committee also heard from people in rural and regional Australia who claim that the CSG does not ensure adequate service delivery.[105] Mrs Tess Le Lievre from Louth in outback NSW stated that recently her telephone was out of order for 16 days, and 'I am not a person that makes a lot of fuss—I try to give everybody a little bit of time—but 16 days was the sort of thing I did not like at all'.[106]

5.84 NFF President Peter Corish told the Committee that the NFF Telecommunications Taskforce reported that NFF performance benchmarks set prior to the Estens Report have not been achieved. He stated:

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101 HiBIS special subsidy applies to consumers without ISDN availability. For checking ISDN availability, see DCITA website, 13 May 2005, at: http://www.dcita.gov.au/_data/assets/word_doc/9735/isdn_availability.doc.

102 Optus, *Submission* 12, p. 15.

103 *Australian Financial Review*, 11 May 2005, p. 15; The Hon Senator Helen Coonan, Minister for Communications, Information Technology and the Arts, *Media Release*, website, 13 May 2005, at: http://www.minister.dcita.gov.au/media/media_releases/metropolitan_broadband_blackspots_programme.

104 Optus, *Submission* 12, p. 8. See discussion in Chapter 4.

105 Mrs Tina Reynolds, Dubbo Chamber of Commerce, *Committee Hansard*, 14 April 2005, p. 59; Mr Mark Needham, NFF, *Committee Hansard*, 11 April 2005, p. 3.

106 Mrs Tess Le Lievre, *Committee Hansard*, 14 April 2005, p. 52.

> These very reasonable benchmarks relating to basic telephone service faults and repairs must be met before Government can say with credibility that services in the bush have been improved.[107]

5.85 Moreover, the NFF believes there has been a decline in the rural telephone repair performance in recent years of as much as five percent,[108] based on successive quarterly statistics published by the ACA since September 2000.[109] The NFF statistics on Rural Telephone Repair Performance showed best performances at 95% during the September quarters for 2000, 2001, 2002 and 2003, but declining to 93% in the 2004 September quarter. Moreover, with the worst performances occurring usually in the March quarters, the worst performance dropped in 2003 to 90%. This trend was repeated in 2004.[110]Figures for the first quarter of 2005 place performance in rural areas at 91%, which is a drop of 1% from the previous quarter.[111] The Committee notes that these figures support other evidence to this inquiry of poor service delivery.[112]

5.86 The Committee notes that the ACA considers performance to be at a 'satisfactorily high level' when performance is at a measure of 90% or more.[113] However, the CSG performance standards are described as minimum compliance standards[114]- with compulsory compensation to customers if standards are not met - and not optimal or aspirational indicators of performance. As a result, it is unclear to the Committee why a rating that is 10% below the basic service level would be deemed high performance.

5.87 The NFF stated that it 'continues to pursue the "same level of service" for farmers and rural communities'.[115] However, the current CSG:

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107 NFF website, *News Release*, 16 June 2005, at: http://www.nff.org.au/pages/nr05/082.html.

108 NFF website at: http://www.nff.org.au/pages/nr05/082b.pdf.

109 NFF website at: http://internet.aca.gov.au/ACAINTER.65636:STANDARD:1611311777:pc=PC_1378.

110 NFF website at: http://www.nff.org.au/pages/nr05/082b.pdf.

111 Australian Communication Authority, *Telecommunications Performance Monitoring Bulletin*, Issue. 32, March 2005 Quarter, p. 39.

112 For example, Mrs Tina Reynolds, Dubbo Chamber of Commerce, *Committee Hansard*, 14 April 2005, p. 59; Mr Mark Needham, NFF, *Committee Hansard*, 11 April 2005, p. 3; NSW Farmers' Association, *Telecommunications Survey*, Press Conference presentation, NSW Parliament House, 13 July 2005, accessed at http://www.nswfarmers.org.au/

113 Australian Communication Authority, *Telecommunications Performance Monitoring Bulletin*, Issue. 32, March 2005 Quarter, p. 4.

114 In an ACA produced Consumer Fact Sheet - *Customer Service Guarantee 2000 (No.2)* – it is stated that the CSG 'requires telephone companies to meet minimum performance requirements', p. 1 of 4, accessed at: http://www.acma.gov.au/ACMAINTER.2097430:STANDARD:986025926:pc=PC_1712

115 NFF, *Submission* 15, p. 3.

> … continues to enshrine inequality into service level standards for a significant number of non-metropolitan residents. An opportunity exists for the current community size based criteria for the CSG to be replaced with non-discriminatory, non-population based criteria that apply to a revised CSG or service provider Customer Service Level Agreement (CSLA) standard. Any new criteria must better reflect access by the provider to the necessary resources rather than continuing with the current outmoded parameters.[116]

5.88 Some suggested the CSG was being undermined by the provision of exemptions to some providers. Ms Corbin from the Consumers Telecommunications Network, for example, stated that:

> … while the new service is rolling out and being developed they can apply to the authority for exemptions on some regulation, and one of them is the CSG. We have asked for more transparency, consultation and accountability about these exemptions because we are really concerned about them undermining the customer service guarantee in the long run.[117]

Unfair consumer contracts and Standard Forms of Agreement

5.89 One issue which arose during hearings was the use of Standard Forms of Agreement (SFOAs) in the telecommunications industry.

5.90 Section 479 of the Telecommunications Act permits the formulation of an SFOA for the supply of voice telephony services, data transmission, tone signalling, or live or recorded information services. Suppliers who use SFOAs are required to lodge them with the ACA[118] and to make them available to customers on request.[119] The ACA may make a written determination requiring suppliers to give customers information about the supply of both voice telephony and data services. The ACA is authorised, through the *Telecommunications (Standard Form of Agreement Information) Determination 2003* (the Determination), to publish this information.

5.91 The Determination requires suppliers to have summaries of the SFOAs, to give those summaries to new customers and to tell existing customers that they can ask for a summary at least once every two years. The Determination requires that suppliers prepare notices for consumers if an SFOA is to be varied in such a way that customer detriment is caused, and for the notice to be published in a place that is reasonably likely for the customer to be aware of its contents.[120]

5.92 The CLC submitted that there were problems with the Determination:

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116 NFF, *Submission* 15, p. 3.

117 Ms Teresa Corbin, *Committee Hansard,* 13 April 2005, p. 31.

118 Section 480.

119 Section 481. See CLC, *Submission 23,* p. 13.

120 CLC, *Submission* 23, p. 13.

> The Determination simply instructs suppliers on the method that must be used to notify customers of changes. … neither the Act nor the Determination adequately deals with the circumstances in which changes may be made to the contract.[121]

5.93 The CLC argued that the legislative arrangements that allow carriers unilaterally to vary their contracts with consumers needed reform.

5.94 In order to improve contractual arrangements, ACIF delivered to the ACA in February 2005 the Consumer Contracts Industry Code.[122] The development and enforcement of the Code is discussed in the next section in more detail. The Explanatory Statement to the Code states that it 'identifies and prohibits the use of unfair terms':

> This Code seeks to ensure that the terms of contracts between service providers and residential and small business consumers are fair and are presented by service providers in a form that is readily accessible, legible and capable of being readily understood by consumers.[123]

5.95 However, the CLC noted limitations to the code:

- the new arrangements will not apply to the supply of subscription television services or to content providers where they are also not providing a carriage service;
- there will still be legislative uncertainty as to the circumstances in which Part 23 of the *Telecommunications Act 1997* (Cth) and ACA's Telecommunications (Standard Form of Agreement Information) Determination 2003 may be used to circumvent consumer protection provided under general law or the Trade Practices Act.[124]

5.96 The CLC noted that the ACA's proposals to amend the determination 'are at a preliminary consultation stage', but:

> … it is unlikely that the proposed amendments will adequately address problems such as … an industry practice which continues to operate … at odds with general law and specific consumer protection legislation.[125]

5.97 In Victoria, recent amendments to Part 2B of the *Fair Trading Act 1999* provide that unfair terms in consumer contracts are void,[126] and list various factors to

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121 CLC, *Submission* 23, p. 14.

122 ACIF C620:2005, republished in March 2005 with amendment.

123 ACIF, *Industry Code Consumer Contracts*, pp ii &iii, ACIF website, 29 June 2005 at: http://www.acif.org.au/__data/page/12605/C621.pdf

124 CLC*, Submission* 23, p. 14.

125 CLC*, Submission* 23, p. 14.

126 Under section 32W, a term is to be regarded as unfair 'if contrary to the requirement of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'.

be taken into account in determining whether particular terms are potentially unfair. One of these factors used to determine unfairness is to consider whether a term permits the supplier but not the consumer unilaterally to vary the terms of the contract.[127]

5.98 Dr Wilding from the CLC described the Victorian legislation as a 'helpful underpinning regulatory measure that encourages industry to develop its own solutions'.[128] He commented:

> There are certainly areas that have been identified by Consumer Affairs Victoria as quite clearly in breach of its laws. We would expect that, simply as a result of that action alone, there would be changes within those contracts.[129]

5.99 Mr Allan Horsley from the ACA confirmed that companies were working towards redrafting their contracts to comply with that legislation.[130] Dr Wilding added, however, that he did not think:

> … that a general law alone has the potential to improve a whole set of specific telecommunications provisions in these consumer contracts in the same way that a combined approach of a state or federal fair trading law with an industry based set of rules can achieve … I think the preference of most consumer groups would be for the Trade Practices Act to be amended to insert unfair terms provisions, but we have not pursued that because it seems clear that that is unlikely.[131]

5.100 Dr Wilding noted that the 'unconscionable conduct' provisions of the TPA were also available.[132]

5.101 During the inquiry GSM Gateway claimed that an upstream mobile network operator had exploited the alleged deficiency in Part 23 of the Telecommunications Act to alter the SFOA with downstream clients of GSM Gateway.[133] On 26 May 2005, the ACCC confirmed that it was currently investigating the matter and was 'conducting broader market inquiries to determine whether there is evidence to support the alleged conduct and to assess whether the conduct complained of is likely to amount to a contravention of the TPA'.[134]

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127 Paragraph 32X(d).

128 Dr Derek Wilding, *Committee Hansard*, 13 April 2005, p. 11.

129 Dr Derek Wilding, *Committee Hansard,* 14 April 2005, p. 11.

130 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 52.

131 Dr Derek Wilding, *Committee Hansard*, 13 April 2005, p. 12.

132 Dr Derek Wilding, *Committee Hansard,* 14 April 2005, p. 11.

133 Mr Peter Kelly and Mr Thomas Amos, *Committee Hansard*, 13 April 2005, pp 84-85.

134 ACCC, *Submission* 17A, p. 1.

5.102 The CLC suggested two options for creating fairness for all parties in any contract variation:

> **Option One** …remove the SFOA regime for all services except fixed-line services [so] that consumers would be given full contracts for all mobile and internet services.
>
> **Option Two** …retain in substance the operation of the SFOA regime in Part 23 [of the *Telecommunications Act 1997*] but amend the provision dealing with variation of contracts.[135]

5.103 The CLC recommended an amendment to subsection 481(2) of the Telecommunications Act to provide certainty as to the circumstances in which unilateral variation can operate fairly for all parties. The proposed amendment would:

> … remove the reference to 'any variation of the agreement' and replace the reference to 'the agreement' with 'the current terms of the agreement'. This will remove any implicit support for the proposition that an SFOA is able to be varied unilaterally and to the detriment of consumers. The Code will then come into effect, allowing for variation in some limited circumstances as agreed between suppliers and consumers in the Working Committee. Circumstances not covered by the Code will be covered by general law and other relevant legislation.[136]

Industry codes and standards

5.104 This inquiry heard compelling evidence of a major problem in the delivery of consumer protection through industry codes and standards. The Committee heard that the industry relies too much on self-regulation to the detriment of end users, that some codes have been developed without sufficient consumer consultation or input and that the time taken to produce them has been excessive.

The legislative framework

5.105 Part 6 of the Telecommunications Act details the circumstances in which the telecommunications industry may make industry codes.

5.106 Sections 117 to 125 outline the ACA's responsibilities. The ACA may register an industry code, and before doing so must be satisfied that the code provides appropriate community safeguards and that the ACCC, the TIO and at least one body or association that represents the interests of consumers have been consulted about the code's development. The ACA is responsible for ensuring compliance with the codes under civil penalty provisions.[137] Where there is no industry code or a code is

135 CLC, *Submission* 23, p. 15.

136 CLC, *Submission* 23, p. 15.

137 Part 31 of the Telecommunications Act provides that pecuniary penalties are payable for contraventions of civil penalty provisions.

deficient, the ACA has a reserve power to make an industry standard.[138] While compliance with ACA standards is mandatory, sign-up to industry codes is voluntary. However, where a code has been registered, the ACA's enforcement powers apply to all industry participants, whether or not they are signatories. The TIO will also apply the code provisions to consumer complaints. The ACA has registered codes on a range of issues, including billing, credit management, customer and network fault management, complaint handling and, more recently, consumer contracts.

5.107 The Australian Communications Industry Forum (ACIF) was established in 1997 to develop codes in accordance with the Act. Funded by members, ACIF states that it 'leads and facilitates communications self-regulation in the interests of both industry and consumers'.[139] ACIF's submission claimed:

> ACIF's 25 Codes embody industry best-practice across a broad range of operating, technical and consumer protection matters. In particular, ACIF's consumer codes provide significant consumer benefits, having been developed collaboratively by industry and consumer representatives and registered by the ACA, after satisfying the ACA that they provide appropriate community safeguards.[140]

5.108 ACIF stated that the codes are compiled under principles of 'self-regulation without undue financial and administrative costs for suppliers',[141] and did not recommend any changes to the existing regulatory policy or framework.[142] However, not all groups agreed.

Criticism of the codes process

5.109 Some groups argued that the process of creating industry codes needs review.[143] For example, the CLC referred to this Committee's previously proposed amendment to the regulatory policy section of the Telecommunications Act (section 4) to 'promote the use of industry self-regulation where this will not impede the long term interests of end users'.[144] In supporting this proposed amendment, the CLC claimed that the ACA has not been sufficiently clear about the need for:

> … genuine consumer participation in code development, the need to demonstrate that the provisions of codes meet some benchmarks [and] the

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138 Sections 123 and 125.

139 ACIF, *Submission* 9, p. 1.

140 ACIF, *Submission* 9, p. 4.

141 ACIF, *Submission* 9, p. 4.

142 ACIF, *Submission* 9, p. 2.

143 For example, CLC, *Submission* 23, p. 8; CTN, *Submission* 30, p. 3.

144 Senate Environment, Communications, Information Technology and the Arts References Committee, *A lost opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters*, March 2005, p. 78, Recommendation 13.

> need for monitoring compliance with codes or implementation of a system whereby industry reporting is genuine and accurate.[145]

5.110 CTN also expressed strong views about self-regulation and the need to protect consumers:

> The ACA [needs] to develop the single Standard using a Customer Lifecycle approach…to take the place of the current miscellaneous collection of stand alone codes.[146]

5.111 The Australian Privacy Foundation also expressed concern about the failure of the regulatory regime to protect consumer interests adequately, pointing to the self-regulatory nature of the codes process as the principal problem:

> Our main criticism of the regulatory regime is that it relies far too heavily on self-regulation. While some useful Codes and Guidelines have emerged from ACIF, the ACIF processes have been cynically manipulated by industry participants to delay and avoid effective regulation. The processes also stretch and exhaust the limited resources of relevant consumer NGOs such as CTN and APF. Many industry participants have even failed to sign up to Codes they have been involved in drafting. The ACA and Department have been far too reluctant to step in even when self regulatory processes have manifestly failed …[147]

5.112 The TIO's 2003/2004 annual report was very critical of the administration of the codes for a range of reasons, including problems with the content and complexity of the codes and limited compliance assistance from ACIF or intervention by the ACA:

> … Consumer Codes are one of the most important underpinnings of the co-regulatory consumer protection regime for the telecommunications industry. Codes have been criticised by consumers and industry for being too complex and prescriptive and for taking too long to develop.
>
> There are also concerns about the coverage given by individual Codes to particular issues and whether some are unduly narrow, leading to calls for a single overarching Code. From the TIO's perspective, however, the key problems are the low sign-up rate and issues of compliance and enforcement. Just over half of all Consumer Code breach investigations by the TIO in the past year involved non-signatories. This suggests a lack of support for Consumer Codes by the very industry that has developed them. After seven years of work this is a poor result.
>
> Equally troubling is the relatively low rate of Code enforcement, whether in the sense of compliance activity by ACIF or formal regulatory intervention

145 CLC, *Submission* 23, pp 8-9.

146 CTN, *Submission* 30, p. 5.

147 Australian Privacy Foundation, *Submission 52*, p. 1.

> by the regulator. For instance, there is clear evidence of widespread systemic non-compliance with the Complaint Handling Code.[148]

Meeting consumer expectations

5.113 Subsection 112 of the Telecommunications Act sets out the general principles relating to industry codes and standards. Paragraph 112(3)(d) requires the ACA to have regard to 'the public interest, including the public interest in the efficient, equitable and ecologically sustainable supply' of carriage services, goods and services used in connection with carriage services 'in a manner that reflects the legitimate expectations of the Australian community'.

5.114 Many groups argued that the 'legitimate expectations of the Australian community', particularly in the USO, are not being met. For example, the CLC proposed a detailed series of legislative amendments to 'provide the necessary fine-tuning to self regulation',[149] some of which are discussed below.

Involvement of consumers

5.115 The CLC was particularly concerned about the need for inclusion of consumers in code development, and called for consumer involvement in 'both the "front end" and "back end" of self-regulation':

> This means involving consumers on an equal footing in all code development work and then ensuring that they are involved in registration and review processes. ... [L]ocking consumers out of the decision-making (for example, in the way that codes are developed in some forums other than ACIF), has the potential to produce poor outcomes for both industry and consumers.[150]

5.116 AAPT, however, suggested there was a better solution to the problem of code development. Mr David Havyatt told the Committee:

> We keep on drawing on the same pool of consumer representatives without…creating any real process for those consumer representatives to undertake real and detailed research about what consumer issues are. ... [T]here may be a better model for undertaking that which was not considered in the CDC report[151] but does…occur in the energy industry… [T]here is in fact a separate body—the consumer institute—that…is separately researching and providing inputs into ordinary processes. [It] addresses some of the balance questions by actually drawing all those

148 Ombudsman's overview, *TIO Annual Report 2003/04* at: http://www.tio.com.au/publications/annual_reports/ar2004/annual_200402a.htm

149 CLC, *Submission* 23, p. 9.

150 CLC, *Submission* 23, p. 8.

151 *Consumer Driven Communications: Strategies for better representation*, December 2004, discussed below.

> resources into one place. … the funding for consumer research [would] be linked in some way to government expenditures rather than being some kind of vague question built around submissions.[152]

5.117 ACA representative Mr Allan Horsley reinforced the need for funding in relation to consumer input into the development of codes:

> My own view is that consumer groups are under resourced and that may on occasion cause them to have to revisit things or take time to come to a position. Equally, I think, consumer groups struggle because there is no single entity, and so there is a need for them to in a sense harmonise a view.[153]

The Consumer Driven Communications Report

5.118 With the aim of improving 'the effectiveness of consumer input and influence to the regulation and governance of the communications industry', the ACA requested representatives from eight consumer organisations to develop strategies for strengthening consumer representation in telecommunications.[154] In late 2004 the Consumer Driven Communications (CDC) Report was released.[155]

5.119 The report lists twelve themes identified in discussions and submissions. These themes focus on the need to ensure that consumers receive products and services with adequate safeguards, that they are protected, represented and funded adequately, and that they participate in policy development. The report states that a strong consumer presence is crucial to an effective regulatory framework,[156] and that its 71 recommendations:

> … have been framed and crafted with a view to practical changes which will improve the participation of consumers and their representatives in setting and guiding consumer outcomes in the communications industry.[157]

5.120 The Committee has recognised the need for consumer participation in the regulatory framework for some time. In its inquiry on the legislation that established

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152 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 35.

153 Mr Allan Horsley, *Committee Hansard,* 4 May 2005, p. 51.

154 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004, p. 2.

155 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004.

156 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004, p. 1.

157 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004, p. 19.

the ACMA, the Committee made a series of recommendations that emphasised participation by, and protection for, consumers in the telecommunications industry.[158]

5.121 The Committee notes that the ACA has not yet formally responded to the CDC report.

The Consumer Contracts Industry Code

5.122 As discussed above, a new Consumer Contracts Industry Code has recently been registered by the ACA.[159] The Code aims to:

> … address aspects of consumer detriment arising from the imbalance in bargaining power between service providers and their residential and small business customers, [and] …. seeks to ensure that the terms of contracts between service providers and residential and small business consumers are fair and are presented by service providers in a form that is readily accessible, legible and capable of being readily understood by consumers.[160]

5.123 The Code refers to an expectation that industry compliance will enhance customer confidence in the fairness, accessibility and intelligibility of consumer contracts as better contract terms become standard practice.[161]

5.124 The Committee heard criticism of the delay in producing the Code and notes that its development by ACIF took almost five years. Ms Teresa Corbin, Executive Director of CTN, for example, noted 'We waited a long time for consumer contracts to be resolved, and I think that caused a lot of unnecessary pain for consumers'.[162] Ms Corbin also noted:

> Even after a code becomes registered, it takes a year to turn around. So, in effect, a regulator has to step back for 12 months, even after a code is registered, before it can do any compliance auditing.[163]

5.125 ACA representative Mr Allan Horsley agreed that the process had been 'a bit long' and that efforts were being made to speed up the process in future.[164] He

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158 Senate Environment, Communications, Information Technology and the Arts References Committee, *A Lost Opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and* matters, 2005, recommendations 9, 13, 14, 15 and 16. Government senators agreed in principle to those recommendations.

159 The Code was registered on 4 May 2005.

160 ACIF, *Industry Code Consumer Contracts*, 2005, p. ii.

161 ACIF, *Industry Code Consumer Contracts*, 2005, p. iii.

162 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 30.

163 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 30.

164 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 47.

considered that a maximum of nine months was a reasonable amount of time from start to registration by the ACA.[165] He noted in relation to the ACA's role:

> We informally encourage ACIF. We use our staff who attend the meetings to encourage timely completion, and your point is probably to steel people to do things much better in the future. A new code process has just started on another code, and there is an across-the-board commitment that it will be done in a far more timely fashion.[166]

5.126 Ms Anne Hurley on behalf of ACIF acknowledged that there were 'deficiencies' in the process:

> We have taken that on board, with the requirement now to deal with the issue of unexpectedly high bills and credit management issues. We are currently revising the credit management code and we are taking the best of the practices from the consumer credit code and refining them even further. We are bringing in professional project management to ensure that there is a six-month time frame and everything is delivered according to milestones along the way, to ensure there is a timely outcome.[167]

5.127 When asked how the ACIF could describe the self-regulatory regime as not needing any change[168] when it has taken so many years to develop this code, Ms Hurley from ACIF agreed that it had taken too long, but added:

> The outcome also needs to be acknowledged that the consumer contracts code is the first time anywhere in the world that there has been an industry response to dealing with unfair contract terms.[169]

Compliance

5.128 As noted above, the TIO has been very critical of the level of industry compliance with codes, and has referred in particular to ACIF's failure to provide adequate support and encouragement to industry participants to comply. Mr Charles Britton from the Australian Consumers' Association told the Committee that ACIF was 'process captured' and that completion of a code tended to be seen as the end of the process:

> … the confusion about ACIF is such that the very fact that a process has been completed is being seen as an outcome. In fact, outcomes from things like contract codes are what happens in the marketplace, not simply that you have managed to deliver a document.[170]

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165 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 50.

166 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 50.

167 Ms Anne Hurley, *Committee Hansard*, 13 May 2005, p. 16.

168 ACIF, *Submission* 9, p. 2.

169 Ms Anne Hurley, *Committee Hansard*, 13 May 2005, p. 21.

170 Mr Charles Britton, *Committee Hansard*, 13 April 2005, p. 61.

5.129 The Committee notes that the CDC Report recommended that ACIF take a more active role in encouraging industry compliance with the codes, including establishing a 'Codes Compliance and Monitoring Committee' and providing assistance to industry suppliers through training and improved guidance documents.[171] The Committee was encouraged to hear that ACIF has recently appointed a compliance manager to assist the industry with compliance – a role that was previously spread across a number of staff and had less prominence as a result.[172]

5.130 Other evidence criticised the ACA's performance. The CLC argued that the ACA has not been clear enough in the past about 'the need for monitoring compliance with codes or implementation of a system whereby industry reporting is genuine and accurate'.[173]

5.131 However, Mr Horsley on behalf of the ACA described the level of overall compliance as 'reasonable', stating:

> We have found instances where some carriers have been slow to comply with codes. We would also say that, where the ACA has had reason to meet with a carrier to investigate compliance and when issues are raised with them, the response to comply has been pretty reasonable.[174]

5.132 Mr Horsley acknowledged that there were often problems 'at the coalface' with compliance despite 'sophisticated compliance regimes' at management level, and noted that the ACA may issue a direction where it is not satisfied about a company's compliance with a code. The ACA had done so in one case:

> … the ACA became very concerned about Vodafone's perceived failure to comply with the mobile number portability code. We went to Vodafone and sought some compliance. That did not come as fast as we would have liked and we issued a direction. After a period of some months, which involved some substantial software changes as a consequence of the software upgrade, we now have compliance.[175]

5.133 Ms Corbin from CTN also pointed to low numbers of companies signing up to codes which may be reviewed within a relatively short period:

> I think there is a real concern about the fact that not many industry members have actually signed codes. They say that the reason they do not sign them is that it is actually really hard to tick all the boxes and make sure that they are complying fully and legally. They say that there is a legal question about them signing off on a code and that that process takes a long

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171 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004, pp 16 & 17.

172 Ms Anne Hurley, ACIF, *Committee Hansard*, 13 April 2005, p. 18.

173 CLC, *Submission* 23, p. 9.

174 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 52.

175 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, p. 52

> time. So, if you review a code every year or two, that basically means that all the signatories drop off and then have to go through all of their internal processes again. If the industry has negotiated a code and this is the benchmark—they may not be [rapt] about it, but it is the benchmark that they believe they can meet and it is what they come out with as their end product—but people do not sign it, you have to ask, 'Where is our confidence that this is really happening?'[176]

5.134 Ms Corbin also referred to a lack of knowledge amongst providers about the codes:

> I also find that players, particularly newer players—and there are more and more of those, and I often go to visit them—do not really understand what the codes are about. They often ask me questions, and I have to say to them: 'Look, I am coming at it from a consumer perspective. You really need to talk to somebody from an industry body or even a government source.' I know the regulator goes around and visits them, but I think there is a real opportunity there for industry associations to provide some training, because I do not think that there is a lot of understanding about what compliance really means—and I think that is part of the difficulty.[177]

5.135 Ms Corbin noted that the CDC report had suggested ongoing monitoring:

> [ACIF has] an internal scheme and they have started to focus more on monitoring in the last two to three years, but a lot of the focus is about getting the statistics, interpreting them and all that sort of thing. One of the issues there is actually having somebody, probably ACMA, pulling all of the data together.[178]

5.136 In relation to the new Consumer Contracts Code, the ACA's Acting Deputy Chairman, Mr Allan Horsley, told the Committee that the ACA would be 'proactive' in ensuring compliance.[179] Ms Hurley from ACIF also stated that to assist with compliance of the new code:

> … ACIF has held a number of industry briefings in Sydney and Melbourne so that suppliers are fully aware of what their requirements are for compliance under the code.[180]

5.137 However, the Committee was told that legislative recognition of these responsibilities was desirable. The CLC recommended a new section 120A in the Telecommunications Act to formalise monitoring of compliance with codes or practice.[181] The new section should require reporting by suppliers/industry

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176 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 33.

177 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 33.

178 Ms Teresa Corbin, *Committee Hansard*, 13 April 2005, p. 33.

179 Mr Allan Horsley, *Committee Hansard*, 4 May 2005, pp 52-53.

180 Ms Anne Hurley, *Committee Hansard*, 13 April 2005, p. 15.

181 CLC *Submission 23*, p. 11.

associations on an annual basis and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA.

5.138 The CLC also supported the CDC's recommendation of a new section 125A to cover situations where evidence suggests that self-regulatory mechanisms will not adequately respond to an identified consumer protection need.[182] The new provision should state that in deciding whether to exercise this power, the ACMA is to refer to the views of, and consult with, any bodies or associations that represent a section of the industry and any bodies or associations that represent consumers.

Dispute resolution – the Telecommunications Industry Ombudsman

5.139 The TIO deals with complaints that consumers have not been able to resolve with their telephone or internet company, and is an 'office of last resort'.[183] The TIO classifies complaints from TIO Member customers under a four tier complaint classification and escalation system:

> At level 1, complaints are referred back to the relevant TIO Member, generally at an escalated customer service point, for a final attempt at resolution. If the complaint is not resolved in a fair and reasonable manner, the TIO will generally escalate it, if necessary through each of the three further levels, with additional costs to the Member.[184]

The main issues facing the TIO

5.140 Mr John Pinnock, the TIO Ombudsman, described problems the office faces:

- The complaints code mechanism that obliges providers to refer customers to the TIO is not being honoured by providers or enforced by the ACA.
- The increase in customer service complaints strongly suggests a decline in performance of service providers.
- Customer hardship complaints are now significant as far as credit management issues are concerned, and are growing most rapidly with mobile carriers and resellers. Apart from Telstra recognising this as an issue, some of the other providers, who are members of the TIO, find that hardship complaints are beyond their capacity to resolve.
- Broadband issues are arising more frequently, including ISP assistance for customers to make the best choice when signing for a broadband service,

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182 CLC *Submission 23*, p. 11.

183 TIO website, 20 May 2005 at: http://www.tio.com.au. The TIO defines a complaint as an expression of dissatisfaction or grievance: Requests for information are registered as Enquiries. Complaints which are anonymous or regarded as trivial or vexatious are also registered as Enquiries (see TIO *Submission* 39, p. 2). In describing the TIO as an office of last resort, the website states 'This means that before contacting the TIO you must have tried to resolve your complaint with your service provider'.

184 TIO, *Submission* 39, p. 3.

delay in transferring from one ISP to another, broadband speed, customer service, aspects of contractual arrangements and advertising.

- There has not been a high level of compliance with the ACIF's complaint handling code.
- Mechanisms to ensure customer complaints are dealt with satisfactorily have not yet been resolved by the council of the TIO.[185]

5.141 The TIO's submission expressed concern over a growth of 'customer service complaints' over the past several years. This category included:

- failure to record changes in customer details, eg change of address
- failure to return calls or emails or reply to correspondence
- inability to contact provider
- failure or refusal to escalate complaint.[186]

Billing complaints

5.142 The TIO quarterly statistics from December 2004[187] show that, of the eight categories of complaints (billing, customer service/contracts, credit control, customer transfer, disconnection, faults, provision/porting and other), billing complaints top the list in all three services, with equal numbers of complaints about contracts in the mobile services area.

5.143 Billing complaints have increased, particularly in relation to mobile services:

> … [in the December quarter] ... landline billing complaints rose 3.7 per cent, internet billing complaints rose 7.1 per cent and mobiles 19.5 per cent.
>
> In landline services, the most significant billing complaint increase was in international data calls. Complaints rose by 107.5 per cent, from 530 to 1100.
>
> In internet services, complaint numbers remained relatively consistent with previous quarters. A total of 39.3 per cent (48.5 per cent - Sept quarter) of all internet billing complaints related to dial-up services, 52.7 per cent (43.8 per cent) for ADSL and 4.0 per cent (5.4 per cent) for cable.
>
> Mobile billing complaints have increased every quarter for the calendar year of 2004. CDMA complaints accounted for 30.3 per cent (21.2 per cent) of complaints with GSM complaints comprising 69.5 per cent (78.7 per cent).[188]

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185 Mr John Pinnock, *Committee Hansard,* 4 May 2005, pp 28–36.

186 TIO, *Submission* 39, p. 5.

187 TIO Complaints statistics, TIO website, 24 May 2005 at: http://www.tio.com.au/statisticsQtr.htm

188 *TIO Talks 33*, April 2005, TIO website, 1 June 2005, at: http://www.tio.com.au/publications/annual_reports/ar2004/annual_200404.htm

5.144 The Ombudsman suggested that some customer billing problems would be reduced if in situations where a customer purchased mobile content from a third party content provider, the service provider that billed the end user took responsibility for the bill:

> In my view it does not matter whether they have a bilateral agreement with a content provider or aggregator of content to share revenue or whether they are merely acting on a fee-for-service basis as some form of billing bureau: if it is on the bill, they deal with it.[189]

Possible solutions in complaints resolution

5.145 The Committee heard a range of suggestions to improve complaints services for customers. It appears that many customers are not fully aware of the complaints mechanism or their rights.

Awareness of TIO

5.146 Several groups raised the issue of consumer awareness of the TIO. For example, the CTN stated that there should be:

> … a thorough audit of compliance with the ACIF Complaints Handling Code in particular the requirement that consumers to be told about the TIO and their right to contact them to assist with the resolution of disputes.[190]

5.147 The Ombudsman said that:

> … the best way of ensuring that [customers] get to the TIO is that if they have an unresolved complaint which they have taken to their provider, that provider ought to refer them to the TIO.[191]

5.148 The Ombudsman, however, acknowledged that methods to improve awareness about the TIO's work, especially in rural areas, are not performing as well as they could. The complaint handling code[192] requires a supplier to advise a customer with an unresolved complaint about the TIO as an external review mechanism. Mr Pinnock told the Committee:

> It is my observation over a number of years, both in relation to the first version of the complaint handling code as well as the current version, that that is more honoured in the breach than in the observance. Consistently over the last three years our internal figures show that somewhere between

189 Mr John Pinnock, *Committee Hansard,* 4 May 2005, p. 31.

190 CTN, *Submission* 30, p. 7. The CTN argued that suppliers should distribute the TIO's contact details with all warning notices and final notices (p. 5).

191 Mr John Pinnock, *Committee Hansard*, 4 May 2005, p. 28.

192 Rule 7.6.1.

> only 11 and 16 per cent of complainants come to us as a result of a direct referral by their provider.[193]

Resolution of complaints

5.149 The Committee heard various suggestions about ensuring that consumers' complaints are heard and acted on. CTN referred to a need to:

> Examine why Australian consumers find it so difficult to make complaints about their services and why so many never even bother to try and register their dissatisfaction.[194]

5.150 The Ombudsman, Mr Pinnock, told the Committee that he agreed with CTN's view that people were having trouble making complaints:

> … principally because some providers, while not discouraging complaints, put up barriers to having complaints escalated.[195]

5.151 Mr Pinnock stated that his office, in dealing with a customer whose complaint has not been resolved, sends the complainant back to an escalated service point in the provider, with the TIO reference number and a telephone number that is not normally available to customers. Mr Pinnock suggested that the provider should be dealing with the complaint at this escalated point, and should make the contact number available to consumers generally. This would reduce the number of level 1 complaints recorded by the TIO, and so reduce the escalation rate.[196]

5.152 The CTN also called for mandatory definition of 'consumer complaint', which would include fault reporting, through a service provider determination.[197]

Expansion of the TIO's role

5.153 Some groups made suggestions about the TIO's role in relation to converging technologies. The CTN, for example, saw the expansion of the TIO's jurisdiction to include pay TV as an absolute minimum reform.[198]

5.154 The Committee has previously recommended broadening the TIO's role to that of a general communications industry ombudsman,[199] in line with the

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193 Mr John Pinnock, *Committee Hansard*, 4 May 2005, pp 28 - 29.

194 CTN, *Submission* 30, p. 7.

195 Mr John Pinnock, *Committee Hansard,* 4 May 2005, p. 35.

196 Mr John Pinnock, *Committee Hansard,* 4 May 2005, p. 36.

197 CTN, *Submission* 30, p. 7.

198 CTN, *Submission* 30, p. 7.

199 Senate Environment, Communications, Information Technology and the Arts References Committee, *A Lost Opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters,* 2005, para 5.141 and Recommendation 17, pp 87-88.

recommendation of the CDC report.[200] Mr Pinnock told the Committee that while he supported the concept, there was an issue as to what would be included. He suggested that, since the TIO is a consumer protection mechanism, converging technologies should be considered as a bundle, with the TIO able to deal with complaints about all aspects.[201] The TIO would then be able to deal with all complaints across the communications industry, including pay TV, network connection and customer equipment issues.[202]

5.155 The Ombudsman stressed that with his office now handling a weekly average of 3000 calls - compared with about 2500 six months ago - three important principles of any complaints handling scheme must apply for the TIO to serve consumers effectively:

- the scheme should develop in step with changes in the telecommunications industry, as opposed to evolving into something that it was never intended to be;
- the TIO should provide an adequate measure of protection irrespective of the services consumers use and the technology that is used to deliver them; and
- consumers should be able to bring a variety of complaints to the TIO in a way that increases the efficiency of complaints handling in the industry, reduces any overlap in jurisdiction and discourages consumers from forum shopping.[203]

Other issues

5.156 Groups such as the CTN made a range of other recommendations which they considered were necessary to improve consumer protection. The Committee did not have time to examine these in detail, but notes that they included suggestions for better control of advertising, telemarketing and selling practices; improvement to the government-funded schemes for consumer advocacy and research; enforcement of community impact statements for new products and services; and payphone provision.[204]

5.157 The Committee did, however, consider in some detail the following three matters: price controls and low income customers, remote Indigenous communities and emergency call services.

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200 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation*, December 2004, Recommendation 43, p. 13.

201 Mr John Pinnock, *Committee Hansard,* 4 May 2005, p. 31.

202 ACA, Final Report: *Consumer Driven Communications: Strategies for better representation,* December 2004, Recommendation 43, p. 13.

203 TIO Ombudsman, *TIO Talks 33*, TIO website, 24 May 2005 at: http://www.tio.com.au/publications/TIO_talk_issues/33/33.2.htm.

204 CTN, *Submission* 30.

Price controls and low income customers

5.158 As the ACCC noted in a recent report:

> Price controls are considered to be a key telecommunications consumer safeguard. They are applied to Telstra to ensure that efficiency improvements are passed through to consumers as lower prices for telecommunications services in markets where competition is not yet fully developed. Price controls have also been used as a tool for achieving certain social policy/equity objectives.[205]

5.159 In particular, the ACCC noted:

> Certain aspects of the current price control arrangements could be seen as assisting potentially disadvantaged consumers. Firstly, Telstra is obliged to provide a low-income package. There is also a cap on the price of local calls and on other calls made in extended zones. Thirdly, there are restrictions on the difference between metropolitan local call prices and non-metropolitan local call prices.[206]

The price control scheme

5.160 The Minister has the power to set price controls for Telstra's telecommunications carriage, content service and facilities. In the absence of healthy market competition – and associated competitive prices – price controls can help to constrain price rises. In theory, as competition increases the need for price regulation will decrease.[207]

5.161 Price control arrangements have been in place since 1989. The current three-year price cap regime is contained in a determination which expired on 30 June 2005 and has recently been extended.[208] The price cap arrangements were recently reviewed by the ACCC,[209] which made various recommendations on the arrangements to apply from 1 July. In summary, the ACCC recommended that the price cap regime be retained (while at differing levels) but not extended to other services. In addition,

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205 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. 1.

206 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. 101.

207 Price controls can have unintended impacts on the dominant competitor. Telstra argues that aspects of the price cap regime can restrict Telstra's capacity to recover costs for certain unprofitable services. In turn, the cost is passed on to other competitors in the form of access charges. In effect, competition may be stifled rather than enhanced. See Telstra, *Submission* 25, p. 16 and Alasdair Grant (ed.), *Australian Telecommunications Regulation: The Communications Law Centre Guide,* UNSW Press, 2004, pp 253-254.

208 *Telstra Carrier Charges – Price Control Arrangements, Notifications and Disallowance Determination No. 1 of 2002.*

209 The review involved extensive consultation by the ACCC through written submissions and public meetings throughout Australia.

the ACCC recommended that supplies to bigger business customers (those that obtain more than five lines) should no longer be captured under these arrangements.[210]

5.162 The ACCC review concluded that low-income consumers have benefited to some extent from Telstra's low-income scheme, *Access for Everyone*. However, there was scope for improvement and some changes were recommended:

> The ACCC believes that future price controls should ensure that all low-income consumers can benefit from the low-income scheme, and that low-income consumers are not worse off if they participate in the scheme. Therefore, the ACCC recommends that concessions be extended or a safety net plan be implemented to ensure that low-income consumers are not worse off compared to standard users.[211]

5.163 The ACCC made several specific recommendations in relation to low income consumers, including recommending that ways to improve public awareness of the low income scheme continue to be explored. The ACCC also suggested changes to strengthen the current regulatory controls.[212]

5.164 The Committee notes that on 22 June 2005 the Minister stated that she expected the existing price control regime would be 'rolled over for a short period' because of the current review of different aspects of 'the consumer framework for telecommunications and the regulatory framework for telecommunications'.[213] On 30 June the Minister announced that the current determination would be extended until 31 December 2005.[214]

Telstra's Low Income Measures Assessment Committee

5.165 The Telstra Low Income Measures Assessment Committee (LIMAC), established in June 2002, comprises representatives from a range of community and government agencies. Mr Christopher Dodds, Chairperson of LIMAC, told the Committee that the committee was established as 'part of a process to establish a compensatory mechanism for low-income, low-use' customers in what the industry termed 'rebalancing', that is, the ending of the cross-subsidy between call charges and line rental charges.[215] For such people, the effect of the increased monthly line rentals was substantial. He pointed to two significant outcomes that he considered LIMAC had achieved in negotiations:

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210 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. v.

211 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. vi.

212 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, pp 110, 116.

213 Senator the Hon. Helen Coonan, Minister for Communications, Information Technology and the Arts, *Senate Hansard*, 22 June 2005, p. 50.

214 'Telstra price controls extended', *The Australian*, 30 June 2005, at:http://australianit.news.com.au/common/print/0,7208,15776749^15306^nbv^,00.html.

215 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 11.

> … the product that maintains a low rental level per month in return for higher call costs. If you are a low spend user that is of advantage. The other one was the linking of the pensioner concession that Telstra provided in addition to the government's pensioner concession to the line rental increase, so that for all pensioners—and that includes aged, disability and single parent pensioners—there has been no impact from the line rental increase at all. That is because the pensioner concession has been indexed against the line rental increases.[216]

5.166 Mr Dodds noted that Telstra had also introduced a range of support products, such as MessageBox for homeless people.[217] Telstra's *Access For Everyone* package aims to provide affordable telephone services to disadvantaged Australians, with ten main products and services being offered, and an eleventh, 'Bill Smoothing' to be launched in June 2005.[218]

5.167 Mr Dodds noted that the package, including the establishment of the LIMAC, had been made part of Telstra's licence conditions and thus was 'future proofed'. He argued that this was 'a very good model' for other utilities companies.[219] However, the Committee notes the ACCC's call for certain aspects of the current regulatory regime to be strengthened, as discussed above. In particular, the ACCC considered that Telstra's licence condition should be amended to require Telstra to comply with a low-income package and associated marketing plan specified by the Minister, noting 'The current regulatory scheme means that improvements or suggestions from parties other than Telstra are not necessarily heard'.[220]

Looking forward

5.168 Mr Dodds argued that the USO was critical to low income people and should be expanded:

> A commitment to ensure that there is universal access is as important for people who are income disadvantaged as it is for people who are disadvantaged through living in rural and remote areas and for people who are disadvantaged through being disabled. If parliament and the Australian government are committed to ensuring universal and equitable access then the USO…should be expanded to cover low-income people and it should be a requirement that all telecommunications companies have packages along the lines of, as a starting point, the low income measures committee and the

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216 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 12.

217 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 12.

218 Public Report to the Minister for Communications, Information Technology and the Arts, *Telstra's Access for Everyone Package*, to 31 December 2004, p. 5.

219 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 12.

220 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. 110.

> access program package. That package also needs to be broadened to reach beyond just low spend customers.[221]

5.169 The CTN also argued that all providers should be required to implement financial hardship policies, and that 'hard caps on bills based on proper credit assessments should be mandated immediately'.[222] The Committee notes that the ACCC's recent report referred to the fact that in the UK and the USA low-income schemes are part of the USO. The ACCC commented that 'Such an approach is arguably more robust than the current Australian approach'.[223]

5.170 Mr Dodds stated that 'a really significant number of low-income people are turning to prepaid phones'. Attention now needed to be paid to mobile phone services:

> … as part of the next step in dealing with the next generation … and in providing protection for low-income people, we have to start looking at the mobile market and at how to involve the mobile providers, including Telstra. … We have to look at how we can get resources and support to people who are having difficulty in that mobile market.[224]

5.171 Mr Dodds warned that the potential problems caused by access to new technologies also needed to be considered:

> Think of the sorts of horror stories we got about teenagers and their mobile phone bills when text messaging came in. Where are we going to be in two years time when 3G is everywhere and sending a video of what is happening at a party to everyone you know because it is really funny starts happening? The potential for unexpectedly high bills for families and teenagers is quite enormous.[225]

5.172 He also argued that a national plan for broadband access needed to be considered:

> I think we need a national plan that is not just something as simple as the [LIMAC] that is providing support on the edge. These are bandaids. The issue of broadband is so critical that it needs a strategy. There are probably some bandaids that would help, but I think a national access plan is the approach that needs to be taken.[226]

5.173 Thus while there are some valuable protections for low income customers under current arrangements, there is evidence to suggest that more needs to be done, particularly in light of new technologies, and that controls need to be tightened.

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221 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, pp 12-13.

222 CTN, *Submission* 30, p. 6.

223 ACCC, *Review of Telstra's Price Control Arrangements*, February 2005, p. 110.

224 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 15.

225 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 15.

226 Mr Christopher Dodds, *Committee Hansard*, 4 May 2005, p. 16.

Remote Indigenous communities

5.174 In 2002 the Estens Report found that remote Indigenous communities remain the most disadvantaged telecommunications users in Australia and face unique difficulties in accessing adequate services.[227] The Estens Report also found:

- the direction of the Telecommunications Action Plan for Remote Indigenous Communities (TAPRIC) is supported as providing a holistic and well-targeted way forward … but further funding will be required in the future [Finding 5.2]
- Telstra needs to continue progress in implementing payphone improvements in remote Indigenous communities as part of its USO … [Finding 5.3][228]

5.175 The Committee notes that the DCITA 2004 review also pointed to the need for some action by Telstra to improve services for remote and Indigenous communities:

> The key … should include the ability to allow for pre-payment for services, and to allow users the flexibility to access their pre-paid service at a number of locations.[229]

5.176 During this inquiry, Mr Mark Needham from the NFF argued that some of the recommendations of the Estens Report relating to remote Indigenous communities still required further work. [230] The Minister recently noted that as few as five per cent of people in remote Indigenous communities have access to a phone at home, compared with 99 per cent of Australians as a whole.[231]

5.177 LIMAC's *Access For Everyone* 2004 report[232] stated:

> LIMAC is pleased to note the increase in perceived affordability of standard and mobile telephone services amongst this low-income segment [Indigenous Australians]. LIMAC is also pleased to note that satisfaction

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227 Report of the Regional Telecommunications Inquiry, *Connecting regional Australia,* 2002, Finding 5.1, p. 9.

228 Report of the Regional Telecommunications Inquiry, *Connecting regional Australia,* 2002, pp 9&10.

229 DCITA, *Review of the Operation of the Universal Service Obligation and Customer Service Guarantee*, 7 April 2004, p. 174.

230 Mr Mark Needham, *Committee Hansard*, 11 April 2005, p. 2.

231 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'Keynote address to the DCITA Indigenous Telecommunications Forum', Alice Springs, 17 May 2005, accessed at http://www.dcita.gov.au/newsroom2/speeches.

232 Public Report to the Minister for Communications, Information Technology and the Arts, *Telstra's Access for Everyone Package*, to 31 December 2004.

> with personal telecommunications services has returned to the levels reported in 2002.[233]

5.178 The Committee is concerned at LIMAC's report that satisfaction with services has only returned to 2002 levels. Progress in achieving equity for all Australians (which includes the disadvantaged, poor, remote and Indigenous Australians) in accessing telecommunications appears to be slow.

5.179 The Committee notes that TAPRIC was introduced in 2002 with $8.3 million in funding over three years to implement two initiatives to improve services in remote Indigenous communities: improving payphone accessibility by working with telecommunications carriers and communities, and undertaking a study to develop a longer-term strategy and action plan for improving telecommunications in those communities.[234]

5.180 Under the TAPRIC Internet Access Program Phase 2, DCITA is making available computer equipment to selected remote Indigenous communities connecting to a suitable high bandwidth Internet service under the HiBIS scheme. Another $3 million was 'rephased' in 2005-06 for the provision of community phones, an alternative to payphones. A DCITA representative recently advised that five trials are currently taking place with prepaid cards and access lines, and that 'the robustness of telephones, particularly in terms of weather impact' had also needed to be addressed.[235]

5.181 While the Committee did not receive further evidence about the situation in remote Indigenous communities so as to enable it to make specific findings, the situation is of concern. As the Estens Report noted:

> Telecommunications has been identified as an important tool for the economic development and self-sufficiency of remote Indigenous communities, assisting them to achieve their social and business aspirations. However, these remote Indigenous communities have generally not attracted the interest of commercial service providers.[236]

Emergency call service

5.182 The Committee heard from the National Emergency Communications Working Group (NECWG), a group which considers the future development, funding, management and security of the Emergency Call Service (E000). Mr Robert Barker, a

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233 Public Report to the Minister for Communications, Information Technology and the Arts, *Telstra's Access for Everyone Package*, to 31 December 2004, p. 21.

234 See http://www.dcita.gov.au/tel/indigenous_telecommunications, accessed on 21 June 2005.

235 Senate Environment, Communications, Information Technology and the Arts Legislation Committee, *Budget Estimates: Committee Hansard*, 24 May 2005, pp 127-128.

236 Report of the Regional Telecommunications Inquiry, *Connecting regional Australia,* 2002, p. 163.

founding member of the Working Group, told the Committee that the group wanted to draw attention to 'the difficulties of a critical community service trying to operate efficiently in an environment which relies in large part on self-regulation'. There were two main concerns about the E000 service:

- it is not a Telstra core business. While Telstra had done an excellent job, there will be no legislative obligation on Telstra to continue with the service after it is fully privatised; and
- there is nothing to ensure that new technologies like VoIP will be utilised for the E000.[237]

5.183 Mr Barker noted that Telstra's cost of running the service was about $20 million per year and that 'there is no way known that the financial impact is structured fairly in what should be a competitive market environment'.[238] While all service providers were obliged to provide consumers with a free call to 000, Telstra provided all the equipment and staff associated with running the service. Mr Barker suggested there should be an independent structure, with separate funding, to ensure appropriate management and strategic planning of the E000 service so that it developed with new technologies.[239]

5.184 Mr Barker said that certain principles must be addressed to ensure the future operation of the E000 service, including that the service:

- is able to operate independently of a carrier;
- can utilise advanced technologies;
- is able to operate at least two centres, both with risk management and business procedures in place;
- has set performance standards and can provide performance reports; and
- is able to deal fast and effectively in emergencies such as terrorist attacks.[240]

5.185 The CTN also urged that these issues be looked at closely, particularly in relation to VoIP.[241]

Conclusion

5.186 The Committee heard significant concern that the current self-regulatory regime is not adequately protecting consumers. The telecommunications regulatory regime emphasises the long-term interests of end users, but it appears that many

237 Mr Robert Barker, *Committee Hansard* 29 April 2005, pp 51-52.

238 Mr Robert Barker, *Committee Hansard* 29 April 2005, p. 54.

239 Mr Robert Barker, *Committee Hansard* 29 April 2005, p. 52.

240 Mr Robert Barker, *Committee Hansard* 29 April 2005, p. 53.

241 CTN, *Submission* 30, p. 10.

consumers are being harmed by industry practices. It appears also that widespread lack of compliance with industry codes has been compounded by insufficient compliance leadership from ACIF and a lack of enforcement action by the ACA. While there are mechanisms for consumer input, particularly in relation to the development of industry codes, these do not appear in many cases to be operating as well as they might. Moreover, consumers often lack awareness of their rights, particularly in regard to complaint resolution.

5.187 The next chapter presents the Committee's findings and recommendations on these and other issues that have arisen during this inquiry.

Chapter 6

A blueprint for the future

> I have always said that one thing the government missed was a blueprint for telecommunications in Australia. Where is the vision? What do we want to do? Where does structural separation fit? Where does the monopoly fit? Where can we have competition? Unless we map the whole thing and say what is needed, we will be having Senate inquiries like this for the next five or 10 years. That is what will happen unless somebody says, 'This is the blueprint and this is the grand plan of action that we have to put in place.' The government never took the initiative; Telstra never took the initiative. Unless we do such a thing we will always have contradictory elements.[1]

6.1 In this report the Committee has highlighted a wide range of matters within the current telecommunications regulatory regime which impede competition and investment and do not adequately protect consumers. Most glaring is the lack of a long-term strategic vision for telecommunications throughout Australia. The Committee concurs with the comments made by the Hon John Anderson MP, then Deputy Prime Minister:

> I have said several times over the past months that the real telecommunications debate should be about securing the services that regional Australia needs, not about selling a phone company. Today in Australia we have what is essentially a 19th century telephone system trying to serve a 21st century information economy. What we should be doing is looking ahead. … Our responsibility, though, is to the national interest and the interests of regional Australia - and we will only serve their interests if we can create a 21st telecommunications system for Australia.[2]

6.2 The Government's intention to privatise Telstra fully as soon as possible appears to have diminished its will to develop this long-term strategic view. Ms Rosalind Eason from the CEPU argued there was 'a kind of policy vacuum' in telecommunications:

> … as far as the long view goes, the impending privatisation has brought all of these strange ideas out of the woodwork, and some are stranger than others. It is muddying the waters. It is very hard to have a policy debate now about what sort of regulatory framework we might need in the next 10 years without it being overlaid by the whole privatisation question. On the one hand is the notion that the government is rejecting all ideas simply because it wants to enhance the share price…On the other hand are various interests, more or less opportunistic depending upon where they come from,

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1 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 58.

2 The Hon. John Anderson MP, Deputy Prime Minster, Speech at the NSW Liberal Conference, 17 June 2005, accessed 29 June 2005: http://www.ministers.dotars.gov.au/ja/speeches/2005/AS11_2005.htm.

> who see this as the moment—the kind of 'we have only three months to get it right otherwise this country is doomed' sort of argument—to gain policy leverage. The whole thing seems to us a very unfortunate conjuncture. That is why we have argued that the privatisation matter should be put aside for the time being. Let us look at the regulatory framework, let us look at new generation networks, the changes happening and what is needed to roll out a modern communications suite of services in Australia, then let us perhaps come back to that matter 10 years down the track.[3]

6.3 As outlined in chapter 2, a dominant theme which emerged during the inquiry was that insufficient progress has been made in providing adequate telecommunications services to rural and regional Australia. Further, there is broad community concern that the situation will worsen once Telstra is fully privatised.

6.4 The Committee notes the Government's commitment to the Telstra sale being conditional on adequate telecommunication service levels in rural and regional Australia,[4] and urges the Government to honour this pledge, including by holding off on passing the necessary legislation until the condition is met. Accordingly, the Committee has kept the desired outcome of improved rural and regional telecommunications services at the forefront during the development of its recommendations.

6.5 The Committee was encouraged by the Minister's recent announcement that a licence condition was soon to be placed on Telstra compelling it to maintain a focus on rural services:

> I expect to be imposing a Licence Condition on Telstra by the end of the month … This is not negotiable – T3 or no T3 – Telstra will be required to maintain their level of service to the bush. … Telstra will be working over the coming weeks to present me with a workable and responsive rural presence plan.[5]

6.6 The Committee notes that the Government announced on 4 August 2005 that such a licence condition had been imposed.[6] Telstra is required to develop a local presence plan which will be open for public comment for at least six weeks and is

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3 Ms Rosalind Eason, *Committee Hansard*, 20 June 2005, p. 20.

4 This commitment was recently reiterated by Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, who stated that adequate services to rural and regional Australia is one of three 'preconditions' for the stage-three sale of Telstra. 'Address to the Adelaide Press Club', 7 July 2005, p. 2, accessed 8 July 2005: http://www.minister.dcita.gov.au/media/speeches/address_to_the_adelaide_press_club_-_12.30pm_thursday_7_july-_check_against_delivery_-_7_july_2005_adelaide

5 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'Address to the Adelaide Press Club', 7 July 2005, p. 8.

6 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'Telstra's rural, regional and remote presence to be assured', *Media release* 91/05, 4 August 2005.

subject to the Minister's approval.[7] However, the Committee emphasises that the value of such measures will depend almost entirely on their final content.

6.7 This chapter summarises the findings of this inquiry and proposes a number of initiatives in response in the following areas:

- the structure of Telstra;
- the ACCC;
- the TPA: Part XIB and section 46;
- the TPA: Part XIC;
- meeting consumer demands;
- the USO; and
- other consumer protection issues

The structure of Telstra: achieving greater transparency

6.8 In Chapter 3, the Committee discussed Part XIB of the TPA, which is the regulatory mechanism aimed at addressing anti-competitive behaviour in the telecommunications sector. A number of weaknesses in the mechanism were identified. Central to the problem are Telstra's capacity to mask the delineation between its wholesale and retail costs and the limitations on the ACCC's ability to establish anti-competitive conduct.

6.9 The Committee has heard evidence which suggests that the lack of transparency between Telstra's wholesale and retail costs is a significant impediment to the effectiveness of the TPA.[8] Further, attempts to address this issue, such as the introduction in 2002 of the enhanced accounting separation regime (discussed in Chapter 3), have not given the ACCC a satisfactory means of determining whether Telstra operates so as to give its retail arm an advantage over its wholesale customers. As Optus submitted:

> There is ongoing debate concerning the separation of Telstra. At the heart of this debate is the concern that Telstra will continue to have strong incentives to favour its own retail operations at the expense of competitors who are wholesale customers. These incentives are very difficult to detect or curtail. Optus is well aware of, and experiences on a daily basis, Telstra's behaviour in this respect.
>
> The accounting separation regime that was introduced in 2002 required greater disclosure by Telstra of its costings and internal pricing. This was

7 The Minister has issued written guidance to Telstra: see 'Local Presence Plan Guidance', August 2005, accessed on 8 August 2005 at http://www.dcita.gov.au/tel/regional,_rural_and_remote_communications/local_presence.

8 ACCC, *Submission* 17, p. 5.

> designed to make it easier for both the ACCC and Telstra's competitors to determine if Telstra was favouring its own retail operations.
>
> The result has been disappointing, a fact recognised by both the industry and the ACCC. The information being provided is far too disaggregated to be used in any meaningful way, and the ACCC has indicated that there is little potential for improvement.[9]

6.10 In response to this lack of transparency and Telstra's monopoly over the network, a number of models have been suggested which aim to provide a clearer indication of Telstra's internal wholesale price to its retail business. As Mr Ian Slattery from Primus told the Committee:

> The arguments behind structural reform and structural rearrangements of Telstra are at the heart of the issue as to what is currently stifling competition, and they are Telstra's monopoly or control over key network elements which display monopoly characteristics which competitors rely on as an upstream input to provide competitive retail services. The fact is that Telstra is dominant in just about every market segment of telecommunications. They are the drivers behind why structural arrangements within Telstra need to be considered.[10]

6.11 The models most frequently proposed in response to lack of transparency are structural separation and operational separation. These models are reviewed below.

Structural separation

6.12 One proposed remedy is the structural separation of Telstra into two separate organisations, that is, wholesale and retail. The Australian Consumers' Association supported this approach:

> … because if the normal logic of wholesale competition were allowed to operate, access would become less of a foreground issue.[11]

6.13 Mr David Spence from Unwired Australia told the Committee that structural separation would stimulate competition and innovation.[12]

6.14 An article by Professor Peter Gerrand[13] examined the arguments for and against structural separation of Telstra, and in particular the buyback of the 'natural monopoly' of Telstra's fixed network into public sector ownership. Professor Gerrand noted that the benefits of a buy-back were offset by the prospect of two major electoral liabilities: the anger of minority Telstra shareholders if they lost shareholder

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9 Optus, *Submission* 12, pp 16-17.

10 Mr Ian Slattery, *Committee Hansard*, 11 April 2005, p. 17.

11 Australian Consumers' Association, *Submission* 16, p. 6.

12 Mr David Spence, Unwired Australia, *Committee Hansard*, 13 April 2005, p. 112.

13 Professor Peter Gerrand, 'Revisiting the Structural Separation of Telstra', in *Telecommunications Journal of Australia*, Vol 54 No 3 Spring 2004, pp 15-28.

value and the excessive demands on the federal budget in the year of the buy-back. Professor Gerrand supported a hybrid solution, a two-stage process, whereby both the costs and risks to the government could be significantly minimised.

6.15 However, arguments against structural separation of Telstra are based upon claims of cost and complexity, akin to 'unscrambling an omelette'.[14] Telstra argued that structural separation would be costly and would result in a loss of efficiency:

> It has become apparent that structural separation in telecommunications imposes large costs in terms of efficiency and international competitiveness. Structural separation results in a loss of the efficiencies that are achieved through vertical integration. As a result, customers are forced to bear higher costs. In addition, it is not clear that there are significant benefits from separation, especially not of the order required to outweigh the substantial costs involved.[15]

6.16 However, the true cost and complexity of the task of structurally separating Telstra are unknown. The ACCC Chairman, Mr Graeme Samuel, told the Committee:

> I think it is fair to say that there has been some work—but not an extensive amount of work—done into the cost and benefits associated with structural separation. The process that has been discussed by the ACCC in previous submissions—and I think you referred to a document signed off by me which would have involved a previous role that I had with the National Competition Council—has indicated that it may have been beneficial to examine the costs and benefits associated with structural separation. I am not aware that such a detailed examination of those costs and benefits has been undertaken.[16]

6.17 The Productivity Commission concluded in its recent report on National Competition Policy Reform:

> In such a rapidly changing environment, were full vertical structural separation to be pursued, it could be very difficult to determine precisely where the split should be made. Consequently, the scope for regulatory error, and its attendant costs, would be high.[17]

6.18 Mr Bill Scales from Telstra told the Committee that 'some constructs of structural separation' would now be 'technically impossible to do':

> What is often not taken into account in this structural separation debate is that Telstra is a much more complex beast than it was five, 10 or 15 years ago. At that time—and I am overstating it here—it was a relatively straightforward copper network. Now we have copper; fibre; a layer on top

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14 Australian Consumers' Association, *Submission* 16, p. 6.

15 Telstra, *Submission* 25, p. 30.

16 Mr Graeme Samuel, *Committee Hansard,* 9 May 2005, p. 3.

17 Productivity Commission, *Review of National Competition Policy Reform,* No. 33, 2005, p. 241.

> of that, which is IT systems; and a layer on top of that, IP systems. They are completely integrated, so the question becomes: how do you make an appropriate separation of that, without virtually having Telstra as it currently is? … To be quite frank, I have not seen anybody who has done any of the work to be able to make the appropriate judgements about the costs and benefits.[18]

6.19 Mr Stephen Dalby from iiNet argued that in any case, structural separation would not provide adequate transparency:

> Structural separation between retail and wholesale does not solve the problem for me when I am dealing simply with Wholesale. I might never deal with Retail, although their behaviour may still affect me. I am trying to strike a deal where I am moving from high-margin wholesale products to low-margin wholesale products and negotiating with somebody that does not want that to happen. I wonder really whether that is another layer of separation that is required between these sorts of full function wholesale products versus the bare bones building blocks.[19]

6.20 The Committee was also told that attempts to modify the structure of the industry by legislation was unlikely to be more productive than allowing regulatory and market processes to run their course:

> It is yet to be demonstrated that legislated structural changes in other industries in Australia have produced superior long-term results than could have been achieved by other less disruptive means. … In telecommunications such separation would be likely to result in inappropriate as well as inadequate investment in infrastructure; that is assuming that the 'infrastructure' could actually be identified separately from services equipment and after it was done, that the purpose or use of the infrastructure would be known.[20]

6.21 Mr Bill Scales from Telstra criticised the ACCC's support for structural separation, arguing that accounting separation, the mechanism currently employed to produce internal transparency between Telstra's wholesale and retail businesses, had not been fully implemented and given an opportunity to work:

> We have not even fully implemented accounting separation, and yet people in the ACCC are saying it does not work. So the question for an organisation like Telstra when it goes before the board is: what do we say about that? Because, on the face of it, it looks as though we have a regulator that has decided that it wants to have structural separation of the company; and to ensure that it puts itself in the best position to argue the policy case for structural separation it will undermine.[21]

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18 Mr Bill Scales, *Committee Hansard,* 4 May 2005, p. 81.

19 Mr Stephen Dalby, *Committee Hansard*, 29 April 2005, p. 41.

20 Mr Doug Coates, *Submission* 2, p. 2.

21 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 71.

6.22 As both ATUG[22] and Optus[23] noted, the Government has made it clear that it has no intention of considering structural separation of Telstra.[24] Mr Peter Lindsay MP told the Committee he opposed any form of forced separation of Telstra, which should be allowed as a private company 'to make its own decisions about what it does and how it runs its business'.[25] However, some industry analysts believe that Telstra will eventually structurally separate of its own accord. Mr Paul Budde told the Committee:

> I am absolutely against forced structural separation. It is the wrong way to go. It is politically totally impossible, so let us not even argue about it, because that would be a waste of time. Structural separation will automatically happen. Telstra is going to structurally separate itself—there is no doubt in my mind about that—within the next five years. So let us assist it to actually find the right sorts of models that will push it in a particular direction rather than forcing it upon it when nobody wants it.[26]

6.23 Mr Budde argued that Telstra had already begun internally separating:

> You would be surprised how far Telstra have already moved themselves in that direction. They will not tell you, but they have. There is a very good wholesale division. The people in wholesale would be laughing and jumping up and down if we did do structural separation. These are all good people who want to look after their wholesale business. They all want to do the best thing for their wholesale customers. So they would love to be passionate about wholesale and sell the right to the services to their customers. … If you simply separate the wholesale division in that situation then the rest will automatically follow because then the wholesale division will get a much better focus and the retail division will get a much better focus.[27]

6.24 Optus noted that during the 1980s, the US government imposed a break up on the dominant company, AT&T. The company was split into a long distance company and seven local telephony companies, each under separate ownership.[28] The

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22 ATUG, *Submission* 20C, p. 4, where it stated: '… the Australian Government has repeatedly refused to seriously contemplate the structural solution. The Government's shareholding in Telstra is an explicit conflict of interest in developing policy options for the telecommunications sector and its consumers.'

23 Optus, *Submission* 12, pp. 16-17. Accordingly 'Optus sees little point in making the case for such a reform'.

24 See also Senator the Hon Nick Minchin, Minister for Finance and Administration, *Senate Hansard,* 21 June 2005, p. 24; Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, 'Address to the Adelaide Press Club', 7 July 2005.

25 Mr Peter Lindsay, *Committee Hansard*, 21 April 2005, p. 6.

26 Mr Paul Budde, *Committee Hansard,* 13 April 2004, p. 46.

27 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 53.

28 Optus, *Submission* 12, pp 16-17.

Committee sought evidence on comparable arrangements in other Australian market sectors such as energy. Mr Paul Broad from PowerTel stated:

> It is worth recognising that, in the energy sector, once a private sector company got involved, for example in Victoria, they immediately separated their network business from their retail business. When owned by governments, the big conglomerates were the way to go. They subsidised their retail businesses through their regulated businesses. They hid all their back-office costs in the regulated businesses so that their retail businesses could be competitive. They destroyed value. Once they were sold, the private sector recognised that the market will rate the retail businesses differently from the network businesses. … The market will adapt. Once the market signals are clear through the industry structure, then in my view we are more likely to attract foreign investment compared to what we have today, which is uncertainty about what structures are likely to emerge.[29]

6.25 The Productivity Commission argued that the transaction cost to full structural separation would be large and therefore:

> … such transaction cost considerations now tip the balance against the full vertical separation of Telstra, regardless of the intrinsic merits of a separated structure in a 'greenfields' situation. However, given the continuing concerns about Telstra's capacity to discriminate against its retail competitors in the provision of network services, greater operational separation is worth further consideration. … Though the potential benefits would be smaller than those on offer from full vertical separation, so too would be the attendant efficiency and transaction costs.[30]

6.26 Some witnesses such as Mr Charles Britton from the Australian Consumers' Association pointed out that the need to engage in a debate about restructuring Telstra remains:

> We would accept some of the arguments about the fact that the Telstra omelette is scrambled, if you like, and you cannot separate it out et cetera. We would not have any sympathy for the notion that therefore we should not move on to a debate about operational separation. … It is certainly timely to talk about operational separation because the time to talk about structural separation may have passed but the problem that structural separation would address has not passed. It is an ongoing reality that we have got a vertically integrated, horizontally sprawling incumbent sitting in the middle of the market.[31]

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29 Mr Paul Broad, *Committee Hansard*, 11 April 2005, pp 18-19.

30 Productivity Commission, *Review of National Competition Policy Reform, No. 33,* February 2005, p. 242.

31 Mr Charles Britton, *Committee Hansard*, 13 April 2005, p. 65.

Operational separation

6.27 In light of the Government's rejection of structural separation, an operational separation model is gaining momentum. As Mr Samuel from the ACCC stated:

> Operational separation is a concept that seems to be finding favour with a number of significant stakeholders in the debate over the future of Telstra – these include Government and Opposition spokesmen, Telstra's competitors and it seems, from media reports, possibly even elements of Telstra itself. The ACCC is strongly supportive of the concept of operational separation. [32]

6.28 Noting that there had been some confusion about what was meant by operational separation, Mr Samuel clarified the difference in the following way:

> The essential difference between the two is that of ownership. Both types of separation involve establishing some parts of Telstra as separate business entities. Under structural separation these separate business entities would be sold to new owners and would no longer be part of Telstra. Under operational separation these separate business entities remain as part of Telstra.[33]

6.29 Witnesses and submissions supported the concept as a pragmatic alternative. Mr Ewan Brown from SETEL told the Committee:

> We have now developed a policy of operational separation because we believe that it is feasible in the current mind-set and the current marketplace environment. Given the limited extent of the powers of the ACCC, we feel that there is an element of goodwill, and an element of pressure might be able to bring that to bear and achieve that transparency of operation between the wholesale and retail sectors which would really allow the provisions of the Trade Practices Act to work properly in this marketplace.[34]

6.30 However, Mr John Feil, Executive Director of the National Competition Council, noted that operational separation was a 'trade-off':

> … between the scope and complexity of regulation required to moderate Telstra's market power and the structure of the business. Structural separation is likely to address both the ability and incentives for anticompetitive behaviour, whereas lower order separation is likely to reduce the ability to engage in anticompetitive behaviour principally by making such action more apparent, along with the attendant regulatory consequences. But it will have limited effects on the underlying incentive to

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32 Mr Graeme Samuel, Chairman, ACCC, Speech at National Press Club, Canberra, 27 April 2005, p. 3.

33 Mr Graeme Samuel, Chairman, ACCC, Speech at National Press Club, Canberra, 27 April 2005, p. 3.

34 Mr Ewan Brown, *Committee Hansard*, 11 April 2005, p. 52.

> utilise market power. It is possible that structural separation would allow for less regulation especially of those parts of the business that exhibit natural monopoly characteristics and can be effectively separated from commercial activities.[35]

6.31 Similarly, Mr David Forman from the CCC stated:

> We regard operational separation as a mechanism by which you seek to emulate as far as possible the outcomes that you would see in a structurally separate Telstra with the recognition that without full structural separation you can never get to the core incentive on Telstra that has been identified in the past by the ACCC to discriminate against access seekers who are its competitors at a retail level.[36]

What operational separation would require

6.32 Mr Samuel told the Committee:

> … an ACCC enforced operational separation would enable us to achieve the objective that I outlined in my opening statement, which is to be able to promote effective competition in the telecommunications sector.[37]

6.33 The ACCC outlined its proposal for operational separation in the following terms in its submission to the Productivity Commission's review of National Competition Policy:

> Under this arrangement, each business would have its own management, location and information systems, and operate as an independent profit centre with specific objectives. The wholesale business would be expected to treat both its internal retail counterpart and external third party retailers at arm's length and on a non-discriminatory basis. Legal or corporate separation is a potential variation where the entities take the form of legally separated firms.[38]

6.34 During this inquiry, the ACCC submitted that operational separation would need to be underpinned by formalised arrangements, including requirements that the two businesses:

- deal with each other on a commercial arms-length basis, including transparent pricing arrangements between Telstra's wholesale and retail arms as well as separate invoicing and billing;
- maintain fully separate accounts and reporting systems, capable of capturing all transactions between the businesses; and

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35 Mr John Feil, *Committee Hansard*, 4 May 2005, p. 91.

36 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 15.

37 Mr Graeme Samuel, *Committee Hansard*, 9 May 2005, p. 14.

38 Cited in CEPU, *Submission* 40, pp 22-23.

- maintain separate staff at all levels, with staff remuneration tied exclusively to the performance of the relevant separated business.[39]

6.35 The Australian Consumers' Association supported 'effective' operational separation, which would require 'ring-fencing' of Telstra's retail and wholesale activities:

> This should be more than just a strengthening of the accounting separation framework and is more than the mere development of a separate wholesale division within Telstra. It is necessary to effectively ring-fence Telstra network operations from retail activities. This would create an internal separation between a 'retail business' supplying services to consumers, and a 'network business' supplying network or wholesale services to both Telstra retail and retail competitors. Such ring-fencing would have the following characteristics:
>
> - Maintenance of separate legal entities for internal business units;
> - Allocation of costs in a reasonable manner;
> - Transparent pricing arrangements between wholesale and retail arms;
> - Separate invoicing and billing systems;
> - Fully separate accounts and reporting systems;
> - Limitations on common staff and sharing confidential customer information; and
> - Staff incentives linked exclusively to the relevant business unit.[40]

6.36 Optus argued that an effective operational separation model would need to include:

> - The establishment of Telstra's access division as a separate operational entity. Under this measure, Telstra Retail would acquire the same services as access seekers. A transfer price would be clear and visible, and Telstra Retail and Telstra Wholesale could be required to prepare accounts based on retail prices.
> - The establishment of requirements for price and non-price non-discrimination by Telstra Wholesale, i.e. a clear non-discrimination rule. Enforcement action to address breaches of the non-discrimination requirements could be obtained in the absence of proof that the breach has resulted in a substantial lessening of competition.
> - The creation of monitoring and reporting requirements for the regulator on measures of discrimination. Such monitoring could focus on, for example, the access prices that Telstra charges its retail division compared with those charged to its competitors, and the

39 ACCC, *Submission* 17, p. 6.

40 Australian Consumers' Association, *Submission* 16, p. 6.

> Service Level Agreements (SLAs) applicable to Telstra Retail compared to those of its competitors.[41]

6.37 The Committee heard that some of Telstra's competitors supported operational separation if it delivered a level of transparency that would address Telstra's current discriminatory practices against its wholesale customers. Mr David Forman from the CCC told the Committee:

> We have argued that operational separation needs to deliver transparency, but that transparency is there not as a means of itself—that is accounting separation. It needs to deliver the ability for the regulator to look for acts of discrimination. … The other elements of the regime such as separate boards, separate staff—and, we would argue, separate locations for a number of operations, if that is not one of those issues—go to behaviour and to the ability to discriminate. It is not simply about prices; it is about discrimination that manifests itself in other ways. We have discussed it in various documents: information asymmetry, information leakage, the issues of Telstra's ability to see into some of the arrangements that appear to be conducted between a competitor and Telstra Wholesale and for some of that information to apparently find its way into Telstra's retail business.[42]

6.38 ATUG submitted that accounting separation was 'ineffective and not likely to work, as it is based only on notional data and does not reflect actual prices/transactions between Telstra Wholesale and Telstra Retail'.[43] ATUG argued that operational separation was needed and that certain requirements must be met:

> One of the outcomes of any move to Operational Separation must be explicitly agreed contracts between Telstra wholesale and Retail which can be mirrored with competitors to ensure equivalent access (price and non-price) is being provided and to ensure that the behavioural and incentive changes that are needed in Telstra for competition to be effective can occur. A critical part of implementation of operational separation will be the introduction of information systems to provide a high degree of confidence that equivalent access is being delivered.[44]

The UK experience

6.39 Optus highlighted the United Kingdom's (UK) approach in relation to its market incumbent, BT. UK regulator OFCOM released a *Strategic Review Telecommunications Phase 2 Consultation Document* in November 2004 which argued that equivalence of access must be tackled 'head-on'. Equivalence of access refers to the same or similar regulated wholesale products, at the same price and using

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41 Optus, *Submission* 12, pp 23-24.

42 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 21.

43 ATUG, *Submission* 20a, p. 3.

44 ATUG, *Submission* 20a, p. 3.

the same or similar processes. In OFCOM's view, creating equivalence requires both organisational and behavioural change:

> • "Significant shift in [the incumbent's] behaviour at an organisational level in support of equivalence at the product level
>
> • "Changes in management structures, incentives and business processes, which today remain as a consequence of [the incumbent's] historic structure as a vertically-integrated operator
>
> • "Information flows within [the incumbent] which mirror the information flows between [the incumbent] and its wholesale customers, so that its customers are able to influence [the incumbent] to the same extent that different parts of [the incumbent] can influence each other
>
> • "That this level of equivalence within the organisation can be demonstrated through transparency" (p15).[45]

6.40 OFCOM had noted that one option for consideration in relation to BT was reference of the matter for investigation by the Competition Commission under the *Enterprise Act 2002* (UK), a possible outcome being the structural separation of BT. In February 2005, BT offered some voluntary changes to its business and organisational structure and OFCOM has worked with them and other industry participants since that time.[46]

6.41 On 20 June 2005, OFCOM published details of its new approach to regulation of the UK's fixed line telecommunications market.[47] BT had offered legally binding undertakings[48] in lieu of a reference under the *Enterprise Act 2002* (UK) to the Competition Commission and these were accepted by the OFCOM Board, subject to final consultation.[49]

6.42 BT's undertakings include the following:

- An operationally separate business unit will be established, provisionally entitled Access Services, to be staffed by about 30,000 BT employees currently responsible for BT's local access networks. The unit will have separate physical locations for management teams, separate employee bonus schemes, separate operating and trading systems and, in time, new branding which emphasises its operational separation.

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45 Optus, *Submission* 12, p. 18.

46 OFCOM 'Strategic Review Telecommunications Phase 2 consultation document: telecommunications statement', 23 June 2005, accessed on 27 June 2005 at http://www.OFCOM.org.uk/consult/condocs/telecoms_p2/statement/.

47 OFCOM, 'A new regulatory approach for fixed telecommunications', 23 June 2005, accessed on 27 June 2005 at http://www.ofcom.org.uk/media/news/2005/06/nr_20050623.

48 In the event of a breach, OFCOM may take the matter to the High Court. Third parties affected by the breach may also seek damages.

49 The consultation period of 6 weeks commenced on 30 June 2005.

- The new unit will be required through formal rules on governance and separation to support all providers' retail activities on a precisely equivalent basis called 'Equivalence of Input'. This means that all providers will benefit from the same products, prices and processes, to ensure that they can order, install, maintain and migrate connections on equal terms.
- The new unit will offer a universally available product and service set, comprising Local Loop Unbundling products, all forms of wholesale line rental and backhaul products. Equivalence of Input will also apply to BT's wholesale internet products used by many ISPs to provide broadband connections.
- There will be 'a number of clear principles' which BT should follow in the design, procurement and guild of its next generation 21st Century Network, in order to help ensure other providers who rely on the network do not suffer competitive disadvantage.
- A new Equality of Access Board will monitor compliance with the undertakings (but will not be an operating management board).[50]

6.43 OFCOM's Chief Executive Stephen Carter was quoted as saying:

> The OFCOM Board proposed to accept BT Group plc's proposed undertakings on the critical assumption that BT Group plc does not merely deliver the letter of the undertakings, but also the spirit.[51]

Regulatory models in other sectors

6.44 As noted earlier, the Committee sought further information about regulatory models in other market sectors during this inquiry. In the Australian energy sector, models exist for 'ring-fencing' the monopoly and competitive activities of utility companies.

6.45 Both the National Gas Code and mandatory guidelines issued by the ACCC under the National Electricity Code contain ring-fencing provisions that have been operating for some time. Under these provisions, utilities are required to maintain separate legal entities for their internal business units. These arrangements do not preclude the separate businesses from being owned by the same shareholders, but they improve transparency and address underlying incentives to engage in discriminatory behaviour.[52] Mr Paul Broad from PowerTel Ltd told the Committee:

> In all the energy businesses I know around the world, separation from network and retail has occurred in some form or other. With regard to the

50 OFCOM, 'A new regulatory approach for fixed telecommunications', accessed on 27 June 2005 at http://www.ofcom.org.uk/media/news/2005/06/nr_20050623.

51 OFCOM, 'A new regulatory approach for fixed telecommunications', accessed on 27 June 2005 at http://www.ofcom.org.uk/media/news/2005/06/nr_20050623.

52 ACCC, *Submission* 17, p. 5.

> model that the ACCC are referring to, businesses in fact did most of that. The ACCC encouraged it and threatened it. Of course, they had the power to do it and made us all sit up and take notice. When we did do it, it was the best thing for our businesses, because we could actually see where we were making money, particularly in some of the old network businesses that had retail attached to them and found the retail businesses were losing lots of money.
>
> To me, it is in Telstra's best interests, in the market's best interests and in the interests of those who are competing. It goes to the heart of: transparency and openness stops all these dead weight losses and the costs involved in running inquiries and having regulators all over you. Surely, from their perspective, they would want to be in the driving seat rather than be driven to an outcome they are not comfortable with.[53]

6.46 In Melbourne, the Committee heard from Mr Paul Fearon, Chief Executive Officer with the Essential Services Commission, who outlined ring-fencing arrangements in the electricity and gas sectors:

> The ring fencing for electricity and, for that matter, for gas—and we are talking here principally about distribution and retailing—has not been the issue that it has been with telecommunications. It comes back to the fact that the contestable activities in energy and the natural monopoly network elements are much more separable…
>
> Nevertheless, we have put in place ring-fencing arrangements…The ring fencing is essentially the financial or accounting separation, with what I would call a relatively benign form of operational separation. That basically comes down to separation of staff, access of information and some limits on joint marketing. The reality is that there is not a strong internal driver to keep these two businesses together anyway. In fact, those businesses that have maintained both of those businesses have recognised that the value to their business is maximised by having them fairly separate in terms of the skills, attitudes and cultures that are required to run them both.[54]

6.47 The success of ring-fencing or operational separation models in the energy sector was compared with the failure of the model applied to telecommunications. As Mr Broad bluntly stated:

> The energy industry did the reform and did it right. In fact the states that did the energy reform—and I have just spent seven years running an energy company—did it right. The feds that did the telco one got it wrong.[55]

6.48 The effectiveness of the energy sector's approach to privatisation and separation was also highlighted by Mr Paul Fearon from the Essential Services Commission:

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53 Mr Paul Broad, *Committee Hansard,* 11 April 2005, pp 21–22.

54 Mr Paul Fearon, *Committee Hansard*, 4 May 2005, p. 43.

55 Mr Paul Broad, *Committee Hansard,* 11 April 2005, p. 18.

> In Victoria, the businesses were legally separated but sold in a stapled form. Since then, there have been a number of transactions which have essentially unstapled them. But there is no regulatory or legislative barrier to these companies being jointly owned. Basically, they were physically dealt with before they were privatised. So the old gas and fuel sectors in Victoria created three staple distributor retailers, and they were effectively operationally and physically separated prior to privatisation.[56]

Concern about operational separation

6.49 Some submissions argued that operational separation was a knee-jerk reaction which had not been considered in concert with wider policy and strategic plans for the telecommunications industry. The CEPU argued:

> There is no consideration, for instance, of what further policy provisions might be required for such separation, once established, to be maintained. Would Telstra wholesale be permanently debarred from offering retail products? Would Telstra retail be denied the right to invest in new infrastructure (e.g. spectrum)? And what would be the effect of imposing what amount to line-of-business restrictions on Telstra, but not on any other vertically integrated operators?
>
> What are the implications of the model for the pricing of "wholesale" products which regulation currently requires be offered on a retail-minus basis i.e. local calls? Would Telstra wholesale be allowed to charge for these services at prices that allow the recovery of traffic sensitive costs i.e. on a timed basis? If so, what happens to the untimed (retail) local call obligation?
>
> What impacts would "virtual separation" have on residual cross-subsidies such as those involved in the geographic averaging of line rental prices? What are the implications for the funding of universal service?
>
> No discussion of "operational separation" which the CEPU has seen to date offers answers to these questions.[57]

6.50 Similarly Optus, while supporting 'an examination of further changes within Telstra to assist in delivering equivalency', cautioned that operational separation, like accounting separation, could require significant cost and effort for no net gain:

> In assessing the imposition of any new regulatory requirement, it is necessary to assess the benefits to be achieved against the cost in implementing the requirement. … While operational separation options may have a theoretical attraction, there is a considerable danger is that the same barrier will be encountered; namely, Telstra will resist change and the regulator will be unable to gain sufficient insight to force organisational and

56 Mr Paul Fearon, *Committee Hansard*, 4 May 2005, p. 45.

57 CEPU, *Submission* 40, p. 24.

> behavioural requirements to deliver tangible outcomes. The end result could be significant effort and cost for no net gain.[58]

6.51 AAPT argued:

> Any such development needs to be carefully designed to ensure that the separation is not merely illusory, as the consequence could be the introduction of additional cost without matching benefit.[59]

6.52 Similarly ATUG submitted:

> Record keeping rules such as Accounting Separation are ineffective, and Operational Separation is a concept untried anywhere in the world as yet and with significant problems even at concept stage. For example, under Australia Corporations Law ATUG is not sure whether an access services division, within Telstra, could ever be sufficiently independent of Telstra's overriding corporate responsibilities to grow and run the wholesale business effectively. It may be that we require separate company structures at a minimum for Operational Separation to be effective.[60]

6.53 Associate Professor Ian Atkinson argued that operational separation looks very similar to structural separation and may well be more complex and difficult to manage:

> I am essentially a scientist. I like to apply the principles of Occam's razor. If it looks like a cat, smells like a cat and moves like a cat, then it is a cat. Within the Australian context, do we really have enough people in business with enough skills to actually run a ring fencing operation like that? I just think it would inevitably fail.[61]

6.54 Similarly Mr Bill Scales from Telstra argued:

> This does look to me like structural separation. It has all the elements of structural separation. It has all the elements that the ACCC called structural separation less than 12 months ago. I am inclined to think that if it looks like a duck, walks like a duck and quacks like a duck then it is a duck. This to me is structural separation under another name.[62]

6.55 However, representatives from the ACCC refuted Mr Scales' claims succinctly:

> Mr Willett—Mr Scales is quite wrong on that, quite ill-informed. It is not structural separation.

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58 Optus, *Submission* 12, p. 18.

59 AAPT, *Submission* 13, p. 8.

60 ATUG, *Submission* 20C, p. 10.

61 Associate Professor Ian Atkinson, *Committee Hansard*, 21 April 2005, p. 50.

62 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 78.

Mr Samuel—If it is a duck, then it has no beak.[63]

Application of models to other competitors

6.56 Not surprisingly, Telstra's largest competitor argued that organisational reform legislation should be directed solely at Telstra:

> Optus is concerned to ensure that any structural separation measures are strictly targeted to where the harm exists, namely Telstra and its fixed line network. Any legislative requirements should impact only on Telstra and, to that end, the requirements should be placed in the Telstra Act, not in the Trade Practices Act.[64]

6.57 However, the Committee notes that many of Telstra's competitors also have the potential to grow to a powerful market position. Some submissions stressed that Telstra was not the only large, vertically integrated telecommunications company in Australia. As Mr Bill Scales from Telstra stated:

> The dynamic nature of the telecommunications market and the emergence of new technologies have further intensified the competitive pressure on Telstra…[T]here are now over 150 licensed carriers in the market competing with Telstra. Many of these competitors are vertically integrated and they are also horizontally integrated. There are many affiliates of powerful foreign owned and even foreign government owned corporate multinationals. Some of them with whom we are competing today are actually larger than Telstra. These affiliates can draw on the extensive resources of those multinational entities when competing in the Australian market, and they do.[65]

6.58 Any legislation which would alter the structure of Telstra must also be applicable to its competitors, who may find themselves the beneficiary of regulatory intervention and consequently in a dominant market position. As the CEPU argued:

> … any proposal to structurally separate Telstra must be viewed in the context of industry structure as a whole. … Splitting Telstra into two separate companies, while leaving (say) Singtel Optus to enjoy all the advantages of vertical integration has never seemed to the CEPU to represent a coherent policy option.[66]

The Committee's view

6.59 The Committee believes that greater transparency between Telstra's wholesale and retail businesses is clearly needed. While the Committee has heard many calls for operational separation and notes that there is growing support for this model, the

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63 Mr Ed Willett and Mr Graeme Samuel, ACCC, *Committee Hansard*, 9 May 2005, p. 8.

64 Optus, *Submission* 12, p.19.

65 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 56.

66 CEPU, *Submission* 40, p. 21.

Committee is not entirely persuaded that operational separation will provide the level of transparency required by the regulator and by Telstra's wholesale customers.

6.60 The Committee recognises that true transparency may only be delivered by structurally separating Telstra. This model will remove the incentive for Telstra to favour its own businesses over its competitors. It will encourage innovation and investment in infrastructure, as Telstra wholesale will benefit from providing services to as many customers as possible. The Committee agrees with Mr Paul Broad who argued:

> The culture of running a network business, where your objective is to minimise capital and to load it up, is vastly different from the culture of running a wholesale business, which is vastly different from the culture of running a retail business. To use one to subsidise and not really know what that subsidy is, to me, is not a sustainable long-term management practice for running businesses.[67]

6.61 The Committee has previously recommended that the Productivity Commission should be asked to undertake a full examination of all the options for structural reform in telecommunications, including the structural separation of Telstra.[68] The Committee notes that the Productivity Commission in its report in February this year concluded that full structural separation 'would inevitably be expensive and time consuming' and that transaction cost considerations 'now tip the balance' against full vertical separation, pointing to some overseas experience.[69] However, the Committee is concerned that there has still not been a detailed review of this option with proper financial analysis, and for that reason repeats its previous recommendation that there should be a full independent review.

Recommendation 1

6.62 The Committee recommends that the Productivity Commission be asked to undertake a full examination of structural separation of Telstra.

6.63 Despite the persuasive arguments for structural separation, the Government has indicated that it is unwilling to explore this option.

6.64 Operational separation appears to have gained support from different segments of the telecommunications market as a second best option. The Committee heard substantial evidence on the features that such an operational separation model might include.

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67 Mr Paul Broad, PowerTel Ltd, *Committee Hansard,* 11 April 2005, p. 21.

68 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in broadband services*, 2004, Recommendation 3.

69 Productivity Commission, *Review of National Competition Policy Reforms*, Report No. 33, February 2005, pp 241-243.

6.65 The Committee heard that the aim of an effective operational separation regime should be to replicate as far as possible the incentives and transparency of structural separation, whilst attempting to avoid some of the costs of implementation. Based on this evidence, the Committee has formed the view that if operational separation is pursued, the model for this separation should, at a minimum, include the features of the ACCC's proposed model. Any model of operational separation that fails to incorporate these threshold requirements is likely to have limited prospects for success.

Recommendation 2

6.66 The Committee recommends that if the Government decides to pursue operational separation of Telstra over structural separation, it should adopt as a minimum the framework and operating rules outlined by the ACCC in its proposed model.

The ACCC

> We also understand the principle of walking softly and carrying a big stick. Those regulators who have a big stick can afford to walk softly, whereas those without may have to trot nervously through the jungle.[70]

6.67 The Committee heard much criticism of the ACCC's ability to deal appropriately with competition and access issues in telecommunications. Criticising the ACCC's handling of the 2004 competition notice process, some submissions queried whether it was a matter of a lack of will on the part of the regulator or inadequate powers. Mr Paul Budde articulated this concern:

> How is it possible that, given the apparently 'blatant' anti-competitive behaviour that has been occurring in the broadband market, the regulator failed to act promptly and decisively. Other issues, such as mobile termination rates, Internet peering and unbundled local loop, demonstrate that the ACCC appears regrettably ineffective.
>
> …This leads me to conclude that either:
>
> - the ACCC's current powers are insufficient to act or
> - the ACCC is not using effectively the powers it had.
>
> The fact that no decisive action is taken plus the fact that the regulator has clearly indicated that Telstra is 'too large to regulate', caused me to conclude that the ACCC indeed is an inadequately empowered regulator.[71]

6.68 Many acknowledged the ACCC's difficult task in regulating a sector so heavily dominated by one vertically integrated company, and argued that the regulator should be given further information-gathering powers. The Western Australian Department of Industry and Resources (WADIR) submitted:

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70 Mr Richard Thwaites, ATUG, *Committee Hansard*, 11 April 2005, p. 39.

71 Mr Paul Budde, *Submission* 1, p. 6.

> The regulators have been assigned a difficult task and need comprehensive and relevant information in order to make the best possible decisions. Toward this objective, the Commonwealth Government should provide all regulators with unfettered and mandatory rights to compel information from telecommunications providers. In the interest of promoting fair and open competition, substantially more information relating to the telecommunications network should be disclosed publicly.[72]

Penalties

6.69 The ACCC's ability to impose adequate penalties to deter anti-competitive behaviour was also raised. As discussed in Chapter 3, some witnesses felt that financial penalties were insufficient. As Mr Damian Kay stated:

> It is corporate bullying. That is a broad, sweeping term, but how do you stop it? The rules are there now to say [Telstra] cannot do that. They have to provide the same service to the end customer, no matter who that line is billed through. So the rules are there. If someone comes down hard on Telstra out of this and says: 'You can't do this. We have all these examples and we are going to fine you $20 million,' they would have made more than $20 million out of this.[73]

6.70 Dr Walter Green argued that corporations and businesses that were caught engaging in anti-competitive conduct should be 'automatically' fined:

> The biggest concern, and one that has been used not only by Telstra but by a couple of others to destroy the competition, is the offering of a retail price which is below the wholesale price. To me it should be in the legislation that if you are caught doing that it is automatic that you will get fined. Just improving that will change the whole dynamics as to how pricing is done. In fact we have been asked to look into two current areas where what Telstra is offering to the large corporate customers is below the wholesale rate that is being offered to carriers.[74]

6.71 ATUG also submitted that to encourage fast compliance an immediate fine should be levied on anti-competitive behaviour:

> The monetary incentive should be used to encourage fast compliance given the safeguards that are in place PRIOR to a notice being issued. The fine should be applied immediately and return of same could be the subject of negotiation on proof that anti-competitive conduct has ceased. Part XIB is not designed to support the negotiation of access prices. That is the role of Part XIC. Part XIB is designed to penalize anti-competitive conduct.[75]

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72 WADIR, *Submission* 32, p. 1.

73 Mr Damian Kay, Telcoinabox, *Committee Hansard*, 21 April 2005, p. 24.

74 Dr Walter Green, Communications Experts Group, *Committee Hansard*, 29 April 2005, p. 18.

75 ATUG, *Submission* 20C, p. 3.

6.72 The Committee notes that suggestions that the ACCC rather than a court have power to impose immediate penalties for certain conduct would present constitutional difficulties arising from the separation of judicial and executive powers, and for that reason does not support these suggestions. However, the Committee considers that the sentiments expressed demonstrate the level of concern about the effectiveness of the current regime.

Other powers

> I do not know that you necessarily need an army in the ACCC, but they need to have the tools. There were some comments made about predetermining what the pricing environment ought to be. That might be a solution and that may avoid the need for building up more muscle within the organisation. Take the competition notice over the ADSL: I was involved as a witness in that process and for 12 months I was giving witness statements. There were a lot of resources spent.[76]

6.73 Optus argued that there was a need for further regulatory reforms, including giving the ACCC additional tools so that it can move more quickly to block Telstra's anti-competitive behaviour. Optus' specific proposals included:

> A prohibition on Telstra unreasonably discriminating in favour of its own retail operations through the introduction of a non-discrimination rule. This would require Telstra to demonstrate it is not discriminating in the way it treats its competitors and itself where it resells services. This would overcome the significant hurdle of competitors currently having to prove Telstra is discriminating when it behaves anti-competitively.
>
> Measures that prevent Telstra targeting customers it has lost to competitors for 180 days (such measures are in place today in Canada). This would remove Telstra's ability to use its competitive advantage to undermine competitor's efforts to acquire customers.[77]

Cease and desist

6.74 The Australian Consumers' Association suggested that the ACCC should be given 'cease and desist' powers when seeking to resolve apparent anti-competitive behaviour. This power, the Association argued, 'would increase incentives to resolve competition issues, while improving the sensitivity of the system to market entrants'.[78]

6.75 Mr David Havyatt from AAPT argued that 'cease and desist' powers would have been beneficial if they had been available during the 2004 ADSL competition notice episode:

> … the issue with the price squeeze we saw was that Telstra had dropped a retail price and then not adequately reduced its wholesale price. A cease and

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76 Mr Stephen Dalby, iiNet, *Committee Hansard*, 29 April 2005, p. 41.

77 Optus, *Submission* 12, pp 4-5.

78 Australian Consumers' Association, *Submission* 16, p. 4.

> desist order would have allowed the ACCC, rather than go through a long process of having the wholesale prices negotiated, to say to Telstra, 'You cannot drop that retail price until you have satisfactorily dealt with the wholesale price.' Both of those would have had beneficial outcomes in terms of the administration of the regime.[79]

6.76 Further, AAPT submitted:

> … Telstra continued to offer anti-competitive prices after the issue of the notice. The problem would be avoided if the ACCC had the power to issue "cease and desist orders" in conjunction with a competition notice.[80]

6.77 Similarly, Unwired Australia argued that the ACCC needed cease and desist powers 'as well as or in place of its competition notice powers':

> Only then will actions cease and irreparable damage to the market that can occur during an investigation be avoided.[81]

6.78 However, the Committee notes that a 'cease and desist' power raises a possible constitutional issue arising from the relationship between judicial and executive powers.[82] The 2003 *Review of the Competition Provisions of the Trade Practices Act*[83] (the Dawson Report) did not support a proposed amendment to Part IV to confer a 'cease and desist' power on the ACCC, noting:

> There is a real question whether the proposed amendment would involve the ACCC in the exercise of judicial power and hence be invalid. The power to make binding orders (albeit temporary) based on a determination by the ACCC that there was a breach of the Act, even though the orders would be enforceable only by the Court, would appear to involve the exercise of judicial power.[84]

6.79 The Dawson Report stated that those difficulties had not been resolved. In any case, such an amendment was not supported because of the availability of injunctions under the TPA and the lack of evidence to show that a 'cease and desist' process would be speedier than obtaining an interim injunction.[85] The Committee notes that

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79 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 31.

80 AAPT, *Submission* 13, p. 6.

81 Unwired Australia, *Submission* 48, p. 3.

82 Dr Mitchell Landrigan, Telstra, *Committee Hansard*, 4 May 2005, p. 57.

83 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, (Chairman Sir Daryl Dawson).

84 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, (Chairman Sir Daryl Dawson), Chapter 5.

85 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, (Chairman Sir Daryl Dawson), Chapter 5.

injunctions are also available for contraventions of the competition rule and other rules in Part XIB.[86]

6.80 Dr Mitchell Landrigan from Telstra also noted:

> I would point out that as part of the Dawson recommendations there is going to be quite significant bolstering of the penalty provisions in part IV. I would have thought that for those who are concerned about the administration of part IV that would be quite a welcome thing.[87]

6.81 The Committee also heard evidence which suggested that granting the ACCC 'cease and desist' powers may not deter anti-competitive behaviour because of Telstra's extensive legal resources. Mr Charles Britton from the Australian Consumers' Association stated:

> The cease-and-desist type power is possibly tainted. You have the competition notice regime. In theory, that allows them to step in…If cease-and-desist had the same unhappy outcome as the competition notice, then that is what I am saying about a reluctance to get more shovels out for that hole. It does dig us deeper in. Telstra has potentially got more lawyers than the ACCC, so in that sense the ACCC is not going to win that arm wrestle for us.[88]

6.82 The Committee believes that if the ACCC had had 'cease and desist' power in the 2004 ADSL competition notice matter, the process may have been resolved in a more timely manner. However, the Committee also notes the views on possible constitutional difficulties with the grant of this power and the availability of injunctions. Accordingly the Committee does not recommend 'cease and desist' powers for the ACCC at this stage.

Divestiture powers

6.83 The Committee heard from such groups as the Communications Experts Group[89] and the CCC which argued that the ACCC should be given divestiture powers, that is, the power to compel structural separation in response to anti-competitive behaviour, as part of its array of regulatory powers.

6.84 Mr David Forman from the CCC stated:

> We have consistently argued that that is a screamingly obvious element that is missing from the regime at the moment. At the moment, the ACCC has extensive competition notice powers that go to fines, but nothing beyond that. We are talking about a $4½ billion company. It would have to be a pretty substantial fine to mean anything, to be material…At the moment, I

86 Section 151CA.

87 Dr Mitchell Landrigan, *Committee Hansard*, 4 May 2005, p. 57.

88 Mr Charles Britton, *Committee Hansard*, 13 April 2005, p. 63.

89 Communications Experts Group, *Submission* 26, p. 4.

> cannot see that fines of the magnitude that is likely to be contemplated under any breach of the act would be a sufficient disincentive to make Telstra walk away from something that it considers fundamental to retaining its market power. If, however, it had to consider the fact that the regulator may attempt to actually change the structure of the company, then that could be a real disincentive.[90]

6.85 Mr Paul Budde expressed similar views:

> Facing the reality of a powerful government that is unwilling to properly address the issue of structural separation, the ACCC should at least be provided with the authority to use this threat as a weapon to force Telstra to change its anti-competitive behaviour and its regulatory game-playing.[91]

6.86 However, not all submissions supported this proposal. It was claimed that despite the antitrust court decision in the United States some twenty years ago, in which the Bell System was broken up, the industry has now reformed on lines not dissimilar from the original structure.[92] Yet it was argued that in the intervening period much time has been wasted on bureaucratic regulation, some innovation has been retarded and there was extensive overinvestment in transmission capacity.[93] Dr Mitchell Landrigan from Telstra noted that there had not been a detailed debate of divestiture powers:

> Divestiture is clearly a complicated issue and much of the debate has not been about strict divestiture of entities as they currently exist but about incremental power that has effectively resulted as an accretion of creeping acquisitions. To my knowledge there has not been detailed debate about divestiture per se of an entity in its existing form.[94]

6.87 Despite these concerns, the Committee has heard a substantial amount of evidence which suggests that the current penalties available to the ACCC to achieve enforcement of XIB and XIC are inadequate. The Committee believes that the financial penalties do not act as a sufficient deterrent to anti-competitive behaviour and that other deterrents are needed.

6.88 When Mr Samuel was asked whether the ACCC sought divestiture powers, he stated that the ultimate aim was to bring about more transparent arrangements between Telstra's wholesale and retail operations so as to allow the ACCC to enforce the TPA provisions more effectively, and that there were other means of achieving this:

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90 Mr David Forman, *Committee Hansard*, 11 April 2005, p. 20. See also CCC, *Submission* 14A, p. 8.

91 Mr Paul Budde, *Submission* 1, pp 1-2

92 Productivity Commission, *Review of National Competition Policy Reforms*, No. 33, February 2005.

93 Mr Doug Coates, *Submission* 2, p. 3.

94 Dr Mitchell Landrigan, *Committee Hansard*, 4 May 2005, p. 57.

> So putting in place penalties, which for example, would have to be of hundreds of millions of dollars to be in any sense meaningful, because Telstra fails to adequately deal with operational separation, or putting in place a divesture order because there is a failure to bring about operational separation, I might suggest with respect, tends to be focusing much more on the potential to do substantial damage to Telstra. Whereas it is far more important that we get the ultimate objective which is: clear, transparent and commercial arms-length dealings between Telstra's wholesale and retail operations. One of the simplest and certainly least damaging ways of achieving that is to have regulations that require those transparent accounting and commercial arms-length dealings to take place and to have those capable of being enforced by a court of law.[95]

6.89 Mr Samuel made clear that it is not a question of wanting divestiture powers; but rather a question of identifying effective means to achieve transparency.[96] ACCC Commissioner Mr Ed Willett expressed similar views.[97]

6.90 Those supporting divestiture powers often referred to the powers available to the United Kingdom regulator, OFCOM. As ATUG submitted:

> The UK context has strong incentives for the parties to agree an outcome - including, importantly, the ability of OFCOM to make a reference under the Enterprise Act to the Competition Commission for an assessment of appropriate remedies (de-merger) in the face of intractable market power arising from an enduring bottleneck in the local access area.[98]

6.91 Mr Paul Budde expressed similar views.[99]

6.92 However, as ACCC Commissioner Mr Ed Willett pointed out:

> … if OFCOM happen to find that the only way it could achieve what it is trying to achieve was through divestiture, then I think you would find the debate here might be very different. In those circumstances we probably would not want to rule out seeking a divesture power, but we are not in that situation.[100]

6.93 Mr Willett argued further:

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95 Mr Graeme Samuel, *Committee Hansard*, 9 May 2005, p. 13.

96 Mr Graeme Samuel, *Committee Hansard*, 9 May 2005, p. 14.

97 Mr Ed Willett, *Committee Hansard*, 9 May 2005, p. 14.

98 ATUG, *Submission* 20C, p. 5.

99 Mr Paul Budde, *Submission* 1, pp 1-2.

100 Mr Ed Willett, *Committee Hansard*, 9 May 2005, pp 14-15.

> We are not in the business of asking for powers that we are not sure we need to achieve the outcome. We have proposed some arrangements here which we think should be given some thought and could be effective.[101]

6.94 Nevertheless, the Committee considers that the grant of divestiture powers would strengthen the ACCC's capacity to deter anti-competitive conduct by giving it another tool with which to encourage compliance. Giving the ACCC a 'stick' as significant as a divestiture power would substantially improve the ACCC's negotiating power when attempting to address instances of large scale anti-competitive behaviour.

Recommendation 3

6.95 The Committee recommends that the ACCC be given divestiture powers.

Resources

6.96 The need for the ACCC to have sufficient resources to be an effective regulator has been raised frequently with the Committee, both during this inquiry and its inquiry into the establishment of the Australian Communications and Media Authority (ACMA).[102] The Communications Experts Group submitted:

> The ACCC has inadequate financial resources to defend a prolonged court case, the ACCC should have the resources to effectively construct a legal argument and obtain the required evidence to support by interacting with carriers, and if necessary providing financial support in preparing a case.[103]

6.97 Mr Richard Thwaites from ATUG also noted that inadequate financial resources may lead to a reluctance to take legal action:

> … we believe the ACCC needs considerably more resources than it currently has in order to mount its arguments and, therefore, to enable it to feel confident in making its judgments and taking them to appeal when necessary. We feel that the ACCC has done its best with the resources available for this sort of thing, but it has been under a severe disadvantage given the ability for it to be basically taken round and round the traps, with far greater resources applied to questioning its judgments. Naturally, this creates an environment of caution.[104]

6.98 The Townsville City Council submitted:

> Most importantly, any regulatory agency must be resourced appropriately to deal on an equal footing with one of the largest companies in Australia. Telstra has the resources to outlast and outgun the existing regulatory

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101 Mr Ed Willett, *Committee Hansard*, 9 May 2005, p. 15.

102 Senate Environment, Communications, Information Technology and the Arts References Committee, *A lost opportunity? Inquiry into the provision of the Australian Communications and Media Authority Bill 2004 and related bills and matters*, March 2005.

103 Communications Experts Group, *Submission* 26, p. 4.

104 Mr Richard Thwaites, *Committee Hansard,* 11 April 2005, p. 42.

> structure. An example of this was the time it took regulators to deal with the issue of Telstra's broadband wholesale pricing to competitors.[105]

6.99 In Perth, Dr Walter Green told the Committee:

> … both the ACA and the ACCC, in my instance, are under-funded to actually deal with these kinds of issues. They need a significantly larger staff to debate and discuss with the industry.[106]

6.100 Some witnesses argued that the ACCC was greatly under-resourced not only in financial terms but in staff expertise. As Dr Green stated:

> The ACCC have two problems. Firstly, they do not have the resources to deal with it properly…Their budget is continually being undercut. To me, they should be growing by eight to 10 per cent per year in their revenue over and above what I call a cost of living increase. In fact, we have the converse; it is going down. Secondly, it is a special set of skills that the ACCC has, so they have to consider staff retention and how that all operates as well. To me, they certainly need beefing up and need to be provided with both additional funds and additional regulatory control.[107]

6.101 AAPT also referred to the importance of appropriate staff.[108] Mr David Havyatt from AAPT told the Committee:

> It has become apparent to us that the ACCC does not have the resources to undertake the kind of ongoing analysis of the unfolding telecommunications markets that is needed for the regulation of this regime. We see that repeatedly in the nature and structure of inquiries that emerge under the regime—there is no coherent whole-of-ACCC thinking unfolding.[109]

6.102 Mr Havyatt argued for a full-time ACCC commissioner dealing with telecommunications, so as to ensure that the sector was adequately scrutinised:

> That commissioner should also be a member of the Australian Communications and Media Authority. So there would be one person who was really spending their time looking at this, and not the chairman and a commissioner doing it as a part-time activity and occasionally weighing into the consideration of telecommunications issues.[110]

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105 Townsville City Council, *Submission* 34, p. 2.

106 Dr Walter Green, Communications Experts Group, *Committee Hansard*, 29 April 2005, p. 19.

107 Dr Walter Green, Communications Experts Group, *Committee Hansard*, 29 April 2005, p. 30.

108 AAPT, *Submission* 13, p. 8.

109 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 30.

110 Mr David Havyatt, *Committee Hansard*, 11 April 2005, p. 30.

6.103 The ACCC has a Chairman, a Deputy Chair and five full-time Commissioners.[111] The Committee agrees that, given the importance of telecommunications and the separate regime established in the TPA for telecommunications regulation, it would be desirable to have one commissioner with particular responsibility for telecommunications. The Committee also agrees that this person should be a member of the Australian Communications and Media Authority (ACMA) so as to facilitate sharing of knowledge between the two organisations.[112]

Recommendation 4

6.104 The Committee recommends 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.

6.105 Earlier this year the Committee recommended that funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority, given the need for the regulator to be well-resourced in order to be effective.[113] In light of the evidence it has received in this inquiry, especially with respect to the ACCC's conduct of the broadband competition notice and the Mobile Terminating Access Services declaration, the Committee repeats that recommendation.

Recommendation 5

6.106 The Committee recommends that funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority.

The role of the ACCC

6.107 This Committee has discussed at length the ACCC's responsibilities for managing anti-competitive practices and protecting consumers. The Committee heard concerns that sometimes these two functions appear to be in conflict. As Mr David Spence from Unwired Australia stated:

> One of the issues is that the ACCC is the consumer council and the competition council. The Telstra drop of broadband prices to $29.95 may have been very good for consumers and certainly improved the take-up rate, but it may not be in the best long-term interests from a competition point of

111 As well as several associate and ex-officio members and a Chief Executive Officer.

112 The Committee previously recommended cross-membership of the ACMA and ACCC boards – see Senate Environment, Communications, Information Technology and the Arts References Committee, *A lost opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill and related bills and matters,* 2005, Recommendation 7.

113 Senate Environment, Communications, Information Technology and the Arts References Committee, *A lost opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill and related bills and matters,* 2005, Recommendation 10 & pp 65-68.

> view. If Telstra were to do that in order to dominate the market in the next couple of years and eliminate all alternative infrastructure providers, then that is not the best competition in the place. I believe that, if you look at competition regulatory bodies around the world, you do not often find them tied up with the consumer council as well… It would be hard for the ACCC to say to Telstra, 'Put the prices back up again from $29.95,' when they are the consumer council.[114]

6.108 However, the Committee notes that the object of fostering competition is to promote the long term interests of end users. The main problem that has become apparent during this inquiry is the ACCC's inability to regulate anti-competitive practices adequately, and this has obvious effects on consumers. The Committee does not support taking consumer protection functions from the ACCC, noting that the former ACA (now the ACMA) also has important responsibilities in that area, as discussed below.

6.109 The Committee also heard criticism of the ACCC's involvement in policy. Mr Bill Scales from Telstra stated:

> If you have a regulator which is clearly determined to become involved in the policy debate and is clearly determined to ensure that its policy outcomes are achieved, then automatically what follows from that is the potential moral hazard of the regulator establishing outcomes will ensure that that follows…They are a natural consequence of trying to achieve a policy outcome.[115]

6.110 AAPT submitted that policy reviews were more appropriately carried out by the department rather than the regulator, and called for additional resources for the department's policy work and policy research, noting:

> Departmental review does not preclude the views of the regulator being sought. During the period of reform in the 1980s and 1990s many of the developments were driven by the research of the Bureau of Transport and Communications Economics, which in part continues as the Communications Research Unit.[116]

6.111 However, in defence of the ACCC, Chairman Mr Graeme Samuel argued:

> We do not get involved in policy debates unless we are either requested to provide opinions on policy by government or asked our views by parliament and parliamentary committees, and then there are the limitations the chair described. We are a regulator. We are intimately involved with the regulation of the telecommunications industry, with one fundamental objective, and that is to bring about a competitive environment in the short- to medium- and long-term future. We will continue to do so. Where it is

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114 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 115.

115 Mr Bill Scales, *Committee Hansard*, 4 May 2005, p. 71.

116 AAPT, *Submission* 13, p. 10.

> necessary for us to express opinions as to our regulatory responsibilities, we will continue to do so.[117]

The TPA: Part XIB and section 46

6.112 In Chapter 3 the Committee discussed the criticisms that Part XIB of the TPA does not adequately define anti-competitive conduct in telecommunications, particularly in light of the issues that surfaced during the 2004 ADSL competition notice. In brief, section 151AJ defines anti-competitive conduct as a situation where a carrier or carriage service provider has a substantial degree of market power and takes advantage of that power with the effect, or likely effect, of substantially lessening competition.

6.113 Several witnesses argued that the ACCC must be empowered to prevent Telstra from engaging in conduct that may constitute misuse of market power or the reduction of competition in the telecommunications market. There was a range of suggestions as to how the legislation might be changed.

6.114 The Communications Experts Group argued that proof of certain behaviours should suffice in itself, instead of needing also to prove the detrimental effect of the behaviour:

> In many cases the ACCC ha[s] to prove that a certain behaviour is unacceptable, and that the alleged offender caused or undertook the unacceptable behaviour e.g. offering retail prices below wholesale prices for some services. There are a number of cases where unacceptable behaviour should be specified, so that the ACCC only has to prove the unacceptable behaviour.[118]

6.115 Optus also criticised the test in Part XIB, proposing in its place a 'non-discrimination rule' about price (that is, a prohibition against 'unreasonable' discrimination on providing listed carriage services):

> The non-discrimination rule (NDR) will mean that instead of competitors having to demonstrate that Telstra's behaviour is anti-competitive by substantially lessening competition, Telstra would need to demonstrate that it was not behaving in a discriminatory manner, so complying with the NDR. This is an important change that shifts the onus of proof onto Telstra to demonstrate compliance with the rule, rather than the much higher test for non-Telstra providers to demonstrate that Telstra is not only behaving anti-competitively, but that this behaviour is having a significant impact on competition.[119]

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117 Mr Graeme Samuel, ACCC, Senate Economics Legislation Committee, *Additional Estimates Hansard*, 17 February 2005, p. 10.

118 Communications Experts Group, *Submission* 26, p. 4.

119 Optus, *Submission* 12, p. 22.

6.116 The Committee notes that Optus' suggestion of a 'non-discrimination rule' is similar in some ways to the UK's regulatory requirements imposed on telecommunications providers with significant market power (SMP).[120] Non-discrimination principles are applied to avoid or, at least, minimise market distortion by those with market power, including vertically integrated organisations that supply to internal and external customers.

6.117 Designated SMP providers must supply products at the same price to external customers as to their internal retail arms, unless differences are 'objectively justifiable'. The non-discrimination obligations in the UK also extend to non-price differences, including the 'timing of provision', the 'functionality of the product supplied', 'the reliability and efficiency of transactional processes', and the availability of relevant product information.[121] Again, the terms and condition of product supply to external customers must be the same as the terms and conditions of product supply to an SMP provider's retail arm, unless the differences are objectively justifiable.

6.118 The Committee notes that the UK regulator, OFCOM, is currently reviewing its approach to investigating potential contraventions of the requirement not to unduly discriminate.[122] The Committee considers that these developments should be examined closely in considering future options for the anti-competitive regime in Australian telecommunications. It may be that imposing a positive duty on all industry participants with 'significant market power' not to discriminate unduly would be beneficial. However, this is not quite the same as reversing the onus of proof in individual cases, as the Optus submission seems to suggest.

6.119 The Committee heard another suggestion about possible legislative amendment, to address the concern about the requirement in section 151AJ to establish that a corporation 'takes advantage' of its market power. Unwired Australia submitted:

> Telstra's position in the market means that any actions it takes, regardless of its purpose in taking them, and whether or not it 'takes advantage' of its position to take them, have dramatic impacts on its competitors. If negative impacts are to be controlled, the provisions should be amended to remove 'takes advantage of that power' as follows to simply refer to a corporation acting with the prohibited effect.[123]

6.120 However, the Committee considers that this suggestion if implemented would broaden the operation of section 151AJ to an unacceptable level. The Committee

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120 The UK requirements not to unduly discriminate are derived from European Directives. See OFCOM, *Undue discrimination by SMP providers*, consultation paper, 30 June 2005, p. 11, accessed at: http://www.ofcom.org.uk/consult/condocs/undsmp/.

121 OFCOM, *Undue discrimination by SMP providers*, consultation paper, 30 June 2005, p. 10, accessed at: http://www.ofcom.org.uk/consult/condocs/undsmp/.

122 A consultation paper was released on 30 June 2005, with responses due by 8 September 2005.

123 Unwired Australia, *Submission* 48, p. 3.

notes that a recent Senate committee report on section 46 of the TPA, referring to various High Court and Federal Court decisions, recommended the insertion of a declaratory provision listing factors to be taken into account in determining whether a corporation has taken advantage of its market power.[124] The ACCC had submitted that a court should consider whether: the conduct of the corporation is materially facilitated by its substantial degree of market power; the corporation engages in the conduct in reliance on its substantial degree of market power; the corporation would be likely to engage in the conduct if it a lacked substantial degree of market power; or the conduct of the corporation is otherwise related to its substantial degree of market power.[125] The report recommended the declaratory provision should be based on those suggestions.[126]

6.121 The Committee considers that such a provision may also be helpful in relation to Part XIB.

Recommendation 6

6.122 The Committee recommends that section 151AJ of the *Trade Practices Act 1974* be amended by inserting an inclusive list of factors to be considered by the courts in determining whether a carrier or carriage service provider has taken advantage of its substantial degree of power in a telecommunications market.

6.123 The Committee notes that Part XIB was never intended to be a permanent part of the TPA. However, it is clear that there are still serious concerns about anti-competitive conduct. Accordingly, the Committee considers that any suggestion that the ACCC should rely only on its general powers under Part IV in the telecommunications market cannot be sustained.

6.124 In any case, the Committee heard concerns about the operation of Part IV. Section 46 relating to general misuse of market power prevents a corporation with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into any market, or deterring or preventing competitive conduct in a market. The Committee heard that the 'purpose test' is 'notoriously difficult to establish'.[127]

6.125 Consistent with its argument about the Part XIB provisions, Unwired suggested that the 'purpose test' in section 46 should be replaced with a test focusing

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124 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, Recommendation 2.

125 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 14.

126 Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 15.

127 Unwired Australia, *Submission* 48, p. 2.

on the outcome or effect of the action.[128] However, Dr Mitchell Landrigan from Telstra argued that 'purpose' has generally been either conceded or quite easily proven:

> I think the current position about that debate is that it is quite redundant given that most of the High Court decisions in which concerns have been raised about whether section 46 has worked have not been about purpose. Purpose has generally been either conceded or quite easily proven, largely because of provisions that are built into section 46. The taking advantage of market power component has been the subject of some detailed debate with some measures proposed about whether indicia about what market power is should be built into the legislation.[129]

6.126 Any changes to Part IV would have implications that range far beyond the telecommunications industry. In light of the ACCC's access to special provisions in Part XIB, the Committee does not recommend any changes to Part IV.

The TPA: Part XIC

6.127 The Committee considers that the administration of the TPA has a potential dampening effect on investment in infrastructure services because of the risk of exposure to access regulation, particularly where there is a risk that regulated returns may not provide a sufficient return on investment. In reaching this view, the Committee is mindful that the benefits of competition in the services sector will be available over the longer term only if there is ongoing investment in the infrastructure that provides those services.

6.128 Another element which the Committee is convinced is having a damaging effect on investment in infrastructure by new entrants is Telstra's behaviour. The Committee has identified at least two ways that this arises: by impeding access to its network on satisfactory terms, so that access seekers cannot build customer bases and profitable businesses sufficient to enable investment in their own facilities; and in the way it directly responds to facilities competition.

6.129 That Telstra can impede access would suggest that the access regime is not working in accordance with the intent expressed in the Competition Principles Agreement between the Commonwealth and the States. The Committee notes that the Agreement provides that legislation with the following effects should be implemented:

> 6(4)(m) The owner or user of a service should not engage in conduct for the purpose of hindering access to that service to another person.
>
> 6(4)(e) The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of a person seeking access.

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128 Unwired Australia, *Submission* 48, p. 2.

129 Dr Mitchell Landrigan, *Committee Hansard*, 4 May 2005, p. 57.

6.130 The thrust of these requirements would appear to be effected by section 152EF of the TPA, which prohibits the hindering of the fulfilment of the standard access obligations. Notwithstanding this provision, however, the Committee heard much evidence of behaviour that seems to fall squarely within the prohibition.

6.131 The Committee has heard evidence of attempts by some firms to respond to demand by delivering services, or building or attempting to build, alternative facilities. Almost invariably, such efforts have been impeded by Telstra.

6.132 The Committee has heard evidence of Telstra overbuilding infrastructure—or dropping its prices for existing services—in response to a threat from potential facilities competitors. Not only does this action block that particular competitor, but it sends a clear signal to the market about how Telstra is likely to respond to similar initiatives.

6.133 The Committee also heard evidence that the cost of transmission—a declared service on many of the routes in question—was too high to justify investment in facilities or services in many markets and, most notably, regional areas.

6.134 It is apparent from these examples and from other evidence received during this inquiry that as long as Telstra has both the incentive and ability to favour itself over competitive service providers, a rigorous access regime is still needed.

6.135 The Committee believes that the access regime should be focussed on bringing about more timely and acceptable resolution of access requests. To this end, the Committee considers that the regime should include not just measures designed to reduce the ability of access providers to impede—or unreasonably delay—access but should also aim to reduce the incentive for it.

6.136 The Committee considers that the object of Part XIC of the TPA should remain the promotion of the long term interest of end users. However, the Committee considers that the objectives to which the ACCC must have regard in determining whether that object is promoted (in section 152AB) need to be weighted differently. In the Committee's view, the objectives of promoting competition in downstream markets and achieving any-to-any connectivity will not be achieved in the long term unless there is continuing investment in infrastructure services. For this reason, the Committee considers that the third objective in subsection 152AB(2)—encouraging the economically efficient use of, and the economically efficient investment in, infrastructure—should be given primacy.

6.137 The Committee notes that the Government has proposed that the objective of the general access regime in Part IIIA be 'to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets'.[130]

130 Paragraph 152AB(e).

Recommendation 7

6.138 The Committee recommends that the third objective of the access regime as set out in subsection 152AB(2) of the *Trade Practices Act 1974*—encouraging the economically efficient use of, and the economically efficient investment in infrastructure—be given primacy.

6.139 As discussed in Chapter 4, it appears that the access regime is not working in accordance with the intent expressed in the Competition Principles Agreement between the Commonwealth and the States. Accordingly the Committee makes the following recommendations.

Recommendation 8

6.140 The Committee recommends that in order to clearly satisfy the Commonwealth's obligations under clause 6(4)(e) of the Competition Principles Agreement, the *Trade Practices Act 1974* be amended to include a provision that requires the owner of a facility that is used to provide a service to use all reasonable endeavours to accommodate the requirements of a person seeking access.

Recommendation 9

6.141 The Committee recommends that to clearly satisfy the Commonwealth's obligations under clause 6(4)(m) of the Competition Principles Agreement, section 152EF of the *Trade Practices Act 1974* be amended to prohibit conduct that has the effect—and not just the purpose—of preventing or hindering the fulfilment of a standard access obligation or an obligation imposed by a determination made by the ACCC under Division 8.

6.142 The Committee notes that the ACCC has power to determine model terms and conditions in relation to 'core services'. The core services are listed in section 152AQB and can be expanded by regulation.[131]

Recommendation 10

6.143 The Committee recommends that the Government consider expanding the class of 'core services' in relation to which the ACCC must determine model terms and conditions for access. In particular, the Committee recommends that for the purpose of improving services in regional areas, certain transmission (or backhaul) routes be specified in the regulations as 'core services' under section 152AQB of the *Trade Practices Act 1974*.

6.144 The Committee notes that the ACCC has already indicated its intention to make variations to 2003 Model Core Services Terms and Conditions Determination for the Unconditioned Local Loop Service. The Committee notes the evidence that the practice of delaying access to declared services seems to be common. While

131 Paragraph 152AQB(1)(e).

Recommendation 9 above addresses this issue, it necessitates legislative change which may take some time. The Committee considers that the matter may be dealt with more expeditiously in any model terms determined by the ACCC.

Recommendation 11

6.145 The Committee recommends that the ACCC include prohibitions on behaviour that has the purpose or effect of impeding or unreasonably delaying access in any model terms and conditions for core services—and particularly those relating to the unconditioned local loop service.

Recommendation 12

6.146 The Committee recommends that the *Trade Practices Act 1974* be amended to require the ACCC to give greater importance to model terms and conditions in arbitrations. In addition to the ACCC merely 'having regard to' model terms and conditions determinations, such determinations should apply presumptively unless the parties can show good reason to depart from them.

6.147 At the very least, the ACCC should have an influence over price sooner in the process, that is, prior to an access dispute arising. The Committee does not have a view about the method by which the prices are set, although, in relation to transmission prices in regional areas where there would appear to be the least prospect of competition emerging to solve the access problem, prices should be more tightly controlled. The Committee notes the view of the Western Australian Department of Industry and Resources that distance based tariffs should be replaced with volume based tariffs.

Recommendation 13

6.148 The Committee recommends that the ACCC be granted powers to set prices in addition to, or instead of, developing pricing principles.

Recommendation 14

6.149 The Committee recommends that subsection 152AQA(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to its pricing principles when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

6.150 The Committee favours the approach taken in Part IIIA of the TPA, which allows the ACCC to require the giving of an undertaking and gives it the power to amend undertakings or substitute its own.

Recommendation 15

6.151 The Committee recommends that subsection 152AQB(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to any model terms and conditions when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

Recommendation 16

6.152 The Committee recommends that further amendments be made to the undertakings scheme to prevent or discourage their use to delay access and to bring more certainty to the market. In particular, the Committee recommends the imposition of shorter target timeframes in relation to access decisions.

6.153 By way of example, the Committee suggests the following targets:

- sections 152AT and 152ATA of the *Trade Practices Act 1974* be amended to require decisions on ordinary and anticipatory exemptions to be made within a period shorter than 6 months.
- sections 152BU and 152CBA of the *Trade Practices Act 1974* be amended to require decisions on ordinary and special access undertakings to be made within a period shorter than 6 months;
- section 152CF of the *Trade Practices Act 1974* be amended to require the Australian Competition Tribunal to make decisions within a period shorter than 6 months. The Committee notes that such a change has been proposed in relation to decisions of the Tribunal under part IIIA.

6.154 The Committee also notes that it is important that the ACCC has adequate resources to fulfil these requirements, and reiterates its call for further funding for the ACCC as set out in Recommendation 5.

6.155 The Committee considers that the need for legislated 'access holidays' has not been demonstrated and therefore supports continuation of the present scheme. The Committee agrees with the ACCC's view that the overturning of the Foxtel/Telstra exemption turned on the particular facts of that case and did not reflect a flaw in the exemptions scheme or prevent the ACCC from making exemptions in the future.

Recommendation 17

6.156 The Committee recommends that the present scheme of anticipatory exemptions and special undertakings remain unchanged for the time being.

Foxtel and the HFC

6.157 In its 2003 report on *Emerging market structures in the communications sector,* the ACCC discussed at some length the incentive for anti-competitive behaviour arising from Telstra's half ownership of Foxtel and its ownership of the HFC network on which it is delivered. The ACCC's specific concerns are that Telstra has full ownership of the main HFC pay TV distribution network and a copper network, as well as a 50 per cent shareholding in the major pay TV operator in Australia. This ownership has specific effects, as the ACCC stated:

> Telstra's ownership of a HFC network:
>
> - diminishes opportunities for competition by actual and potential network competitors

- means Telstra's copper and HFC networks do not compete with each other denying potential price and service benefits that such competition could deliver to consumers.

Telstra's partial ownership of Foxtel provides it with the incentive to:

- foreclose supply of pay TV channels by Foxtel to other networks competing with Telstra for the supply of telecommunications services
- prevent other pay TV businesses or channels from gaining access to Telstra's HFC network.[132]

6.158 In relation to Foxtel, the ACCC noted:

> Through its partial ownership of Foxtel, Telstra has the ability to veto supply of pay TV channels by Foxtel to other networks. Foxtel and Telstra also have an interest in preventing other pay TV businesses or channels from gaining access to Telstra's fixed customer access network. Therefore, Telstra is in a position where it controls important inputs of supply for its potential and actual broadband network competitors, as well as for pay TV operators competing against Foxtel (on the Telstra HFC network).[133]

6.159 The report noted that Foxtel is presently supplying content to other carriers, and that proposed access to content arrangements will help to facilitate this further. Telstra's influence on these agreements remains and access regulation will only go so far to reduce this influence. The ACCC concluded that requiring Telstra to divest its Foxtel shareholding would remove Telstra's influence in preventing Foxtel supplying its pay TV channels (particularly premium channels) to other networks. Divestiture would also be likely to make Telstra more willing to allow other pay TV businesses or channels access to Telstra's HFC network (in the event it is not divested).[134]

6.160 The ACCC also considered Telstra should divest itself of its HFC network because Telstra owns two of the three major fixed telecommunications networks. As firms do not compete with themselves, Telstra's continuing focus is not to maximise the revenue from each network separately but rather to maximise revenue across both networks. Therefore, in seeking to protect the revenues of both networks, investment will not be made, or will be delayed, in services that would cannibalise the revenue of the other network. For example, Telstra does not seek to supply telephony services on its HFC network which would reduce the revenue that Telstra receives from its PSTN network:

> Divestiture of the HFC would introduce a new infrastructure competitor into the market, creating conditions for increased rivalry and innovation in the supply of a full range of telecommunications services, including broadband services. The Commission believes that if the HFC is divested, divestiture of Foxtel would become even more important so that Telstra

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132 ACCC, *Emerging market structures in the communications sector*, June 2003, p. 39.

133 ACCC, *Emerging market structures in the communications sector*, June 2003, p. xviii.

134 ACCC, *Emerging market structures in the communications sector*, June 2003, p. xxii.

> could not use its influence in Foxtel to deny the new network owner access to Foxtel pay TV content.[135]

6.161 ATUG submitted:

> The OECD's conclusion on ownership of cable and copper networks and competition in broadband is clear, "... the broadband markets in one third of OECD countries are being held back where the cable networks are not providing independent competition with the PSTN. This is evident in the difference in level of service, pricing and take-up of service. In these cases all options need to be considered to increase the level of competitive provision of broadband access including separating cable networks from incumbent PSTN operators".[136]

6.162 The Committee notes that the OECD in an Economic Survey report in December 2004 also recommended that Telstra be required to divest the HFC network and its shareholding in Foxtel on the basis that there was 'no effective competition in pay TV'.[137] An earlier OECD report also stated:

> Evidence continues to show that ownership of cable networks, by incumbent telecommunication carriers, leads to a slower roll out of broadband access. Overall broadband growth rates are clearly higher where there is head to head competition between independently owned DSL and cable networks.[138]

6.163 Mr Charles Britton from the Australian Consumers' Association agreed there was a need for Telstra to divest itself of both its share in Foxtel and of its HFC network. Mr Britton also noted the positive effect on competition and infrastructure investment of cable companies' and copper line telcos' competition in the United States:

> … you have a structural competition driver in the United States where the cable companies are in competition with the established copper line telcos and are driving voice over IP as a competitive offering in the marketplace. We are not going to see anything like the same structural pressure behind the rollover voice over IP because we do not have the facilities competition that has emerged between cable and DSL and we do not have the drivers that are going to produce it.[139]

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135 ACCC, *Emerging market structures in the communications sector*, June 2003, p. 30.

136 ATUG, *Submission* 20C, p. 9.

137 OECD Economic and Development Review Committee, *OECD Economic Surveys: Australia*, December 2004, p. 114. The report noted that 'This dominant position is disquieting' and made recommended divestiture 'provided independent assessment shows the benefits of divestiture would exceed the costs' (p. 114).

138 OECD Working Party on Telecommunications and Information Services Policies, *Broadband access for business*, December 2002.

139 Mr Charles Britton, *Committee Hansard*, 13 April 2005, p. 61.

6.164 The Australian Consumers' Association argued the need for divestiture prior to the sale of Telstra:

> In our view the requirement that Telstra divest itself of the HFC cable network and the Foxtel service that it carries is an essential pre-requisite to privatisation, in order to curb the horizontal sprawl of the corporation into media, and the exercise of market power into both spheres in a mutually reinforcing way that will over time deliver significant monopoly benefits for the company and consequent detriment to consumers.[140]

6.165 Mr Paul Budde went further in proposing that Sensis and Foxtel should be amalgamated prior to divestiture:

> 'Let's hive off Sensis from Telstra, put the Foxtel shareholding in that and actually create a media company.' That would solve a lot of problems. The value of Telstra will not be diminished by Sensis, because there is no synergy between Telstra and Sensis. If Sensis is not there, the mobile, broadband or voice divisions are not suddenly going to be different—not at all. If you unshackle Sensis, I guarantee it will increase rather than reduce in price. So it would be great for the shareholders who the government wants to look after. You are then creating a situation where you start pushing in the direction of structural separation, without forcing it in that very rigid way that some of the commentators are talking about and that we do not want. You would actually be pushing it in the right direction and then you would start seeing that if you start opening up that market, Telstra without Foxtel would become far more involved in what is called broadband television, IPTV.[141]

6.166 Mr Budde also argued that such a model would create competition in the media sector.

6.167 The Committee notes the CEPU's opposition to this proposal,[142] but believes that competition in the telecommunications market would be enhanced if Telstra were required to divest itself of its share in Foxtel and of its ownership of its HFC network, as it has previously recommended.[143]

6.168 The Committee heard evidence that ownership of both the cable and copper network by a fully privatised Telstra, whose goal would be maximising shareholder value and not national interest, would be disastrous for competition and innovation. Telstra would continue to squeeze the maximum value out of the 100% owned copper network, staving off competition in the HFC network. As this behaviour would be difficult to regulate, the Committee believes that if privatised Telstra should be

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140 Australian Consumers' Association, *Submission* 16, pp 10-11

141 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 52.

142 CEPU, *Submission* 40, p. 22.

143 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in broadband services*, 2004, Recommendations 4 and 6.

required to divest the HFC cable. If on the other hand Telstra remained in public hands, the Government as majority shareholder could play a greater role in encouraging access to both networks, although the Government has been reluctant in the past to be involved in strategic and operational decisions. The Committee believes that further consideration would need to be given to the merits of divesting the HFC cable while Telstra remained in majority public ownership.

Recommendation 18

6.169 The Committee recommends that Telstra be required to divest its shareholding in Foxtel.

Recommendation 19

6.170 The Committee recommends that:

(i) if Telstra is fully privatised, it be a condition of the sale that Telstra be required to divest its HFC network; and

(ii) if Telstra remains in public hands, the Government direct the Australian Competition and Consumer Commission to provide further advice on its recommendations in its report *Emerging Structures in the Communications Sector* that Telstra be required to divest itself of its HFC network.

Investment in infrastructure

6.171 In chapters 4 and 5 the Committee discussed concerns that a large percentage of the Government's HiBIS funding, designed to promote infrastructure competition in regional Australia, was going to Telstra to upgrade its regional network and that there is growing concern in regional and rural Australian about the future of the USO.

6.172 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.[144]

6.173 Mr Malcolm Moore provided the Committee with an outline of a model for increasing telecommunication facilities in regional Australia. However, he pointed out that for this to be achieved:

> … it is essential to identify if there is any optical fibre linking any of these areas, and these actual fibre routes need to be identified. It does not matter who owns this fibre and if it is in use or not …[145]

Recommendation 20

6.174 The Government should undertake a mapping exercise of optic fibre networks in Australia. Particular consideration should be given to mapping of 'dark' fibre and infrastructure owned by government authorities, local councils and utilities.

Meeting consumer demands

6.175 While the Telecommunications Act states that one of the main objects of the regulatory regime is to promote the 'long term interests of end users', the Committee heard many times during this inquiry that the self-regulatory regime has failed to give consumers adequate protection. Moreover, the Committee heard repeated criticism of the USO, particularly in rural and regional areas, in terms of the range and reliability of current services. Access to broadband is now considered a vital part of many businesses in rural and regional areas, but problems of availability, reliability and cost are apparent in many areas.

The Universal Service Obligation

6.176 As discussed in Chapter 5, a key criticism of the USO is that it only allows for the provision of a Standard Telephone Service (STS) and the 'legitimate expectations of the Australian community' now go beyond a copper wire voice service. Another criticism is the costing and funding arrangements that require telecommunication service providers to subsidise the Universal Service Provider, Telstra.

6.177 The Committee notes the suggestions that broadband should become an integral part of the USO and could be used to explore future opportunities in the USO

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144 The Committee notes that a similar recommendation was made in an earlier report: ' The ACA should be empowered and required to develop a comprehensive inventory of all significant telecommunications infrastructure, including geospatial data on Telstra's existing customer network and mobile phone coverage, and make that information available to other carriers and service providers, local government, and other interested parties to facilitate planning for new infrastructure.' See Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian telecommunications network*, August 2004, p. 148.

145 Mr Malcolm Moore, *Submission* 6C, p. 18.

environment.[146] However, the Committee notes that there has been no attempt to analyse the costs of providing this service to all users on request, and considers that other policy options are available, as discussed in the next section.

6.178 The Committee also acknowledges that further broadening of the USO would exacerbate conflicts about how the USO should be funded. Telecommunications providers argue that the levy is another obstacle to expanding their broadband services in regional and remote Australia, while Telstra argues that it is subsidising the USO.

6.179 This inquiry heard strongly conflicting views over whether the current funding arrangements should continue or whether Telstra should fund the existing USO. The Committee notes in particular DCITA's recommendation in 2004 that Telstra should fund all costs associated with the traditional STS provision, and that this recommendation has not been implemented. However, USO subsidies have been steadily reduced from $240m in 2001-02 to a projected $145m by 2007-08. Consequently the imposition on other industry participants has been reduced significantly. The Committee considers that the Government should review the basis of the funding in two to three years time, prior to the setting of the next three years of USO subsidies. By that time, other regulatory measures will be in place and there may be new or different considerations.

Recommendation 21

6.180 The Committee recommends that the Government review the basis of funding for the Universal Service Obligation prior to setting the subsidies for the next three year cycle to commence from 2007-08.

Broadband

6.181 In recent years, the community's demands for access to telecommunications have increased. To have equality of access for all Australians now means equality of access to broadband, as the Broadband Advisory Group's Report to Government recognised in January 2003. The report states:

> The principal challenges are geographic considerations, technological limitations and availability, perceptions about price and the value proposition of broadband and the need for a national strategic approach to broadband rollout…The Government should promote investment in those areas of Australia that are likely to remain underserved purely by the private sector. As identified in the Estens Inquiry, rural and regional areas are a priority. The development of demand aggregation strategies should be used to assist in this process.[147]

146 For example, Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 47.

147 *Australia's Broadband Connectivity: The Broadband Advisory Group's Report to Government*, Chapter 10, accessed 28 June 2005 at: http://www.dcita.gov.au/ie/publications/2003/01/bag_report/chap10.

6.182 The Higher Bandwidth Incentive Scheme (HiBIS), funded by the federal government, has gone some way towards providing broadband to rural and regional areas. However, as noted in Chapter 5, witnesses indicate that monthly payments are too costly for rural and regional Australians[148] and some service providers do not sign up to the scheme because of recurring costs.[149]

6.183 The Committee takes particular note of the fact that an equitable roll out of broadband services is of importance to Australians living in rural, regional and remote areas, and that a strategy is required to achieve universal access. As the CEPU states:

> Contrary to the wishful thinking of the Page Report, there are no short cuts to an equitable broadband future.[150]

6.184 The Committee further notes that at the recent Regional Telecommunications Forum in Sydney, representatives of 25 regional cities called for high-capacity broadband infrastructure across Australia by 2010. Delegates agreed that 'access to high-speed broadband was 'absolutely critical' to ensure Australia remained globally competitive'.[151] The group aims to work with the Federal Government to achieve this goal.

Recommendation 22

6.185 The Committee recommends that the Government carry out a cost analysis of the Higher Bandwidth Incentive Scheme (HiBIS) immediately to ascertain how equitable universal broadband access can be ultimately provided.

6.186 The Committee recognises that there are no regulatory requirements in place for the rollout of any infrastructure other than the mobile infrastructure.[152] This results in 48.9% of HiBIS customers currently being supplied by satellite,[153] which is the highest proportion of all the methods available to deliver broadband. Satellite delivery does not create an infrastructure that would otherwise provide opportunities for a greater number of customers in a local area to access broadband. This does not allow the Demand Aggregation Policy to deliver the required outcomes; it should be urgently reviewed.[154]

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148 Mr Gary Chappell, Peel Development Commission, *Committee Hansard,* 29 April 2005, p. 67.

149 Mr Stephen Dalby, iiNet, *Committee Hansard,* 29 April 2005, p. 39.

150 CEPU, *Submission* 40, p. 30.

151 Mr Harvey Grennan, 'Give us broadband in five years', *The Sydney Morning Herald*, 5 July 2005, p. 23.

152 Mr Horsley, ACA, *Committee Hansard*, 4 May 2005, p. 46.

153 DCITA, update of answer to Question on Notice 141, tabled 24 May 2005 at Environment, Communications, Information Technology and the Arts Legislation Committee *Budget Estimates* hearing; and see Environment, Communications, Information Technology and the Arts Legislation Committee *Budget Estimates Hansard*, 24 May 2005, p. 105.

154 Mr Paul Budde, *Submission* 1, p. 11.

6.187 Mr David Spence from Unwired Australia stated that:

> We believe that encouragement of other medium sized and smaller companies to roll out in regional Australia is beneficial for future competition and prices in the market. For instance, there is the HiBIS fund at the moment for broadband in rural and regional Australia, and Telstra gets most of the HiBIS funding. We believe it would be better in the long term for that funding to go to companies other than Telstra.[155]

6.188 The Committee notes that the Government has put a ceiling on Telstra's eligible claim on the HiBIS funds at 60%.[156] Latest figures available, as at 23 May 2005, indicate that Telstra has received $25.218m of the total $39.353m of the HiBIS subsidy claimed to that date.[157] Telstra has 11,233 customers using broadband in the scheme. The nearest HiBIS provider is BorderNet, whose claims amount to $2.95m (1179 customers) to the same date.[158]

6.189 The Committee considers that to create broadband competition, providers should be given incentives to apply for registration as a broadband service provider through the HiBIS. The Committee believes that incentives that favour proposals which create broadband infrastructure, rather than proposals that simply provide broadband to a single customer through satellite, would result in more opportunities for consumers to get access to broadband.

6.190 The Committee notes that the current HiBIS Program Guidelines state:

> The HiBIS Service Area may also be defined by the locations to which it is technically or financially feasible to offer the proposed HiBIS Service, rather than by a discrete geographic area. For example, a HiBIS Provider providing HiBIS Services via satellite may define its HiBIS Service Area to include those Premises only serviceable by satellite solutions.
>
> HiBIS Service Areas must be within the HiBIS Area.
>
> An Applicant's proposed HiBIS Service Area must be defined with sufficient specificity to enable a clear understanding by DCITA and the Applicant's potential Customers of the circumstances and locations in which the Applicant will provide a HiBIS Service.
>
> DCITA reserves the right to reject any application which, in its view, indicates the Applicant has defined the service area to target a particular

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155 Mr David Spence, *Committee Hansard*, 13 April 2005, p. 114.

156 Optus, *Submission* 12, p. 11.

157 DCITA, updated answer to Question on Notice 140, tabled 24 May 2005 at the Environment, Communications, Information Technology and the Art Legislation Committee *Budget Estimates*.

158 Optus claimed to have received 22% of the HiBIS fund at the ATUG conference in Canberra, 12 May 2005. See *Telecommunications in Rural Australia – Stimulating Competition for Real Future Proofing*, ATUG website, 22 June 2005, at: www.atug.com.au/atug2005Regprogram.cfm.

Customer group, rather than all Eligible Customers able to receive the service in a HiBIS Service Area.[159]

6.191 The Committee recognises that the HiBIS currently allows registered service providers to avoid developing infrastructure for broadband delivery, thereby limiting the number of Eligible Customers access to broadband. There is no obligation to provide a means for future customers to access broadband.

Broadband options

6.192 There are a number of options available to achieve equitable broadband accessibility, particularly in regional, rural and remote communities. The Committee has heard that broadband should become part of the USO, with the required extra funding coming from increased industry subsidies;[160] that the USO should remain as an STS provision, funded by Telstra and leaving the development of broadband to the telecommunications service providers;[161] and that the government should set a ten year national target for an optic fibre consumer access network roll-out, overseen by the ACMA.[162]

6.193 The Committee, however, favours the consideration of further developing the Higher Bandwidth Incentive Scheme (HiBIS), so that a service provider would receive suitable financial subsidies from the Government to develop broadband services in specified rural, regional and remote areas according to a scale that favours the development of broadband infrastructure over single satellite pickup. The Committee does not suggest that satellite services should not be subsidised at existing levels, but rather that financial incentives be provided for developing infrastructure which may benefit multiple users, where that is possible.

Recommendation 23

6.194 The Committee recommends that funding of the Higher Bandwidth Incentive Scheme (HiBIS) be broadened according to the following provider subsidy principles:

- **a higher subsidy for a broadband service that creates suitable and sufficient infrastructure for use by multiple consumers (taking into account immediate and future needs of consumers in an area), such as those using ADSL via cable or wireless; and**

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159 Higher Bandwidth Incentive Scheme (HiBIS), *Program Guidelines*, p. 45, 17 June 2005, at: http://www.dcita.gov.au/__data/assets/pdf_file/25005/HiBISGuidelinesU.pdf.

160 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 47.

161 Optus, *Submission* 12, pp 4, 16.

162 Senate Environment, Communications, Information Technology and the Arts References Committee, *Report into Competition and Broadband Services*, August 2004, Recommendation 1.

- **the existing level of subsidy for a broadband service delivered to individual consumers via satellite where other means such as ADSL and CDMA can not be utilised.**

6.195 The Committee also considers that HiBIS subsidies should be sufficient to encourage potential broadband service providers to apply for registration in the specified areas, and costed so as to allow them to meet service obligations without undue financial and administrative burdens.

6.196 The scheme would rely on the development of realistic pricing regimes for use of networks so as to encourage broadband service providers to use cost-efficient means to deliver broadband to rural and remote communities. The Committee has previously recognised the need for the ACCC to investigate backhaul accessibility and costing arrangements for broadband carriers.[163]

Recommendation 24

6.197 The Committee recommends that the ACCC examine the availability of access to, and cost of, backhaul services for carriers building or proposing to build new broadband infrastructure in regional Australia.

6.198 The Committee recognises the difficulties experienced by smaller broadband service providers with fewer resources to apply for registration with DCITA, and notes the complex application requirements, as evidenced in the HiBIS Program Guidelines and Application for Registration.[164] The Committee considers that there appears to be scope for simplification of that application process.

Recommendation 25

6.199 The Committee recommends that the Government consider simplifying the HiBIS application requirements in order to give regional broadband service providers more realistic opportunities to apply.

6.200 Apart from the complexities of applying for HiBIS registration, the Committee heard evidence of delays in the processing of completed applications. For example, one small telecommunications provider in Townsville claimed that the ACA received its application for HiBIS registration in October but did not finally register the organisation until April the following year:

> We were the first in Queensland to come out with regional wireless broadband. We have been very restricted by the authorities. We have got

163 Senate Environment, Communications, Information Technology and the Arts References Committee, *Competition in Broadband Services*, August 2004, Recommendation 9.

164 Application for registration as a HiBIS provider, accessed on 24 June 2005, at: http://www.dcita.gov.au/__data/assets/word_doc/23253/HIGHER_BANDWIDTH_INCENTIVE_SCHEME.doc.

hundreds of thousands of dollars worth of capital equipment sitting idle, waiting for licences and approvals from ACA.[165]

Recommendation 26

6.201 The Committee recommends that the Department of Communications, Information Technology and the Arts streamline the processing of applications from broadband service providers for registration with the HiBIS.

6.202 The Committee recognises that the Digital Data Service (DDS) and Special Digital Data Service (SDDS), which delivers access to internet at around 19 kbps (non-broadband) through the normal telephony copper wire, do not meet the legitimate expectations of the Australian community. The broadening of the HiBIS as recommended by the Committee would mean that the DDS and SDDS would eventually be replaced by broadband services that would meet this expectation.

6.203 The Committee recognises the merit in local governments developing business schemes with the potential to deliver affordable broadband services to regional and remote areas, and supports efforts by local councils in developing business models for trial.[166]

Recommendation 27

6.204 The Committee recommends that the Government fund local governments to develop business models that focus on delivering affordable local broadband services to regional and remote Australians.

People with hearing and speech impairment

6.205 The Committee is concerned that hearing and speech impaired people do not have adequate access to telecommunications services. The Australian Communications Exchange (ACE), in arguing for a new definition of the Standard Telephone Service, argued that access to broadband would bring significant benefits for hearing and speech impaired people. While the Committee has not recommended that broadband be made part of the USO, improved access to broadband through the HiBIS scheme would significantly assist hearing and speech impaired people, providing that the service delivered the required minimum 384kbps upstream and downstream for sign language over video.[167]

6.206 The Committee has previously recommended that a disabilities equipment fund should be established,[168] and that consultation between representatives of people

165 Mr Noel O'Brien, IQ Connect Pty Ltd, *Committee Hansard*, 21April 2005, p. 72.

166 See, for example, Orana Regional Development Board, *Submission* 8, pp 6-8.

167 ACE, *Submission* 7, p. 2.

168 Senate Environment, Communications, Information Technology and the Arts References Committee*, The Australian Telecommunications Network,* 2004, Recommendation 14.

with disabilities and telecommunications carriers should be required to ensure that the new equipment will be available in conjunction with the new technologies.[169]

Recommendation 28

6.207 The Committee recommends that the Government provide funding to ensure that deaf and hearing and speech impaired people have equal access to a suitable broadband service through HiBIS and through an independent disabilities equipment program.

The Customer Service Guarantee

6.208 The Committee is concerned about the declining telephone repair performance figures in rural Australia, amounting to as much as five percent in recent years according to NFF statistics. The Committee notes that the Government has yet to fulfil the promise it made in 2003[170] to deliver the outcomes recommended by the Estens Report. As the NFF noted, basic telephone service fault and repair standards must be met before the Government can claim that services in rural, regional and remote areas have been improved.[171] As discussed in Chapter 2, the NFF disputes the Government's assessment of the status of implementation of several of the Estens Report recommendations.

Recommendation 29

6.209 The Committee recommends that the Government fulfil its promise to implement all 39 recommendations of the Estens Report. The Committee further recommends that an independent audit of the Government's implementation of the Estens Report recommendations be conducted prior to the introduction of legislation providing for the further sale of Telstra.

Consumer protection

6.210 The Committee remains steadfast in its call for the adoption of those strategies detailed in the ACA's *Consumer Driven Communications* (CDC) Final Report that better protect the rights of the consumer in the telecommunications industry, and supports the concept that telecommunications is primarily a service available to all Australians. In particular the Committee endorses Recommendation 2 in the CDC Report, which details proposed changes to paragraph 117(1)(i) of the Telecommunications Act. The Committee seeks to ensure that the consumer drives the telecommunications industry, and is disappointed that the ACA (now the ACMA) has not yet responded to these recommendations.

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169 Senate Environment, Communications, Information Technology and the Arts References Committee, *The Australian Telecommunications Network*, 2004, Recommendation 15.

170 NFF website, *News Release*, 16 June 2005, at: http://www.nff.org.au/pages/nr05/082.html.

171 NFF website, *News Release*, 16 June 2005, at: http://www.nff.org.au/pages/nr05/082.html.

Recommendation 30

6.211 The Committee recommends that the Australian Communications and Media Authority give immediate and urgent consideration to adopting the recommendations in the ACA research report *Consumer Driven Communications: Strategies for Better Representation* so that the rights of consumers are better protected, as previously recommended by the Committee.[172]

6.212 The Committee is concerned that there has been considerable delay in the development by ACIF of some of the codes of practice within the telecommunications industry. In particular, the Consumer Contracts Industry code, which was five years in the writing, has still another year to go before the ACMA can audit compliance. These delays have resulted, in some cases, with undesirable industry practices flourishing unimpeded, particularly those relating to unilateral alterations to the Standard Forms of Agreement (SFOAs) in section 481 of the Telecommunications Act.

Recommendation 31

6.213 The Committee recommends that Part 6 of the *Telecommunications Act 1997* be amended to require the ACMA to enforce the development of codes within set time-frames.

Complaint handling and code compliance

6.214 The Committee is concerned that many service providers not only fail to resolve complaints satisfactorily but also fail to refer their customers to the Telecommunications Industry Ombudsman (TIO).[173] The Committee notes that TIO figures show only between 11% and 16% of all complaints to the TIO are referred to the complaints handling scheme by the provider, despite the complaints code that obliges providers to refer customers to the TIO.[174]

6.215 An ACA representative told the Committee the ACA had sufficient power to deal with non-compliance,[175] but the Committee is concerned that codes of practice have not been enforced by the ACA, with only one instance of a direction being issued.[176] The growing number of overall complaints and the growing number of customer service complaints dealt with by the TIO[177] indicate a fall-off in providers'

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172 Senate Environment, Communications, Information Technology and the Arts References Committee, *A Lost Opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters,* March 2005, Recommendation 14.

173 Mr John Pinnock, *Committee Hansard*, 5 May 2005, p. 29.

174 Rule 7.6.1, *Complaint Handling Code*, ACIF C547:2004. See TIO, *Submission* 39, p. 3.

175 Mr Allan Horsley, *Committee Hansard*, 5 May 2005, p. 54.

176 Mr Allan Horsley, *Committee Hansard*, 5 May 2005, p. 54.

177 Mr John Pinnock, *Committee Hansard*, 5 May 2005, p. 29; TIO, *Submission* 39, p. 4.

performance in resolving customer complaints. The Committee believes that the new ACMA must do more to ensure compliance with industry codes of practice.

6.216 The Committee agrees with the CDC's recommendation, supported during this inquiry by the Communications Law Centre, that the Telecommunications Act should be amended to formalise monitoring of compliance with codes of practice.[178] A new section 120A should require reporting by suppliers/ industry associations on an annual basis and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA.

Recommendation 32

6.217 The Committee recommends that the *Telecommunications Act 1997* be amended by inserting a new section 120A that requires annual reporting by suppliers or industry associations of compliance with industry codes and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA.

6.218 The TIO's figures on escalation rates of cases referred to it show that almost 88% of customer complaints are not resolved between the customer and the provider after referral back to the provider by the TIO (level 1 complaint). The TIO then has to escalate the complaint to level 2, at cost to the provider. The TIO noted that since 2000, there had been 'a steady increase in the level 2 escalation rate' (that is, the percentage of cases not resolved at level 1). The rate was now 12% of all cases.[179]

6.219 The Committee believes that, to be effective, the complaints handling scheme should develop in step with changes in the telecommunications industry, should provide an adequate measure of protection to consumers irrespective of the services and the technologies used, and should allow consumers to bring a variety of complaints to the TIO in a way that increases the efficiency of complaints handling in the industry, reduces any overlap in jurisdiction and discourages consumers from forum shopping.[180]

6.220 The Committee has long held that the Telecommunications Industry Ombudsman should be able to offer consumer services not only in telecommunications but also in broader communications such as pay TV, particularly in light of converging technologies.[181] The Committee repeats its previous recommendation.

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178 CLC, *Submission* 23, p. 11.

179 TIO, *Submission* 39, p. 4.

180 TIO Ombudsman, *TIO Talks 33*, TIO website, 24 May 2005 at: http://www.tio.com.au/publications/TIO_talk_issues/33/33.2.htm.

181 Senate Environment, Communications, Information Technology and the Arts References Committee, *A Lost Opportunity? Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters*, March 2005, Recommendation 17.

Recommendation 33

6.221 The Committee recommends that the *Telecommunications (Consumer Protection and Service Standards Act 1997* be amended in order to establish a single Communications Industry Ombudsman.

Low income consumers

6.222 As Mr Paul Budde stated, it must be remembered that telecommunications provide not only economic but enormous social benefits:

> It is important for our economy; it is important for our lifestyle; it is important for our kids; it is important for poor people and rich people and everybody else.[182]

6.223 The Committee considers that price controls provide significant protection for low income customers. The Committee notes that the Minister recently stated that the price control regime would be extended until 31 December 2005, pending the Government's consideration of broader telecommunications regulation issues.

6.224 As discussed in Chapter 5, the ACCC considered that Telstra's licence conditions which provide for measures such as LIMAC should be amended to require Telstra to comply with a low-income package and associated marketing plan specified by the Minister. The ACCC made a range of other recommendations aimed at ensuring that Telstra's low-income consumers are no worse off than its other users.[183] The Committee urges the Government to give the ACCC's recommendations serious and prompt consideration and to report publicly on which recommendations they will implement and which, if any, they will not support, and the reasons why.

6.225 Groups such as LIMAC and CTN argued that all telecommunications companies should have similar measures for those suffering financial hardship. Moreover, it is clear that, although certain measures have been put in place for fixed phones, there is concern about the impact on low income consumers of mobile phones as well as new technologies such as 3G. The Committee urges the Government and industry to put plans in place.

6.226 The Committee acknowledges that many consumers are forced to purchase packages or bundles from service providers that contain some services they do not wish to have, and that such consumers are only seeking to access local services at minimal rates. Accordingly the Committee considers that a basic residential package should be made available by all carriage service providers.

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182 Mr Paul Budde, *Committee Hansard*, 13 April 2005, p. 53.

183 ACCC, *Review of Telstra's price control arrangements*, February 2005, pp 113-117.

Recommendation 34

6.227 The Committee recommends that all carriage service providers make available a Basic Residential Package to households who want only a clear, cost-based package of local access services.

The Emergency Call Service

6.228 Finally, the Committee is concerned that the ACA has not yet considered the future development, funding, management and security of the Emergency Call Service (E000) in light of the rapidly emerging communications technologies, particularly VoIP.[184] The emergency call service, currently administered by Telstra, is facing difficulties.[185] The Committee notes that, under Part 8 of the TCPSS Act, the ACA (now ACMA) may, by written determination, impose emergency service requirements on all or any of the carriers, carriage service providers and emergency call persons.

6.229 The Committee believes that planning and developing the emergency service to take account of new technologies, particularly VoIP, is a matter of urgency. After Telstra is fully privatised, the federal Government should assume this responsibility.

Recommendation 35

6.230 The Committee recommends that the Government give urgent consideration to the recommendations of the National Emergency Communications Working Group, particularly in regard to new technologies such as VoIP.

Senator Andrew Bartlett
Chair

184 NECWG, *Submission* 3, p. i.

185 NECWG, *Submission* 3, p. 7.

Government Members' Dissenting Report

Government Senators do not support the recommendations in the majority report. Government Senators are of the view that this inquiry was unnecessary given the large number of recent Senate inquiries into telecommunications. This is borne out by the fact that a number of the recommendations in this report are exactly the same as recommendations put forward in more than one previous report.

High quality, affordable telecommunications services are critical to the ongoing prosperity of Australia. Telecommunications, and communications services more broadly, have the capacity to transform the way people carry out business, interact with friends and family, engage with the world outside Australia, and receive education and health services. This has been clearly recognised by the Government in Australia, and it is why there has been a focus on liberalising the Australian telecommunications market and encouraging the development of competition.

The Australian telecommunications market was opened up to full competition in 1997. A critical part of encouraging the development of competition in telecommunications markets throughout the world has been establishing a regulatory regime that ensures that new market entrants can get access to, and use of, key services owned and operated by the incumbent provider. In Australia this is achieved through the access regime contained in Part XIC of the *Trade Practices Act 1974*. In addition to the access regime there are also telecommunications specific competition rules in Part XIB of the *Trade Practices Act 1974*.

There is substantial evidence to show that since 1997, all Australian consumers have experienced real benefits from the development of competition in the Australian telecommunications market. This in turn, suggests that the regulatory framework has served Australian consumers well.

There are now well over 100 telecommunications carriers in Australia and there are several hundred Internet service providers (ISPs). While Telstra holds the largest share of the legacy telephony market, there are encouraging signs of real competition in new and emerging services. There are four companies operating mobile phone networks in Australia – Telstra, Optus, Vodafone and Hutchison. These companies have formed into two joint ventures (Telstra and Hutchison, and, Vodafone and Optus) to rollout new 3G mobile services. The demand for broadband services in Australia has meant there are now a number of companies rolling out their own broadband networks – TransACT in the ACT, Neighbourhood Cable in Ballarat, Unwired in Sydney, Primus and Internode in capital cities.

Government Senators believe that it is important to focus not on competition for its own sake, but rather on whether or not consumers are receiving benefits as a result of the existing regulatory framework.

Research published by the former telecommunications regulator, the Australian Communications Authority, found:

> … that the Australian economy was more than $10.4 billion larger in 2003-04, in terms of total production, than it would have been without the telecommunications reforms [of 1997].
>
> By 2003-04, these telecommunications reforms have resulted in:
>
> - Around 29,600 extra jobs being created in the Australian economy;
> - Private real consumption benefits of nearly $720 per household, or $5.5 billion for all households;
> - Benefits to small business in excess of $2.1 billion; and
> - The output of the telecommunications industry being 96 per cent greater than if the telecommunications reforms (which commenced in 1997) had not happened.[1]

What this demonstrates clearly is that Australian consumers have benefited from the telecommunications reforms introduced in 1997. While this is not necessarily evidence to say that the regulatory framework does not need some adjustment, it does allow Government Senators to conclude that the current regulatory framework has worked reasonably well to date.

Government Senators appreciate that there is likely to be ongoing and rapid technological change in telecommunications. However, while it can be stated with certainty that there will be change, it cannot be stated with any certainty, just what this change will look like. As a consequence, Government Senators believe that any adjustment of the regulatory regimes needs to be cautious to avoid trying to predict what technologies are going to succeed in the future and what business models and market structures are likely to emerge. The regulatory framework should be flexible and responsive enough to adjust to changing market conditions, and robust enough to deal with significant changes in technologies.

With this in mind, Government Senators note that the Minister for Communications, Information Technology and the Arts has initiated a carefully considered review of telecommunications regulation.

1 Australian Communications Authority, *Telecommunications Performance Report 2003-04*, p. 31.

Recommendations which Government Senators reject

Separation of Telstra

Recommendation 1

The Committee recommends that the Productivity Commission be asked to undertake a full examination of structural separation of Telstra.

As the majority report notes, the Government has made it clear that it does not endorse the structural separation of Telstra, due to the cost and the complexity of such an exercise. This position has been supported in a report prepared for the former Labor Shadow Minister for Communications, Mr Lindsay Tanner who stated:

> … the existence of the minority private shareholding in Telstra and the cost and complexity therefore associated with such separation, make [structural separation] an inappropriate strategy for reforming Telstra.[2]

Several witnesses to this inquiry also highlighted concerns over forced structural separation, and the Productivity Commission, itself, in its report in February this year, concluded that full structural separation would be both expensive and time consuming. Given the number of people who have considered the question of structural separation, and then concluded that it would be costly and complex, Government Senators reject this recommendation.

Recommendation 2

The Committee recommends that if the Government decides to pursue operational separation of Telstra over structural separation, it should adopt a model that incorporates the features outlined by the ACCC, as this is the minimum that could be expected to have any prospect of success.

Government Senators note that the Minister for Communications, Information Technology and the Arts is examining the possibility of introducing a model of operational separation that suits the Australian telecommunications market. The Minister stated recently that:

> Operational separation can go well beyond the scope and impact of accounting separation without taking the heavy-handed and costly step of structural separation or forcing radical re-structuring of Telstra.
>
> The aims for operational separation are that:
>
> - It should provide wholesale customers of Telstra with greater certainty and clarity of Telstra's operations.
> - It should also give them confidence that they will receive treatment from Telstra Wholesale equivalent to that provided to Telstra's own retail arms;

2 Mr Lindsay Tanner MP, 'Reforming Telstra: The Next Step', *Press Release*, 6 February 2003.

- It should allow the regulator to more quickly and effectively scrutinise Telstra's activity and compliance with its regulatory obligations; and
- It should provide Telstra itself with greater regulatory certainty.

… Telstra can only benefit from more transparent operations, and from wholesale customers gaining a clear understanding of, and confidence in, their right to equivalent service

But the model needs to be workable, cost-effective and not completely re-engineer Telstra's existing structure.[3]

Given that the Minister is actively investigating possible models for operational separation, Government Senators do not believe it is either necessary or appropriate to pre-empt what might be under consideration.

Recommendation 3

The Committee recommends that the ACCC be given divestiture powers.

Government Senators note that during hearings for this inquiry the ACCC was pressed at length by Senator Conroy as to whether they sought or required divestiture powers. ACCC representatives indicated that a divestiture power was not sought, as they considered that the real issue was transparency of Telstra's operations and that operational separation could overcome any need for more stringent sanctions. As the ACCC chairman noted:

> I think we indicated that—to the extent that our thinking has gone as far as it has, which is not that far in terms of sanctions—the most important sanctions would be those of court orders requiring enforcement of or compliance with legislative or regulatory requirements…
>
> So putting in place penalties, which for example, would have to be of hundreds of millions of dollars to be in any sense meaningful, because Telstra fails to adequately deal with operational separation, or putting in place a divesture order because there is a failure to bring about operational separation, I might suggest with respect, tends to be focusing much more on the potential to do substantial damage to Telstra. Whereas it is far more important that we get the ultimate objective which is: clear, transparent and commercial arms-length dealings between Telstra's wholesale and retail operations. One of the simplest and certainly least damaging ways of achieving that is to have regulations that require those transparent accounting and commercial arms-length dealings to take place and to have those capable of being enforced by a court of law.[4]

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3 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, Address to the Adelaide Press Club, 7 July 2005.

4 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 9 May 2005, pp 13–14.

While the majority report refers to the UK model in support of its argument for divestiture powers, the Minister has rightly pointed out that the Australian situation is not necessarily the same.[5]

Government Senators also note that the telecommunications specific competition rules in Part XIB of the *Trade Practices Act 1974*, are as far as possible, designed to be consistent with general competition law. Inclusion of a divestiture power in relation to telecommunication is, therefore, not appropriate.

As discussed previously, the Minister is currently undertaking a review of the telecommunications regulatory regime. As part of this process the Minister released an issues paper to which all interested parties were able to make submissions. Government Senators note that the issues paper, and the regulatory review that the Government has underway, explores the same broad issues that are the subject of many of the recommendations made in the majority report:

> The purpose of this issues paper is to seek comments and views from the telecommunications industry and other interested parties about whether it would be appropriate or desirable to make further changes to the telecommunications competition regime at the present time, in light of:
>
> - the level of competition and service development in the sector;
> - the desirability of promoting efficient investment in new telecommunications networks (including high capacity customer access networks);
> - the likely impact of existing market structures on the future development of such networks and on competition in newly developed and emerging markets for new telecommunications services, such as broadband and voice over internet protocol (VOIP) services;
> - experience with the practical operation of Parts XIB and XIC of the *Trade Practices Act 1974* (the TPA) as they currently apply, taking into account the changes made by the Government in 2002…[6]

Government Senators consider that until this review has been finalised it would be premature to make specific recommendations about amendments to the TPA Act and accordingly do not support the following recommendations:

- **Recommendation 5**
  The Committee recommends that funding to the ACCC for telecommunications competition issues be substantially increased as a matter of urgent priority.

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5 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, Address to the Adelaide Press Club, 7 July 2005.

6 *Telecommunications Competition Regulation Issues Paper*, released April 2005, available at: http://www.dcita.gov.au/__data/assets/word_doc/25175/Issues_Paper.doc.

- **Recommendation 6**
  The Committee recommends that section 151AJ of the *Trade Practices Act 1974* be amended by inserting an inclusive list of factors to be considered by the courts in determining whether a carrier or carriage service provider has taken advantage of its substantial degree of power in a telecommunications market.

- **Recommendation 7**
  The Committee recommends that the third objective of the access regime as set out in subsection 152AB(2) of the *Trade Practices Act 1974*—encouraging the economically efficient use of and economically efficient investment in infrastructure—be given primacy.

- **Recommendation 8**
  The Committee recommends that in order to clearly satisfy the Commonwealth's obligations under clause 6(4)(e) of the Competition Principles Agreement, the *Trade Practices Act 1974* be amended to include a provision that requires the owner of a facility that is used to provide a service to use all reasonable endeavours to accommodate the requirements of a person seeking access.

- **Recommendation 9**
  The Committee recommends that to clearly satisfy the Commonwealth's obligations under clause 6(4)(m) of the Competition Principles Agreement, section 152EF of the *Trade Practices Act 1974* be amended to prohibit conduct that has the effect—and not just the purpose—of hindering the fulfilment of a standard access obligation or an obligation imposed by a determination made by the ACCC under Division 8.

- **Recommendation 10**
  The Committee recommends that the Government consider expanding the class of 'core services' in relation to which the ACCC must determine model terms and conditions for access. In particular, the Committee recommends that for the purpose of improving services in regional areas, certain transmission (or backhaul) routes be specified in the regulations as 'core services' under section 152AQA of the *Trade Practices Act 1974*.

- **Recommendation 11**
  The Committee recommends that the ACCC include prohibitions on behaviour that has the purpose or effect of impeding or unreasonably delaying access in any model terms and conditions for core services, particularly relating to the unconditioned local loop service.

- **Recommendation 12**
  The Committee recommends that the *Trade Practices Act 1974* be amended to require the ACCC to give greater importance to model terms and conditions in arbitrations. In addition to the ACCC merely 'having regard to' model terms and conditions determination, such determinations should apply presumptively unless the parties can show good reason to depart from them.

- **Recommendation 13**
  The Committee recommends that the ACCC be granted powers to set prices in addition to, or instead of, developing pricing principles.

- **Recommendation 14**
  The Committee recommends that subsection 152AQA(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to its pricing principles when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

- **Recommendation 15**
  The Committee recommends that subsection 152AQB(6) of the *Trade Practices Act 1974* be amended to require the ACCC to have regard to any model terms and conditions when it is assessing undertakings as well as in the arbitration of access disputes as is presently provided.

- **Recommendation 16**
  The Committee recommends that further amendments be made to the undertakings scheme to prevent or discourage their use to delay access and to bring more certainty to the market. In particular, the Committee recommends the imposition of shorter target timeframes in relation to access decisions.

- **Recommendation 17**
  The Committee recommends that the present scheme of anticipatory exemptions and special undertakings remain unchanged for the time being.

Recommendations 18 and 19

The Committee recommends that Telstra be required to divest its shareholding in Foxtel.

The Committee recommends that:

(i) if Telstra is fully privatised, it be a condition of the sale that Telstra be required to divest its HFC network; and

(ii) if Telstra remains in public hands, the Government direct the Australian Competition and Consumer Commission to provide further advice on its recommendations in its report *Emerging Structures in the Communications Sector* that Telstra be required to divest itself of its HFC network.

Any proposal to force Telstra to divest its interest in Foxtel or to divest its broadband HFC cable network would result in fundamental industry restructuring years after very large investments have been made. It is difficult to see that the claimed benefits of Telstra divesting its pay TV interests would be outweighed by the significant separation costs. Divestiture is not required to stimulate broadband competition in Australia. The Telstra cable network currently faces infrastructure based competition from the Optus cable network in almost every cabled street. Wireless broadband and infrastructure based ADSL competitors are also emerging.

A key question that must be asked, is who would buy the Telstra cable? It is quite possible that a forced sale of this network would actually make life for competitors like Optus more difficult. Also, who would buy Telstra's stake in Foxtel? Again, it is quite possible that the industry structure that emerged following a sale of Telstra

would cause more competition problems in the media sector. Accordingly, recommendations 18 and 19 are rejected.

Broadband infrastructure

Recommendation 20

The Government should undertake a mapping exercise of optic fibre networks in Australia. Particular consideration should be given to mapping of 'dark' fibre and infrastructure owned by government authorities, local councils and utilities.

Government Senators believe that it would be hard to justify such an exercise, as it would place an undue reporting burden on carriers and others, and divert significant Government resources for little obvious benefit. The information provided under such an exercise is also likely to be commercial-in-confidence and therefore limited in the purposes it could be used for.

The Universal Service Obligation

Recommendation 21

The Committee recommends that the Government review the basis of funding for the Universal Service Obligation prior to setting the subsidies for the next three year cycle to commence from 2007-08.

This is done anyway as required under the Act.[7] The Minister will take advice from the regulator before setting the USO subsidies. This happened recently when the Minister sought advice from the ACA before announcing subsidies for the next three years.

The USO has been reviewed to death. It was the subject of a major review in 2004. Following the review Cabinet decided that there would be no change to the USO costing and funding arrangements. The Minister also has recently confirmed that the Government will not change or water down the USO costing and funding arrangements[8] which require Telstra to ensure that all Australians, regardless of where they live, have access to a standard telephone service and payphones. Telstra is the provider of USO services in Australia and receives a subsidy from all licensed telecommunications carriers for doing so. Each carrier pays according to its share of industry revenue.

The USO is supported by other safeguards including the Customer Service Guarantee (CSG), the Telecommunications Industry Ombudsman (TIO), the Network Reliability

7 *Telecommunications (Consumer Protection and Service Standards) Act 1999*, section 16A.

8 'Mexican stand-off: Telstra provokes rural showdown', *The Australian Financial Review*, 29 July 2005, p. 1.

Framework, and price control arrangements. These safeguards are enshrined in legislation and will remain regardless of who owns Telstra.

Broadband infrastructure, including the Higher Bandwidth Incentive Scheme

Recommendation 22

The Committee recommends that the Government carry out a cost analysis of the Higher Bandwidth Incentive Scheme (HiBIS) immediately to ascertain how equitable universal broadband access can be ultimately provided.

The answer to "how equitable broadband access can be ultimately provided" is HiBIS. There is no point carrying out a cost analysis of HiBIS to determine how to provide broadband access to people living in regional, rural and remote areas – HiBIS is already doing that. What the majority report should have recommended was for the Government to do a review of HiBIS to determine if there could be any improvements to the scheme.

However, Government Senators note that the Department of Communications, Information Technology and the Arts is already undertaking such a review as is normal practice for these targeted assistance programs.

Government Senators also note that HiBIS has been very successful in its first year, connecting more than 600 regional and rural communities to terrestrial broadband. HiBIS has been so successful that the Government recently committed a further $50 million to the scheme taking total funding to $157.8 million. Government Senators recommend continued Government support for HiBIS.

Recommendation 23

The Committee recommends that funding the Higher Bandwidth Incentive Scheme (HiBIS) be broadened according to the following provider subsidy principles:

- **a higher subsidy for a broadband service that creates suitable and sufficient infrastructure for immediate and future consumers in an area, such as those using ADSL via cable or wireless; and**
- **the existing level of subsidy for a broadband service delivered to individual consumers via satellite where other means such as ADSL and CDMA can not be utilised.**

Government Senators note that these subsidy principles are already in place. Under HiBIS, there are different subsidies for different circumstances and the subsidy levels are working well, with more than 600 rural communities connected to terrestrial broadband in the past 12 months alone. For people living further away from regional townships or who live in remote areas receive a higher subsidy. Many of these people are receiving wireless or satellite broadband. There are more than 25 wireless broadband providers and eight satellite broadband providers registered with HiBIS. Government Senators note that two-thirds of HiBIS customers are connected to a

terrestrial broadband service (e.g. ADSL, cable or wireless). Less than third are connected to a satellite service, which is reasonable considering the size of Australia's land mass.

Recommendation 24

The Committee recommends that the ACCC examine the availability of access to, and cost of, backhaul services for carriers building or proposing to build new broadband infrastructure in regional Australia.

Again, Government Senators point out that this is a recommendation that has already been addressed. The ACCC has already announced a review and declared a transmission which can be used for backhaul. Therefore, we can consider this to be another unnecessary recommendation.

Recommendations 25 and 26

The Committee recommends that the Government consider simplifying the HiBIS application requirements in order to give regional broadband service providers more realistic opportunities to apply.

The Committee recommends that the Department of Communications, Information Technology and the Arts streamline the processing of applications from broadband service providers for registration with the HiBIS.

Clearly these recommendations were determined without considering the facts. In less than one year, the Department of Communications, Information Technology and the Arts has registered more than 35 Internet Service Providers to HiBIS. This demonstrates that the Department's processes are working well and that HiBIS is promoting competition. The application and approvals process usually takes between one and two months, which is a reasonable time period to ensure that the provider can deliver a reliable and fast broadband service to eligible customers. Accordingly, we reject these recommendations.

Recommendation 27

The Committee recommends that the Government fund local governments to develop business models that focus on delivering affordable local broadband services to regional and remote Australians.

Again, this recommendation has already been addressed through the Australian Government's Demand Aggregation Brokers Scheme. Under this $8.4 million program, brokers work with community and sectoral leaders to encourage investment by governments, the private sector and local communities in broadband infrastructure and services. Twenty three community-based brokers have been funded under the scheme and are working in regional communities, often closely with local councils or regional development boards, to bring together demand for broadband to increase the

purchasing power of buyers and deliver lower costs and improved access to broadband.

Recommendation 28

The Committee recommends that the Government provide funding to ensure that deaf and hearing and speech impaired people have equal access to a suitable broadband service through HiBIS and through an independent disabilities equipment program.

Government Senators agree with the sentiments set out in Recommendation 28 that deaf and hearing and speech impaired people have equal access to suitable services. We note that under the *Telecommunication (Consumer Protection and Service Standards) Act 1999* and the *Disability Discrimination Act 1992* the Government is ensuring that all Australians have reasonable access to a basic fixed line telephone service through such means as the National Relay Service.

In relation to broadband, deaf and hearing impaired people living in regional, rural and remote areas are eligible for the Government's $157.8 million HiBIS program. For those people living in metropolitan areas, they will be able to benefit from the Government's $50 million Metropolitan Broadband Blackspots Program when it is launched in early 2006. Therefore, there is already significant Government funding to provide suitable broadband services for everyone.

The Estens Report

Recommendation 29

The Committee recommends that the Government fulfil its promise to implement all 39 recommendations of the Estens Report. The Committee further recommends that an independent audit of the Government's implementation of the Estens Report recommendations be conducted prior to the introduction of legislation providing for the further sale of Telstra.

Government Senators supports the first part of Recommendation 29 but note that the Government intends to implement all 39 recommendations from the Estens Inquiry anyway. We also note that 32 of the 39 recommendations have already been implemented, with the remaining seven to be completed shortly. Five of the remaining seven recommendations require the passage of legislation which has already been introduced to Parliament. The Minister has advised that the other two recommendations have almost been implemented.

Government Senators reject the second part of Recommendation 29 in the majority report. The Government has accepted every recommendation from the Estens Inquiry and is implementing each and every one of them. As the Minister recently noted:

> No one could reasonably argue that the Howard Government has failed to respond to the urgent need to upgrade telecommunications services in rural and regional Australia. We Networked the Nation and then had two, major

> independent inquiries – Besley and Estens – and backed that up with funding of $163 million and $181 million respectively…
>
> When Labor dominated Senate committees were calling for billions to be spent on yesterday's technology – dial-up Internet services – it was the Howard Government that responded with a National Broadband Strategy and $107.8 million to deliver broadband to the bush through our Higher Bandwidth Incentive Scheme (HiBIS).
>
> Estens has long been considered the bench-mark for adequacy of services in the bush and the Government has accepted all 39 Estens recommendations. With Estens implementation almost complete our thoughts now turn to what Estens called 'future-proofing' – a term that captures the overriding concern in the current debate.[9]

Consumer issues

Recommendation 31

The Committee recommends that Part 6 of the *Telecommunications Act 1997* be amended to require the ACMA to enforce the development of codes within set time-frames.

Government Senators note that the ACMA and the Minister already have the powers required to enforce the development of codes in a timely manner as well as to intervene and provide direction. Therefore, Government Senators find this recommendation to be unnecessary.

Recommendation 32

The Committee recommends that the *Telecommunications Act 1997* be amended by inserting a new section 120A that requires annual reporting by suppliers or industry associations of compliance with industry codes and, where the ACMA considers that monitoring is not providing adequate or accurate data, monitoring by the ACMA.

There are already provisions in place for carriers to comply with the requirements of industry codes. The ACMA also has the power to direct companies to comply. We note, however, that the ACMA is currently undertaking consultations on a guideline for establishing code failure.[10] Government Senators reject this recommendation.

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9 Senator the Hon Helen Coonan, Minister for Communications, Information Technology and the Arts, Address to the Adelaide Press Club, 7 July 2005, p. 6.

10 See http://www.acma.gov.au/ACMAINTER.2163012:STANDARD:1961131216:pc=PC_1661.

Recommendation 33

The Committee recommends that the Telecommunications (Consumer Protection and Service Standards Act 1997 be amended in order to establish a single Communications Industry Ombudsman.

Government Senators reiterate the comments made in their dissenting report for the inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matters[11] that we do not disagree with the possibility that the TIO could be used to develop a simpler and more streamlined process of consumer complaint handling. However, we do not consider that the *Telecommunications (Consumer Protection and Service Standards) Act 1999* should be amended at this stage. The TIO scheme works very well and adding TV and radio content complaints to its jurisdiction is not supported by the TIO, because these types of complaints are very different to complaints about telephone billing disputes. Therefore, we reject this recommendation.

Recommendations supported in principle

Recommendation 4

The Committee recommends 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.

Government Senators note that the ACCC already has a commissioner who has carriage of telecommunications issues. In relation to this person also being a member of the ACMA, we note that there are provisions for this to occur and it has happened in the past. However, it would be prudent to consider this matter only after the senior ACMA positions have been finalised, including the appointment of the ACMA Chair.

Recommendation 30

The Committee recommends that the ACMA give immediate and urgent consideration to adopting the recommendations in the ACA research report *Consumer Driven Communications: Strategies for Better Representation* so that the rights of consumers are better protected than currently under the ACA, as previously recommended by the Committee.

This is another recommendation that has already been addressed. The 'Consumer Driven Communications: Strategies for Better Representation' report was submitted to the ACA late in December 2004. The ACMA is considering those recommendations

11 Senate Environment, Communications, Information Technology and the Arts References Committee, *A lost opportunity, Inquiry into the provisions of the Australian Communications and Media Authority Bill 2004 and related bills and matter,* March 2005.

which relate to its functions and powers and has developed a workplan for addressing the recommendations.

The Government is also considering the recommendations. The Government has met members of the group that prepared the report and expect to have further discussions in the near future. We understand that other bodies, such as the Australian Communications Industry Forum and the Telecommunications Industry Ombudsman, are also considering the recommendations that relate to their functions and powers.

Recommendation 34

The Committee recommends that all carriage service providers make available a Basic Residential Package to households who want only a clear, cost-based package of local access services.

The Government already has in place a number of measures which aim to assist low income individuals in regard to access to adequate telecommunications services. However, Government Senators consider that it would be beneficial if other carriage service providers were to put in place similar measures for people on low incomes as Telstra has developed, particularly in light of the ongoing move away from a monopoly in telecommunications service provision.

Recommendation 35

The Committee recommends that the Government give urgent consideration to the recommendations of the National Emergency Communications Working Group, particularly in regard to new technologies such as VoIP.

A review into generation services such as Voice over Internet Protocol (VoIP) has already commenced. In fact a consultative process was launched at the end of last year in which the Australian Communications Authority, the ACCC and the Department of Communications, Information Technology and the Arts issued public discussion papers and invited comments. As a result of that process, the Government is considering advice on the issue of the policy and regulatory framework for Voice over Internet Protocol services in Australia and will make a further announcement when that is done.

Government Senators support communications capabilities that enable individuals to rapidly and reliably be connected to the appropriate Emergency Services Organisations in times of emergency. We support in principle that ACMA also consider the recommendations of the National Emergency Communications Working Group.

Senator the Hon Judith Troeth
Deputy Chair

Senator the Hon Michael Ronaldson

Appendix 1

Submissions and Tabled Documents

Submissions

1. Paul Budde Communication Pty Ltd

2. Mr Doug Coates

3. National Emergency Communications Working Group

4. Tower Sanity Alliance

5. Customer Service Institute of Australia

6. Mr Malcolm Moore, Moore and Moore Consultancy Services

6A. Mr Malcolm Moore, Moore and Moore Consultancy Services (Supplementary Submission)

6B. Mr Malcolm Moore, Moore and Moore Consultancy Services (Supplementary Submission)

6C. Mr Malcolm Moore, Moore and Moore Consultancy Services (Supplementary Submission)

7. Australian Communication Exchange Limited

7A. Australian Communication Exchange Limited (Supplementary Submission)

8. Orana Development & Employment Council

8A. Orana Development & Employment Council (Supplementary Submission)

9. Australian Communications Industry Forum Limited

10. KNet Technology Pty Ltd

11. Orana Regional Development Board

11A. Orana Regional Development Board (Supplementary Submission)

12. Optus

13. AAPT

14. Competitive Carriers Coalition

14A. Competitive Carriers Coalition (Supplementary Submission)

14B. Competitive Carriers Coalition (Supplementary Submission)

15. National Farmers' Federation

16. Australian Consumers' Association

17. Australian Competition and Consumer Commission

17A. Australian Competition and Consumer Commission (Supplementary Submission)

18. in tempore Advisory

19. Small Enterprise Telecommunications Centre Limited (SETEL)

20. Australian Telecommunications Users Group Limited (ATUG)

20A. Australian Telecommunications Users Group Limited (ATUG) (Supplementary Submission)

21. GSM Gateways Association Inc

22. WA Local Government Association

23. Communications Law Centre

24. Australian Communications Authority

24A. Australian Communications Authority (Supplementary Submission)

25. Telstra

25A. Telstra (Supplementary Submission)

26. Communications Expert Group

26A. Communications Expert Group (Supplementary Submission)

27. Computer Research and Technology

28. Ms Tess Le Lievre

29. Ms Liz Murray

30. Consumers' Telecommunications Network

31. Mr Ross Kelso

32. Department of Industry and Resources, Government of Western Australia

32A. Department of Industry and Resources, Government of Western Australia (Supplementary Submission)

33. Telecommunications and Disability Consumer Representation (TEDICORE)

34. Townsville City Council

35. Regional Internet Australia

36. Mr John Dobinson

37. NQ Telecom

38. Virtual Local Group

39. Telecommunications Industry Ombudsman

40. Communications Electrical and Plumbing Union (CEPU)

41. Meridian Connections Pty Ltd

42. Queensland Department of Main Roads

43. Mr Michael Davis

44. Chief Minister's Department, ACT Government

45. Australian Association of the Deaf Inc

46. Combined Pensioners and Superannuants Association of NSW Inc

47. IQ Connect

48. Unwired Australia Pty Ltd

49. Mr John and Mrs Jan Coombs

50. Department of Communications, Information Technology and the Arts

51. Baulderstone Hornibrook

52. Australian Privacy Foundation

Tabled Documents

13 April 2005 – Sydney

50% off national mobile calls rates tabled by Mr Brian Currie, Hutchison

10% off your Telstra business bill tabled by Mr Brian Currie, Hutchison

An introduction to ACIF Consumer Codes tabled by Ms Anne Hurley, ACIF

What you should tell your customers about their Internet Telephony/VoIP service tabled by Ms Anne Hurley, ACIF

Variation of our customer terms tabled by Mr Tom Amos, GSM Gateway Association Inc

14 April 2005 – Dubbo

Address by Narromine Shire Council – Mayor Bob Barnett tabled by Cr Robert Barnett, Mayor, Narromine Shire Council

21 April 2005 – Townsville

Medicine, Health & Molecular Sciences Sites, current and near future tabled by Dr Ian Atkinson, James Cook University

Paper commenting on two terms of reference: 1(c) and 1(e), tabled by Mr Steve O'Brien, IQ Connect

James Cook University 'Outlook' – the magazine of Australia's leading tropical university, article p.6 VC's view tabled by Mr Kent Adams, James Cook University

29 April 2004 – Perth

WA – A Connected Community – State Communications Policy October 2004 tabled by Mr Dan Scherr, Department of Industry and Resources, WA Government

A CD titled *Telecommunications Needs Assessment – the communications needs of regional Western Australians* tabled by Mr Dan Scherr, Department of Industry and Resources, WA Government

Appendix 2

Public Hearings

Monday, 11 April 2005 – Canberra

National Farmers Federation

Mr Mark Needham, Policy Manager, Telecommunications

Competitive Carriers Coalition

Mr Paul Broad, Managing Director, PowerTel ltd

Mr Errol Shaw, Diurector, Strategic Business Development, PowerTel Ltd

Mr David Forman, Executive Director, Competitive Carriers Coalition

Mr Ian Slattery, General Manager, Regulatory, Primus Telecom

AAPT Ltd

Mr David Havyatt, Head of Regulatory Affairs

Australian Telecommunications Users Group

Mr Richard Thwaites, Adviser and Canberra Representative

Small Enterprise Telecommunications Centre Ltd (SETEL)

Mr Ewan Brown, Executive Director

Department of Communications, Information Technology and the Arts

Mr Simon Bryant, General Manager, Telecommunications Competition and Consumer

Mr Christopher Cheah, Chief General Manager, Telecommunications and Post

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

Wednesday, 13 April 2005 – Sydney

Communications Law Centre

Dr Derek Wilding, Director

Australian Communications Industry Forum

Ms Anne Hurley, Chief Executive Officer

Consumers Telecommunications Network

Ms Teresa Corbin, Executive Director

Paul Budde Communication Pty Ltd

Mr Paul Budde, Managing Director

Australian Consumers Association

Mr Charles Britton, Senior Policy Officer, IT and Communications

Hutchison Telecommunications (Australia) Ltd

Mr Brian Currie, General Manager, Regulatory Affairs

Mr Steve Wright, Director, Stakeholder Relations

GSM Gateway Association Inc

Mr Peter Kelly, Chairman

Mr Thomas Amos, Consultant

Moore and Moore Consultancy Services

Mr Malcolm Moore, Executive Manager

Australian Communication Exchange Ltd

Mr Peter Knox, Chief Executive Officer

Ms Tracey Annear, Executive Officer, Sydney

Unwired Group Ltd

Mr David Spence, Chief Executive Officer

Thursday, 14 April 2005 – Dubbo

Dubbo City Development Corporation Ltd

Mr Jeffrey Caldbeck, General Manager

KNet Technology Pty Ltd

Mr Joseph Knagge, Chief Executive Officer and Director

Computer Research and Technology

Mr Arthur Hissey, Managing Director and Chief Technical Officer

Narromine Shire Council

Mr Robert Barnett, Mayor

Mr Paul Bennett, General Manager

Orana Regional Development Board

Mr Max Walters, Chairman

Ms Juliet Duffy, Executive Officer

Orana Development Employment Council

Mr Thomas Warren, Chief Executive Officer

Mr Michael Davis, Private Capacity

Mrs Therese Le Lievre, Private Capacity

Dubbo Chamber of Commerce

Mrs Tina Reynolds, President

Ms Jodie Lawler, Executive Officer

Fletcher International Exports Pty Ltd

Mr Roger Fletcher, Owner and Manager-Director

Thursday, 21 April 2005 – Townsville

Mr Peter Lindsay, Federal Member for Herbert

North Queensland Telecom

Mr Jeremy Moffat, Managing Director

Telcoinabox and Universal Telecom

Mr Damian Kay, Chief Executive Officer, Telcoinabox and Managing Director, Universal Telecom

Townsville City Council

Mr Paul Askern, Director, Corporate Services

Mr Anthony Wilson, Manager, Information Technology Section, iTComm Services

James Cook University

Mr Kent Adams, Director, Information Technology and Resources

Associate Professor Ian Atkinson, School of Information Technology and Manager of High Performance Computer, Information Technology and Resources

Mr Murray Griffin, Chief Executive Officer/Managing Director, NQ-ITX Ltd

Townsville Chamber of Commerce

Mr John Bearne, President

Mr Mark Agius, Infrastructure Consultant, Regional Internet Australia Pty Ltd

Mr John Lyons, Corporate Affairs, Regional Internet Australia Pty Ltd

Mr Warren Thomson, Chief Executive Officer, Regional Internet Australia Pty Ltd

Townsville Regional Telco Ltd

Mrs Carol Bermingham, General Manager

Mr Sean Johnson, Lawyer

IQ Connect Pty Ltd

Mr Noel O'Brien, Chairman

Mr Steven O'Brien, Sales and Marketing Manager

Mr Ross Kelso, Private Capacity

Friday, 29 April 2005 – Perth

Western Australian Local Government Association

Mr Alden Lee, Program Manager, Linking Councils and Communities

Mr Christopher Hill, Telecommunications Consultant

Communications Expert Group

Dr Water Green, Director

iiNet Ltd

Mr Stephen Dalby, General Manager, Regulatory

National Emergency Communications Working Group

Mr Robert Barker, Founding Member

Virtual Local Group

Mr Kenneth Grogan, Manager

Peel Development Commission

Mr Gary Chappell, Community Broadband Demand Aggregation Broker

Wednesday, 4 May 2005 – Melbourne

Professor Peter Gerrand, Private Capacity

Telstra Low Income Measures Assessment Committee

Mr Christopher Dodds, Chairperson

Telecommunications Industry Ombudsman

Mr John Pinnock, Ombudsman

Essential Services Commission

Mr Paul Fearon, Chief Executive

Australian Communications Authority

Mr Allan Horsley, Acting Deputy Chairman

Mr John Neil, Acting Senior Executive Manager

Telstra

Mr Bill Scales, Group Managing Director, Corporate and Human Relations, Telstra Corporate Office

Dr Mitchell Landrigan, Group Manager, Regulatory, Telstra Corporate Office

National Competition Council

Mr John Feil, Executive Director

Mr Alan Johnston, Director

Optus

Mr Paul Fletcher, Director, Corporate and Regulatory Affairs

Monday, 9 May 2005 – Canberra

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman

Mr Ed Willett, Commissioner

Mr Brian Cassidy, Chief Executive Officer

Mr Michael Cosgrave, General Manager, Telecommunications

Monday, 20 June 2005 – Canberra

TransACT

Ms Dianne O'Hara

CEPU

Ms Rosalind Eason, Senior National Industrial Research Officer

Mr Colin Cooper, Divisional President, Communications Division

DCITA

Mr Simon Bryant, General Manager, Competition and Consumer Branch, Department of Communications, Information Technology and the Arts

Mr Christopher Cheah, Chief General Manager, Telecommunications, Department of Communications, Information Technology and the Arts

Ms Carolyn McNally, General Manager, Regional Communications Policy, Telecommunications Division, Department of Communications, Information Technology and the Arts