COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS REFERENCES COMMITTEE

Reference: The provisions of the Australian Communications and Media Authority Bill 2004 and related matters

THURSDAY, 10 FEBRUARY 2005

CANBERRA

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SENATE

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS REFERENCES COMMITTEE

Thursday, 10 February 2005

Members: Senator Cherry *(Chair)*, Senator Tierney *(Deputy Chair)*, Senators Mark Bishop, Conroy, Lundy and Tchen

Participating members: Senators Abetz, Allison, Bartlett, Bolkus, Boswell, Brown, Buckland, George Campbell, Carr, Chapman, Colbeck, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Humphries, Knowles, Ludwig, Mason, McGauran, Nettle, O'Brien, Payne, Robert Ray and Watson

Senators in attendance: Senators Cherry, Conroy, Lundy, Tchen and Tierney

Terms of reference for the inquiry:

To inquire into and report on:

(a) the provisions of the Australian Communications and Media Authority Bill 2004 and the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004 and related matters;

- Provisions of the Australian Communications and Media Authority Bill 2004
- Provisions of the Australian Communications and Media Authority (Consequential and Transitional Provisions) Bill 2004
- Provisions of the Data casting Charge (Imposition) Amendment Bill 2004
- Provisions of the Radio Licence Fees Amendment Bill 2004
- Provisions of the Radiocommunications (Receiver Licence Tax) Amendment Bill 2004
- Provisions of the Radiocommunications (Spectrum Licence Tax) Amendment Bill 2004
- Provisions of the Radiocommunications (Transmitter Licence Tax) Amendment Bill 2004
- Provisions of the Telecommunications (Carrier Licence Charges) Amendment Bill 2004
- Provisions of the Telecommunications (Numbering Charges) Amendment Bill 2004 and
- Provisions of the Television Licence Fees Amendment Bill 2004, and related matters

(b) whether the powers of the proposed Australian Communications and Media Authority and the Australian Competition and Consumer Commission will be sufficient to deal with emerging market and technical issues in the telecommunications, media and broadcasting sectors; and

(c) whether the powers of Australia's competition and communications regulators meet world best practice, with particular reference to the United Kingdom regulator OFCOM and regulators in the United States of America and Europe.

WITNESSES

Committee met at 9.04 a.m.

BRITTON, Mr Charles Crawford, Senior Policy Officer, IT and Communications, Australian Consumers' Association

CHAIR—I declare open this public hearing of the Senate Environment, Communications, IT and the Arts References Committee in relation to its inquiry into the powers of Australia's communications regulators and welcome people here today. This is the first day of hearings for this inquiry. The committee will hold a second public hearing tomorrow. Due to the reporting date of 10 March 2005, the committee is unable to hold further hearings outside of Canberra. We are disappointed that the time constraints have not allowed us to investigate this issue a lot more thoroughly, but we are in the hands of the Senate. However, the committee has received 21 submissions, which have assisted this inquiry significantly.

For the benefit of our witnesses, I will point out that the committee prefers all evidence to be given in public but should you at any stage wish to give your evidence, part of your evidence or answers to specific questions in private you may ask to do so and we will consider that request. I welcome our first witness from the Australian Consumers Association, Mr Charles Britton. I thank you for coming, especially at such short notice. It is very much appreciated by the committee. You are reminded that the evidence given to the committee is protected by parliamentary privilege and the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. We have received your written submission. Are there any changes you wish to make to your written submission at this stage?

Mr Britton—No.

CHAIR—I invite you to make an opening statement before we then move to questions.

Mr Britton—Thank you very much for the opportunity to appear and present the Australian Consumers Association view on the merger of the ABA and the ACA into ACMA. In the view of the Australian Consumers Association, we think this a conversation about a gap—a gap between what is happening in terms of technology in the marketplace and what the government and regulatory response is. The convergence of content with carriage, of modes of carriage and of modes of content based on digital technology is a long apparent trend. It has been apparent for at least 10, if not 15, years. There has been a lot of talk and sometimes not very much action. The tendency has been to confront convergence issues as they arise. A classic is digital TV, which we started solving five years ago and which we still have not really solved. A current example is the premium mobile data services issue.

The emergence of premium mobile data services, while an obvious convergence event and one of the first marketplace convergence events to happen in Australia, seemed to surprise everybody when it actually happened. There was regulatory confusion along the lines of who, what and when. Who should deal with it, the Australian Communications Authority, the ABA or the OFLC? Where did the lines exist? What should they do? We saw the Australian Communications Authority experimenting with novel forms of regulatory instruments and then falling back to a service provider rule that it has taken an awfully long time to come up with. And when? The numbers were released for these premium services before the regulatory arrangements had been settled.

The current service provider rule sets out a default scheme which is neither of the existing schemes in the space. That is, it is neither the Telecommunications Industry Ombudsman nor the Telephone Information Services Standards Council—the TIO or the TISSC. It sets out a default scheme which is ill-defined and opens the door to further dispute resolution schemes and rules in that space. That is a small technical corner of the universe but the point is that it completely goes against the goals of convergence, it goes against the stated goal of the regulator—to have one point of contact for consumers—and it is certainly against the goals of the consumer groups involved. The critical question is: how would ACMA, as contemplated, make a difference? From what we can see it would not really do so because it is just an administrative convergence and does not actually solve the problem of who, what, where and when.

We cannot go on trying to solve convergence issues as they emerge on a day-to-day basis. The day is now and it is quite late in the day. There are structural challenges and novel forms will continue to emerge, probably at a greater pace than they have. For one thing, people are talking about things like remote live video with camera control and multiple real-time multiparty text and chat. What that is going to be called and how you regulate that is going to call for all the minds we can muster.

In our view, administrative combination is necessary but not sufficient in this space. What we have in the act is something that delivers a conjoined regulator, if you like. What we argue for is a genuinely converged regulator that can seamlessly address content and carriage issues across the network communications industry and with an ADR scheme—an alternative dispute resolution scheme—to match. At the very least, there should be a required roadmap for this conjoined ACMA to pursue genuine convergence with goals and milestones specified with a clear emphasis on the long-term interests of end users—that is, consumers.

CHAIR—I will start by referring to your section on dispute resolution where you talk about possibly expanding the jurisdiction of the TIO. I would not have thought that the TIO would have the resources in its current permutation to take on that extra area of pay TV and the convergence issues.

Mr Britton—I guess that one of the virtues of the TIO is that it is a scalable funding model—that is, the members pay, and they pay by dispute. You could not just say, 'TIO, you do this.' You would need to change the definition of the TIO—in our view, to a communications industry ombudsman—and expand its membership base, which would expand its resources base, and that would become self-funding. We do not argue for just tacking it on, as it were; it needs to be approached in a systematic way. But we think that will give consumers the comfort of a one-stop shop and not having gaps. As I say, the premium services determination opens the door to possibly three, four or more ADR schemes.

CHAIR—Have you had much of a look at the British communications regulatory system?

Mr Britton—I am aware of it, but I have not looked at it in depth.

CHAIR—I was just going to ask whether there were any lessons we should learn from the Ofcom experience, in terms of looking at the ACMA.

Mr Britton—I heard a presentation the other day from a fellow who runs the equivalent of the content regulator, if you like, or the dispute resolution body. The key message was: universality of coverage. I think that is the message we have been talking about with the convergence aspect: getting umbrella coverage of what is a complex domain. What used to be natural distinctions in the analog world are becoming artificial in the digital world, and then they are becoming obstructions because they do not move with the market and the technology.

Senator CONROY—Thank you for that presentation, Mr Britton. I want you to expand on some of the points you raise in your written submission. I want your view on the effectiveness of the current regulatory regime for communications and media in dealing with the challenges posed by convergence. I know you have touched on that briefly, but I am hoping you can expand on that.

Mr Britton—As I said, digital TV example is not just about the regulators. In a policy and regulatory sense we have not grasped the full potential of that change. In some ways we chloroform things such as data casting. They have not been an issue, but had they emerged they would have been a significant issue. I do not think chloroforming change is the way to deal with it. All the regulators seem to be aware of it because they talk about it a fair bit. 'Outraged' is too strong a word to use, but I was nonplussed, shall we say, when the premium service mobile data issue came as an apparent surprise. There had been a lot of talk and preparation, and then an actual event occurred and it was like nobody was prepared at all. If we ask whether the representations are ready and aware of it, we would have to say, 'Yes, they are.' But I think they are partly handicapped by the legislative framework that separates them. The ACMA merger does not actually seem to address who does content and who does carriage. It brings the administrative structures together, and may make it easier, but how you would resolve the question of what you do about the fact that content and carriage are becoming inextricably intertwined is not well signposted. And what do you do about the fact that there are different approaches? Take the competition approach to spectrum and the number of carriers and operators in telecommunications and compare that with the ABA's approach. Take the fact that market regulation of broadcast is dealt with in the ABA, but in the Communications Authority it is dealt with in the ACCC and ACMA. This does not go to your question, but what we have is a landscape which is varied and uneven in the way these two regulators carry on, and I do not know that we actually have a road map that says how we are going to fit them together other than by joining them at the head.

Senator CONROY—You have stated in the past—I think it was in an *Australian Financial Review* article—that the current regulatory regime has produced weird interim regulatory responses. Could you expand on that?

Mr Britton—That was about the premium rates base. I do not want to sound obsessed with it, but it is a current issue. It is a very good micro example of how we fumbled the convergence ball, but it is not the be-all and end-all. I was making specific reference to the fact that, at one point, the Communications Authority was contemplating memorandums of understanding with the different carriers. I suppose I called it weird because it was invented out of nowhere. It does not exist in the legislation. It was something that was made up, and it had all the hallmarks of policy-making on the run.

That is part of what I am saying: 'Why is this a surprise?' It has been on the cards for 10 years. Why do we suddenly have to say, 'Oh, we do not know what to do'? We will have this new method of dealing with things, which basically has a very uncertain status in our view. I guess it rested in the agreement between the carrier and the Communications Authority, but where any of the rest of it rested, we were not at all sure. It was innovation and an illustration that innovation is not always a positive thing.

Senator CONROY—Has the current regulatory regime allowed for the emergence of consistent consumer protection across the media and communications markets? I think the point you are making is that it has not.

Mr Britton—I do not think so. Certainly, pay TV is the real example right at the moment. Bits of pay TV are dealt with by the TIO—when it is bundled, perhaps—but large bits of it are not. You had the TARBS go broke and there was no ADR scheme for people to go to. It was just straight to fair trading type generalist agencies when people were thinking: 'This is a communication service. Why can't it go to the TIO? Why isn't there some specialist agency?'

Senator CONROY—How many different agencies, if you had a complaint, would you have to go to? Do you need a degree to work out which of the acronyms applies in a particular case?

Mr Britton—Part of the problem is that consumers can end up going to the TIO, to TISSC or, potentially, to the ABA if it is a content issue on the internet. They could go to the state fair trading agencies. They could possibly try going to the ACCC. The Communications Authority is there to deal with spam, for instance. There is a wide range of possible avenues that people might have to pick and choose between. Certainly, the TIO and TISSC work reasonably well together. They have tried to refer matters but there are always people falling between the cracks. People do not know where to go. Then you have the whole question of the ABA not being geared to consumer complaints, because classically broadcast is not about individual consumers; it is about advertisers. The customer of a broadcaster is the advertiser not the viewer. But that is changing because of the digital change that is coming along. Pay TV is an example. It is a subscriber relationship, which is a much more individualised and personalised relationship. That is one of the consumer impacts of convergence, and why it is important, for instance, that we now get TV coming to the mobile phone handset—and that is billable, it has to be said. Our view looking into the future is that we are going to see ongoing jumbling between these domains. It would be sensible to set it up so that we had an umbrella approach that brought some sort of consistency.

Senator CONROY—The merger and those sorts of things have been around for a while now. Do you believe that the legislation represents a timely response?

Mr Britton—We have said in our submission we think it is too late. We do acknowledge that it is important not to act too quickly with some of this stuff. That is coming out of the debate about media regulation, because some people have said, 'Technology has moved on and we do not need media regulation because of the digital changes.' We have said: 'No, that is not quite right. In our view we have not got that far that fast.' But, in terms of moving the regulatory regime to be able to seamlessly and sensitively address the issue, part of the point is that we are not necessarily arguing for a 'one size fits all' response to the convergence space. Different areas may need to be treated differently given their state of innovation, their state of market

development, the degree of threat to consumer interests et cetera. There is probably quite a long list of things you could use to distinguish different approaches, but they are approaches that relate to the nature of the market place and not to legacy structures about what is broadcasting, what is telecommunications, what is premium rate content, what is internet content, what is spam and what is offensive content under the ABA. We need to bring those together and then perhaps we can deal with different areas in a more or less light-handed way. But, organically, it is a market place and the convergence changes would be the—

CHAIR—You spoke in your submission about the fact that technical standards do, to some extent, drive competition, and that competition is inadequate in the industry. In your view, what is the relationship between the ACCC and the ACA? Do you think it works effectively now? Is there a sufficient recognition of technical aspects as the drivers of competition, particularly given that the ACMA is of course a technical regulator?

Mr Britton—That is not an area where we had a lot of concern as such. We looked at the main issues there, which I think are the ACCC as competition regulator and the issues of the access regime that it tries to administer there, which is not actually technical as such. We are not uncomfortable with the approach of the ACA in terms of spectrum sale and management, but we do think there is an interesting disjunction in the conjoined regulator, if you like, between that and the approach of the ABA in the way it is required to act. That is not its discretion, but the two are handled in really quite different ways. I do not know that this legislation contains pointers to solving it or even an imperative to solve it.

Senator CONROY—It seems that the regulatory approach at the moment is pretty ad hoc. Are you confident that this organisation is going to be able to remedy that, or are there still some concerns?

Mr Britton—I think there would be abiding concerns, particularly in some ways about where the drivers might take us. I think one of the other things we mentioned in our submission was the question of the consumer focus or otherwise of the regulator. Where there are differences—and we talked about spectrum management, competition policy and consumer protection orientation or consumer involvement orientation—and if there is going to be a tussle, which one is going to win? It is not defined where the regulator's objectives lie in that sense. So we obviously have concerns to watch and monitor how that comes out and which particular view prevails. We are not necessarily arguing for the creation of this converged regulator just by saying, 'Now you are converged,' and mashing them together. I think it does need a road map, a strategy, and that should be built into the definition of what ACMA is. ACMA should be required to move down that path in a structural and outcomes focused way. It may be implicit in the creation of ACMA that it should do that, but, yes, implied directions can give rise to ad hoc solutions.

CHAIR—Is there a reasonable statement in any reports you have seen—I know this proposal has been around for quite some time—of what the road map for ACMA should be or what its objectives should be?

Mr Britton—Not that I am aware of, but that is not to say that it does not exist in some place.

CHAIR—You can take that question on notice, if you like, if you are aware of one and want to drop it in.

Mr Britton—Do you mean an official one from ACMA or one drafted by people who are not ACMA people?

CHAIR—I noticed in your submission that you referred at a couple of stages to some of the objectives you thought it should have. I just wonder whether the objectives clause of the act itself needs improvement.

Mr Britton—That is possibly something people could turn their minds to, yes.

Senator TIERNEY—Mr Britton, you mentioned in your verbal submission that you believe that this authority is conjoined rather than converged, and then a little bit later you said we should not act too quickly. In the evolution of regulation, isn't it better to just be conjoined at this point? There may be other steps later, integrating the authority more effectively, but, at this point in time, isn't it better to just conjoin the organisations and then work out what you will refer to the road map, in response to rapidly changing technologies?

Mr Britton—I hear that point. I think we are saying that it is a necessary condition, so at some point they need to be joined. Our view is that we are getting later rather than earlier in the day. Perhaps that would have been a very useful position at some point earlier in the process. As I said, the convergence process has been unfolding for quite some time. I think that point is well made—that is, being sensitive to the timing of how it is done. Our view is that it has been left somewhat late in the day and that, while we do need to do this and we certainly welcome it being done, perhaps it should have been done earlier and perhaps it should contain imperatives to advance the process a little more quickly than might be the case if they are just left to their own devices once conjoined.

Senator TIERNEY—You are critical of the role of general competition law in this area. You make the point in your submission that areas that are based on networks are typically complex and do not have an easily well defined market and that where there is significant residual incumbent market power these general competition laws do not work particularly well. But we are setting up an authority that covers the whole area. So, surely, given what you perceive to be the shortcomings of general competition law, what could now evolve through this regulator answers that problem, does it not?

Mr Britton—What we are urging is the fact that there is a necessity for, in our view, converged communications networked industry specific legislation and regulation. So in that sense we are endorsing, if you like, the continued specific regulation of those industries. Perhaps there is some debate about whether the competition regulations should be in the ACCC or in the ACMA space. Our view is that that is something that can be thrashed out, because there is currently a difference in the way the two areas work. But, in the final analysis, we certainly want to see industry specific regulation, and quite possibly legislation, to govern competition behaviour in those markets. It is not clear, in our view, how that is going to emerge from ACMA. We are simply wanting to state the view that that should be an outcome from wherever these processes lead us. There is pressure from various commentators and sources for us to go to general competition law in media and communications, and we are simply not of that view.

Senator TIERNEY—On page 4 of your submission you state:

ACA has a low opinion of the extent to which the market power of the previous monopoly incumbent, Telstra, has been diminished.

Again, in the sweep of time and the way in which technology is evolving, and given that we have only been in the process of moving from a monopoly situation for about 10 years, surely we are at a pretty inevitable stage? That sort of dominance is not going to disappear overnight, is it? But are you satisfied that trends are in place to perhaps reduce that dominance over time, given the evolution of new technologies and the sorts of other players that might come into the market?

Mr Britton—I do not think we are comfortable with that. There are certain markets where competition appears to have emerged, but Telstra, to name the incumbent, has a role in most of those new markets. A perfect example at the moment is the voice over IP opportunity. We are seeing in the United States that technology being pushed quite vigorously by cable companies that own cable plants and are independent of telecommunications companies. In Australia, one of the major—and probably the pre-eminent—cable plants is also owned by Telstra, the provider of telecommunications services over copper wires. So, even looking into the future and looking at new technology which should enable competition, we perceive the potentially dampening hand of the incumbent throughout the industry. Telstra is present in most of the operations of most of the other operators in one way or another. In that sense, we do not necessarily think that the trends are to a diminished presence of Telstra in the marketplace.

Senator TIERNEY—On page 5 of your submission you envisage as a role for the new authority being able to intervene strongly 'to break chokeholds by dominant players and ease the passing of obsolete technologies'. Could you elaborate a little further on how such an authority might undertake and successfully complete such a challenging task?

Mr Britton—One of the things is being able to intervene where there is market power. Perhaps that is more a role for the ACCC. But between the regulators we need to be able to see the sort of thing I am talking about, which is the cable operator and the voice over IP situation. I think voice over IP is part of what was in contemplation because we are moving to the point where, ultimately, current voice technologies are going to become obsolete. How can we engineer those from the market in such a way that does not disadvantage people who are still wanting to use the facilities of those technologies, make sure that the new offerings come up to scratch and that those issues do not become competition issues and they remain addressed as consumer and marketplace issues?

Senator TIERNEY—On page 7 you see a role for the TIO—perhaps an evolving role, given the new range of the market that this new authority would cover. Could you explain further how you see TIO's role expanding under the aegis of this new authority?

Mr Britton—We would like to see the TIO become the CIO, the communications industry ombudsman. It seems to match the boundaries of ACMA—that is, the merged entity—because of, as you have pointed out, the gaps between TISSC, the ADR, TIO and pay TV. As more subscriber based content services emerge, the content provision through premium SMS and other examples of mobile data need to have a clear and unambiguous home, and there is no doubt that the communications industry ombudsman has the power and ACMA has the capacity to direct people to use that ADR. In other words, we would like to see a single legislatively

based ADR as the TIO currently is covering the full space that ACMA converged space, if you like, covers.

Senator CONROY—You mentioned this earlier, Mr Britton, but could you compare the relative performance in your experience of the ABA and the ACA in responding to and addressing consumer complaints?

Mr Britton—The ABA does not, in a sense, deal with individual consumer complaints, and that is one of the root causes of our unease about this merger.

Senator CONROY—Didn't you find Dr Flint approachable?

Mr Britton—Yes, a personable fellow. Their approach to consumer issues is not necessarily in terms of individual complaints. Certainly, the whole cash for comment affair was a sad commentary on the state of self-regulation, the capacity of the regulator to respond and what the regulator then put in place. It is an ongoing issue of how content and attribution is dealt with, so we are not at all comfortable that that has been covered off. That works in broadcasting mode. One of the classic moments for me in that whole inquiry was when one of the QCs got up and said, 'Who's actually being damaged here? Nobody has actually lost out. Why are we all here? There's not a problem.' The key point was that every one of those 200,000 or 300,000 listeners had had their trust abused and been dudded, but there was no mechanism for them to necessarily make individual complaints. It was about a systemic consumer issue, and I think it illustrated that the processes were not particularly robust and there wasn't really an avenue for individual consumers.

You have that whole history of broadcast culture that does not deal with individuals; it deals with mass audiences. On the other side, you have the Communications Authority, which I know in latter days has become a little more involved in consumer protection. There have been times—not so long ago—where there was a very uneasy relationship between the Communications Authority and the Telecommunications Industry Ombudsman. I have been in meetings where the complaints coming out of the TIO were being dismissed by the Communications Authority as anecdotal, which at the time was one of those bizarre moments of: what do you mean? How can the systemic report from the TIO be treated as anecdotal? They said, 'No, they are not really evidence.' That is not necessarily the current culture of the Communications Authority but it is relatively recent history, which is one of the concerns we have about where the management of this authority goes; who is going to run it; who is going to form the commission; and will it be back to the bad old days of the Communications Authority, particularly informed by broadcast culture which is: what is a consumer anyway? The marketplace imperatives are not there because the broadcast model increasingly is not falling apart but becoming more about individual relations.

We feel that the self-regulatory set up in the communications industry has failed to deliver a coherent set of consumer safeguards, and one of the other things we are campaigning for is a consumer protection standard which outlines, in not overly verbose terms, the rights of consumers and the obligations of carriers and providers in the communications marketplace—not in place of the Trade Practices Act but to articulate what those protections mean and what additional protections are required in the communications industry. That is the standard we would like to have the Telecommunications Industry Ombudsman working to, which would

integrate what has been developed in the ACIF codes, which, as I said, are disjointed codes which may or may not have some relationship to each other. I would like to see those joined into a single code, with all the gaps filled in and informed by the additional requirements of content and content carriage, as in pay TV, mobile phone data et cetera.

Senator CONROY—Given that experience, and I appreciate the point you made that things have evolved a bit since the bad old days, are you concerned that the culture will be right with the new ACMA? Which sort of style of dealing with consumer complaints do you envisage, or has it not reached the stage where you have been able to engage in discussions?

Mr Britton—I do not think we have a readout on it. I do think that the communications authority has positioned itself very strongly at the moment in terms of position papers. They have made a statement of regulatory principles, they have engaged with the consumers driving the communications process, and that has delivered a report with a set of recommendations that we would be expecting at least the current incumbents of the communications authority to push through. Part of that is probably aiming towards driving a consumer focus into ACMA. We would be very supportive of that occurring and very critical if it gets lost. The key point is: how do we underwrite that? You would not necessarily write that in black-letter legislation specifically, but how do we craft the encouragement for both the proper convergence and the ongoing diligence in dealing with consumer matters?

Senator CONROY—Do you believe that the ACMA legislation will enable ACMA to adequately address the challenges of convergence? Are you being critical that current regulatory regime has missed the boat? Do you think that this has got it right?

Mr Britton—I think it is fairly silent on that. In a sense, it is simply the administrative conjunction of the two, so in that sense it addresses the problem but does not really deliver. It is in the right space and on the right page; I am just not sure it is driving to the conclusion. It is the preface, but it is not the rest of the book.

Senator CONROY—You have stated in the press:

To join them at the top and leave the bottom untouched would be a mistake ...

Is that what you are referring to there?

Mr Britton—Yes, particularly without a good roadmap to how you close the zipper.

Senator CONROY—You have stated that ACMA needs unambiguous powers to deal with the convergence issues and that you are not confident that they are yet there in the framework of ACMA.

Mr Britton—Certainly in terms of down on the ground resolving whether the TIO can deal with content issues, it cannot at the moment. There is nothing here that solves that, so that is an ongoing, on the ground consumer issue, with the communications authority—as we understand it, and it is still unclear, and we are still researching what the basis of it is—in a sense claiming to have to draft a service provider rule that facilitates the emergence of a third, if not fourth, ADR. We are told that part of the reason is that that is the way the legislation works. We are in

the process of legislatively changing things. Why is this a problem? Yes, you can probably get up a legislative response to solve that particular issue, but that is the day by day approach. We need a regulatory framework.

The problems are going to happen and go on happening, probably faster and faster. We need a regulator which is empowered to move in that space. As I said, it does not necessarily need to deal in a heavy-handed way with everything. We are certainly well aware that there are circumstances when, in relation to competition or innovation issues, you would not want to clamp down. But you want to have certainty that the regulator can intervene in the space and move more or less intrusively as the market and technology require rather than as the features of the regulatory framework require.

Senator CONROY—My natural assumption when I heard that they were bringing them together was that there was going to be a one-stop shop for consumers, but it seems to me from what you are describing that that is not going to be the case.

Mr Britton—That does not appear to be the case, from our reading of the way things are unfolding at the moment. The problem is that once a third or fourth ADR stream sprouts up it will be much harder. It is much easier to start things up than it is to shut them down. And it is going in completely the wrong way in terms of the strategic direction that everybody, including this legislation, is talking about.

Senator CONROY—So in ACA's view what further legislative change is required for the government to effectively respond to the new challenges presented by convergence. What is needed? You said that this is the preface; give me the first couple of chapters.

Mr Britton—I could probably give you an outline of the first couple of chapters. Part of the point is to identify some of the disjunctions and then rectify them. There are the following questions. Where are the competition rules going to be dealt with? Where and how are spectrum allocation procedures going to be dealt with? There needs to be a reconciling of consumer protection and a clear statement about how that is going to be handled. There needs to be an unambiguous embrace of the long-term interest of end users in broadcast technologies and telecommunications.

Those sorts of things need to be considered in eliminating any distinction, in a marketplace sense, of content and carriage. The reality may not exactly match that but we must be conscious of the difference between things like complaints about classification decisions and consumer complaints about being charged too much or consumer complaints about terms and conditions not being clear et cetera. So there are some things but they should be dealt with natively to their requirements rather than just because they use to be part of the ABA. This particular section, because it used to be part of the ABA, does not have the powers to deal with it. Because it used to be subject to this legacy regime—the TIO being an example—it cannot intervene over there even though it is part of the same umbrella space.

So we should not write such legislation capriciously or rapidly, but there is no program to even start it. At this juncture, as opposed to adhering to counsels of perfection, the process should be started and ACMA should be charged to do the ground work. It would be useful to see

an undertaking in something like the explanatory memoranda: this is the objective of the legislation; this is the first move; and this is where we want to go.

Senator CONROY—I think you also argue that the Telecommunications Industry Ombudsman Scheme should be broadened to encompass the entire communications sector. So should we just move an amendment deleting 'tele' from 'telecommunications'?

Mr Britton—That would be a start, I suppose. I really do not know what other technical requirements would be needed to do that. Undoubtedly there would be some devilish details to be covered but, in broad aspiration, people should be able to take any consumer dispute that occurs in the area bounded by ACMA, to the CIO. In some ways the name change is the most trivial but in some ways the most important because it says what it covers. To go on calling it the TIO and expand its jurisdiction is not what we are after. We are not just looking to build another wing onto the TIO. At the same time we are not uncomfortable with most of the operations of the model, so we are not looking for a particularly comprehensive overhaul of it.

Senator CONROY—In terms of the impending sale of Telstra—it looks increasingly likely despite National Party posturing—will the creation of ACMA provide consumers with adequate consumer protection in the communications market? That is going to become a very big issue if Telstra is sold. Is ACMA going to cope with it?

Mr Britton—I think it is essentially a sidebar to that. I do not think it will make any positive or negative difference being, if you like, an administrative change. However, to the extent there is any worsening of consumer issues, it will not in any way increase the capacity of the system to respond. That may or may not be to do with the privatisation of Telstra as such, but rather the ongoing development of the convergent marketplace and whether Telstra as a privatised player will play harder in some of that converged space—which may or may not eventuate; we really do not know. Certainly I do not think there is any great comfort or encouragement in this in terms of consumer protection.

Senator LUNDY—I want to refer to comments made in your conclusion about the long-term interests of end users. You propose that that test be applied right across the converged digital arena—so into broader areas of media and so forth. Do you have a view how that could be expressed in the form of an amendment to this act?

Mr Britton—I think the simple answer is no.

Senator LUNDY—You have raised that in your conclusion so obviously an expansion of the reference to the long-term interests of end users across the broader converged communications area is something that the ACA would think is desirable.

Mr Britton—Absolutely, it is just that I am not particularly gifted in that area of legislative drafting, that is all. We would certainly encourage that.

Senator LUNDY—I am just trying to find out if that is the sort of amendment you are looking for that would give some expression to the points you have made.

Mr Britton—Absolutely. We think that is a critically guiding principle, particularly in the way that networked industries are about people talking to people. I think that gets lost in a lot of the industry aspirations to be content providers and sell people content. What actually drives a lot of telecommunications, and what actually delivers most of the profit for that matter, is people talking to other people connected across the network. So I really think it is very important. That is the long-term interests of end users; it is not to have things sold to them. Maybe that is what they want and maybe that is in their interest, but one of the key network interests of end users is to be able to remain connected.

Senator LUNDY—This is the any to any communication or connection that you are talking about.

Mr Britton—That is a critical element of it, and we certainly think that a primary goal of this organisation should be to facilitate and maintain that aspect.

Senator LUNDY—Another other point you make in your submission is about the relationship between the ACCC and ACMA. To what extent are the resource issues and weaknesses of the ACCC contributing to your view on the strengthening of regulation within ACMA to solve some of these problems?

Mr Britton—I am not sure that strengthening of regulation within ACMA would address the issues that we are worried about with the ACCC. I think what we are saying in that regard is that, as far as competition policy is concerned, in the traditional telecommunications base we have more or less reached the bottom of the barrel in terms of what an access regime can deliver. Part of that is because of the resourcing of the ACCC and part of it is because Telstra has got deeper pockets than the ACCC, and it probably has more political clout than the ACCC. So in fact the ACCC is outmatched. It cannot actually do the job it is being asked to do.

It is not just the ACCC. No regulator is ever going to be as rich, powerful and well-connected as Telstra is. We think that is one of the persuasive arguments for, at the very least, ring fencing Telstra into two separate pieces if not structurally or equitably separating the wholesale and retail arms. I think it has been demonstrated over the last 10 years or so that that access regime is not working. There are things that we can go on talking about doing, but really none of the things that have been talked about and done in the regulatory sense have actually made a lot of difference. We are not really looking to ACMA to solve that problem, because we believe it has gone past being a regulatory problem. What we would like to see, however, is some of the same competitive rhetoric and some of the same attempts to curb incumbents applied on the broadcast base as diligently as they have been applied on the communications base, and that that flavour inform ACMA totally. That is part of pursuing the long-term interests of end users rather than the long-term interests of media proprietors.

Senator TCHEN—I would like to raise an issue with Mr Britton on his comment that Telstra has deeper pockets than the ACCC and has more political clout than the ACCC. I know this is not directly linked to this inquiry, but it seems to me that this reflects much of the supposition and many of the premises held by a lot of consumer groups and much of the public on Telstra and the control of telecommunications. I think that is quite a baseless claim because, when you come down to it, the ACCC has the entire resources of the nation behind it whereas Telstra's resources are limited to what it actually owns. I cannot think of any instances that anyone has

actually nominated where the ACCC has been denied authority or resources to carry through any action against Telstra. Do you know any instances?

Mr Britton—I think my point there would be the long-standing access debates and the inability to get traction through the court system and through the regulatory processes, which are contested step by step and day by day. Telstra has the capacity to have an enormous legal department, which understands and can shade any regulatory instrument to the narrowest margin. That is something that is not necessarily available to nonincumbents. So new entrants who wish to comply with the regime have to comply, in a sense, more thoroughly because they do not have the same resources to be able to go as far to the edges of regulation. I take your point entirely about the ACCC representing the nation—I think that is a really important point to make. We have had a competition notice sitting on Telstra because of its broadband behaviour for nine months now with $1 million a day fines—or whatever it is—accumulating. That does not seem to have gotten its attention. So, while your point is well made, at the same time it is really important not to underestimate just how resilient Telstra's coffers are.

Senator TCHEN—I accept your argument about new entrants versus Telstra, but my point is that the same argument does not apply to the ACCC. Nine months in a court, from my limited knowledge of court procedures, is quite a short period.

Mr Britton—I think in the instance of this broadband determination it has not gone to court; it has just been sitting there effectively not being paid much attention to.

CHAIR—Thank you, Mr Britton, for your time this morning, we very much appreciate it, and your very interesting submission. You have made some very good points.

[9.53 a.m.]

SINCLAIR, Mrs Rosemary Anne, Managing Director, Australian Telecommunications Users Group

THWAITES, Mr Richard Nelson, Adviser, Australian Telecommunications Users Group

CHAIR—I now welcome the representatives of the Australian Telecommunications Users Group. Thank you for your time today. It is much appreciated. Your evidence today is protected by parliamentary privilege and the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. You are reminded that if you wish to make any private comments you can make that request and the committee will consider it. I invite you to make an opening statement before we move to questions.

Mrs Sinclair—I will take the opportunity of the opening statement to address the three terms of reference, in what I hope will be a pretty succinct manner, and then we can get to any questions. What I have done in regard part (a) of the terms of reference is go through the provisions of the legislation to highlight, in what I hope is a helpful and practical way, the sorts of issues that were being canvassed in the discussion I was party to this morning. For example, section 8(1)(d) of the legislation talks about the ABA's power. That reference is to carriage services and makes no inclusion of content, although as we sit here the ACA is conducting an investigation into content for mobile phone services. I will go through this list briefly to highlight the fact that just putting these things on the same page misses a number of opportunities to effectively merge these bodies for the better outcome that that could deliver end users of telecommunications.

In sections 10(q) and 10(1), for example, where we are looking at the content side of things, we talk about broadcasting, internet content and datacasting. There is no reference there to mobile content and, beyond that, to IP services. In section 10(1)(j) we talk about codes of practice for broadcasting. That raises the questions: what is the role of consumers in codes of practice for broadcasting and how do we take account of the work that the ACA has been recently doing on consumer driven consultation processes? Section 10(1)(m) goes to complaints. The questions for me there are: what is the role of the TIO in addressing complaints coming out of the broadcasting side of things and where does pay television get included?

Section 17 is the only reference to the ACCC in any of this legislation and for ATUG this is a core issue. We see the merged authority having a big role in competition and consumer protection. That is really at the heart of our concerns, but in all the legislation the only reference to the ACCC is around section 17 and it is on the particular issue of electronic addressing. Section 59 continues the ACA as Consumer Consultative Forum. The question for us is: how do we expand the brief of that body and resource that kind of forum? The issue of resourcing input from the consumer side is a very significant one. The ACCC has also done a lot of work over the last 18 months or so identifying that empowered consumers are a very necessary part of effectively competitive markets.

In sections 8, 9 and 10, for each of telecommunications, radio communications and broadcasting et cetera, we have a responsibility to advise the minister around developments in bits of the industry and the operation of the act. My reading of that is that it is all past tense. We are advising the minister of what has happened and there does not seem to be any opportunity raised to advise the minister of what might be needed, given the problems and concerns that may have been identified over the last 12 months.

They are some specific comments about the legislation to give some practical flavour to concerns that just making a compilation of legislation does not really address the policy objective outlined in the second reading speech and media releases. What we are trying to do is address the regulatory framework for a convergence era that we are creeping towards.

Part (b) of the terms of reference goes to a very important question and we do not think that the powers proposed, given what I have just said about them, are really adequate to what is a very large task. I do not want to understate the complexity of what needs to be done to address emerging market and technical issues in all these spaces. For us the issues come down to the convergence agenda. There has been work done by the ACA around this issue in its Vision 20/20 report and its discussion paper on voice over IP at the moment. There is Dita's own paper on emerging voice services and what the appropriate response is there.

Issues around consumers are important. I have mentioned the ACA's work and the ACCC's work. The two areas are code development, which is input at the early stage, and then complaint handling if something goes wrong. Recent work by ACIF in the consumer contracts code development has indicated the potential, I believe, of a new model to assist us all to get more effective consumer input. But that model required funding, it required a different input of skills, and indeed a different structure was used with that particular exercise.

The third set of issues is around content. I have already mentioned mobiles as a current example of where things seem to be falling between the bits of legislation. Lastly, of course, for ATUG, the central concern around competition is very important to us. Wireless services and the competition aspects of content, which the ACCC has recently been raising, are uppermost in our minds there.

With respect to part (c) of the terms of reference, world's best practice, in a policy sense I would say that world's best practice is taking regulators and policy makers to two core issues in this industry. One is market power and how that is dealt with—and we have heard often from the ACCC over the last two or three years around this issue, not least in its emerging structures report, which in our view has never been effectively dealt with. But also I would say that in the ACCC's annual reports to parliament there are continued messages around market power in this industry and the difficulty the ACCC is having in dealing with that.

The second area that policy makers are focusing on is generally described as market failure. In this sense, we mean rural and regional Australia. If you have a market that is not going to be addressed by commercial competitive means, for whatever reason, then there needs to be a commitment to government policy and government programs, including funding, to make sure that those end users are not left behind.

Beyond that, a lot of work has been done by this committee and others over the last couple of years in Australia which we think ought to be part of our real deliberations about the legislative framework for an ACMA. We were involved ourselves in the Australian telecommunications network inquiry, the inquiry into competition in broadband services and the inquiry on the T3 legislation—that piece of work. Beyond that, the Productivity Commission has its review of national competition policy, which has quite some significant recommendations about telecommunications. The OECD has done a lot of work. Recent attention has been on the economic survey, but beyond that there is a very interesting piece of work talking about the implications of convergence for the regulation of electronic communications. There is a lot in there about USOs, licensing conditions, access regimes, interconnection and so on.

Those are the quick comments we would make about each of those terms of reference. To conclude, we think that the issues needing a regulatory response have moved from duopoly to early competition and now to convergence, consumers and the current version of competition. We think this administrative merger does not really take the opportunity that we ought to be taking to think about that and perhaps to report back to parliament or the minister in 12 months time on what the appropriate structures, skills, resources and powers really are that are needed to deal with the issues coming out of this sector.

CHAIR—Would that sort of inquiry be similar to the Ofcom strategic review, in your view?

Mrs Sinclair—I think Ofcom provides a good model, in the sense that they did take those five regulatory bodies and put them together. As I understand it, that body then was given the task of coming back in 12 months time with recommendations around structures, powers, legislation and so on. But that piece is missing from this legislation, albeit that the background to this legislation says we are doing this to deal with the convergence agenda.

CHAIR—I was reading through the attachment, which I think is the executive summary of what that review is doing, and I thought that some of the issues and the challenges sounded very similar to what we are talking about in the Australian context.

Mrs Sinclair—Yes.

CHAIR—Yet the impression I get from that is that Ofcom is basically saying, 'We are a going to have to change the way we do pretty much everything to meet those challenges.'

Mrs Sinclair—Ofcom has seriously thought about each sector and regulatory authority, and it has identified issues where there needs to be common cause to resolve problems. But to be absolutely fair, in that strategic framework consultation document, which is a hefty document, Ofcom says that there will be specific issues around broadcasting for the next 10 years. We are not yet in a world where everyone has broadband television to their PCs. Ofcom has identified a transition period where we need to move from the situation of just putting five people in the same room; we need to merge that more effectively. But going down the track there will be even further work needed.

CHAIR—It is an extraordinary challenge. In Telstra's submission they look at the relative role of the ACCC and the ACMA, and they argue that by international standards the ACCC has a lot more powers than its competition counterparts in other countries. They particularly point to

the sectoral specific regulation—the access regime—and point out that in some countries that is in the technical regulator rather than the competition regulator. Do you have any thoughts on that?

Mrs Sinclair—That is an issue that we have thought about. It is a difficult question. For example, there are times during the ACA's deliberations where they ought to have the power to deliver pro-competitive outcomes but that is not really within their purview. The ACCC, on the other hand, has built up considerable expertise using some of the generally available skills and resources in the ACCC. So for a number of the issues that we deal with—for example, access to bottleneck infrastructure—there are lessons from other industries. So whatever we do I would not like to undo that channel of communication. And if we are still optimistically heading towards an environment where the general provisions around competition law and consumer protection apply, then they ought to be applying to every industry. I think that in telecommunications we are going to wind up needing bottleneck infrastructure rules for a considerable period of time. As I see the continuing developments around the copper network—through ADSL, for example, we have gone from 3.4 kilometres to 4 kilometres, to 20 kilometres—it seems to me that bottleneck infrastructure is going to be on our agenda for a very long time.

The question of how the ACCC deals with that is a separate issue. In the accounting separation steering committee discussions there has been an issue about the ACCC's ability to resource the kind of information intensive process that we have wound up with when trying to arrive at equivalent access. That is what we are trying to do. When I look at Ofcom, and the rules in that environment, it seems to me that there is a much shorter path. If you have significant market power then ex ante rules apply to you; they do not apply to everybody else in the space. This way of dealing with market power has got to be part of our deliberations going forward.

CHAIR—I will ask you a very hard question—or at least it might seem to be one. In the last paragraph of your submission, on page 9, you say:

> ATUG believes the policy imperatives have become stronger since the time of this statement and that the powers of ACMA should be enhanced to ensure an effective role for ACMA in achieving project-competitive outcomes for end users.

I know we have talked generally about that issue, but do you have any specific suggestions on how the act should be amended in that regard, given that we deal with it in four weeks time?

Ms Sinclair—We should put in a sentence or two about the objectives for this body. What we have in here is a lot of information about functions and quite a bit of administrative information about who can become a member, how long they can become a member for and the remuneration tribunal and all the rest of it. It seems to me that the one glaring omission from this legislation is an objectives clause, which ought to go to the issue that this body ought to be focused on pro-competitive outcomes in all its work. In the same way that part 11(b) and part 11(c) of the ACCC access regime is about promoting competition, any to any connectivity, and the long-term interests of end users. That sort of 'reason why we are doing this' type statement is missing from this legislation.

Senator LUNDY—Going to this issue of the long-term interests of end users, do you see an opportunity to amend the bills we are considering to reflect that within ACMA's charter, if you like? Or do you think it is more an issue of amendment with respect to the trade practices?

Ms Sinclair—No. The balance we are kind of drawing here is that at the moment we have got competition matters in the ACCC and we have got technical matters—spectrum matters, content matters and some consumer protection matters—in ACMA. I am referring to an explicit statement around the objectives such that what is done—all of this; these two pieces—ought to be in the long-term interests of end users. I would augment that with a statement around pro-competitive outcomes. Those should be explicitly included in some sort of objects clause.

Senator LUNDY—To what degree have the regulations administered by the ACA, particularly in the past, contributed to less than optimal competitive outcomes or even anticompetitive outcomes?

Ms Sinclair—Perhaps I can answer the question more positively by saying that in recent times my sense is that the ACA is taking the opportunity to come out with decisions that are pro-competitive. For example, I think on decisions around wireless broadband spectrum it is targeting a scenario where we actually get more competition in difficult areas than we would if it had adopted its approach of previous years. Another example—and it is going to sound funny coming from a user group—is the exemption for a neighbourhood cable for its VoIP services from CSG and other legislative requirements is good. This pro-competition, pro-innovation approach that seems to have emerged in the last couple of years is something we would want to see more of. I would rather be more positive.

Mr Thwaites—I would like to add something about the importance of such a statement. It gives guidance to the decision makers and provides transparency for those looking at the act and what they may or may not expect from it. In relation to a statement made earlier by the Consumers Association about the balance of power between incumbents and competitive entrants in regard to the difficulty of pursuing process, Australian administrative law is particularly demanding on decision makers—depending on your perspective, you could call it world's best practice in providing opportunities for challenge to any administrative decisions. In that context, clear statements of intention in the act itself are absolutely essential to providing a secure basis for difficult decisions that a regulator is called upon to make, in which the interests of one party suffer compared to the interests of another. So this is a very important missing element for the effectiveness of the new body.

Mrs Sinclair—The ACA, as we have it at the moment, is much more focused on implementation of things like USO licensing, numbering and so on. This goes back to my point that we really want these regulatory bodies to be more proactive in identifying for the rest of us where there might be opportunities for better policy or better legislation. Going back to the issue of broadband wireless for a moment, the link between that and pro-competitive outcomes was quite esoteric; there was not a general position at the ACA that you go for pro-competitive outcomes. It was in the rules around spectrum licensing. In section 61(1)(v) there was a suggestion that if you might think this or that you could refer something to the ACCC. So it is not part of ordinary day-to-day business, and I think it needs to be elevated and made easier so that we have all the policy and regulatory resources directed to better outcomes for end users—

pro-competitive outcomes being one of them. In rural and regional there is a whole other agenda around policy and program administration and so on.

Senator LUNDY—Do you have a view on what the powers of ACMA should be if there is any evidence in the sector of new technologies or a demand developing but being either withheld or constrained through the use of the regulatory environment or, indeed, through plain old commercial decisions? Do you think ACMA should address those issues?

Mrs Sinclair—That is where I think that ACMA should at least have the power to bring those issues to light. For example, I have had infrastructure investors say to me that the rules around USO contributions have made it on occasion difficult for them to get financing for projects that they otherwise would be interested in. Of more particular concern to me was that these were projects in regional Australia. How you capture a power for ACMA to bring those concerns to light is the question you are asking, and I have not given any thought to how to do that. It will not come out of the ACCC because it is not a competition issue. I think it goes to the issue I am raising about pro-competition and support for innovation.

Senator LUNDY—It is certainly a consumer issue, because presumably the problem would relate to some sort of consumer demand being satisfied. But, at the moment, you are talking about consumer protection, not consumer rights—a more proactive power on behalf of consumers.

Mrs Sinclair—I think that is at the base of what the OECD is recently saying to us in this economic survey. They are saying: 'You've come so far but there is a long way you could go, both on the industry development side and in terms of equipping Australian consumers to be part of the information society and the information economy.' So it is a larger issue than what any of us might think about what Telstra is doing. It is a bigger policy issue than that, and I think that is what missing in this legislative coming together.

Senator TCHEN—I have just two quick questions. My first one refers to your last answer. Are you suggesting that USO provisions are actually acting as a barrier to competition?

Mrs Sinclair—Yes, that is what I am suggesting on the basis of experiences that people have shared with me. If we are focusing on the development of infrastructure competition in areas where it is difficult—regional Australia—then, in some people's calculation about the return on investment, the requirement for a carrier to contribute to USO has been a concern to some people in their thinking about these programs.

Senator TCHEN—My next question follows on from the chair's last question to you about what your group is able to suggest about how to improve this legislation. You mentioned one of the ways was to incorporate objectives into the legislation but you did not provide a complete answer. What sort of objectives do you think should be incorporated? Can you be any more specific.

Mrs Sinclair—Yes. The set of issues that we are interested in are around pro-competitive outcomes—that the objectives of ACMA ought to be to support competition.

Senator TCHEN—It seems to me one of the problems with an objective is that it can be so specific that it is constraining. It can be so general as to be probably quite meaningless. There are some comments in the second reading speech about what the organisation is supposed to do.

Mrs Sinclair—Yes—what the objectives are.

Senator TCHEN—I just wondered whether that covers it.

Proceedings suspended from 10.22 a.m. to 10.36 a.m.

CHAIR—We will resume proceedings. Senator Conroy has the call.

Senator CONROY—Do you agree with claims made by the Competitive Carriers Coalition that the ACA has been reactive in its response to convergence?

Mrs Sinclair—I do not know whether I would agree with that statement as simply put as that. The ACA now has is a very useful discussion paper out on VoIP. Whether or not I am sure about its interest in mobile content, I guess I would say that they are doing some hard yards in facilitating a discussion around that. Their Vision 20/20 work, which is a huge project of some 18 months, has provided some useful groundwork for thinking about convergence. Coming back to this legislation, I would be more focused on the fact that we have not got a vehicle for the ACA to really do anything about all that work in terms of bringing that thinking into play. They get to do what they have ordinarily done without even the benefit, to go back to Senator Tchen's question, of an overarching objects clause.

I had a look at the second reading speech and I do not see anything that looks like an objects clause around procompetitive outcomes, consumer protection and long-term interests of end-users. As far as possible I would like that to be explicitly stated in the act and legislation, hopefully reflecting the objects clauses, various, in all the other legislation that that bill refers to as well as the ACCC telecommunications-specific parts of the Trade Practices Act. That is a long-winded answer to the question but having seen them do what I regard as important pieces of work I could not say that they have been on the back foot.

The second little complication I would like to throw in, and again it is perhaps going to sound a bit paradoxical from a user group, is that we are not in favour of regulation for its own sake and regulation having to be put in place before anything happens. Take, for example, the voice over IP service. I now have the Skype service on my laptop. I downloaded it from a site. I do not know where it was from—somewhere in the world. I bought $US20 worth of SkypeOut, which connects me to the public network. If I wanted to I could get myself a US number. If I have a complaint I am not sure who I go to, but at €1 for an hour's worth of international telephone voice call I am not sure that it is going to be material to me even if something does go wrong.

All that is happening. We have not put in place a regulatory framework ahead of things. If we find that we get a very big problem with spam or if we find Australian consumers are being ripped off by fraudulent operations in California or wherever we are going to need to respond. It is going to be difficult to respond, given the global nature of this. So in terms of supporting innovation by letting markets unfold but then having the ability to react promptly if we see evidence of a problem for consumers then I would say the ACA's watching brief—thinking their

way through this—has been appropriate. On the other hand, I feel quite differently, for example, about the ACCC and its ability to deal with market power and anti-competitive behaviour. We need much speedier responses there. We have the regulatory framework; it is how we actually implement it.

Senator CONROY—In light of what I would describe as the nominal changes being made to the underlying regulatory regime by the proposed bill, what prospects are there that ACMA will take a more proactive approach to addressing the problems?

Mrs Sinclair—None at all, in my view, unless we tell them explicitly that that is what we want them to do. Going back to old ground, it is the reason we think there needs to be a very clear objects clause which can guide all the administrators.

Senator CONROY—Is that enough—just an objects clause?

Mrs Sinclair—No. The second piece of work that we want them to do is a very big piece of work: looking at the various bits of legislation, the roles and responsibilities, the skills structures, the strategies and so on. We think they should be doing that piece of work within a 12-month time frame. Having seen the Ofcom people do that, I can say it is a very big task, especially since the industry continues to develop and problems emerge that need to be dealt with. Thirdly, we would want them to have the very explicit power to come back to parliament each year and say in their annual report: 'This is what's happened. These are areas of contention where we do not feel we have sufficient power.' Then parliament can do something about it. There is a three-pronged attack.

Mr Thwaites—On that particular question, there is always the dimension to be considered that it is very important for a regulator to be independent of policy. While regulatory bodies in various jurisdictions have an important function in doing inquiries and facilitating public discussion and so forth, we feel that in order for their independence to be sufficiently robustly defensible—say, under court challenge—it is equally important that they not be seen as policy advocates as the outcome of the work that they do. So there is a balance required between using their expertise to facilitate discussion and inform government and the policy formation role, which really needs to be something outside the independent regulatory structure.

Senator CONROY—The two cultures of the ACA and the ABA are probably substantially different. In light of the merger, do you have any concerns about the way those two cultures are going to be jammed together?

Mrs Sinclair—I do. That concern from my point of view comes from practical experience of having worked in both the telecommunications industry and the broadcasting industry—at the ABC rather than with commercial broadcasters—and seeing people talk about convergence between carriage and content and not really understanding that there are different issues under those simple terms. So I think amalgamating the cultures without losing the expertise that is needed to deal with the issues is no small task. In fact, the appointment of the person to head ACMA will be a very significant appointment and one that—

Senator CONROY—What sort of background should the chairperson have?

Mrs Sinclair—They would need background in both those industries, but also—

Senator CONROY—Is that a job application?

Mrs Sinclair—No, no, no; I am not nearly sensible enough to take on that sort of role. I would also say that they would need a strong commercial background, because when we look at telecommunications, for example, we are talking about billions of dollars of investment over many years, so it is important to get those investment signals right. On the other hand, the person will need a real appreciation of consumers, which is a different thing from an audience. An audience is when you sit there and I can send something at you; if I am a consumer, I am interacting, I am paying and if I do not get what I want or if there is a problem with quality I want to complain. The person will have to have an understanding of the difference between, say, audience and consumers. So a very extensive background will be needed. It will be very important for that person to understand the very big-picture role for this organisation.

Senator CONROY—You have identified a deficiency in terms of there being no statement of objectives. Are there any other areas where you would like to see some amendments to this bill?

Mrs Sinclair—The list that I went through at the beginning, but I hesitate to go down that track because what I am trying to do in identifying all those different clauses is to say that these clauses are raising problems that are not going to be addressed, in my view, just by inserting, say, 'mobile content'—broadcasting, internet content, mobile content, datacasting. That is just the surface of it. So I have not gone down the track of writing the clauses that I think ought to be there.

CHAIR—Thank you, that concludes your evidence. Thank you very much for your help again this morning. It is a very interesting submission.

[10.48 a.m.]

LANDRIGAN, Dr Mitchell, Group Manager, Regulatory, Telstra

McKENZIE, Ms Kate, Managing Director, Regulatory, Telstra

CHAIR—Welcome. Thank you very much for your time, especially at such short notice. You are reminded that the evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute contempt of the Senate. I invite you to make an opening statement before we move to questions. We are running a bit behind schedule already.

Ms McKenzie—We will keep the opening statement brief. Thank you very much, Senator, for the opportunity to respond to the inquiry. I guess the committee will have read our submission and be aware of our key points. In summary, there are three key points. Firstly, we support the merger of the ACA and the ABA. We think greater coordination of regulation at the institutional level is an important step in addressing technological convergence. We think the merger is to be welcomed and is consistent with international best practice.

Secondly, Telstra believes that it is important to take every opportunity to be clear, to demarcate and clarify the responsibilities of the merged body and other regulators such as the ACCC. We have some concerns regarding the potential for overlap and duplication between the two regulators. We particularly have a concern that if such overlap is allowed to occur it can lead to rivalry, tension, conflict, confusion and inefficiency. This could risk overregulation and uncertainty at the expense of both industry and consumers. Thirdly, we will submit that the powers of the new merged body and of the ACCC are sufficient to deal with emerging market and technical issues. The ACCC already has more powers than generic regulators in other comparable jurisdictions. If you like, I will briefly elaborate on those points.

I would also just like to make the additional point that we view the formation of the merged body as an institutional issue distinct from issues relating to amendments to the substantive underlying regulatory regime, which clearly will need to be adapted from time to time as the industry and the market evolves. The honourable minister announced a separate review of the telecoms industry regulatory framework in December. It may well be that there are some opportunities to address some of those issues as part of that inquiry. We would be happy to be involved in such a review when it gets under way. As the committee would appreciate, though, we support the formation of the new body as soon as possible and we do not think that it needs to wait for further substantive reviews of the regulatory framework.

We think the merger will enable more consistent and effective regulation and therefore we would agree with comments in the explanatory memorandum to the bill. Technological convergence, as the committee would be aware, is a relatively recent phenomenon, driven by increased digitisation of content and modern digital media. In turn, this has allowed different media to be provided over essentially the same types of digital platform. A future example is the broadcasting and telephony services supplied by a single broadband Internet connection into the home. Such convergence is a worldwide phenomenon. The challenge for Australia is to adopt the

more harmonised and coordinated regulatory structure across convergent media to respond to this phenomenon. As identified in our written submission, in the longer term this response should appropriately occur at policy level, at the legal and regulatory level and at the institutional level.

We think the merger is an important step at the institutional level. It is consistent with best practice. As committee members would be aware, the British government merged its five broadcasting radio communications and telecommunications regulators in March 2002 to form a single regulator known as Ofcom for similar reasons to the reasons the ACA and the ABA are being merged.

In relation to the second point, we do think there needs to be clarity about the powers of the ACCC and the ACMA. We think the bill could be improved by an amendment that includes a statement that the ACCC does not have jurisdiction over matters properly within the jurisdiction of the ACMA, and vice versa. We think there is potential for confusion and possible rivalry between the two regulators at the expense of industry and consumers and it would be preferable to make sure that there is clarity about those issues before the ACMA is formed.

In relation to the third point, we do think that there are sufficient powers already to regulate. The existing powers should be sufficient. They are quite extensive, touching on all facets of the telecommunications industry. The telecommunications industry is already one of the most regulated sectors in Australia. As we also identified in our written submission, the telecoms sector is overregulated by world standards. Australia's level of regulation has not been adjusted to reflect the significant market entry and increased competition relative to the environment eight years ago. In an international context, Telstra notes that the ACCC already has more powers than generic regulators in other comparable jurisdictions. Unlike in other jurisdictions, the ACCC has a significant role as the sectoral regulator as well as a generic competition regulator. This creates an unusually high concentration of regulatory power in the hands of the generic competition regulator relative to international best practice. Importantly, this point about the unusually great role of the ACCC in sectoral issues in Australia further underlines our second point, which is that there is a need to ensure clarity in the division of responsibility between the two regulators. We are happy to take questions on any of those points.

Senator CONROY—Does Telstra have any market power?

Ms McKenzie—It has some market power in some markets. As time goes by though, there is, generally speaking, not sufficient recognition of the degree of competition that has emerged in the industry. There seems to be a mind-set that still paints Telstra as a monopoly organisation, and it is clearly not, in any market, anymore.

Senator CONROY—What is your penetration in the various markets?

Dr Landrigan—Which market are you referring to? It might be a helpful starting point.

Senator CONROY—Mobiles? Broadband? Home phones?

Ms McKenzie—It is somewhere in the forties.

Dr Landrigan—In the mobile market, our market share is generally regarded to be in the mid-forties.

Senator CONROY—Home phones?

Dr Landrigan—It depends on how you define home phones.

Senator CONROY—Usually, I define it as something you walk over to, you pick up a receiver and talk into it. What is your definition of a home phone?

Dr Landrigan—There could be many.

Ms McKenzie—Things that Rosemary talked about earlier.

Senator CONROY—How about fixed line? I am apologising for my lack of technical expertise here.

Ms McKenzie—Certainly in terms of fixed lines our market share would be higher than that. It would be somewhere in the early seventies, I think, Mitchell.

Dr Landrigan—I think it is probably higher than that.

Senator CONROY—Eighty? Eighty-five? Ninety? That was a question.

Dr Landrigan—Let me go to the question: what you seem to be assuming by your question is that there is a necessary correlation between share and market power, and on that point I think I would probably engage you—

Senator CONROY—We may have had this discussion once before in a different committee.

Dr Landrigan—We may have.

Senator CONROY—I think your answer last time—just so you know, Ms McKenzie—was that Telstra actually denied that they had market power in any market. But I am pleased to see you have updated us by admitting you had some market power in possibly some markets. The reason I am asking these questions is your suggestion that the ACCC needed to be constrained and that they were overregulating you in your markets. I was just perplexed. You probably would be the only people in the country that would think that the ACCC needed to be constrained in this area.

Ms McKenzie—I am not sure that we are suggesting that the ACCC need to be constrained; what we are suggesting is more that there needs to be a kind of reasonable regulatory regime, and the access regime in particular. In a competitive market, you could ask the question: why isn't the access regime that applies to every other industry equally applicable to the telecommunications industry? Why is there still a need to have a separate access regime for the telecommunications industry? I do not think we are trying to make out an argument that there should be no regulation at all.

Senator CONROY—As I said, I only raised those issues because you raised the ACCC's powers. In your submission, in response to the new institutional arrangements for the Australian Communications Authority and the Australian Broadcasting Authority 2003 discussion paper, Telstra was of a view that convergence was placing increasing pressure on existing regulatory arrangements and that a mere administrative merger without a change to the substance of the respective regulatory frameworks will clearly not adequately respond to this pressure. Is that still Telstra's view?

Ms McKenzie—Yes.

Senator CONROY—Could you expand for us on why you do not think it will adequately respond to the challenge of convergence?

Ms McKenzie—What we are suggesting there—I think consistently with what we have said in our current written submission—is we think the institutional arrangements are one step that needs to be taken but that longer term, over a period of time, as the platforms upon which these sorts of services are provided change and evolve and the markets change and evolve, there will be a need to look again at some of the current rules and how they are going to operate in those new markets. That may go to things like the way spectrum is allocated. It may go to things like who bears the responsibilities, in that the current arrangements, whilst they are technologically neutral on the whole—which we would support—are drafted in an environment where most of these services were provided in a particular way and that over time, as they come to be provided in different ways, there will be a need to look from time to time at whether the obligations are sitting in the right place and whether the rules that we have had in the recent past are going to withstand changes in the way those services are provided.

Senator CONROY—As a communications company that is intimately acquainted with the current revelatory regime—and I am sure that you spend most of your working day on this—is there sufficient flexibility in the current regulatory regime to stimulate investment and new business activity in convergent technologies?

Ms McKenzie—I am not sure what you mean by regulatory flexibility.

Senator CONROY—Business continues to argue that there needs to be a greater degree of flexibility in regulation. I am just seeing whether or not you find that it is too stifling.

Ms McKenzie—Certainly I think that in all of these debates you have to try to strike the right balance. At the end of the day, business will be constrained from investing if the rules mean that there is no certainty about getting a return on that investment. In some areas I think there probably is a risk with the current regulatory regime.

Senator CONROY—Do you think they have got the right balance? That is really what I am trying to get to. With what is being proposed in this merger, is the balance right, in your view?

Ms McKenzie—I think probably in relation to the ACA and the ABA we would have fewer issues. Probably the issues come more into the ACCC regime, the separate access regime, the degree of discretion that exists in that regime and, in some cases, the uncertainty it provides in relation to investment.

Senator CONROY—Under the proposed bill will ACMA be able to effectively implement the differing policy objectives of the broadcasting and telecommunications regulatory regime, in your view?

Ms McKenzie—I think the short answer is yes. As these issues converge, and you are talking about regulation in a market where, for example, content might be being delivered over mobile phones using four or five different forms of technology, there should be no reason in principle why the existing expertise of both the ABA and the ACA cannot be brought together to make sure that there is consistency in the way that those sorts of things are regulated going forward.

Senator CONROY—Do you consider that the differing regulatory approaches contained in the separate broadcasting and telecommunications arms of the current regime will affect the development of convergent technologies? Do those differing approaches in existence run a risk of distorting the converging market?

Ms McKenzie—I suppose all forms of regulation run the risk of distortion, and the more interventionist they are the greater the risk of distortion. You would hope not.

Dr Landrigan—There do seem to be some anomalies in the way broadcasting spectrum is regulated, for example, compared to the way telecommunications spectrum is used and regulated. These are matters which we have pointed out for some time in submissions to the Productivity Commission—that is, in the broadcasting sector spectrum is basically paid for on a revenue basis whereas in the telecommunications industry it is paid for up front with licence fees. That does seem to be somewhat anomalous, given that the same spectrum can in many cases be used for dual purposes—which is a neat example of convergence in and of itself. We expect that that anomaly will actually be carried over to the new entity, but it is being dealt with in the same way, in our view, in the new bill as it is now.

Senator CONROY—I guess what I am referring to is that the ABA has cultural and social objectives to deal with whereas the ACA probably has a more technical, economic perspective and in trying to marry those two together in the one organisation I am wondering whether or not they will get the balance right.

Ms McKenzie—I guess there will be challenges in cultural change as the bodies are merged which will no doubt have to be addressed by the management of the organisation, but in theory I cannot see any reason why a body cannot be capable of balancing a range of objectives.

Senator CONROY—One of the issues is the differing ministerial direction powers that are going to exist. Broadcasting regulations only permit general directions whereas the telco regulations allow specific directions. There will be those sorts of inherent differences.

Ms McKenzie—I guess historically that is a reflection, as you suggest, of the different roles that they have had and where their efforts have been concentrated. The view we are taking is that the institution should be set up and allowed to get under way and we will see how those things pan out. No doubt over a period of time issues will emerge that need to be addressed.

Senator CONROY—How do you view the current ad hoc approach to regulating convergent technologies? You might have heard some of the earlier testimony from the consumer angle. I

am sure it is equally as frustrating from your commercial angle in trying to deal with this ad hoc approach. Has the approach affected the emergence of convergent technologies? An example is the development of wireless local area networks—I think WiFi is the technical term—and the issuance of a ministerial determination in 2002 exempting them from the licensing requirements of the Telecommunications Act. It seems very ad hoc.

Ms McKenzie—In principle you would have to concede that it is quite difficult in an environment like this, where new technologies are emerging quite regularly and quite rapidly. I think it is very difficult for a regulatory framework in advance of the emergence of those technologies to figure out the best way of dealing with them. Certainly there are some pitfalls in relying on exemptions because, as we know, once those players are in the market and they have an exemption, it is very hard to pull back from that. You have to be a little careful that by relying too heavily on those sorts of exemption powers you do not de facto end up with regulatory provisions that are not the most desirable across the board. As I say, it is very difficult. I do not know how you, in advance of those developments, figure out what the regulatory framework should do. I think there is a flip side risk that, if you attempted to do that, you would create even more distortions because you would be putting in place a whole set of rules that would run the risk of diverting investments inefficiently or preventing the growth of some of those technologies.

Senator CONROY—Given that operators will still be obliged to comply with a number of distinct regulatory regimes, often with conflicting objectives, does Telstra consider that the merger will reduce administrative costs for business?

Ms McKenzie—I do not think so because, as far as we can see, the current requirements remain undisturbed by the merger.

Senator CONROY—In light of the fact that Telstra's telecommunications carrier licence fees—and I think you mentioned them a little while ago—will fund the telecommunications functions of ACMA, does Telstra consider that the merger legislation does enough to ensure that the costs of undertaking these functions are minimised?

Ms McKenzie—That is not something we had given a lot of thought to in the formulation of our submission. Obviously, as a matter of principle, we would like to think that those fees are spent efficiently. I am not sure I have a firm view about that.

Dr Landrigan—The answers to many of these questions, which are essentially of an administrative and cost nature, will only become apparent as the entity sorts out its own institutional arrangements. Some of that may need to be looked at at some future point in time. It is obviously quite difficult to do it before the merger is even consummated.

Senator CONROY—So you would not mind if they decide to put up fees?

Dr Landrigan—No, that is not what I am saying at all. I am saying that much will depend on what the institution actually does as it sorts out its own processes.

Senator CONROY—We had some discussion with previous witnesses about the chair and the background of the chair. This is going to be a pretty difficult job to straddle. Does Telstra have any views at all about the qualifications and background of the chair?

Ms McKenzie—Again, I am not sure that is for us to say. Obviously we would like a chair who has relevant industry background and the skills and expertise necessary to run the organisation, but I do not think we have any particular views beyond that.

Senator CONROY—Are you surprised that there are not any savings arising out of this merger? Normally the argument about merging things is that you have efficiencies, that two organisations only need one HR department and that sort of thing. Yet there are no savings here.

Dr Landrigan—There may well be administrative savings, which are difficult to quantify, that arise as part of the organisation being brought together. It may be difficult to pin a dollar figure on what those savings are, but one would think that, in an administrative sense, efficiencies would arise by bringing it all under one umbrella.

Senator CONROY—I would have thought so. It is just that the government claimed there are none. That was surprising to me. I was wondering whether it was surprising to you.

Ms McKenzie—That is really something that the ABA and ACA guys are better placed to answer than we are. They would be much more familiar with their internal workings than we are.

Senator LUNDY—In your submission you say that the principle of technological neutrality should be fundamental to telecommunications and broadcasting law. Can you articulate the basis for that view? What is the context with regard to where Telstra wants to go that makes you state it?

Ms McKenzie—We would just say that, as a matter of principle, that is the right philosophy to have. It is the role of regulation to make sure that markets work fairly and efficiently. It is not the role of regulation to pick one kind of technology over another. Therefore, if you go down the path of having regulatory rules that have different provisions in relation to different kinds of technology and which, from a consumer's point of view, may well be delivering the same services then you are unnecessarily creating distortions for no very good reason. If you want efficient outcomes then you should let the market figure out which forms of technology are best invested in. The regulatory framework should really just deal with any market fairness issues.

Senator LUNDY—Does the statement that Telstra has made recognise the fact that obviously all things are not equal in the market at the moment? Is that principle one that you think you should aim for or could it be adopted now despite the obvious view of regulatory authorities that Telstra does still have, at least in some markets, substantial power?

Dr Landrigan—Perhaps I could address that question. I actually do not see the connection between supporting an environment that allows for regulation to be applied in a technologically neutral fashion to all things not being equal. But there are many instances in the current environment where the legislation and the way it is administered have been demonstrably implemented in a technologically neutral fashion. The point of the statement really is that we do

not think regulation should be locked into technologies per se in a way that perpetuates the application of the regulation to that technology if the technology has evolved.

Senator LUNDY—How does that principle apply with emerging technologies that are perhaps not regulated but where there is an opportunity for greater competition across that new platform?

Dr Landrigan—A very good example of this which is quite recent—as it turns out, we do not support the application, but it is clearly evidence of the environment being applied in a technologically neutral fashion—is the evolution of the ACCC's service description from 2G telephony to 3G. The service description of the declaration was amended with a relatively minor change to apply to voice telephony using 3G technology. Although we do not support the application of that declaration to 3G, that is technologically neutral regulation working in practice.

Senator LUNDY—Why don't you support it given that you have stated that the principle of technologically neutral technology should apply and that is the example you are choosing to use?

Dr Landrigan—We have also articulated over many years that we do not think regulation should be applied unless there is manifest market failure. We do not think that is the case in relation to 3G technology. That position, I might say, is supported by Vodafone and Optus.

Senator LUNDY—Can you tell me how this principle of technological neutrality would apply to emerging services? I would give Telstra's CDMA network as an example of a service that Telstra is offering that obviously is quite specific to Telstra's ability to offer it.

Dr Landrigan—Again, that is a working example. The original service description for 2G telephony was amended to embrace CDMA as a declared service. With respect, I do not really understand the point of the question.

Senator LUNDY—There is another point that Telstra makes strongly, and this goes back to Senator Conroy's questions. Your submission describes at great length the current functions of the ACCC. Although I appreciate that the evidence you have given is that you are not arguing for a specific reduction of ACCC power as part of this submission, what is the point you are trying to make by spending so much of your written submission on highlighting the current powers of the ACCC?

Ms McKenzie—It is partly a response to the view that is often proffered that they need to be given more power. We are trying to make the point there that, before you leap to that conclusion, it is important that people look at the very extensive range of powers that they already have. I am not quite sure what else it is that you would give them.

Senator LUNDY—One of the suggestions that came up earlier was in the area of consumer protection and the ways in which both the ACCC and ACMA could more effectively utilise consumer protection powers. What is Telstra's view of the consumer protection side of the role of ACMA?

Ms McKenzie—Again I think there needs to be some clarity; that is fundamentally what we would argue. We probably do not have a view. Somebody needs to be responsible for it. It needs to be clearly articulated who that is and how that function would be administered. The main point we would make is that we would not like to have confusion about who is responsible for that.

Senator LUNDY—Do you think within the regulatory framework at the moment there is adequate consumer voice, or should there be more or less?

Ms McKenzie—If you look at consumer voice across the powers of the ACCC, you will see that certainly the ACA gets into those issues. The self-regulatory process has quite extensive involvement from consumer groups. We have state regulators getting involved in consumer issues as well as.

Senator LUNDY—So you are happy with the current level of consumer representation?

Ms McKenzie—It is not a question of whether we are happy or not happy with it; it is more a question that, in designing the regulatory framework, we ought to be able to have a set of arrangements where there is some clarity. Probably the consumer area is one area where there is some potential at the moment for overlap and confusion, which is what we think should be avoided.

Senator LUNDY—Do you support the Consumers Association's call for an expansion of the TIO powers into broadcast, pay TV and content issues and for the TIO to become a communications industry ombudsman?

Dr Landrigan—Again, we need to look at how those powers, if they did evolve in that way, would interplay with the ACMA and how some of the broader consumer protection measures would play into the state based regulatory frameworks.

Senator LUNDY—I appreciate that. I am just trying to get a general view from Telstra. This issue has been around for a long time, particularly the problem with the TIO and their inability to address pay TV related issues.

Dr Landrigan—That is a matter that would best be left until the ACMA takes on its new functions just to see how the breadth of those powers will apply to those areas.

Senator LUNDY—Telstra is not supporting that proposition at this stage?

Ms McKenzie—No.

Senator LUNDY—Another suggestion put forward by the Consumers Association related to expanding the definitions of content for the purposes of regulation so as to include obviously SMS and mobile phone content but also—and I think this relates back to some of the narrower definitions—datacasting content. Does Telstra have a view on the way in which content definitions should be handled in these bills?

Dr Landrigan—As you may know, there is a lot of work happening through industry bodies such as AMTA and the IIA. They are looking at very difficult questions of how to monitor content and the ability of carriers to exercise any control over how content is viewed, given that most of the content is still being formulated and sent around by content providers as opposed to carriers. It would be a shame if legislative policy were to ride roughshod over some of that good and important industry work. So I think it is a little premature to be looking at how to define legislative obligations in advance of that.

Senator LUNDY—Are you suggesting that interventions by the ACA previously could be defined as riding roughshod over industry efforts to self-regulate?

Dr Landrigan—Your question was whether the legislation should be amended.

Senator LUNDY—I am just following up, because you use quite strong words.

Dr Landrigan—Not at all.

CHAIR—Thank you very much, Ms McKenzie and Dr Landrigan, for your time this morning. It is much appreciated.

[11.19 a.m.]

CURRIE, Mr Brian, Regulatory Affairs Manager, Hutchison/Competitive Carriers Coalition Inc

FORMAN, Mr David, Executive Director, Competitive Carriers Coalition Inc

SLATTERY, Mr Ian Thomas, General Manager Regulatory, Primus Telecom

CHAIR—Welcome. Thank you for your time this morning. I invite you to make an opening statement, before we move to questions. For the record, Senator Lundy has informed me that she is married to Mr Forman. That interest has been noted by the committee.

Mr Forman—Thank you for giving us the opportunity to appear before the committee. We have made a written submission, but I would like to make a few brief points in relation to some of the issues. We are conscious that the intention of the present merger legislation is to introduce the merger with a minimum of change to internal roles and activities at this point. However, as we discussed in our written submission, we think it would be appropriate, and is probably necessary, to have an examination of the roles of regulators and the performance of the new agency 12 to 18 months subsequent to the completion of the merger. Experience suggests it is inevitable in any merger that one of the issues that emerges is cultural differences between the organisations—they tend to come to the fore during the merger process.

Members of the CCC are concerned to ensure that the culture that emerges in the new agency, particularly in dealing with corporate stakeholders, reflects the need for a greater level of cooperation between industry, other representative groups, other regulators and other stakeholders, and that the agency demonstrates a consistency in its understandings of the principles of self-regulation that underpin many of the structures and institutions in Australian telecommunications. In our submission we have highlighted the way that emerging issues such as voice-over IP and content have been handled, as examples of what we regard as some failures of coordination in the arrangements today.

We have also discussed what we regard as the ACA's poor performance in aligning the regulation of mobile content with work that has gone on in other agencies. It is our view that inconsistent, confusing, overly-intrusive regulation inevitably has to be paid for by someone. We think that at present consumers are paying a price in terms of higher prices and slower introduction of services. Contributing to that are these arrangements and the failure of competition to develop in telecommunications in Australia as the resources of new entrants in particular are diverted into what we regard as non-productive activities.

Reinvigorating competition in telecommunications, you will not be surprised to hear from us again, is the primary issue we face in this country in these industries at the moment. We are of the view that the ACCC requires an immediate and significant increase in resources to perform the functions for which it is presently responsible—and we have separately made submissions to that extent. However, having said that, we think it is unlikely that any regulator could effectively manage competition in telecommunications in the face of the present structural arrangements

with regard to Telstra. The federal government has recently indicated that it is considering some of those issues and whether it is appropriate to make changes to make competition more effective in the light of the proposed full privatisation of Telstra. I repeat that we think it is appropriate that the regulatory arrangements be reviewed 12 to 18 months out from this merger to take into account any other changes that are made.

CHAIR—Coming back to the question of the review, you would be aware that the minister has announced a review of telecommunications regulation in December. You would also be aware that Ofcom is conducting a strategic review of its role in the UK. Does either of those provide a model for the sort of review you are talking about?

Mr Forman—The Ofcom review is one that we have been interested in following. It has been very wide ranging and has looked at many of the issues around the failure of competition that they observe in the UK and has pinpointed the same structural arrangements, or similar structural arrangements, as being the root cause. Particularly interesting to us are some of the remedies that they have suggested in terms of the ways in which that structure could be addressed. We have been contributing to the government some of our thoughts in the form of written documentation and capturing our thinking at a higher level. It is not yet clear exactly how wide ranging that review will be, but we would be hopeful that it would cover the same breadth of issues that are being looked at by Ofcom.

CHAIR—So the review you are talking about, as a recommendation, is different from both of those sorts of issues?

Mr Forman—Yes. We are suggesting that we think the competition issue is the primary issue that needs to be considered in Australia with regard to telecommunications at the moment. The review that we are talking about in our submission, 12 to 18 months from now, is to look at the ACMA and its functions and its performance in the light of any changes that occur between now and the consummation of that merger. Particularly we highlight the cultural issues and the emerging culture in that organisation as something that will need to be looked at in that sort of time frame.

CHAIR—Your submission, of all the submissions we have received, is one of the most critical of the performance of the ACA. You describe its 'apparent unfriendliness to commercial concerns'. The Consumers Association this morning did speak about concerns about not being sufficiently responsive to consumer issues. Do you want to expand on your concerns about the current performance of the ACA vis-a-vis your members and how that might be affected one way or the other by this merger?

Mr Forman—This goes to the cultural issue I have mentioned a couple of times. CCC members have observed in the way the ACA conducts itself that there appears to be a distrust of industry that underlies many of the relationships it has with industry bodies or companies when it consults with them. There seems to be an underlying assumption, for example, a prejudgment toward regulating activity that activity will require regulation. The nature of the consultation that it engages in seems to suggest that it has in its mind what the outcome will be prior to consulting. That is contrasted with what members observe of the ABA, which communicates with industry in such a way as to suggest that it is interested in better understanding the issues before it draws conclusions.

There are other examples that I can point to. For example, there is the way it reports on the CSG. As you may be aware, many of those companies retailing products are in fact reselling Telstra products that are captured by the CSG obligations. That means there is very little control those companies have over their performance in meeting their CSG obligations because, in effect, they are reliant upon Telstra. This has been communicated to the ACA by member companies repeatedly, particularly in the context of public reporting via the ACA of the performance of individual companies. They have indicated to the ACA that there is simply nothing they can do about that because they are reliant on their provider to meet those obligations. Yet there seems to be no willingness by the ACA to accept and understand those commercial arrangements and at least temper some of the public communication that it makes by pointing that out when it reports on performance of companies that are in fact only reselling services.

CHAIR—That is interesting. So that comment was made more in the context of the issues of CSG rather than technical standards. I know you have been very critical of the USO type area.

Mr Forman—There are other examples as well in relation to, for example, the way—as we point to in the submission—that the ACA has dealt with issues around content regulation and mobiles.

CHAIR—That was my next question.

Mr Forman—Brian can perhaps give more of a history of the way that has been done.

CHAIR—Just before he does, I think you pointed to a regulatory gap in the content regulation between the ABA and the ACA. In your answer you might like to expand on where there is a regulatory gap and whether this bill will plug it.

Mr Currie—I guess it does go to what we would see as the cultural differences of the organisation. One example is the development of content for 3G. Hutchison have been working with or at least talking to the ABA and the ACA for about two years prior to launching some of our products. The work we did with the IIA and the ABA appears to have been ignored by the ACA. We understand the position about the jurisdiction of schedule 5 of the broadcasting act, but nevertheless the ACA appears to have not even considered the scheme that the industry has developed under the IIA code. We believe that the draft determination the ACA has put out is unduly interventionist. It is inconsistent with the treatment of content, particularly internet content which is in the 3G space, which is portal or internet content hosted in Australia. That is much the same or always the same as internet content. That is regulated under the current arrangements under schedule 5.

We appear to have two different inconsistent schemes being proposed by the ACA. Whilst we acknowledge and fully understand that there needs to be new regulation for premium SMS and MMS services, there appears to be an approach that says that you combine portal services or proprietary services—as it is defined—in the same regulatory scheme that is being proposed for premium SMS and MMS.

Senator TCHEN—I have a follow-up question for Mr Forman. In your comments you were critical of the ACA's attitude, particularly towards your members. Do I understand that you are

suggesting that, in a situation where you are actually retailing or re-marketing a service provided by someone else, retailers and/or secondary manufacturers in a general sense should not bear any responsibility for the quality of service delivered on the ground that there is nothing they can do about it?

Mr Forman—No. I am suggesting that the ACA regularly publishes reports on the performance of a number of carriers that are retailing services, some of which are supplied by Telstra and over which they have no control in terms of meeting the CSG obligations. They report those in ways which are critical of companies that are reselling services in terms of meeting those CSG obligations—when those companies are unable to effect any improvement in that CSG performance—without reporting to the public that those companies are in fact unable to effect those improvements. So they publish to the broader community a document that is highly critical of companies—or could be seen as being highly critical of companies—knowing that there is in fact nothing they can do about that without adding that qualification to the report. Do you want to expand on any of that, Ian?

Senator TCHEN—I understand that part. The concerns I have are that hypothetically—let me put myself in ACA's position—the ACA might say, using the same term, 'There's nothing we can do directly to the primary providers because our charter, our terms of reference only allow us to monitor the service provider through the retailers.'

Mr Forman—I think there are a number of things they could do. The point I am making is that the documentation that they are publishing is in a sense misleading and they are knowingly publishing that. Secondly, if they are so constrained as to be unable to put any clarifying remarks in those press releases, there is no evidence they have made any representations to policy makers to suggest that perhaps there needs to be some kind of amendment so that those realities can be reflected in the public statements that they issue.

Senator TCHEN—Let me finish my point. Until such things are done and if the ACA actually take the attitude that they will make due allowance for inadequacy in the service provider because they need to take into consideration that there is nothing that can be done about the primary provider, doesn't that run the risk that a regulatory body basically works hand in glove with the service provider to give an excuse for the inadequate service from the point of view of the consumer?

Mr Forman—I think there is an issue about the integrity of information to consumers that is published and I think that is a prime responsibility of a regulatory agency. But it is my understanding that at least one carrier has simply refused to be a part of the reporting regime because of the ACA's performance in this regard. So, in effect, the integrity of the reporting scheme is undermined even further by the fact that someone simply opts out.

Senator TCHEN—So you do have an option to opt out?

Mr Forman—I do not think they are opting out in ways that are anticipated and allowed. I think they are just refusing to participate.

Mr Slattery—Just to add to that, carriers do not really have the option to opt out because the ACA does have quite serious powers to direct carriers to report on the customer service guarantee. So it is open to the ACA to direct carriers to participate.

Mr Forman—That is not about a carrier but a member, so I do not have direct knowledge, but it indicates to me that there is a dispute that has reached a point of serious conflict, if in fact that is what is going on: that they are simply not providing the information until such time as they are satisfied that it is going to be reported in ways that they regard as fairer.

Senator TCHEN—But there are things that your members, as secondary providers, can do about the quality of service provided by Telstra, isn't there? Because you can always not cooperate with Telstra and not take the service from them?

Mr Forman—There is no-one else who provides the service. It is the nature of the monopoly facility that they have.

Senator TCHEN—Yes, I know. What I am getting at is that then Telstra will become a direct seller to the public and they will have to carry the can for any criticism.

Mr Forman—If you choose not to participate in a market completely—if you choose to allow them to leverage their market power to the point where you simply withdraw from the market—that is not a commercial option.

Senator TCHEN—It works both ways though because surely by taking this Telstra service you exert a commercial influence on Telstra. Earlier, when we heard from Telstra, their representatives said that Telstra's market share does not equate to market power.

Mr Forman—Maybe it does not but they make 95 per cent of the profit in the industry and maybe that does indicate market power. Another point that we have made consistently here and in other places is that commercial arrangements do not necessarily reflect the existence of a market. This is an incidence where there are commercial arrangements in place but, as purchasers of these services, the alternative carriers exercise, in many cases, no influence whatsoever over Telstra. Telstra will determine what the service will look like and they will determine what quality of service you get. If you do not want to buy it then so be it. It goes to the very core of the nature of the problem that we have here.

Senator TCHEN—Then wouldn't it be easier for the matter to be taken up by the ACCC?

Mr Forman—Yes, and that goes to the issue that the ACCC has raised about its inability to address Telstra's incentive and ability to discriminate against access seekers, as opposed to the quality, the nature of the product and the performance of the product they provides to their own retail customers. So absolutely we can go to the ACCC and have on many occasions. The ACCC itself points to the problem that it has in dealing with what is a fundamentally uncompetitive structure in the industry in Australia.

Senator CONROY—I want to touch on some of the issues that you mentioned in your opening statement. You have been discussing some of this with Senator Tchen but I wanted to

discuss your view of the current state of telecommunications regulation in Australia. In your submission you state:

The CCC believes that there is a crisis in the regulation of telecommunications, particularly the enforcement and oversight of safeguards to competition that requires immediate action.

That is pretty strong stuff.

Mr Forman—Absolutely. The example that we have pointed to over the past 10 months has been the existence of a competition notice in relation to wholesale price squeeze in relation to wholesale and retail DSL. The competition notice is one of those industry-specific mechanisms that sits inside the powers that the ACCC has relating to telecommunications which attempts to deal with the fact that this industry is different from others because of the extent of integration of the incumbent. It seems extraordinary that what has been supposedly the atomic deterrent in regulation has been imposed for 10 months—that Telstra have been willing to engage in a debate with the commission for 10 months while fines of potentially $300 million have continued to rack up. That indicates that Telstra are able to see and respond to emerging threats to their market power and understand that the remedies that are available to the commission are inadequate to prevent them from gaining benefit.

While that has been absorbing the energies of the industry and the commission, there have been numerous other issues that have been going on in the background. I think there have now been three sets of undertakings in relation to other products that Telstra have made to the commission. They have all gone through a process of examination. The first two were withdrawn after months of examination. They absorbed the resources of the commission and they absorbed the resources of our members.

It is intensely frustrating to us when—after spending that energy and time and investing in external advice, in many cases, to assess undertakings that are put forward by Telstra—they are withdrawn and replaced with others and the whole process starts again. The commissioner has, as we have alluded, what we regard as the template for funding these activities in the commission, which is the Australian Energy Regulator. The commission has a budget of about $20 million a year for managing energy markets and it has about 100 staff. In telecommunications, it has less than $6 million and about 33 or 34 staff. If you look at those two markets in terms of their total revenues and the capitalisation of the companies involved, they are comparable and yet there are, in telecommunications, a whole set of other duties, powers and responsibilities that the commissioner has. So it is unsurprising to us when Telstra is able to bring to bear $50 million-odd of legal and regulatory budget against $5 million in the commission that you get into a situation where the rest of us are always chasing to try and catch up, and conflicts are able to be drawn out and are never resolved.

Senator CONROY—Do you believe that the regulators of telecommunications services in Australia have been sufficiently proactive in addressing the challenges posed by convergent technologies? Do you think there has been enough cooperation and coordination between the regulators on how these convergent technologies are emerging?

Mr Forman—It is clear that our view is that there has not been enough coordination. The regulatory and reporting burden across a number of agencies that the members of the CCC face has reached the point where it just seems silly.

Senator CONROY—What has been the impact? I know you have some of your members with you here today. What has been the impact of this failure on your business operations, the regulatory burden and the mess?

Mr Slattery—As a ballpark estimate, Primus has had to realise an increase of about 60 per cent of resourcing to deal with what it considers is an increased regulatory burden, primarily as a result of added reporting and monitoring requirements and record-keeping rules imposed on us. One of the concerns that we have, if you look at for example, section 4 of the Telecommunications Act, it includes that in the ACA undertaking its functions it have due consideration to minimising the regulatory burden on the industry. What we would like to see going forward within the ACMA or whatever our future regulatory or regulator regime may be down the track is greater consideration being paid to the regulatory burden imposed upon the industry as a result of functions such as increased reporting requirements. One of the problems we have is that we see increased reporting requirements being placed upon carriers but we do not see any tangible feedback about how that is actually improving the competitive landscape.

Senator CONROY—What has been your experience in relation to the way in which the regulators have handled the introduction of VOIP?

Mr Forman—There have been separate endeavours by various bodies to understand the full implications of VOIP. ACIF has had a process that has been a bit broader—I cannot remember the full title of the process now—looking at next generation networks and trying to anticipate how they would be regulated and what the functions of those regulations would be and where they would fail.

ACIF produced an extensive paper, with perhaps 100 questions or more, in the middle of last year. The ACCC has inquired of us as to what we think are some of the implications and the department has inquired of us as to what we think are some of the implications. We have been asked the same questions numerous times by at least four separate bodies. In our view, as with most things, we think that the most important implications to get our heads around are those that relate to what will be the competitive impacts of the introduction of VOIP and what will be the potential anticompetitive responses, because there is a track record in other jurisdictions—once again we are a bit behind the curve on the introduction of VOIP in this marketplace. There have been examples in other jurisdictions of the way incumbents have acted to frustrate and forestall the introduction of VOIP, and we think that is where we need to be focusing our energy, not on having to respond to a hundred pages of questions from the ACA when it would appear that the regulatory regime can accommodate the introduction of these services.

Senator CONROY—Maybe one of your members might like to respond, but how much did it cost in time and money to respond to all of these inquiries from different government groups? A shake of the head unfortunately does not get recorded in *Hansard*, Mr Slattery.

Mr Slattery—I have not actually sat down and made a dollar calculation on it, suffice it to say that it is significant. Carriers like Primus and the other members of the CCC do not have

unlimited regulatory resources to throw at these things, and every day we are sitting down and very critically reviewing the regulatory priorities because some things inevitably have to fall off the end. We just do not have the resources to deal with it. We would like to be in the luxurious position that Telstra is in.

Senator CONROY—Is it true they have more lawyers than any other company in the country?

Mr Slattery—I do not know about that, but I did see at least two years ago where, depending on which document you read, their annual legal budget was somewhere between $50 million and $100 million. We dream of that sort of budget.

Senator CONROY—We might ask them. They are appearing before us next week at Senate estimates. We might ask them how many lawyers they have on the payroll.

Mr Forman—And how many they employ in Mallesons, too, I suggest would be worth asking. Can I just pick up on one of the earlier points that Ian made around the burden of record-keeping rules? It is important to understand that those obligations are directly related to the regulator trying to understand the implications of the failure of competition. For example, there is discussion of record-keeping rules around corporate markets, which is an attempt to deal with allegations of anticompetitive conduct in those corporate markets. If you had markets that functioned properly, you would not need those record-keeping rules, and that is why we keep saying, 'Let's get back to the source of the problem here and get the structures right so that we have a competitive market.' So much of this would fall away if you had properly competitive markets and you could see that companies were engaging in ways that were directed by market signals.

Senator CONROY—In your submission you describe the current telecommunications regime as being in crisis. Do you believe the proposed ACMA legislation adequately addresses the crisis?

Mr Forman—I think they are separate issues. As we say, the primary problem is getting competition right, and the crisis to us is around—as I think we have also described—the vicious circle of failure of competition leading to greater regulatory burden as various regulators attempt to respond to the symptoms of failure of competition, which leads to the types of things that Ian has spoken about: more reports landing on his desk that he has to respond to and go, speak to his sales and accounts people about and get them to drag information out of the organisation. Some of this is information that people simply do not keep because it does not relate to your business. That draws resources away, which makes it harder to compete, which leads to more regulation and so it goes. The merger of the regulators into ACMA is something that we are supportive of in principle because it should lead to less duplication and the opportunity to identify duplication. It should also lead to a better ability to handle some of the issues around convergence, but it is not the primary problem.

Senator CONROY—Given the level of investment made by your members, how does the state of telecommunications regulation in Australia affect the environment for investment in Australian communications infrastructure? I am interested; it must be fairly frustrating trying to go forward with plans when you are being tied down and bound up in all this regulation.

Mr Currie—In terms of the activities Hutchison is involved with, which is very much focused on content in the mobile space, you could say that to develop content in Australia is difficult enough without further regulation that may impose different arrangements that might exist overseas. I guess the end result of that is that content simply will not be developed in Australia if it is too difficult. I believe that shaping the content for that environment is very much a new industry.

Mr Slattery—I would just add one comment in answer to your question, taking it in the broadest sense. I use the example of the recent competition notice being issued by the ACCC to Telstra regarding its pricing of broadband services. That conduct commenced February last year. We still do not have that resolved nearly 12 months down the track. That sort of uncertainty created by what we consider to be a deficiency in the competition legislation, anyone would have to agree, does create difficulties for carriers like Primus when it is looking at making substantial investments in broadband infrastructure.

Senator CONROY—Do you think this legislation adequately solves this problem that you are identifying, that there is a negative investment effect because of all the uncertainty? Does this legislation take away that uncertainty and that negative investment impact?

Mr Slattery—No, I do not think it does. It gets back to Mr Forman's point that this merger really is not the issue. The issue is getting the industry structure right, addressing the vertical and horizontal integration of Telstra and how it uses that in the market and developing a regulatory and legislative regime around that to improve competition. So, no, I do not think this particular merger of the ACA and the ABA will go anywhere near addressing this problem. I will pass it over to any other comment.

Mr Currie—In my view, the merger is important, but it is much more important to get the culture right. Whilst the legislation exists and it is adequate, it is more the implementation of the legislation that is important.

Senator CONROY—What is your response to the government's failure to engage in the wholesale review? You are saying there needs to be more, that this is really not solving the issues. How do you feel about there not being a wholesale review of the regulatory arrangements for the telecommunications industry as part of this merger?

Mr Forman—We are always optimistic that there will be one eventually.

Senator CONROY—Your submission advocates locking in a statutory review of the effectiveness of the regulatory regime 18 months after its establishment.

Mr Forman—A review of the arrangements in relation to the merger?

Senator CONROY—'Effectiveness of the regulatory regimes' is what I think your submission says. That suggests, because you are saying you need it locked it, you are not quite as optimistic as perhaps you have just indicated.

Mr Forman—Perhaps the language is misleading, but we are talking about locking in a review of these arrangements 12 to 18 months later. We think that there will inevitably be

changes that will occur—if those are only the privatisation of Telstra which will have market implications; the mooted changes to media laws and the emerging experience in the UK of Ofcom and how it performs; as well as overcoming those logistical issues around putting two organisations together. We will be able to see which culture seems to be predominating in the new organisation because, as I remarked earlier, there is inevitably cultural conflict when you merge two organisations. We can see two cultures from the perspective of the communication that the members have with these two organisations. We can see two cultures that are quite different.

Senator CONROY—What impact do you consider the privatisation of Telstra will have on the effectiveness of the current regulatory regime? Do you think this bill will in any way offset those potential impacts?

Mr Forman—I do not see anything in these arrangements that will effectively act to constrain the ability of Telstra to exercise its market power in ways—

Senator CONROY—Telstra told me this morning that it only had market power in one area.

Mr Forman—It was a big area.

CHAIR—Thank you very much for your help this morning with this very important issue. That concludes our evidence from you.

[12.03 p.m.]

GAILEY, Ms Lynn Elizabeth, Federal Policy Officer, Media Entertainment and Arts Alliance

CHAIR—Welcome. You are reminded that evidence given to the committee is protected by parliamentary privilege and that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. I invite you to make an opening statement before we move on to questions.

Ms Gailey—The alliance is broadly supportive of the proposed merger of the ACA and the ABA. We see the proposed merger as axiomatically, though somewhat obliquely, being a continuation of support for the continued regulation of content. But we consider that there is something of a lost opportunity in that the merger of the two organisations is not being considered within a broader context and that a review of the regulatory framework and the policy framework within which the regulator is to undertake its duties has not been considered at the same time. We noted that comment was sought on whether the regulators in Australia are world's best practice and we have only looked, in this instance, towards Ofcom. We note the work that Ofcom has undertaken in the last few years has been as sound as it is because it has been so incredibly well resourced in order to undertake the research that is necessary in any kind of overarching review of policy framework for broadcasting in any country. We would be concerned to see that the new regulator is adequately resourced to be able to undertake that kind of research.

CHAIR—I have a couple of questions. Yours is one of the few submissions that we are taking evidence on from the broadcasting and content side so it is a very interesting submission. It raises some very interesting questions. I will start with the last issue you raised, which is the whole question of how Ofcom deals with content regulation vis-a-vis the ABA now let alone the merged body. What would be your recommendations to government in terms of developing the ACMA as to how they should ensure that the content regulation role is not lost or does not become a poor cousin in this massive merged body?

Ms Gailey—That is our concern. Whilst in principle we are supportive of the merger, we are most concerned that the primacy of content regulation remains in the new organisation. This goes back to the fact, and I think this was said by the people who were speaking earlier, that simply merging the two organisations is not going to address the broader issues—namely, that we need a proper policy framework and a review of the policy framework as the Productivity Commission and the ACCC have made clear. Going forward into this century, the whole of broadcasting is changing so dramatically in this decade that it does need a really comprehensive review, and part of that review would, one would hope, be looking at ways in which the centrality of content regulation is continued into the future. Does that answer your question?

CHAIR—Yes, it touches upon it. We sort of have two models floating around here. One is the Ofcom style review which is being done by Ofcom as a key part of its mandate—so it obviously impacts the way Ofcom itself will be doing its work in the future. Would you see that as an appropriate model for a review or would you prefer a review outside the governmental

framework, something more independent along the lines of a Productivity Commission style review?

Ms Gailey—I think our preference would be for an independent review of the kind that the Productivity Commission were calling for.

CHAIR—One of the little changes in the act which I notice only one submission has noted—and that was Telstra—is the change to the way of removing board members. Currently the ABA board members can only be removed for misbehaviour and that sort of thing. The ACA board members can be removed by the minister if the minister is of a view that their performance is unsatisfactory. It is the ACA standard which will now apply to the new merged body. In my view that makes the members more vulnerable to being removed. Given that the ABA has such a significant role in the judging of fairness of content in terms of complaints taken to it—like the Alston complaints and so forth—do you think that change is significant?

Ms Gailey—It is not something I have given a lot of thought to.

CHAIR—You might want to take it on notice.

Ms Gailey—I am happy to take it on notice.

CHAIR—That power to remove board members and the significance that might have is interesting.

Senator LUNDY—Thank you for your submission. On the issue of content convergence, one of the issues that has come up with other witnesses is the treatment of content in the context of the distribution mechanism. Does the MEAA have a view about the relationship between distributors of content, content providers themselves and, for example, carriers or broadcasters and how those different players in the sector should be treated from a regulatory point of view? The issue I am particularly interested in is whether the MEAA is of the view that there should be some regulation relating to the separation between content providers, content carriers and so forth?

Ms Gailey—We think that there is a difference between carriage and content. I suppose we fall broadly in the same position as the Productivity Commission, made clear in 2000. But our concerns are also, if you are looking at the regulation of content, there are issues—some of which are still outstanding—in terms of addressing how content is going to be regulated. There have been a number of inquiries into content, for instance, on pay television that still have not been concluded some years after those inquiries were conducted. In terms of content in the future, there are issues about delivery of content by mobile telephony, and that is an area that we consider should be looked at. We are not saying what we think should be done, but it is certainly an area that needs to be considered for the future, and whether it is appropriate or otherwise to have any kind of regulation of content in those forms on those delivery platforms.

As a gentleman earlier said, there seems to be a potential for Australia losing its place as a content creator because of the lack of certainty across a whole range of areas. We think that would be tragic, because obviously the creation of intellectual property is income generating for the country. We think those kinds of issues should be addressed. Britain is really moving fast in

terms of driving the creation of content out of England, and we are going to be sitting in a position where we are increasingly becoming a purchaser rather than a creator, and that is an opportunity that I do not think we should be missing.

Senator LUNDY—Can you point to what the MEAA sees as the opportunities in these current bills that could remove existing impediments to content creation, perhaps through definitions of content in various media?

Ms Gailey—I think the issue here is that we are talking about a structural amalgamation and the bigger issues are elsewhere. The opportunity has not been taken to look at the amalgamation in the context in which the new regulator will exist.

Senator LUNDY—Do you think there is a risk that in the amalgamation, rather than move closer to resolving some of those issues, the interests of carriers or distributors of content might cloud the issues that the MEAA should be addressing with respect to content creation?

Ms Gailey—I do not know that it will cloud it, but I think it is just not addressing the major issue.

Senator CONROY—We have heard from a number of witnesses today that this bill does not go far enough. I think the Consumers Association said it is the preface to the book, rather than actually addressing the need, and I am sure you heard CCC people say that the real issue is not this bill; the real issue is the regulatory framework. What is your view on that?

Ms Gailey—We would agree with that.

Senator CONROY—Is it a parliamentary inquiry? Is it another in-house departmental inquiry? What sort of format do you think is the best way for that inquiry to be undertaken?

Ms Gailey—It needs to be an independent inquiry.

Senator CONROY—Independent of the department or government?

Ms Gailey—I think the Productivity Commission is an organisation that has been set up to do precisely that kind of work.

Senator CONROY—Thanks very much.

Senator TIERNEY—Following on from that question and where you commented on this as the preface—or comments have been made to that effect—surely that is a necessary step. We are in a very rapid period of change in these areas. Surely we need to bring the regulatory scheme under the purview of one body first, and then you could have an evolutionary process once you have got it all together, as this authority will create. Then as the market develops, and as that authority responds to that, that would happen, hopefully, relatively quickly over time, but not necessarily right at the start of the process, surely.

Ms Gailey—We support the amalgamation of the two regulators because ideally it should lead to a regulator having better oversight of the whole landscape, but we think that for a regulator to

regulate they have got to be doing so within a policy framework that addresses the issues that we are going to be facing and should be facing almost immediately.

Senator TIERNEY—But that is a little bit utopian, isn't it? Surely now is the point to start developing that, now that you have got the whole thing into one authority. That authority should start the ball rolling on doing precisely that, shouldn't it?

Ms Gailey—There should be an independent review. If you look at England, they are years ahead of us and we both started from the same point. Back in 1998 we were driving along the road quite nicely, but we seem to have parked off to one side and we are letting the years go by without actually addressing the issues. The issues that Australia is facing are substantially not all that different from the issues that were being faced in the UK.

Senator TIERNEY—How do you define an independent review? What sorts of players would you have conducting an independent review that was truly independent?

Ms Gailey—The Productivity Commission is a model; it is independent of the department and, if given appropriate terms of reference by government, it has shown itself in a number of inquiries it has conducted to be independent. It has run incredibly comprehensive reviews that have allowed for sufficient input by the general public as well as stakeholders across a range of inquiries that it has conducted.

Senator TIERNEY—On the first page of your submission, halfway down—

Ms Gailey—I am sorry, it does not have page numbers; it is a problem with my computer.

Senator TIERNEY—It is after the executive summary page, so it is the first page of the full submission about halfway down.

Senator CONROY—Are you volunteering to chair the inquiry for us, Senator Tierney? Are you independent enough?

Senator TIERNEY—I was trying to figure out who these independent people were.

Senator CONROY—I have always thought of you as very independent.

Senator TIERNEY—Perhaps I might be such a person. Halfway down the page it says:

… it is difficult to see how the "new authority would be better placed to take a strategic view of wider convergence issues" …

I would have thought that, surely, all these things are under the purview of the this new authority. It is precisely the body that can take a wider view of these convergent issues. I am trying to tease out your reasoning.

Ms Gailey—We do not think that just a structural merger is going to address the bigger issues because they do not have the authority, for instance, to start looking at the issuing of a fourth licence. They do not have the authority to start looking at regulation of content on mobile

telephony in whichever way you might wish to consider it. What they are doing is not going to change anything. It may be that in the amalgamation issues might emerge that are cultural issues within the organisation, which was referred to earlier. That is possible but the merger is not the issue. I cannot see how just putting the two organisations together is going to enable them to do anything that they cannot currently do.

Senator TIERNEY—I would not have thought it is frozen in time given that it is a rapidly changing market. The nature of the authority will probably evolve over time and its response to that market will evolve over time and its structures will evolve over time.

Ms Gailey—But the policy framework within which it is operating is not being addressed at the moment and until such time as the policy framework within which the regulator is operating is reviewed and amended, changed, developed to address issues of convergence then the amalgamation of the two organisations is not going to make any difference.

Senator TIERNEY—Policy frameworks evolve over time as well, in all areas. It is quite possible that it will do that, particularly as convergence becomes more dominant in the system.

Ms Gailey—It is our view that it would have been timely if that policy review had been undertaken at the same time.

CHAIR—I thank you for your time this morning, Ms Gailey. It is a very interesting submission on the broadcasting side and we will reflect on it some more. Thank you very much for responding to yet another inquiry into the broadcasting area.

Ms Gailey—Thank you very much.

Committee adjourned at 12.20 p.m.