

The Senate

Environment, Communications
and the Arts
Legislation Committee

Telecommunications Legislation Amendment
(Competition and Consumer Safeguards) Bill
2009 [Provisions]

October 2009

© Commonwealth of Australia 2009
ISBN 978-1-74229-199-4

This document was printed by the Senate Printing Unit, Parliament House, Canberra

Committee membership

Committee members

Senator Anne McEwen (ALP, SA) (Chair)
Senator Simon Birmingham (LP, SA) (Deputy Chair)
Senator Scott Ludlam (AG, WA)
Senator Kate Lundy (ALP, ACT)
Senator the Hon. Judith Troeth (LP, VIC)
Senator Dana Wortley (ALP, SA)

Substitute members for this inquiry

Senator the Hon. Ian Macdonald (LP, QLD) replaced Senator the Hon. Judith Troeth (LP, VIC) from 6 October to 23 October 2009

Participating members for this inquiry

Senator Mark Bishop (ALP, WA)
Senator Mary Jo Fisher (LP, SA)
Senator the Hon. Ian Macdonald (LP, QLD)
Senator the Hon. Nick Minchin (LP, SA)

Committee secretariat

Dr Ian Holland, Secretary
Mr Geoff Dawson, Principal Research Officer
Ms Sophie Dunstone, Senior Research Officer
Mr Jack Corbett, Senior Research Officer (Graduate Program)
Ms Jacquie Hawkins, Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: eca.sen@aph.gov.au

Internet: http://www.aph.gov.au/senate/committee/eca_ctte/index.htm

Table of Contents

Committee membership	iii
Chapter 1.....	1
Referral to the committee	1
Purpose of the bill.....	1
Outline of the bill.....	1
Chapter 2 - Issues to do with separation of Telstra	5
Provisions of the bill on separation of Telstra.....	5
Submissions on separation of Telstra	6
ACCC's role in structural or functional separation of Telstra.....	14
Committee comment	15
Chapter 3 - Access, competition and consumer safeguards.....	17
Access and anti-competitive conduct regimes	17
Changes to part XIC of the Trade Practices Act	20
Comments in submissions on Part XIC changes.....	21
Committee comment on changes to the Trade Practices Act.....	27
Consumer safeguards.....	27
Conclusion	28
Coalition Senators Dissenting Report	31
National Broadband Network (NBN).....	31
Significance of the NBN Implementation Study.....	32
Urgency before Christmas	37
Structural Separation of Telstra.....	38
Spectrum Threat	39
Sovereign Risk.....	40
Access arrangements	41

Consumer Measures	43
Conclusion	44
Additional Comments submitted by Senator Scott Ludlam for the Australian Greens.....	47
Additional Comments - Senator Fiona Nash.....	51
Appendix 1	53
Appendix 2	63

Chapter 1

Referral to the committee

1.1 On 17 September 2009, the Senate referred the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 to the Senate Environment, Communications and the Arts Legislation Committee for inquiry and report by 26 October 2009.

1.2 On 23 September, in accordance with usual practice, the committee advertised the inquiry in *The Australian*, calling for submissions by 7 October 2009. The committee also directly contacted a range of individuals and organisations to invite submissions.

1.3 The committee received 119 numbered submissions, listed at Appendix 1. The committee also received 224 form letters listed at Appendix 1.

1.4 The committee held public hearings in Melbourne and Canberra on 13 and 14 October 2009. The participants are listed at Appendix 2.

Purpose of the bill

1.5 The bill proposes to amend the *Telecommunications Act 1997*, Parts XIB and XIC of the *Trade Practices Act 1974*, the *Radiocommunications Act 1992* and the *Telecommunications (Consumer Protection and Service Standards) Act 1999*. The bill also makes consequential amendments to the *National Transmission Network Sale Act 1998*.

1.6 The bill seeks to introduce a series of regulatory reforms intended to enhance competitive outcomes in the Australian telecommunications industry and strengthen consumer safeguards. It seeks to 'promote an open, competitive telecommunications market to provide Australian consumers with access to innovative and affordable services'.¹

1.7 The reform package can be divided into three parts: addressing the vertical and horizontal integration of Telstra; streamlining the access and anti-competitive conduct regimes; and strengthening consumer safeguard measures such as the Universal Service Obligation and the Customer Service Guarantee.²

Outline of the bill

Structure of the telecommunications sector

1.8 Part 1 of Schedule 1 proposes to insert a new Part 33 into the *Telecommunications Act 1997* with provisions for Telstra to voluntarily structurally separate.

1 Explanatory Memorandum, p. 3.

2 Explanatory Memorandum, p. 1.

1.9 According to the explanatory memorandum:

Structural separation may, but does not need to, involve the creation of a new company by Telstra and the transfer of its fixed-line assets to that new company. Alternatively it may involve Telstra progressively migrating its fixed-line traffic to the [National Broadband Network] over an agreed period of time and under set regulatory arrangements, and sell or cease to use its fixed-line assets on an agreed basis. This approach will ultimately lead to a national outcome where there is a wholesale-only network not controlled by any retail company – in other words, full structural separation in time³

1.10 Part 1 of Schedule 1 also provides for Telstra to be functionally separated should Telstra choose not to voluntarily implement structural separation. The bill achieves functional separation by requiring Telstra to:

- Conduct its network operations and wholesale functions at arm's length from the rest of Telstra;
- Provide the same information and access to regulated services on equivalent price and non-price terms to its retail business and non-Telstra wholesale customers; and
- Put in place strong internal governance structures that provide transparency for the regulator and access seekers, and that ensure that equivalence arrangements are effective.⁴

1.11 In the explanatory memorandum, the government cites Telstra's 'ongoing dominance in the Australian telecommunications market' as the reason for its strategy 'to correct this unique market structure, by introducing a set of measures designed to promote competition...while providing Telstra with the flexibility to choose its future path'.

1.12 Under the bill, if Telstra chooses not to structurally separate, divest its hybrid fibre coaxial (HFC) cable network and its interests in Foxtel, Telstra will be prevented from acquiring spectrum which could be used for advanced wireless broadband services. However, in the event that the Minister is satisfied that Telstra's structural separation undertaking is sufficient to address the government's concerns about Telstra's dominant position in the market, the bill does enable the Minister to remove the requirements around the divestment of the HFC cable network and Foxtel.⁵

Access and anti-competitive conduct regimes

1.13 Part 2 of Schedule 1 seeks to amend the current 'negotiate-arbitrate' model in Part XIC of the *Trade Practices Act 1974* for agreeing terms of access between providers and access seekers, in order to address the government's concern that the current model is not achieving effective outcomes.

3 Explanatory Memorandum, p. 1.

4 Explanatory Memorandum, p. 2.

5 Explanatory Memorandum, p. 2.

1.14 The bill allows the regulator, the Australian Competition and Consumer Commission (ACCC), to set up-front prices and non-price terms for declared services. These are intended to set a benchmark that access seekers can fall back on, should negotiations with the provider fail.

1.15 The bill also removes the ability to have decisions made under Part XIC of the Trade Practices Act subject to merits review, in order to 'promote regulatory certainty and timely decision-making'. Judicial review processes will continue to be available.

1.16 Part 3 of Schedule 1 is intended to streamline the enforcement process to which the ACCC must adhere. The bill makes changes to the competition notice process, and specifically to consultation and observation of procedural fairness by the ACCC.⁶

Consumer protection

1.17 The bill amends the *Telecommunications (Consumer Protection and Service Standards) Act 1999* by strengthening the Universal Service Obligation (USO), Customer Service Guarantee (CSG) and priority assistance services, as well as enhancing the regulatory powers of the Australian Communications and Media Authority (ACMA). These amendments are detailed in Parts 4 to 8 of Schedule 1 of the bill.

1.18 Part 4 of Schedule 1 includes new requirements of the universal service provider such as minimum performance benchmarks that must be met by the universal service provider. Performance standards to be determined by the Minister include maximum periods of time for new connections, fault rectification and reliability standards, and performance standards in relation to payphones. There will also be 'new rules in relation to public consultation and notification of proposals to remove payphones'.⁷

1.19 Under Part 5 of Schedule 1, the Minister can establish minimum CSG performance benchmarks. Part 5 also seeks to clarify CSG waiver provisions including the requirement for a customer's express agreement for a waiver and the inclusion of a statement outlining consequences of the CSG waiver.

1.20 Part 6 of Schedule 1 introduces a new service provider rule requiring service providers to either offer a priority assistance service in accordance with the Communications Alliance code on priority assistance, or inform customers of providers from whom they can purchase such a service if they require it. Telstra will remain bound by its current carrier licence condition requiring it to have priority assistance services.

1.21 Part 7 of Schedule 1 expands the powers of the ACMA to issue infringement notices under the Consumer Protection Act. The government intends that this will 'assist the ACMA in enforcing obligations under the telecommunications regulatory regime'.

6 Explanatory Memorandum, pp. 3-4.

7 Explanatory Memorandum, p. 5.

1.22 Part 8 of Schedule 1 substitutes a new definition of civil penalty provision to simplify and clarify the definition.⁸

1.23 There was general support for the enhancement of consumer safeguards in the bill, and this report concentrates on issues relating to the structural separation of Telstra, and on Trade Practices Act reforms.

8 Explanatory Memorandum, pp. 5-6.

Chapter 2

Issues to do with separation of Telstra

Provisions of the bill on separation of Telstra

Addressing Telstra's vertical integration

2.1 The bill provides that Telstra must separate either functionally or structurally. The Government argues that separation of Telstra is needed because:

- Telstra is one of the most integrated telecommunications companies in the world;
- partly because of this integration, it has been able to maintain a dominant position in virtually all aspects of the market despite more than 10 years of open competition; and
- Telstra's high level of integration has hindered the development of effective competition.¹

2.2 The default position is that Telstra must functionally separate according to a functional separation undertaking approved by the Minister. The bill requires Telstra to comply with 'functional separation principles' listed in the bill, including that there should be equivalence in relation to the supply by Telstra of regulated services to its wholesale customers and its retail business units, and related matters.²

2.3 Alternatively, Telstra may voluntarily structurally separate: that is, the ACCC may accept an undertaking from Telstra that -

- Telstra will not supply fixed-line carriage services to retail customers using a telecommunications network over which Telstra is in a position to exercise control; and
- Telstra will not be in a position to exercise control of a company that supplies fixed-line carriage services to retail customers using a telecommunications network over which Telstra is in a position to exercise control.³

2.4 If a structural separation undertaking is in force, Telstra does not have to comply with the provisions about functional separation.⁴ The Government's stated preference is that Telstra should voluntarily structurally separate.⁵

2.5 According to the explanatory memorandum, Telstra could undertake structural separation in several ways:

1 Explanatory Memorandum, p. 1.

2 Item 22, proposed additions to Schedule 1 of the *Telecommunications Act 1997*.

3 Item 21, proposed section 577A of the *Telecommunications Act 1997*.

4 Item 22, proposed section 82 of Schedule 1 of the *Telecommunications Act 1997*.

5 Explanatory Memorandum, p. 8.

A few examples are:

- Telstra may elect to facilitate the transfer of the provision of fixed-line carriage services to its retail customers to another carriage service provider, over which Telstra is not in a position to exercise control.
- Telstra may establish a new company to supply fixed-line carriage services to its retail customers and divest enough of its interests in that company to ensure that it is no longer in a position to exercise control of that company.
- Telstra may elect to progressively migrate the traffic of its retail customers to another national network for the provision of fixed-line carriage services, such network being a network over which Telstra is not in a position to exercise control.⁶

Addressing Telstra's horizontal integration

2.6 The bill prevents Telstra from acquiring specified bands of spectrum, which could be used for advanced wireless broadband services, unless it structurally separates and divests its hybrid fibre coaxial (HFC) cable network and its interests in subscription television broadcasting licences (ie Foxtel). However the Minister may exempt Telstra from the requirements in relation to HFC networks and subscription television broadcasting licences if the Minister is satisfied that Telstra's structural separation undertaking is sufficient to address concerns about the degree of Telstra's power in telecommunications markets.⁷

2.7 The Government supports this measure on the grounds that:

Telstra's level of horizontal integration across the different delivery platforms—copper, cable and mobile—is in contrast to many countries where there are restrictions on incumbents owning both cable and traditional fixed-line telephone networks.... Telstra's horizontal integration has significantly contributed to Telstra's ongoing dominance in the Australian telecommunications market.⁸

Submissions on separation of Telstra

Submissions supporting the bill

2.8 Most submissions from stakeholder companies or consumer interest groups supported separation of Telstra.⁹ Their core argument supports the government's view that Telstra's level of vertical integration has allowed Telstra to behave

6 Explanatory Memorandum, p. 92.

7 Item 22, proposed additions to Schedule 1 of the *Telecommunications Act 1997*. Explanatory Memorandum, p. 2.

8 Explanatory Memorandum, p. 2.

9 For example Vodaphone Hutchison Australia, *Submission 40*. Australian Telecommunications Users Group, *Submission 44*. Optus, *Submission 47*. Macquarie Telecom, *Submission 69*. iiNet, *Submission 70*. Austar, *Submission 71*. Internode, *Submission 73*. Primus Telecom, *Submission 76*. Infrastructure Partnerships Australia, *Submission 93*. Telecommunications Expert Group, *Submission 97*.

monopolistically, to the detriment of competition and Australian consumers. For example:

A number of international comparisons show Australia with higher prices, less innovative offerings and poorer service levels including broadband speeds and switching practices. ATUG believes this is due to lack of effective competition in the telco sector. Examples include OECD Communications Outlook 2009 and Oxford Business School Broadband Quality Score 2009.¹⁰

Telstra continues to identify the number of new carrier licences and ongoing price reductions as indicators of a vibrant, competitive marketplace, completely ignoring the figures included in the explanatory memorandum which show the extraordinarily high figures for the HHI, the Herfindahl-Hirschman Index, for this industry. That is a standard measure of concentration in industry that shows this industry is basically as concentrated as a dysfunctional duopoly.¹¹

2.9 Some noted that Telstra's market dominance has increased in recent years; for example:

Data from recent Telstra annual reports further shows how quickly competition has retreated in recent years. In the past three years there has been a fall of 290,000 individual consumers lines connected to competitors. This is a fall of 12.75% compared to a loss of 0.6% of basic access lines by Telstra Retail in the same period.¹²

2.10 Submissions argued that functional separation has been successful in the United Kingdom:

Perhaps the most compelling endorsement of separation is provided by Ofcom which, following a recent assessment of the impact of the separation arrangements introduced by BT, has concluded that separation has been successful in delivering improved competition in the UK.¹³

2.11 Infrastructure Partnerships Australia noted the benefits of structural separation listed in a 2003 OECD report and supported by the 1993 Hilmer report on national competition policy:

The [Hilmer] report advocated the separation of natural monopoly components (such as fixed copper network) from competitive functions (such as retail services).¹⁴

10 Australian Telecommunications Users Group, *Submission 44*, p. 5. Similarly Competitive Carriers Coalition, *Submission 48*, p.2. Optus, *Submission 47*, p. 5.

11 Mr D. Havyatt (Unwired Australia), *Proof Committee Hansard*, 13 October 2009, p.20.

12 Competitive Carriers Coalition, *Submission 48*, p. 3. Similarly Unwired Australia, *Submission 55*, p. 3. The Explanatory Memorandum discusses market concentration and notes that it is increasing (except in retail mobile services): p. 21.

13 Optus, *Submission 47*, p. 7. Similarly Infrastructure Partnerships Australia, *Submission 93*, p. 12.

14 Infrastructure Partnerships Australia, *Submission 93*, p. 11.

2.12 Optus submitted that criticisms of separation 'do not stand up to scrutiny':

These criticisms fail to acknowledge that the reforms have been well signalled and that they are aimed squarely at delivering improved outcomes for all Australians by putting the industry on to a more competitive basis. The experience of the UK and New Zealand demonstrate the benefits that separation brings in terms of delivering pro-competitive outcomes.¹⁵

2.13 The department argued that the dominance of one player in the market was such that action was required:

In the explanatory memorandum is a quote by Lord David Currie in the UK:

All that is needed is for the incumbent not to try their hardest to achieve reliability, timeliness and predictability to disrupt significantly the launch by competitors of a rival retail proposition.

... It is at that end, not who is the largest mobile phone player, the largest wireless player or the largest fixed-line player. It is about that competition angle. Are you able to disrupt someone's ability simply by not trying hard because across your set of businesses that part of your business that does infrastructure supply can simply say, 'I think I'll just be passive in the face of this person's needs. I might delay it or lose it or sleep on it.' None of that is unusual behaviour in marketplaces, and we all know it. The question in this is: has it arrived at a point where it sufficiently impedes supply of innovative services to consumers and businesses? The conclusion we have reached is that it does.¹⁶

Other suggestions from supporters of the bill

2.14 Supporters of separation made some detailed suggestions for amendments. The Competitive Carriers Coalition (CCC) argued that the principles for functional separation should be legislated in more detail.¹⁷ The CCC argued that it should be legislated that Telstra must at once implement changes to remove its incentives to discriminate against other retailers, although structural separation may take some years.¹⁸ Unwired Australia argued that the legislation should provide more detail about the grounds on which the Minister may exempt Telstra from the pay TV and HFC network divestment provisions.¹⁹ Unwired Australia suggested that if Telstra

15 Optus, *Submission 47*, p. 4.

16 Mr P. Harris, Department of Broadband, Communications and the Digital Economy, *Proof Committee Hansard*, 14 October 2009, p. 27.

17 Competitive Carriers Coalition, *Submission 48*, p. 5. Similarly Macquarie Telecom, *Submission 69*, p. 2.

18 Competitive Carriers Coalition, *Submission 48*, p. 7. Similarly Primus Telecom: 'Separation plans or undertakings should be required to achieve significant pro-competitive milestones along the way.' *Submission 76*, p. 2.

19 Unwired Australia, *Submission 55*, p. 7. Similarly Austar, *Submission 71*, p. 5.

breaches a functional separation undertaking, the ACCC should be able to apply to the Federal Court to force divestiture.²⁰

Submissions opposing the bill

2.15 Stakeholder groups who opposed the separation provisions were Telstra and a number of investment managers or shareholder interest groups concerned about the likely effect of the changes on the value of Telstra shares.²¹ Their main arguments were:

- separation will discourage investment or cause efficiency losses;
- separation will have high transitional costs for Telstra;
- separation will reduce Telstra's share value.

2.16 Submissions from individual Telstra shareholders mostly focussed on the third point.

Effects on efficiency and investment

2.17 Investors Mutual argued that economic literature supports vertical integration:

In industries that face significant uncertainties only vertically integrated firms are the most economically efficient allocator of resources.²²

2.18 Telstra argued similarly that vertical integration 'reduces costs and facilitates innovation and is supported by international studies'.²³ In reply Unwired Australia said:

...Telstra also claims that separation is not required if it makes a series of changes in the wholesale regime to provide transparency and equivalence. I do not know how you can reconcile those two views: that you can get equivalency and transparency in a wholesale structure with a vertically integrated firm, yet the vertically integrated firm has a lower cost structure and a greater ability to innovate than any other firm in the market. Quite frankly, if the first statement is true, that vertical integration reduces costs and facilitates innovation, then we should not attempt to have a competitive telco regime.²⁴

2.19 The Australian Shareholders Association argued that the bill will discourage investment:

20 Unwired Australia, *Submission 55*, p. 10.

21 Maple Brown Abbott, *Submission 4*; Australian Foundation Investment Company, *Submission 53*; Investors Mutual Ltd, *Submission 68*; BT Investment Management, *Submission 74*; Australian Shareholders Association, *Submission 77*. Barmen, telecommunications consultants, also opposed 'forced separation': *Submission 96*, p. 5.

22 Investors Mutual, *Submission 68*, p. 5. Similarly Telstra, *Submission 88*, p. 6.

23 Telstra, *Submission 88*, p. 5.

24 Mr D. Havyatt (Unwired Australia), *Proof Committee Hansard*, 13 October 2009, p. 20.

International investors in particular will consider Australia to have a much higher level of sovereign risk if this Bill is passed and the Government allowed to impose its will on a private company.²⁵

2.20 BT Investment Management submitted that:

It's a circular argument to suggest that because Telstra owns the only regulated bottleneck asset that it makes the bulk of fixed line market profit and should be broken up...

Whoever owns it will make such a regulated profit.... We consider that Telstra's profit is high because it is a well run integrated business and because of its high level of investment relative to its competitors.²⁶

2.21 Telstra argued the changes 'have the potential to significantly increase regulatory uncertainty and hence reduce investment in telecommunications markets.' Telstra noted that it has a 62 per cent share of the market but makes 70 per cent of telecommunications sector capital investment (implying that this is a desirable result of the status quo). In reply Unwired Australia argued that the right comparison is with profit, not market share; Telstra still has 90 per cent of the industry's profit; thus Telstra is under-investing: 'Only people with market power can withhold investments'.²⁷

Transitional costs

2.22 Telstra argued that the cost of separation would be in the range \$500 million to \$1.2 billion.²⁸ In the Government's view 'it is unclear what assumptions Telstra's claimed implementation costs or effects on its share price are based on... Telstra's claims can be assumed to represent the upper bounds of possible costs.'²⁹

2.23 Others disputed the likely cost of separation. Optus said:

These costs are unlikely to be anywhere near as much as Telstra has claimed. Optus notes that BT, which is a considerably larger company than Telstra, incurred costs of £153 Million in implementing a very detailed and robust form of functional separation... In many respects the costs to be incurred in implementing separation will simply be displacing costs the industry incurs to date operating under the present regulatory arrangements. In recent years the industry will have incurred costs of no less than \$200 million operating within the present regulatory arrangements.³⁰

25 Australian Shareholders Association, *Submission 77*, p.3. Similarly Maple Brown Abbott, *Submission 41*, p. 2.

26 BT Investment Management, *Submission 74*, p. 3.

27 Telstra, *Submission 88*, pp. 2,10. Mr D. Havyatt (Unwired Australia), *Proof Committee Hansard*, 13 October 2009, p. 20.

28 Telstra, *Submission 88*, p. 8. See discussion at *Proof Committee Hansard*, 13 October 2009, p. 4.

29 Explanatory Memorandum, p. 28.

30 Optus, *Submission 47*, p. 11. Similarly Mr A. Sheridan (Optus), *Proof Committee Hansard*, 13 October 2009, p. 18.

2.24 The Government has argued that:

Telstra's vertical integration affects all Australians and the economy more generally through higher telecommunications prices and reduced innovation and investment in the sector.... It is the Australian Government's considered view that the medium- and longer-term competition benefits for the economy, business and end-users of implementing functional separation outweigh the short-term costs to Telstra of implementing functional separation if Telstra decides not to voluntarily structurally separate.³¹

Effect on Telstra's share value

2.25 Telstra and some other stakeholder groups argued that separation would reduce Telstra's share value. These submissions were mostly from investment managers.^{32 33} Their concern about share value was usually coupled with an argument that the separation envisaged by the bill was unfair as it was not foreshadowed at the time of privatisation.³⁴

In all three public offers Telstra was marketed as a strong investment on the basis of its large size and its position as the Australia's only integrated telecommunications company. The same assets that the Government as now insisting Telstra divest were promoted strongly as reasons for investment in the company... Obtaining full value for those assets in the situation of a forced sale will be difficult.³⁵

We believe that the proposed structural separation if it occurs would result in a permanent reduction in shareholder value... the Government will be penalising Telstra for being successful and thereby penalising the many Telstra shareholders who relied on Government representations.³⁶

2.26 It was sometimes unclear whether the claim was that the increased competition caused by separation would cause a transfer of profit from Telstra to its competitors in a zero-sum game, or that the community as a whole would lose because they believe Telstra's market dominance is economically efficient.

31 Explanatory Memorandum, p. 33.

32 The Committee notes that the two investment managers who gave evidence opposing the bill hold shares in Telstra but not in Telstra's Australian competitors. Mr A. Tagliaferro (Investors Mutual Ltd), *Proof Committee Hansard*, 13 October 2009, p. 42. Mr R. Barker (Australian Foundation Investment Company), *Proof Committee Hansard*, 13 October 2009, p. 35.

33 The 224 form letters which the committee received were mostly about this issue.

34 Telstra focussed on economic arguments, and mentioned fairness arguments only passingly; for example: 'Telstra's shareholders have invested significant sums in these assets. To require them to divest their interests in these assets just as they are becoming profitable is unjust and raises questions of sovereign risk.' *Submission 88*, pp. 3, 8.

35 Australian Shareholders Association, *Submission 77*, p. 1. Similarly Maple Brown Abbott, *Submission 41*, pp. 1-2. Mr R. Barker (Australian Foundation Investment Company), *Proof Committee Hansard*, 13 October 2009, p. 33.

36 Australian Foundation Investment Company, *Submission 53*, p. 2.

2.27 Supporters of the bill argued that 'the government must stand firm and put the long term interests of all 22 million Australians ahead of the short term interests of less than 2 million Telstra shareholders.'³⁷

2.28 On the question of whether the bill is fair to Telstra shareholders, the department argued that the three Telstra privatisation prospectuses mentioned regulatory risk adequately:

I have a list here of the quite generic warnings that went in every Telstra share offer: 1997, 1999 and 2006.

The 1997 offer said: 'There can be no assurance that the current or future governments will not take further steps which alter Telstra's competitive position or the manner in which the Australian telecommunications industry is regulated.'

In the 1999 offer: 'There is also a risk that current or future governments will take steps that further alter Telstra's competitive position or the manner in which the Australian telecommunications industry is regulated.'³⁸

2.29 The T3 prospectus in 2006 said:

Regulation impacts the way Telstra does business and Telstra believes it is the most significant ongoing risk to Telstra. There can be no assurance as to future policies and regulatory outcomes. Regulatory outcomes may be significantly adverse to Telstra shareholders.³⁹

2.30 The Competitive Carriers Coalition argued that complaints that Telstra shareholders have been betrayed should not be taken seriously, since:

- Every Telstra sale tranche acknowledged the simple reality that the regulation of telecommunications was subject to change;
- Telstra shareholders are asking to have interests protected that are immeasurable. It is impossible to know what regulatory action might result in Telstra share movements over time. Functional separation of BT was followed by share growth, while Telstra's value has declined precipitously in recent years while it was brutally exercising market power;
- It is not the Government's responsibility to protect the interests of the shareholders of one company over the interests of other companies' shareholders, and certainly not ahead of the interests of all citizens who have paid inflated prices for crucial communications services because of Telstra's unconstrained monopoly power....⁴⁰

37 Internode, *Submission 73*, p. 2.

38 Mr P. Harris (Department of Broadband, Communications and the Digital Economy), *Proof Committee Hansard*, 14 October 2009, p. 29. Similarly Unwired Australia, *Submission 55*, p. 15.

39 Telstra 3 Share Offer Prospectus, October 2006, p. 42.

40 Competitive Carriers Coalition, *Submission 48*, p. 4. Similarly Internode, *Submission 73*, p. 2.

2.31 Supporters of the bill argued that in any case the likely detriment to Telstra's share price is uncertain or overstated. For example:

The market reaction to the announced package of reforms has been fairly muted with Telstra's share price recovering after an initial small drop. More significantly, Optus notes that many industry analysts have retained their "Buy" recommendations on the Telstra stock following the Government's announcement and predict share price accretion over the next twelve months as these reforms are implemented.⁴¹

A more considered view is that these reforms address the inherent regulatory uncertainty within the industry, and once the reforms are implemented they will open up enormous potential for Telstra and other industry participants to pursue significant growth opportunities.⁴²

If you look at what happened in the UK, BT share price actually improved relative to both the rest of the UK share market and to some of its standout competitors on the European continent. It improved because a lot of the uncertainty was removed and there was the promise that, over time, other aspects of regulation that constrained them in retail markets would be removed.⁴³

2.32 The ACCC, in its submission to the Government's April 2009 National Broadband Network discussion paper, stated that vertical separation can enhance the value of separated firms. It reasoned that there may be some vertical diseconomies of scope which may arise as a firm takes on additional functions which are outside the scope of its core functions and which the firm is not well equipped to perform. It gave examples of previous voluntary separations to support these claims.⁴⁴

Comments on horizontal separation of Telstra

2.33 Generally, stakeholders who supported structurally separating Telstra also supported horizontal separation:

Access to valuable content is likely to become an important force driving the take-up of higher speed broadband services. This creates a very real risk that a monopoly in premium content could be used to undermine future competition in broadband services.⁴⁵

The level of Telstra's horizontal integration across all Australian telecommunications platforms, including fixed line, mobile, coaxial fibre cable and Foxtel cable, is unusual if not unique among advanced

41 Optus, *Submission 47*, p. 11.

42 Primus Telecom, *Submission 76*, p. 2. Similarly Mr D. Foreman (Competitive Carriers Coalition), *Proof Committee Hansard*, 14 October 2009, p. 9.

43 Mr D. Forman (Competitive Carriers Coalition), *Proof Committee Hansard*, 14 October 2009, p. 9.

44 Australian Gas Light Company 2005, Toll 2007, Time Warner 2008. Explanatory Memorandum, p. 10.

45 Optus, *Submission 47*, p. 7.

economies. Telstra's integration across all telecommunications technologies has significantly contributed to the organisation's ongoing dominance in the Australian telecommunications market and has allowed the organisation to utilise undue influence to block market participants.⁴⁶

The fact that FOXTEL has not extended its product portfolio to offer a competing broadband access product, unlike other major pay TV providers in the developed world, is a clear indication that the services and products available to consumers are being limited by the integration of Telstra and FOXTEL. AUSTAR believes that the divestiture of FOXTEL is a critical step in addressing competition concerns raised by Telstra's horizontal integration.⁴⁷

2.34 Optus noted that the horizontal separation provisions are ultimately discretionary and can be waived if the Minister is satisfied with the terms of Telstra's structural separation plan: 'On balance this approach appears reasonable.'⁴⁸

2.35 Opponents of the bill were often critical of horizontal separation. These included:

- Australian Foundation Investment Company: 'shareholders have borne the risk of the [Foxtel and HFC] investments and should be allowed to reap the rewards'; and
- BT Investment Management: 'restricting Telstra's access to 4G spectrum is counter-productive to effective industry development.'⁴⁹

ACCC's role in structural or functional separation of Telstra

2.36 The provisions concerning structural separation give the ACCC the role of accepting Telstra's undertaking concerning separation. If the ACCC considers that Telstra has breached the undertaking it may apply to the Federal Court for a remedy.⁵⁰

2.37 The provisions concerning functional separation give the ACCC the role of advising the Minister whether to accept a functional separation undertaking.⁵¹ The ACCC must monitor and report annually on Telstra's compliance with a functional separation undertaking.⁵²

2.38 Submissions were generally supportive of this role. The Competitive Carriers Coalition urged that the process by which the ACCC considers structural separation

46 Infrastructure Partnerships Australia, *Submission 93*, p. 13.

47 Austar, *Submission 71*, p. 4.

48 Optus, *Submission 47*, p. 7. Similarly Australian Telecommunications Users Group, *Submission 44*, p. 6.

49 Australian Foundation Investment Company, *Submission 53*, p. 2. BT Investment Management, *Submission 74*, p. 2.

50 Item 21, amendments to the *Telecommunications Act 1997*, proposed section 577A ff.

51 Item 22, amendments to the *Telecommunications Act 1997*, proposed sections 77, 80.

52 Item 39, amendments to the *Telecommunications Act 1997*, proposed section 105B.

should have the highest level of public consultation, and there should be more guidance to the ACCC on what would be acceptable in an undertaking by Telstra.⁵³

2.39 Foxtel argued that the ACCC's discretion regarding Telstra's undertaking to structurally separate would be too broad, and matters that the ACCC should consider should be set out in the bill.⁵⁴

Committee comment

2.40 The object of telecommunications policy is to promote innovation in telecommunications, and more efficient and competitive services for the community as a whole. The Committee accepts the view of the Government and most industry stakeholders that the separation of Telstra will bring long term benefits.

2.41 In the committee's view the three Telstra sale prospectuses were clear enough about the potential of regulatory changes in the telecommunication sector that might affect Telstra's competitive position. The committee notes that in any case there is a lack of consensus around what might be the long terms effects of separation on Telstra's share price.

2.42 It is not the government's role to support the share value of one telecommunications company in preference to its competitors, however the committee does not believe that sufficient evidence has been presented that these regulatory reforms will be detrimental to Telstra's share price. The enhanced consumer protections offered in the bill, the greater regulatory certainty that will be brought about by its passage, and the improved efficiency and competition in the sector as a result, should together ensure a sound future for all Australia's telecommunications providers.

53 Competitive Carriers Coalition, *Submission 48*, p. 7-8. Similarly on consultation Unwired Australia, *Submission 55*, p. 9; Macquarie Telecom, *Submission 69*, p. 2.

54 Foxtel, *Submission 98*, p. 6.

Chapter 3

Access, competition and consumer safeguards

3.1 The bill proposes changes to parts XIB and XIC of the *Trade Practices Act 1974* administered by the Australian Competition and Consumer Commission (ACCC).

Access and anti-competitive conduct regimes

3.2 Part XIB of the *Trade Practices Act 1974* (TPA) prohibits a service provider with a substantial degree of market power from engaging in conduct which has either the effect or purpose of substantially lessening competition.¹ Part XIB also contains provisions for the ACCC to issue a competition notice if it believes a carrier or carriage service provider is engaging in anti-competitive conduct.

3.3 The bill proposes two changes to Part XIB. First, the bill seeks to clarify the scope of ACCC intervention in instances of perceived anti-competitive conduct relating to content services.² This has arisen due to concerns that current practices, involving the bundling of content access with telecommunications services, may constitute anti-competitive conduct.³ The government's position is that the current provisions do not specify whether content services, as defined in the *Telecommunications Act 1997*, are covered by Part XIB.⁴

3.4 Second, the bill seeks to streamline the competition notices process to reduce delays. The consultation process, a statutory requirement in the competition notices process, has been criticised on the grounds that it is open to manipulation by parties intentionally drawing out negotiations to secure a competitive advantage.⁵ The government is seeking to reduce delays currently penalising the victims of alleged anti-competitive conduct.⁶

Inclusion of content services

3.5 Item 158 amends section 151AF to clarify that a telecommunications market, for the purpose of part XIB, includes content services as defined in the *Telecommunications Act 1997*.

1 Explanatory Memorandum, pp. 53-54.

2 Explanatory Memorandum, pp. 53-54.

3 Explanatory Memorandum, pp. 53-54.

4 Explanatory Memorandum, pp. 53-54.

5 Explanatory Memorandum, pp. 54-55.

6 Explanatory Memorandum, pp. 54-55.

3.6 Content services include broadcasting services, online information services and online entertainment services that are currently offered as part of bundled packages by service carriers and carriage service providers.⁷

3.7 Optus supported the change. It said:

The opportunity exists for content especially that acquired on an exclusive basis, to be used for anti-competitive purposes through bundling with telecommunication services. It is appropriate, therefore, that content should be subject to the anti-competitive conduct provisions.⁸

3.8 On the other hand, Foxtel disagreed with regulating access to content, on the grounds that this 'will constitute an inappropriate interference with the economic rights of rights holder and content providers.'⁹ BT Investment Management argued that:

the ACCC is shaping-up to get into pay TV issues and on line content issues which may well have implications beyond Telstra...

The ACCC already has wider discretionary powers over conduct in the telecommunications industry than apply in other industries. The... proposed changes listed above increase regulatory uncertainty which is not in the long term interests of end users because it inhibits competition and increases risks in making investment.¹⁰

3.9 The Government argues that, on the contrary, the reforms will increase regulatory certainty. It has reasoned that inclusion of content services is advisable since:

it is unclear whether Part XIB applies to content services supplied by carriers and carriage service providers. Clarifying the scope of Part XIB will increase regulatory certainty and reduce the risk of protracted legal disputes on this issue.¹¹

3.10 FreeTV agreed that the government's proposed reforms would increase certainty.¹²

Changes to the competition notice regime

3.11 The bill proposes repealing provisions that require the ACCC to consult the affected provider before issuing a Part A competition notice.¹³ It would expressly

7 Explanatory Memorandum, pp 55-56.

8 Optus, *Submission 47*, p. 8. Similarly Australian Telecommunications Users Group, *Submission 44*, p. 7. Austar, *Submission 71*, p. 5.

9 Foxtel, *Submission 98*, p. 16-17.

10 BT Investment Management, *Submission 74*, p. 7.

11 Explanatory Memorandum, p. 4.

12 FreeTV, *Submission 72*, p. 3.

remove any common law obligation on the ACCC to observe requirements of procedural fairness in relation to issuing a Part A competition notice.¹⁴

3.12 The Government supports this change on the grounds that '...the consultation process prior to the issuing of a competition notice can delay enforcement action....'

These delays may lead to irreversible damage to the parties that are affected by any alleged anticompetitive conduct.... [Removing the requirement of procedural fairness] will deny the party alleged to have taken part in anti-competitive conduct the ability to delay the ACCC's enforcement activities on procedural grounds. The focus for both parties will therefore be on resolving the alleged illegal conduct, rather than on litigation aimed at challenging the processes followed by the ACCC. The competition notice can be lifted at any time if the ACCC is satisfied that the allegation of improper conduct is mistaken, or the situation has been corrected.

If the ACCC commences court proceedings to enforce a Part A competition notice, the ACCC would still have to prove to the court that the competition rule had been breached by the alleged offender.¹⁵

3.13 Telstra submitted that these changes exempt the ACCC from procedural fairness obligations without policy justification:

As a model litigant, the ACCC should at all times be required to meet an even higher standard of procedural fairness.... a competition notice is an administrative instrument. If used incorrectly, it is potentially damaging, hence the need for proper administrative process and administrative law protections. If not, how can any investor have confidence that the power will not be misused? ... the changes to Part XIC and Part XIB contained in the Bill will significantly increase regulatory uncertainty by allowing unfettered regulatory discretion. This will not provide the industry with the guidance and clarity it requires during a period of significant transition.¹⁶

3.14 Other submissions generally supported the changes to Part XIB.¹⁷ The ACTU supported the reform 'because it will prevent those being issued with the notice from being able to delay the process'.¹⁸ Similarly, Pipe Networks pointed out that the change would 'ensure that Telstra's focus is on remedying its anticompetitive conduct

13 A Part A competition notice states that the provider has engaged in certain anti-competitive conduct. A Part B competition notice states that the provider has contravened the competition rule (that is, the prohibition on anti-competitive conduct) - sections 151AKA, 151AL. The two types of notice have different effects in any subsequent legal proceedings. There is no requirement for consultation before issuing a Part B competition notice. See Explanatory Memorandum, p. 53ff.

14 Item 159, amendments to section 151AKA of the Trade Practices Act.

15 Explanatory Memorandum, p. 4; similarly p. 54-55.

16 Telstra, *Submission 88*, p. 4, 11.

17 For example Optus, *Submission 47*, p. 8; Free TV, *Submission 72*, p. 3.

18 ACTU, *Submission 52*, p. 5.

rather than disputing the process by which those notices were issued'.¹⁹ iiNet argued that the proposed changes to Part XIB in fact did not go far enough, asserting that the ACCC should be able to issue binding rules of conduct in relation to anti-competitive conduct.²⁰

Changes to part XIC of the Trade Practices Act

Background on the access regime

3.15 Part XIC of the *Trade Practices Act 1974* (TPA) contains the telecommunications access regime. Under this regime, the ACCC may 'declare' specific telecommunications services. A telecommunications provider that supplies the declared service (an access provider) is obliged to supply it to other telecommunications service providers (access seekers) on request (subject to certain exceptions).

3.16 The terms on which a declared service is supplied are determined by agreement between the access provider and the access seeker. Failing this, the terms are as specified in:

- an access undertaking previously lodged by the access provider and accepted by the ACCC (if there is one); or
- in the absence of a relevant undertaking, a determination by the ACCC following arbitration.

3.17 This is known as the negotiate-arbitrate model.

3.18 The explanatory memorandum specifies that this approach was chosen over more direct methods of setting access terms in order to encourage market-based outcomes. However, determining terms and conditions of access under Part XIC has proven to be time-consuming and litigious. Since the start of the Part XIC regime in 1997, there have been 157 telecommunications access disputes notified, compared with three in other sectors. At March 2009, the ACCC was considering 51 access disputes, all involving Telstra.²¹

Changes to the access regime

3.19 The bill proposes reforms of the regime to allow the regulator to set up-front prices and non-price terms for declared services. The ACCC will issue 'access determinations' for each declared service, with terms and conditions (and any appropriate exemptions or special rules) usually set for a period between three and five years. The regulator will also be able to determine 'fixed principles', such as how depreciation is treated, to remain in force over a longer period if necessary.

3.20 The ACCC will have the power to make binding rules of conduct for the supply of declared services which would apply either in addition to, or as a variation

19 Mr D. Clapperton (Pipe Networks), *Proof Committee Hansard*, 13 October 2009, p. 25.

20 iiNet, *Submission 70*, attachment, p. 6-8.

21 Explanatory Memorandum, p. 45-6.

of, an access determination. The duration of binding rules of conduct would be limited to a maximum of 12 months. The government argues that this will allow the regulator to act quickly on issues affecting the supply of retail services. It is envisaged that binding rules of conduct will only be used on an occasional basis.²²

3.21 Access providers and access seekers may also make 'access agreements'. An access agreement would override an access determination or binding rules of conduct.²³

3.22 The bill also removes the right of appeal to the Australian Competition Tribunal against certain decisions of the ACCC under Part XIC ('merits review').²⁴ The explanatory memorandum states that:

merits review of ACCC decisions under the [Trade Practices Act] can contribute to delays and regulatory uncertainty. This is problematic in the telecommunications sector which is characterised by rapid technological advances and changing market conditions.

3.23 The ACCC's decisions will still be liable to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.²⁵ Substantial support for the proposed reforms was demonstrated in stakeholder responses to the *National Broadband Network: Regulatory Reform for 21st Century Broadband* April 2009 discussion paper.²⁶

Comments in submissions on Part XIC changes

3.24 Submissions to this inquiry generally agreed that the negotiate-arbitrate model has failed. They supported the proposed changes, with some provisos or suggestions noted below. For example Optus said:

The negotiate/arbitrate model under Part XIC has proven to be a failure. It has provided Telstra with both the incentive and means to game the system to its advantage, which has resulted in a merry-go-round of regulatory disputes, delay and legal challenges.²⁷

3.25 Similarly the Australian Telecommunications Users Group said:

22 Item 71ff, amendments to the *Trade Practices Act 1974*. Explanatory Memorandum, p. 3.

23 Item 116, proposed sections 152AY, 152BE. Explanatory Memorandum, p. 138.

24 Item 108 repeals the right of review by the Tribunal of the ACCC's decision in relation to an application for exemption from standard access obligations. Item 128 repeals the right of review by the Tribunal of the ACCC's decision in relation to accepting or varying an access undertaking.

25 Explanatory Memorandum, p. 137.

26 Explanatory Memorandum, p. 51.

27 Optus, *Submission 47*, p. 8.

ATUG supports these amendments to Part XIC to provide more streamlined and timely outcomes which will be of benefit to end users by improving choice.²⁸

3.26 Telstra supported changes to Part XIC of the Trade Practices Act 'that will more closely align it with the access pricing arrangements used in other industries'. However, Telstra argued that the bill 'contains none of the explicit and inherent safeguards for access providers present in other regulatory frameworks'. Telstra argued that the bill gives the regulator much greater discretionary power than in those other industries:

This Bill is highly unusual in that it gives the regulator significant powers without setting out very careful prescriptions on how those powers should be used.

3.27 Telstra also argued that the changes to Part XIC need to be deferred until clear policy guidance to the regulator, along the lines of other industries, is included.²⁹

3.28 Foxtel preferred to retain the negotiate-arbitrate model, and did not think that the ACCC should be able to make upfront determinations.³⁰ BT Investment Management argued that the changes 'are unreasonable and give a role to the ACCC beyond what is reasonable for an independent regulator.'³¹

3.29 The department responded that 'there are quite a lot of criteria set out that the Commission is required to take into account [in making an access determination]...'

For example, under proposed new provision 152BCA, the commission has to take into account 'whether the determination will promote the long-term interests of end users'. That test requires it to have regard to the extent to which the determination will promote competition, achieve any-to-any connectivity and encourage efficient use of and investment in telecommunications infrastructure, having regard to feasibility of supply of services, the legitimate commercial interests of the suppliers of the services and the incentives and risks for investment.³²

3.30 While there was widespread support for Part XIC reform, there were some specific proposals and concerns raised regarding the relationship between access agreements and access determinations; the treatment of exemptions from standard access obligations; the transitional provisions; the removal of merits review; and the need for changes to the regime governing access to facilities.

28 Australian Telecommunications Users Group, *Submission 44*, p. 7. Other supporters of the changes (some with provisos or suggestions) were Mr J. Horan (Primus Telecom), *Proof Committee Hansard*, 13 October 2009, p. 25; ACTU, *Submission 52*, p. 2; Macquarie Telecom, *Submission 69*, p. 3; Austar, *Submission 71*, p. 5; Primus Telecom, *Submission 76*, p. 3.

29 Telstra, *Submission 88*, p. 3.

30 Foxtel, *Submission 98*, pp. 2, 7, 8.

31 BT Investment Management, *Submission 74*, pp 1, 8.

32 Mr R. Buettel (Department of Broadband, Communications and the Digital Economy), *Proof Committee Hansard*, 14 October 2009, p. 28.

Access agreements to prevail over access determinations

3.31 Several submissions were concerned that allowing access agreements to override the ACCC's access determinations would be at risk of abuse by Telstra's market power. For example Pipe Networks argued that the proposals are flawed since 'they allow access seekers' existing contractual agreements with Telstra to trump future terms of access set by the ACCC':

It would be dangerous to allow carriers and access-seekers to contract out of Regulated Terms because of the significant risk that carriers (and especially Telstra), by virtue of its position and superior bargaining power, could exert leverage upon access seekers to induce them to contract out of the Regulated Terms, to the detriment of competition.³³

3.32 Pipe Networks argued that the bill's scheme in which precedence goes to access agreements, in a situation of market power, without access to arbitration, could lead to a result worse than the status quo.³⁴

3.33 Several proposals were put forward in response to this issue. The Competitive Carriers Coalition suggested that access seekers with commercial agreements should be able to revert to ACCC-determined conditions on application. Macquarie Telecom suggested that an access agreement should only prevail over an access determination where the inconsistency is for the benefit of the access seeker. iiNet made similar arguments.³⁵

3.34 The department commented that 'the relationship between access determinations and access agreements will also be given further consideration in the light of submissions provided by a number of parties'.³⁶

Treatment of exemptions from standard access obligations

3.35 Section 152AS of the Trade Practices Act allows the ACCC to grant exemptions from the standard access obligations for declared services via a disallowable instrument. The standard access obligations cover:

- Supply of active declared service to service provider;
- Interconnection of facilities;
- Provision of billing information;
- Timing and content of billing information;
- Conditional-access customer equipment, and

33 Pipe Networks, *Submission 51*, p. 2,6 & *Proof Committee Hansard*, 13 October 2009, p. 26. Similarly D. Foreman (Competitive Carriers Coalition), *Proof Committee Hansard*, 14 October 2009, p. 8.

34 Pipe Networks, *Submission 51*, p. 6.

35 Competitive Carriers Coalition, *Submission 48*, p. 9-10. Similarly Macquarie Telecom, *Submission 69*, p. 4. iiNet, *Submission 70*, attachment, p. 3. Internode, *Submission 73*, p. 2.

36 Department of Broadband, Communications and the Digital Economy, answers to questions taken on notice.

- Exceptions.³⁷

3.36 The bill repeals section 152AS. The need for ordinary exemptions is removed because the ACCC will be able to include provisions in an access determination which remove or limit the obligation of carriers or carriage service providers to comply with some or all of the standard access obligations. Anticipatory exemptions would still be available.³⁸

3.37 In their submission to the inquiry, Unwired Australia noted that:

The application of exemptions to defined geographic areas has been of some recent interest and litigation. There is particular concern in some quarters about the appropriateness of these exemptions, and, in particular, whether the legislative process as subsequently applies sufficiently requires the ACCC to consider the effect on all markets.³⁹

3.38 Unwired Australia recommended that the bill be amended so that an access determination must specify terms and conditions for all declared services, and that the determination not be able to exempt providers from offering the declared service.⁴⁰

3.39 The department responded that:

the bill continues to allow the ACCC to reduce regulation in a targeted manner, by providing that access determinations be able to exempt particular providers or classes of providers from having to provide access to the declared service.⁴¹

Concerns with transitional provisions

3.40 Under the bill the ACCC, if it has started a public inquiry about a proposed access determination, may terminate any arbitration on foot about the related declared service.⁴² Access seekers were concerned that this could create injustice. iiNet suggested that the trigger for terminating an arbitration should be the making of the access determination, not the starting of a public inquiry. Macquarie Telecom suggested that the price terms in the access determination should be backdated to when the access seeker started negotiations with the access provider.⁴³

37 *Trade Practices Act 1974*, sections 152AR, 152AS.

38 Item 94. Item 116, proposed paragraph 152BC(3)(h). Explanatory Memorandum pp. 51, 134. An anticipatory exemption applies to a service that is not yet declared at the time the exemption is made.

39 Unwired Australia, *Submission 55*, p. 13.

40 Unwired Australia, *Submission 55*, p. 13.

41 Department of Broadband, Communications and the Digital Economy, answers to questions taken on notice.

42 Item 154(12).

43 iiNet, *Submission 70*, attachment, p. 4. Macquarie Telecom, *Submission 69*, p. 4.

End of merits review

3.41 The bill repeals provision for merits review of certain ACCC decisions by the Australian Competition Tribunal. The intention of removing merits review in some circumstances is to reduce delays and regulatory uncertainty. The ACCC's decisions will still be liable to judicial review by the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977*.⁴⁴

3.42 Submissions from Telstra's competitors mostly supported this move. For example Optus said:

Today almost all commercial negotiations end up in a dispute before the ACCC, with these disputes in turn appealed to the Australian Competition Tribunal or the Federal court... Optus also argued for the removal of the provisions relating to the lodgement of ordinary access undertakings and merits based appeal processes, on the basis that each of these arrangements has been largely used to frustrate and delay the regulatory decision making processes.⁴⁵

3.43 On the other hand Vodaphone Hutchison Australia, while agreeing that the negotiate-arbitrate model should be abolished, thought that the provisions give too much discretion to the ACCC:

We do not consider that the judicial review process is sufficient for promoting accountability in the Commission's decision. The threshold for identifying errors in law is too high... We consider that an independent merits review is necessary...⁴⁶

3.44 Telstra opposed the end of merits in context of the regulator's wide discretion and the importance of its decisions:

Typically, such rights are only removed where regulators have limited discretion. That is not the case here. Abolishing appeals on the merits of the ACCC's decisions only increases regulatory uncertainty, especially in view of the dramatically expanded powers. Telecommunications will be the only national utility industry in which there is no merits-based review of the regulator's access pricing decisions.⁴⁷

3.45 Foxtel suggested a compromise approach, retaining a more limited form of merits review with time limits and restrictions on the information able to be considered.⁴⁸

44 Explanatory Memorandum, p. 137.

45 Optus, *Submission 47*, p. 8. Similarly Australian Telecommunications Users Group, *Submission 44*, p. 7.

46 Vodaphone Hutchison Australia, *Submission 40*, pp. 1-2.

47 Telstra, *Submission 88*, p. 10. Similarly BT Investment Management, *Submission 74*, p. 8.

48 Foxtel, *Submission 98*, p. 14.

Access to facilities

3.46 A regulatory framework aimed at ensuring fair access for all telecommunications providers to telecommunications transmission towers and underground facilities is legislated in Schedule 1 of the *Telecommunications Act 1997*. Pipe Networks noted that this facilities access regime 'exists independently of the regime for access to 'declared services' in Part XIC of the Trade Practices Act 1974' and that 'Both Schedule 1 and Part XIC presently adopt a 'negotiate-arbitrate' model'.⁴⁹ Pipe Networks argued that the negotiate-arbitrate model under the Telecommunications Act 'suffers from the same failings as that in Part XIC' and that access to facilities legislated in Schedule 1 was potentially more relevant to the National Broadband Network (NBN) than that under Part XIC:

Of the nine services currently declared under Part XIC, six of those services relate to services supplied using legacy copper cables which may be rendered obsolete by the currently preferred Fibre-To-The-Premises (FTTP) model for the National Broadband Network (NBN).

In contrast, access to duct will be a vital component of the NBN. Access to telecommunications towers (for the deployment of fourth generation wireless services to provide coverage of 'gaps' in FTTP infrastructure) is also likely to be a significant part of the NBN. Access to both these types of facility is regulated by Schedule 1 and not Part XIC.⁵⁰

3.47 On that basis, Pipe Networks and Macquarie Telecom both recommended that the negotiate-arbitrate model under Schedule 1 of the Telecommunications Act should also be amended by the bill.⁵¹ The department commented that regulation of access to telecommunications facilities is being considered separately.⁵²

Other matters

3.48 iiNet was concerned that the provisions about access determinations and binding rules of conduct may not allow urgent action to add to the terms of an existing access determination which does not cover the field. It suggested that the ACCC's power to make interim determinations, or binding rules of conduct, should be extended to cover this situation.⁵³

3.49 iiNet suggested that when holding a public inquiry on a proposed access determination, the ACCC should be able to consider all previous inquiries under Part XIC, not only previous inquiries on access determinations.⁵⁴

49 Pipe Networks, *Submission 51*, p. 3.

50 Pipe Networks, *Submission 51*, p. 4.

51 Pipe Networks, *Submission 51*, p. 4; Mr Matt Healy, National Executive, Regulatory and Government, Macquarie Telecom, *Committee Hansard*, 13 October 2009, p. 26.

52 Department of Broadband, Communications and the Digital Economy, answers to questions taken on notice.

53 iiNet, *Submission 70*, attachment, p. 4.

54 iiNet, *Submission 70*, attachment, p. 4.

3.50 Unwired Australia suggested that the ACCC should be able to make fixed principles determinations that are to operate across all access determinations during their period of currency.⁵⁵

Committee comment on changes to the Trade Practices Act

3.51 The committee accepts the strong evidence of the need to reform the negotiate-arbitrate model, and notes that most submitters support the bill's proposals.

3.52 The committee believes that some issues raised by submitters, particularly access-seekers, may present opportunities to further improve the regulatory framework. In the time available, the committee was not able to form a view about the detail of some of these proposals and how any amendments might be framed. Areas in which the committee thought there was a particular need to carefully examine submitter concerns were the circumstances under which access agreements will prevail over access determinations, and the retention of the negotiate-arbitrate model in the facilities access regime in Schedule 1 of the *Telecommunications Act 1997*.

Consumer safeguards

3.53 Numerous submitters were supportive of the proposed changes to consumer safeguards.⁵⁶ ATUG voiced their support for 'stronger Consumer Safeguards and the new approach of using performance benchmarks', whilst Macquarie Telecom acknowledged that a 'consumer protection approach' would give consumers greater choice and control over their telecommunications.⁵⁷

3.54 The Australian Communications Consumer Action Network (ACCAN) was supportive of the government's move to address the vertical integration of Telstra⁵⁸ but was concerned that the bill did not go far enough with regard to consumer safeguards.⁵⁹ ACCAN recommended that:

...the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 be amended to redefine the definition of the Standard Telephone Service and to re-frame the LTIE so as to better serve the interests of end-users, whether consumers or business.⁶⁰

55 Unwired Australia, *Submission 55*, p. 12.

56 See Mr Andrew Sheridan, Optus, *Proof Committee Hansard*, 13 October 2009, p. 17; Mr John Horan, General Manager, Legal and Regulatory, Primus Telecom, *Proof Committee Hansard*, 13 October 2009, p. 26; Mr Matt Healy, National Executive, Government and Regulatory, Macquarie Telecom, *Proof Committee Hansard*, 13 October 2009, p. 26; Mr David Havyatt, Manager, Regulatory and Corporate Affairs, Unwired Australia, *Proof Committee Hansard*, 13 October 2009, p. 26.

57 Mr Matt Healy, National Executive, Government and Regulatory, Macquarie Telecom, *Proof Committee Hansard*, 13 October 2009, p. 25.

58 Mr Allan Asher, Chief Executive Officer, ACCAN, *Proof Committee Hansard*, 13 October 2009, p. 53.

59 ACCAN, *Submission 91*, p. 3.

60 ACCAN, *Submission 91*, p. 5.

3.55 ACCAN also proposed that the compensation payment mechanism be automated, to increase the incentive on service providers to respond to problems in a timely manner:

Service guarantees, standards, benchmarks and all that are a good idea, but I would still leave in there a sufficient incentive for suppliers to get things right by providing for compensation payments where they fail to do what they promise to do—where they fail to turn up to install, to repair and things like that. These days most people are in the workforce or getting back into the workforce, and it is actually quite costly to have time off work to be at home, and doubly frustrating when technicians do not come, so it is appropriate for there to be compensation payments. In order to be efficient, I would make them automatic so that a service failure automatically gives rise to an obligation on the supplier to make those compensation payments without a consumer having to go through a whole bureaucracy to establish that.⁶¹

3.56 The committee notes the government appears to be aware of this issue, and has responded to it in the current proposals through increased clarity and enforcement of penalties. The explanatory memorandum comments that 'by increasing civil penalties in some cases, carriers will be more likely to comply with the obligations rather than pay compensation'.⁶² The committee also draws attention to the fact that the explanatory memorandum specifically says that more extensive actions to expand the scope of the universal service regime could occur in future.⁶³

Conclusion

3.57 The committee believes that the bill in its current form provides important and timely reforms to Australia's telecommunications regulatory regime that will be of benefit to providers and consumers. While further examination of issues raised above is warranted, the committee believes that the passage of the bill should not be delayed. In particular the committee notes the view, held by some stakeholders, that the legislation should be delayed until the results of the National Broadband Network implementation study are known. However the regulatory regime will operate regardless of the results of that study, and must be improved for consumers and carriers as soon as possible. The National Broadband Network should not be used as an excuse to delay reforms and to increase regulatory uncertainty.

3.58 Based on the answers to its questions on notice, the committee believes the government has recognised the concerns of stakeholders outlined above, and is examining them carefully. The committee asks that the minister address these concerns during consideration of the bills in the Senate.

61 Mr Allan Asher, Chief Executive Officer, ACCAN, *Proof Committee Hansard*, 13 October 2009, p. 54.

62 Explanatory Memorandum, p. 74.

63 Explanatory Memorandum, p. 74.

Recommendation 1

3.59 The committee recommends that the bill should be passed.

**Senator Anne McEwen
Chair**

Coalition Senators Dissenting Report

Coalition Senators have serious concerns about the proposals contained in the Bill and the Government's claims about the urgency of the measures.

It is concerning that the majority report has almost entirely ignored the weight of the evidence presented to the Committee about this legislation. The vast majority of submissions to this inquiry are opposed to the provisions in the Bill that deny Telstra access to spectrum unless it enters a structural separation undertaking. The hostility to this legislation is evident throughout the submissions encapsulated by Synstrat Management who state that the "proposed legislation is morally abhorrent".¹

National Broadband Network (NBN)

There is no mistaking that this Bill is primarily about ensuring the Government's proposed National Broadband Network can work by forcing the participation of Telstra.

Labor's attack on Telstra and its shareholders via Part 1 of Schedule 1 of this Bill, is a form of legislative blackmail that we believe can only be seen as an admission that its new NBN policy cannot be implemented without effectively re-nationalising Telstra's fixed-line network.

Labor doesn't want its NBN to have to compete with Telstra; it wants its NBN to be a majority Government-owned monopoly. The Government recognises that Telstra's fixed line customers are its most valuable asset and requires their migration onto the NBN in order for it to have any chance of being viable.

The Second Reading Speech does not disguise this aim. In relaying the "options" open to the Company, Minister Albanese told the House that:

Alternatively, it may involve Telstra progressively migrating its fixed line traffic to the NBN over an agreed period of time and under set regulatory arrangements and for it to sell or cease to use its fixed line assets on an agreed basis. This approach will ultimately lead to a national outcome where there is a wholesale only network not controlled by any retail company—in other words, full structural separation in time. Such a negotiated outcome would be consistent with the wholesale only, open access market structure to be delivered through the National Broadband Network.²

The evidence presented to the Committee from those supportive of the legislation, left Coalition Senators in no doubt that these legislative proposals are inextricably related to the NBN.

¹ Synstrat Management, Submission, p 1

² A. Albanese, House of Representatives Hansard, 15 September 2009

The Competitive Carriers Coalition CEO, David Forman, confirmed this during the Senate Committee hearing when he said in response to a question from Senator Birmingham:

If you suggested to me that the NBN was likely to succeed in the absence of this legislation, then I would suggest that was a pretty big bet.³

Maple-Brown Abbott describe the bill as:

a high risk strategy to deliver the NBN and more competition in the telecommunications sector. It runs the risk of damaging Australia's sovereign risk rating as well as stifling investment and innovation in the telecommunications sector. It places too much power in the hands of the ACCC.⁴

Significance of the NBN Implementation Study

Minister Albanese stated during the second reading speech that:

The establishment of the NBN will fundamentally transform the competitive dynamics of the communications sector in this country. NBN Co. will be a wholesale only telecommunications provider with open access arrangements.⁵

The NBN Implementation Study is due in February 2010. The Implementation Study is set to provide clarity on how the NBN roll-out will actually occur, how much it will cost taxpayers, how long it will take and how much consumers can expect to pay for the NBN's services.

Senator Conroy has previously outlined to the Committee the intent of the Government's Implementation Study. During Budget Estimates, he told the Committee that:

The government will shortly commence its implementation study, which will, among other things, work through the detailed network design and rollout schedule for the NBN. It will also investigate the extent of coverage that will be achieved by FTTP, next generation wireless broadband and satellite elements. That implementation study is due for completion in early 2010.⁶

The Coalition has asked a range of questions about the NBN roll-out and each time the Government has used the guise of the Implementation Study to avoid providing further information. Some examples include:

³ Hearing, 14 October 2009, ECA 10

⁴ Maple-Brown Abbott, Submission, p 3

⁵ A. Albanese, House of Representatives Hansard, 15 September 2009

⁶ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 126

- **Pricing**

Senator Conroy, Senate Question Time 14 May 2009:

The government recognises that affordability is an important factor that will drive take-up of services on the NBN. NBN prices cannot be structured without considering the prices people pay today for comparable services. Pricing levels on the National Broadband Network will be a key issue considered in the Implementation Study.⁷

Budget Estimates, 26 May 2009:

Senator MINCHIN— Can you guarantee that the wholesale fixed line prices will be no higher than they currently are?

Senator Conroy—That is why we are having an implementation study.⁸

- **Costs and Financing**

Budget Estimates, 26 May 2009:

Senator MINCHIN - Thank you. I turn to the costing. We did touch on this \$43 billion and the basis on which you came to that costing. Are you able to give the committee at least some breakdown of that \$43 billion in terms of wages, equipment, capital and expenditure?

Senator Conroy—The implementation study is examining most of those issues.⁹

In an answer to a Question on Notice asked by Senator Abetz, Senator Conroy provided the following answer on 17 August 2009¹⁰:

What is the total Federal Government contribution to its cost?	To be determined as part of the Government's consideration of the Implementation Study.
If applicable, what other funding sources are involved and what is their contribution to the project cost?	Private sector funding will be sought to invest in the company established to build and operate a new National Broadband Network. Strategies to maximise private sector investment will be investigated as part of the Implementation Study which will report in early 2010.
Is the project to be completed in stages/phases; if so, what is the timing	The rollout will be phased. The Tasmania element will commence first.

⁷ Senate Hansard, 14 May 2009

⁸ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 143

⁹ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 116

¹⁰ Senate Hansard, 14 August 2009

and cost of each stage/phase?	<p>Negotiations are currently in progress. Projects under the \$250 million Regional Backbone Blackspots Program are expected to commence in the first half of 2009-10.</p> <p>The phasing and associated costs for the full rollout will be developed as part of the Implementation Study.</p>
What cost benefit or other modelling was done before the project was approved?	<p>Costings were developed in consultation with and validated by the Department of Finance and Deregulation. The Government has commenced the process to undertake a detailed Implementation Study that will include business case modelling.</p>

- **Rural and Regional Australia**

ECA Committee, Budget Estimates, 26 May, 2009:

Senator BIRMINGHAM—Are you basically saying when you talk about the NBN process—which we have learnt in the past 18 months or so, of course, is a bit like the piece of string that never ends—that regional Australia could be waiting 10-plus years to see the remaining \$325 million spent anywhere?

Senator Conroy—The regional review recommended to government that responses relating to the NBN are held until the outcome is fully known.

Senator BIRMINGHAM—How do you define what the outcome being fully known of the NBN is?

Senator Conroy—At this stage, the final outcome is not known.

Senator BIRMINGHAM—That is plainly obvious for all to see.

Senator Conroy—It is a matter of ongoing discussions between ourselves and the Tasmanian government. It is a matter of an ongoing tender process to be commenced shortly for the Regional Backhaul Blackspots program. It is an ongoing process of the implementation study which will report in February next year. It is an ongoing discussion with satellite, wireless and fibre owners at the moment to meet the national broadband network proposal. All of those are ongoing. What we have said is that the project will take up to eight years. We have not tried to pretend that this is anything other than the largest infrastructure project in Australia's history.

Senator BIRMINGHAM—Will the outcome be known at the end of the scoping study in February next year or will it not be known for eight years when all your targets are met?

Senator Conroy—It is an implementation study.

Senator BIRMINGHAM—That is right, you are not doing a scoping study.

Senator MINCHIN—No, they are not bothering with that.

Senator BIRMINGHAM—Sorry about that.

Senator Conroy—It is an implementation study which will recommend to the then board how to implement our proposal to round out all of those issues, which have been legitimately raised by not only yourselves but also many in the sector. We are not going to rush simply because you are demanding we have an outcome before we actually have it, just because you are demanding it.¹¹

Senator BIRMINGHAM—No, at what point in all of these different processes will the

Glasson requirement for an outcome to the NBN be met? What do you define to be the outcome?

Senator Conroy—We will see what the implementation study provides to us and then we might be in a better position to make an assessment along the lines that you are calling for. At that point we will be able to make an assessment of the question you are asking.¹²

Senator FISHER—Will the study have a map of who will be covered, where and why?

Senator Conroy—The implementation study is designed to generate the configuration of the network.¹³

- **Cabling, aerial deployment, shareholdings**

Senate Question Time, 16 June 2009:

Senator Minchin: I ask the minister what assumption was made regarding the degree to which aerial cabling would be used in relation to the government's cost estimate of \$43 billion for its NBN mark 2. Does the minister agree with Optus that the estimated cost of the project—that is, \$43 billion—will mean at least 70 per cent aerial deployment nationwide?

Senator Conroy: but let me be clear: we have said we are having an Implementation Study to go through all of these issues. We have said that from day one, and we do not resile from that. We are in negotiations which will allow us to be definitive on that. Depending on whether one

¹¹ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 34-35

¹² ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 35

¹³ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 126

company or another company is involved, we will change this equation.¹⁴

ECA Committee, Budget Estimates, 26 May, 2009:

Senator MINCHIN—The government has indicated a minimum shareholding of 51 per cent. Has the government indicated a maximum shareholding in this company? Currently it owns all the shares.

Mr Lyons—The government has indicated that there will be retail ownership caps yet to be determined. Other issues relating to the structure of the company will be finally determined after the implementation study.¹⁵

ECA Committee, Supplementary Budget Estimates, 19 October 2009

Senator MINCHIN—So, up to \$2 billion. At this stage, the maximum equity that the government will put into NBN Co. is \$2 billion?

Senator Conroy—Under that mechanism, yes.

Senator MINCHIN—There has been no other decision to make any other moneys available, has there? I am not saying there might not be in the future, but to this point this is the only mechanism?

Senator Conroy—We have indicated that we will issue bonds.

Senator MINCHIN—No, I am talking about equity.

Senator Conroy—NBN Co. will, potentially, issue bonds. What was the time profile of the other equity?

Mr Heazlett—It is over a number of years.

Senator Conroy—Over a number of years.

Mr Heazlett—It is an issue that will also be dealt with as part of the implementation study as the appropriate mechanisms to utilise.¹⁶

All this evidence points to a Government that announced a massive spending proposal without any detail to support it.

And despite the fact they have been unable, or unwilling to answer a single question about the NBN roll-out, they expect the Parliament to tick-off on significant changes to the telecommunications sector in a truncated period of time.

The Minister's Second Reading speech indicated that the measures are "*designed to position the telecommunications industry to make a smooth transition to the NBN environment as the new network is rolled out.*"¹⁷

¹⁴ Senate Hansard, 16 June 2009

¹⁵ ECA Committee, Budget Estimates Hansard, 26 May 2009, ECA 112

¹⁶ ECA Committee, Budget Estimates Hansard, 19 October 2009, ECA 66

¹⁷ Albanese, House of Representatives Hansard, 15 September 2009

Yet, until we know how this network will be rolled out, it is the view of Coalition that it is premature for the Parliament to consider the reforms that affect the structure and operation of Telstra.

Urgency before Christmas

In answer to Questions from Senator Ian Macdonald at Estimates on 19 October 2009, the following exchanges took place:¹⁸

Senator IAN MACDONALD—Telstra told us the other day that they are hopeful of coming to some negotiated settlement with you shortly, and I am wondering if you can update us—without, of course, giving away anything that is commercial-in-confidence—on what is the necessity for the bill that is currently before the parliament being passed before Christmas, and how are the negotiations going?

Senator Conroy—As I have said many times publicly, I am not going to be giving a day-by-day description of how negotiations are going other than to generally say—

Senator IAN MACDONALD—We do not want it every day, just this one day.

Senator Conroy—Today is part of every day.

Senator IAN MACDONALD—All right.

Senator Conroy—I would say what I have said consistently, which is that discussions are constructive and positive. In terms of wanting to resolve it before Christmas and pass the legislation, it is very simple; there is a great deal of regulatory overhang on the Telstra share at the moment and Telstra shareholders are very concerned about that. We are seeking to end the regulatory uncertainty around Telstra and the sooner that that can be done the better. We believe that dragging it into next year will not be to the benefit of the market as a whole or, importantly, Telstra shareholders.

Senator IAN MACDONALD—Of course, that is not Telstra's view. I thought they were more into you—

Senator Conroy—You asked me my view. I am giving you my view.

Senator MINCHIN—Are you telling Telstra what is good for Telstra?

Senator IAN MACDONALD—Telstra shareholders—that is the point. Wouldn't Telstra know what is best for Telstra shareholders?

Senator IAN MACDONALD—Could you answer the question?

Senator Conroy—the Telstra share price dropped nearly 40 per cent.

Senator IAN MACDONALD—So you know what is better for Telstra shareholders?

Senator Conroy—No, I am simply making the point that at the moment the market would say to you, if you go and read any analyst's report, that there is

¹⁸ ECA Committee, Budget Estimates Hansard, 19 October 2009, ECA 68-69

an enormous amount of regulatory overhang and if that were cleared up by Christmas I am sure every Telstra shareholder would be relieved.

Senator IAN MACDONALD—That is not what the shareholder associations all told us.

Senator Conroy—So they are now speaking on behalf of Telstra shareholders!

Senator IAN MACDONALD—Well, that is what they are; they are Telstra shareholders.

Senator BIRMINGHAM—That is not what Telstra told us; they would expect to be speaking on behalf of their shareholders.

This exchange shows there is no real argument for passage this year and in fact, a delayed passage may well resolve many of the issues for both the Government and Telstra.

Structural Separation of Telstra

As recently as May 2009 the Minister told the Committee that he had never advocated structural separation of the Telstra:

Senator Minchin: I am asking you whether you would rule out forced structural separation?

Senator Conroy: I am not advocating it. I have never advocated it. I think I can say that but –

Senator Minchin: Interestingly you have never actually advocated separation, as far as I can tell.

Senator Conroy: I have certainly never advocated structural separation, I do not believe. I think that is a true statement. What I have said, though, is that the existing regime is not satisfactory.¹⁹

Coalition Senators are concerned that the Minister's position changed so rapidly.

Coalition Senators note that Labor did not propose structural separation in its 2007 election policy, nor has it ever before proposed breaking-up Telstra.

Coalition Senators believe that the proposals in the Bill to either impose functional separation and potentially prevent Telstra accessing advanced spectrum, or to structurally separate and still risk forced divestment in its HFC cable network and its Foxtel interests, are an extreme and unacceptable way of forcing a publicly listed company to the negotiating table.

These choices offered in the Bill appear to have been structured by the Government to offer little more than a 'Clayton's choice'. The Government is on the record as saying that it is their 'clear desire that structural separation occur voluntarily'. During this inquiry it became clear from the way the Department responded to questions about legal advice and compensatory risks faced by the Commonwealth that this choice has only been structured to reduce the legal risk to the Commonwealth. The Government

¹⁹ ECA Budget Estimates, 26 May 2009, ECA 162

will clearly use the full force of this Bill to force structural separation, ideally through the transfer of assets into its NBN, however possible.

Foxtel also raised their concern about the discretion given to the ACCC stating that the *“Bill does not set any limits on the Commission’s power to accept or reject an undertaking for Telstra to divest its interest in its HFC Cable or Foxtel.”*²⁰

In relation to divestiture of assets, we believe that this is a matter for shareholders and the Minister should not be given the discretion to require such divestiture, or not, in connection with a structural separation undertaking.

In its submission to the NBN Regulatory Reform discussion paper, even the ACCC was not convinced of the merits of divestiture of Telstra’s HFC network in advance of the completion of the Implementation Study. The ACCC said in their submission:

Therefore, the ACCC considers that the size of the benefits that would flow from the divestiture would, in the longer term, depend on the way in which the NBN is implemented, including the nature of any involvement by Telstra in the NBN Co.²¹

Spectrum Threat

Of particular concern to Coalition Senators is the Bill’s proposal to legislatively prevent Telstra from acquiring specified bands of spectrum which could be used for advanced wireless broadband services.

This can be seen as nothing more than attempted legislative blackmail given that the mobile and wireless market is highly competitive in Australia with Telstra’s network competitors actually having the majority of the market share.²²

As many submissions to the Senate inquiry have pointed out, and as was explained by Telstra in its evidence to the Committee, denying Telstra future advanced spectrum will mean there is no upgrade path to a higher speed and capacity next generation network.

Given Telstra has the largest network in the country, in terms of geographical coverage, this is likely to have greatest impact on rural and regional customers. In its submission responding to the Government’s regulatory reform discussion paper, the ACCC advised that *“no specific legislative changes are required to address competition concerns in relation to the allocation of spectrum.”*²³

As Telstra highlighted in their submission to the inquiry:

²⁰ Foxtel Submission, p 6

²¹ ACCC Submission, NBN Regulatory Reform Discussion Paper, p 9

²² ACCC *telecommunications reports 2007–08 Report 1*, 2009, p 33

²³ ACCC Submission ‘National Broadband Network: Regulatory Reform for 21st Century Broadband’ June 2009, p 84

Taking Telstra out of the market for next generation spectrum will make the mobile market less competitive and punish the telecommunications company that has not only led innovation but invested in the world's fastest mobile wireless network covering 2.1 million square kilometres.

Denying Telstra access to spectrum will undoubtedly hurt consumers, particularly those in rural and remote Australia, by depriving them of an upgrade path with reduced competition and innovation. It will put at risk Australia's place as a global leader in the mobiles market.²⁴

Former ACCC chair Allan Fels is reported as saying that if the Government was fully covered under the Trade Practices Act the spectrum threat would likely amount to an abuse of market power.²⁵

The Government itself in the Explanatory Memorandum of this Bill acknowledges that there could be a loss to taxpayers if Telstra is not allowed to participate in spectrum auctions through reduced competitive tension.²⁶

And if Telstra is unable to further upgrade its mobile network, this could reduce the incentive for its competitors to also invest in next generation upgrades of their mobile networks.

Synstrat Management view this legislative proposal as:

Legal trickery in attempting to coerce Telstra to divest its assets under threat of being forbidden from bidding for 4G frequency spectrum, and therefore curtailing the long-term competitiveness of its mobile telephone network is an unethical way for the government to conduct its business.²⁷

Sovereign Risk

The Government cannot ignore the overwhelming concerns expressed by Telstra shareholders through this inquiry, nor can they ignore the concerns expressed by well-respected investment and management firms about this heavy-handed legislation. Coalition Senators believe the evidence presented to the Committee raises serious concerns that the Government must address.

In its submission, the Australian Foundation Investment Company (AFIC) stated:

If the Parliament passes this legislation we think Australia's investment standing could be significantly diminished. Investors, particularly international investors, will perceive substantially heightened sovereign risk if the Australian Government can act arbitrarily in this way.²⁸

²⁴ Telstra Submission, p 3

²⁵ 'New Telco 'Monopoly' faulted', *The Australian*, 17/09/09, p 2

²⁶ Explanatory Memorandum, 44

²⁷ Synstrat Management, Submission, p 1

²⁸ Australian Foundation Investment Company, p 3

AFIC are not alone in their concern about this Bill. BT Investment Management Ltd expressed similar concerns about investment certainty in stating that:

We consider that the Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2009 (the Bill) goes beyond well established regulatory practice and undermines independent regulation of the telecommunications sector by the Australian Competition and Consumer Commission. Our concerns are that the proposed legislation creates additional and unnecessary regulatory risk and so complicates risk assessment for investment purposes and potentially raises sovereign risk for our Telstra share holding.²⁹

The Australian Shareholders Association also highlighted their concerns in their submission:

The ASA is concerned not just about the value destroying nature of the proposal for Telstra shareholders, but also about the implications for investment generally. International investors in particular will consider Australia to have a much higher level of sovereign risk if this Bill is passed and the Government allowed to impose its will on a private company. Investors, both small and large will consider that the level of risk of Government or regulator intervention when investing in highly regulated industries is increased by this decision. In addition the decision is likely to impact the confidence the market will have in future privatisations.³⁰

Further, Maple-Brown Abbott strongly expressed their concern about the precedent established by this Bill:

The effects of the Bill are unprecedented in this country. If investors become concerned about exposure to acts of Government such as legislative and regulatory impositions, it could have a detrimental impact on the valuation of many financial assets, not only Telstra and the wealth of its 1.4 million shareholders. Of major concern is that the Bill may damage Australia's sovereign risk rating.³¹

And Packer and Co Ltd stated:

As international investors, we spend a great deal of time thinking about sovereign risk in our capital allocation decisions. We can assure you that the Government's actions will be closely monitored by the global investment management community.³²

²⁹ BT Investment Management Ltd Submission, p 2

³⁰ Australian Shareholders Association Submission, p 3

³¹ Maple-Brown Abbott, Submission, p 2

³² William Packer, Packer & Co Ltd, Submission, p 2

Access arrangements

Coalition Senators support sensible reform to improve existing competition provisions in the telecommunications sector.

However, given the evidence presented to the Committee, we are concerned about some of the proposed amendments to the *Trade Practices Act* and the level of discretion that is handed to the regulator, the Australian Competition and Consumer Commission (ACCC).

Particularly, Coalition Senators note that the powers given to the ACCC seem unjustified in relation to even the suggestions put forward by the ACCC to the NBN Regulatory Reform Discussion Paper.

Coalition Senators have concerns about the total removal of merits review in relation to regulatory decisions under part XIC. We are also significantly concerned about the Government's proposal to waive procedural fairness.

Again, concerns were raised about these amendments during the Senate inquiry.

Vodafone Hutchinson indicated that the Bill should include provisions for a merits review of the ACCC declaration and/or determination.³³

Foxtel's submission has focussed on the amendments to the TPA and they state that:

The Draft Bill proposed dramatic changes to the regulatory regime governing the telecommunications industry despite the Government not having undertaken a rigorous analysis or inquiry into whether there has been significant market failure justifying such changes".³⁴

"The proposal to give the Commission the broad power to make interim access determinations without giving affected parties procedural fairness is contrary to well established principles equally of good public policy and administrative law designed to protect against arbitrary decision making."³⁵

In relation to the abolition of merits review, BT Investment Management Ltd stated:

As investors in Australian telecommunications we consider there are huge risks in allowing the ACCC to set prices up front without any right of appeal. Ordinarily in a market price setting is a right that follows investment, and in turn is instrumental in driving investment. The ACCC is not a market player; it does not make investment decisions and it does not face investment risk.³⁶

³³ Vodafone Hutchinson Australia, Submission, p 1

³⁴ Foxtel Submission, p 1

³⁵ Foxtel Submission, p 2

³⁶ BT Investment Management Ltd Submission, p 9

Vodafone Hutchinson highlight their concerns with the broad powers given to the ACCC under the proposals. They state in their submission to the inquiry that:

We are concerned, however, that the move to strengthen and streamline the access regime provides too much discretion to the Australian Competition and Consumer Commission (the Commission), with too little accountability.³⁷

Vodafone Hutchinson also highlight the potential conflict of interest that exists due to the ACCC's responsibility for "*both building the case for an access determination and assessing its merits*" and that "*the benefits from a merits review process exceed the costs associated with regulatory uncertainty of delays*".³⁸

Coalition Senators strongly agree with the views of Foxtel regarding the abolition of procedural fairness.

...the proposal to give the Commission the broad power to make interim access determinations without giving affected parties procedural fairness is contrary to well established principles equally of good public policy and administrative law designed to protect against arbitrary decision making.³⁹

Consumer Measures

The Coalition supports sensible measures to ensure consumers are given appropriate protections and support in their telecommunications choices.

Coalition Senators note that these consumer measures are scheduled to commence on 1 July 2010.

In relation to the Universal Service Obligations (USO), Coalition Senators want to ensure that the arrangements underpinning the USO are strong in order to ensure rural and regional Australians have access to quality and affordable telecommunications services.

However, Coalition Senators strongly believe that the NBN will require a thorough and comprehensive review of the USO regime. Even the Government has acknowledged that issues surrounding the USO would be considered when the NBN roll out was determined.⁴⁰

The Explanatory Memorandum (EM) entirely contradicts the Government's proposed timing for this Bill. The EM States:

³⁷ Vodafone Hutchinson Australia, Submission, p 1

³⁸ Vodafone Hutchinson Australia, Submission, p 2

³⁹ Foxtel, Submission

⁴⁰ Communications Day, 22 October 2009, p 2

Broadening universal service arrangements at this time could lead to significant higher costs that may be avoided if the reforms were deferred until after the detailed operating arrangement for the NBN had been settled.

The Government has announced that once the detailed operating arrangements for the NBN have been settled, the Government will consider the broader range of issues associated with the delivery of universal access in an NBN environment.⁴¹

It also specifically states that: “*Future USO arrangements will be considered once the detailed operating arrangements for the NBN have been settled in early 2010.*”⁴²

We therefore think on balance that it makes more sense to await the Implementation Study, which if completed on schedule, will not delay the 1 July 2010 commencement of these measures, to ensure that the USO does reflect the operating environment created by any NBN roll-out.

Conclusion

Coalition Senators believe that the structure of Telstra is a matter for Telstra and its shareholders.

The Government’s decision to hold a gun to the head of the company is a concerning precedent that has raises sovereign risk questions about the Australian investment climate.

The threat to starve Telstra of future advanced mobile and wireless spectrum will harm rural and regional customers and will reduce competition in a highly competitive market.

While Coalition Senators strongly support sensible reforms to ensure competition improvements in the telecommunications market, we have concerns about the discretion this Bill gives to the Minister and ACCC, particularly through the proposed waiver of procedural fairness and the removal of merits review of regulatory decisions made by the ACCC under part XIC.

Given the proposed expansion of powers to the Minister and ACCC proposed by this Bill, Coalition Senators support continued consideration of areas in which the Bill can be improved.

Recommendation

Coalition Senators recommend that further consideration of this Bill not proceed until after the NBN Implementation Study has been completed, the Government

⁴¹ Explanatory Memorandum, p 66

⁴² Explanatory Memorandum, p 80

has tabled its response to the Implementation Study and the Senate has certainty about the network structure of NBN Co and the regulatory framework which will surround it.

Should debate proceed in advance of the completion of the Implementation Study, the Bill should be amended to address the significant concerns raised with the Committee.

**Senator Simon Birmingham
Senator for South Australia**

**Senator the Hon. Nick Minchin
Senator for South Australia**

**Senator the Hon. Ian Macdonald
Senator for Queensland**

**Senator Mary Jo Fisher
Senator for South Australia**

Additional Comments submitted by Senator Scott Ludlam for the Australian Greens

The Australian Greens welcome the opportunity to begin the process of reversing the worst consequences of the privatisation of Telstra. The main aim of the bill is to address the horizontal and vertical integration of Telstra, which has allowed the incumbent to unfairly exercise market power, ultimately to the detriment of the public interest. While the Telstra board will decide which form of separation the company will undergo, the most likely outcome will be a return to public hands of key network infrastructure which should never have been sold in the first place.

The amendments the Greens will propose to this bill are intended to strengthen the rights of three distinct interest groups, namely:

- The end-users – 22 million Australians who will use the services carried over telecommunications networks, but most particularly users in rural and regional areas.
- The greatest diversity of market participants – to ensure that the playing field is level
- The workforce of Telstra, protecting their interests during the transition period.

Principles with which the Greens have approached this bill:

- The importance of telecommunications as an essential service, and the responsibility of providers to uphold universal service obligations;
- The potential for low-cost, fast broadband to improve economic prosperity, the delivery of education and medical services, strengthen social and professional networks and increase Australia's integration and participation in the international community ;
- The need to bridge the digital divides in Australia based on wealth and geography;;
- The importance of diversity in telecommunications markets, and the need to restrain large players from abuse of market power;

- Public ownership and control of natural monopoly components of telecommunications networks.

Greens position on the bill:

The Greens seek Government agreement on the following amendments:

- **Protection of Telstra workforce**

The bill is currently silent on the impacts of functional or structural separation on the Telstra workforce. The Greens believe it is essential to protect the rights and entitlements of Telstra's workforce to ensure no-one is worse off after the adjustments to Telstra's structure.

- **Protection of the rights of end-users**

The debate over the future of Telstra (and the market structure of the proposed NBN) has tended to overlook the rights of the people who will ultimately use the telecommunications services - the end-users. For this reason the Greens will propose amendments which broaden the definition of 'Standard Telephone Service' to cover the much larger array of telecommunications services which now exist, and we will move to make compensation payments liable under the Customer Service Guarantee (CSG) automatic rather than relying on customers to apply.

In particular these amendments will strengthen services in regional areas where services have traditionally been patchy or non-existent.

- **Access determinations to prevail over access agreements, by application**

As suggested by the Competitive Carriers Coalition and others, access seekers with prior commercial agreements should be able to fall back on later access determinations made by the ACCC, creating in effect a 'no disadvantage test' in access agreements.

- **Independent review of amendments to the TPA after 3 years** to examine whether the access regime is functioning appropriately. This bill grants very wide discretion to the ACCC, to the degree that rights to procedural fairness and access to merits review by the Australian Competition Tribunal have been removed. The Greens acknowledge the reasoning behind these amendments but remain concerned that in solving one problem (removing the ability of the incumbent to mire access determinations in endless procedural delays) we will

have removed two avenues of redress which the industry may later regret. A formal review will allow the Government to assess whether the new access regime is functioning well.

Senator Scott Ludlam
Senator for Western Australia

Additional Comments - Senator Fiona Nash

- Many of those submitting to this inquiry have expressed their support for the separation legislation. A number of submissions overwhelmingly indicated that Telstra's level of vertical integration and consequent monopoly has been detrimental to competition in the telecommunications industry. The submission from the Australian Telecommunications Users Group (ATUG) is a clear example of how the lack of competition has led to higher prices for the consumer.
- ATUG made the point very clearly that they believe regional Australia stands to be a beneficiary from a more effectively competitive market structure.
- The central arguments from those submissions that oppose the bill are that separation will discourage investment or cause losses; and that separation transitional costs are too high for Telstra. In my view this reflects short term thinking. Companies in other jurisdictions that have undergone separation have adapted to, and in some cases welcomed, their new regulatory environment.
- As highlighted by the Department of Broadband, Communications and the Digital Economy, the three Telstra sale prospectuses were clear about the potential of regulatory changes in the telecommunication sector that might affect Telstra's competitive position.
- Having attempted measures to encourage operational separation of Telstra in 2005, it is apparent that that policy did not yield the results hoped for in terms of allowing for greater competition. Therefore, stronger separation is the only logical way forward.
- I agree with the conclusion that previous "negotiate and arbitrate" models in dealing with access by the ACCC have not been effective. The changes regarding this in the legislation are a welcome step forward.
- Evidence to the inquiry showed that there was agreement for the consumer safeguards in the bill. I believe these safeguards will prove efficient protection mechanisms, particularly for regional areas.

- In 2005 the Page Research Centre, through the Regional Telecommunications Inquiry, identified there was a lack of competition in the telecommunications sector in rural and regional Australia. Its research found that lack of access to infrastructure at a fair price was inhibiting service providers entering into the regional market.

Senator Fiona Nash
Senator for New South Wales

Appendix 1

Submissions and Answers to questions taken on notice

Submissions

- 1 Ms Veronica M Nicholls
- 2 Dr Ronald Thomson
- 3 Confidential
- 4 Mr Brett Davies
- 5 Mr Alan Tickle
- 6 Mr Adrian Rogers
- 7 Mr Wade McGirr
- 8 Mr David Lunn
- 9 Mr Richard Zielinski
- 10 Mr Simon Lee
- 11 Mr Michael Rosenthal
- 12 Mr Frank Johnson
- 13 Mr Brett Rosenthal
- 14 Mr Tony Bergman
- 15 Mr Tom Bowen
- 16 Mr Frederic Materne
- 17 Mr Greg Lane
- 18 Mr Ken Bundgaard
- 19 Mr Paul Myers
- 20 Mr Ken Jones
- 21 Mr Frank Hart
- 22 Mr Peter Thornhill
- 23 Mr Michael J Mead
- 24 Mr Robert Varcoe
- 25 Mr Gerry Dee
- 26 Mr Greg Sharah
- 27 Mr Steven Jarick
- 28 Mr Graham Poole
- 29 Mr Bruce Scurr

- 30** Ms Kathleen C Eiszelt
- 31** Mr Robert Ludlow
- 32** Mr Wayne E Griffith
- 33** Ms Beryl M Casling
- 34** Mr Steve Hart
- 35** Mr Tom Knox
- 36** Mr Lou Stefanetti
- 37** Ms Ruth Povey
- 38** Mr Winston Willis
- 39** Dr Douglas Kelso
- 40** Vodafone Hutchison Australia Pty Limited
- 41** Maple-Brown Abbott Limited
- 42** Mr Daryl Goss
- 43** Name Withheld
- 44** ATUG
- 45** Mr R A Mumberson
- 46** Mr John Murphy
- 47** Optus
- 48** Competitive Carriers' Coalition
- 49** Mr Dick Schoorl
- 50** Mr David Lidbetter
- 51** Pipe Networks Limited
- 52** Australian Council of Trade Unions (ACTU)
- 53** Australian Foundation Investment Company
- 54** Synstrat Management Pty Ltd
- 55** Unwired
- 56** Mr John Curtis
- 57** Mr Ian Heyes
- 58** Mr William Packer
- 59** Mr Anton Tagliaferro
- 60** Mr Cres James
- 61** Mr Ron Newell
- 62** Mr Colin R Milewski
- 63** Mr Tony Truda

64	Mr Geoff Neely
65	Mr Mike Elliott
66	Mr John Hines
67	Mr Narindar Singh
68	Investors Mutual Limited
69	Macquarie Telecom
70	iinet
71	AUSTAR United Communications Ltd
72	Free TV Australia
73	Internode and Agile
74	BT Investment Management Limited
75	452 Capital
76	Primus Telecom
77	Australian Shareholders' Association
78	Mr Brett Ward
79	Mr Robert Campiciano
80	Mrs sue barron
81	Name Withheld
82	Mr Michael Friebel
83	Mr Kwok K Leung
84	Mr Dennis Obst
85	Mr N Lienert
86	Mr Alan Bolder
87	Mr G M Beauchamp
88	Telstra
89	Pastor Malcolm Huf
90	Mr Jim Bond
91	Australian Communications Consumer Action Network (ACCAN)
92	Mr Brian Havard
93	Infrastructure Partnerships Australia
94	Mr Reg T Fisk
95	Mr Michael Baldwin
96	Bramex Pty Ltd
97	Communications Experts Group Pty Ltd

- 98** Foxtel
- 99** Mr Kevin Morgan
- 100** Mr Luc Corrado
- 101** Mr John Phillips
- 102** Mr Fernando Dias
- 103** Mr Ganesh Prasad
- 104** Mr Robert Spinks
- 105** Mr Brian Hall
- 106** Mr Douglas Booth
- 107** Mr Adrian Cardell
- 108** Mr Barry L Smith
- 109** Mr Paul Rasmussen
- 110** Mr Geoffrey Thompson
- 111** Mr Peter and Mrs Janet Ellis
- 112** Mr John Stretch
- 113** Mr Peter Hamilton
- 114** Mrs Jill Hamilton
- 115** Name Withheld
- 116** Confidential
- 117** Confidential
- 118** Confidential
- 119** Mr Bill Ranken

Form letters and letter writing campaigns

The committee received a form letter, and variations on it, from the following:

Mrs C Keaton	Mrs H A Faulkner	Mr R J Hay
--------------	------------------	------------

Mrs S L Hay	Mrs C M Rae	Mr J Gleeson
Mrs M Rowan	Mr G S Charlton	Mr & Mrs R C Prendergast
Mr R C Prendergast	Mrs D B Prendergast	Mrs J E M Whitehead
Mrs K Bleakley	Mr B Barty	Mrs H Cook
Mr S Sambolic	Mrs V Sambolic	Dr4 C M Jeffs
Mr A Ball	Mr S Tadros	Mr & Mrs W R Smith
Mr M J Baldwin	Mrs K Lancaster	Mr V Kusovski
Mr & Mrs H L Jackson	Mr D W Lancaster	Mr A A McLennan
Mrs L L Hill	Mrs N A Hardy	Mrs E M Colliss
Mr & Mrs W Nowak	Mrs J Raengel	Mr L Crowe
Mrs R Crowe	Mr G F Calcott	Mrs M J Crandon
Mr D Crandon	Mrs J Jackson	Mr D G Errington
Mrs B Errington	Mrs S F Barty	Mr & Mrs G Cashion
Mrs D Bowman	Mr & Mrs B J Mannix	Mr P F Hambley & Ms G K Whitfield
Mrs R Martinez	Mrs J B Rowley	Mr P F Orvad
Mrs M G Orvad	Mr & Mrs A Hooker	Mr L Young
Mrs R L Pitt	Ms V L Doherty	Mr J Bowman
The Barker Family	Patphil Pty Ltd, Clifford Family A/C	Mrs A A Gardiner
Mr & Mrs J E Noakes	Mrs B J Tuckerman	Mr & Mrs E C Noble
Mr & Mrs M McConnell	Mr & Mrs G Whelan	Mr & Mrs A H Gal
Mr J Haug	Mr C C Paton	Mr & Mrs R A V Rowntree
Mr K W Atkinson	Mrs L Henson	Mr A Henson
Mr D W Smith	Mr W G Nixey	Mr C J Dean

Mr & Mrs K F Streeter	Mr & Mrs D M Love	Mrs J M Ryan
Mr V C Coombes	Mr & Mrs B R Ali	Mrs C M Henderson
Mr J L Mercer	Stone Family Superannuation Fund	Mr & Mrs R E Hewison
Pat Adams Superannuation Fund	Mr & Mrs L Nabbe	Mr M M Hierl
Mrs B C Daniels	Mr M Silva	Mrs V D Bock
N J C Case Super Fund	Mr & Mrs R Billingham	Mr & Mrs S O'Toole
Mr G Holowinski	Ms H Delamore & Mr P Simmonds	Mr M Freeman
Mrs B J Nagy	Mr R E Holterman	Dr & Mrs R J Lewis
Mrs P M Bodey	Mr & Mrs A Eager	Mrs J Smith
Mr H A Twyman	Mr B F Wood	Miss B E McPhie
Mr & Mrs V Kusovski	Mrs E M Evans	Mrs C Holowinski
Robert May Superannuation Fund	Mrs M C Lowe	Mr R Lowe
J C & R G Dowd	Mrs M R Zammit	Mr W P Breed
Mrs J Breed	Mr & Mrs J B Drinkwater	Mr B V Medley
Miss J M Herbert	Ms P Guida	Ms P Calabro
Ms J Risk	Mrs E S Hunt	Mr R Gaspari
Mr B M Joyce	Mrs F M Harvey	Mrs I A McGrath
Mrs I C Chapman	Mrs J M Allan	Mr & Mrs A T Risk
Mr M A Spreat	Ms S Somerville	Mr & Mrs A Pendlebury
Mr & Mrs L Vlasoff	Mr R J Keat	Mr M Stanojevic
Mr & Mrs J S Gauci	Mr W S Evans	Mrs P E O'Connor
Mr J Morgan	Mr G Luck	Mrs A L Luck
Mr W Wenham	Mr W S Furney	Mrs M J Furney

Mrs C E Armstrong	Mrs K M Hall	Mr & Mrs G D Shore
Mr & Mrs D R Agnew	Mrs P M Martin	Mrs H Fittler
Mr & Mrs N W Blizard	Mrs S J Walker	Mr R J Curtis
Mr R E Brownsell	Mrs E E Brownsell	Mrs M Chandler
Mr R J O'Connor	Mr A L & Mrs L E MacLeod	Mrs S Whitbourn
Mrs P J Gleeson	Mrs Z H Smith	Mr & Mrs P Mortensen
Mr I G and Mrs C J Batchelor	D & L Hodges	Mr J L Nagy
Mrs S Montgomery	Mr Bill Croke	Mr & Mrs R N Baker
Mr & Mrs R Halsey	Kerry Donlan	John Spinks
Marion & Peter Orvad	Beth Robinson	Delia McNamara
Don & Margaret Driscoll	Peter & Christine Subotic	Mr K Bowman
Mr & Mrs E C Noble	Mrs I C Chapman	Elizabeth McAndrew
Mr & Mrs A H Russell	Rymack Pty Ltd	Mr R Ball
Mr R J Gamble	Mr J H McIntyre	Mr and Mrs G K Stark
Mr and Mrs A Petersen	Mrs M E Gordon	Mr W J Waugh
Mr and Mrs R K Johnson		

The committee received another from letter from the following:

Mr Brendan Downes, Aurum Planning WA	Karen Keeshan, Western Pacific Financial Group Pty Ltd	Margaret Koorey
F A & M D Mellor Pty Ltd	Mr David Smyth, Hartleys Limited	Mr Peter Kirk, Quill Group Financial Planners
Mr David Teoh	Graham Holmes	Alan Muir, Future Wealth
Grant Robinson	Garry & Desma Wedding	

The committee received a number of letters and additional individual text from the following:

Mr Peter James-Martin	Mark Walker	John Carberry
Michael Toal	David South	Gerard O'Brien
Trevor Gadd	Stephen Ballinger	Michael Coffey
Mark Kynaston	Marc Venter	Ernie Venter
Graeme Orr	Duncan Walker	Martin Webb
Jason & Helen Gereis	Judith Lloyd	Michael Hilliard
Dianne Norris		

The committee received a further form letter from the following:

Ann & Jeff Borgas	Andrew & Bronwyn Hein	Gordon & Ena Mibus
Robert & Valerie Arnold		

The committee received copies of a letter that the committee understands distributed at Australian Foundation Investment Company from the following:

Athina Pazolli	Werner Fuchs	W L Ranken
----------------	--------------	------------

Answers to questions taken on notice

Department of Broadband, Communications and the Digital Economy (from public hearing, Canberra, Wednesday, 14 October 2009)

Appendix 2

Public hearings

Tuesday, 13 October 2009 – Melbourne

Telstra

Dr Tony Warren, Executive Director, Regulatory Affairs

Mr David Quilty, Group Managing Director, Public Policy and Communications

Mr Geoff Booth, Group Managing Director, NBN Engagement

Mr Bill Gallagher, General Counsel, Public Policy and Communications

Optus

Mr Andrew Sheridan, General Manager, Interconnect and Economic Regulation

PipeNetworks

Mr Dale Clapperton, Legal Counsel

Mr Tony Dooley, External Legal Advisor

Unwired

Mr David Havyatt, Manager, Regulatory and Corporate Affairs

Macquarie Telecom

Mr Matt Healy, National Executive, Regulatory & Government

Primus Telecom

Mr John Horan, General Manager, Legal and Regulatory

Australian Foundation Investment Company

Mr Ross Barker, Managing Director

Investors Mutual Ltd

Mr Anton Tagliaferro, Investment Director

Mr Jason Teh, Portfolio Manager/Analyst

Australian Communications Consumer Action Network

Mr Allan Asher, Chief Executive Officer

Wednesday, 14 October 2009 – Canberra

Competitive Carriers' Coalition

Mr David Forman, Executive Director

Australian Telecommunications Users Group

Ms Rosemary Sinclair, Managing Director

Department of Broadband, Communications and the Digital Economy

Mr Peter Harris, Secretary

Miss Pip Spence, First Assistant Secretary, Networks Policy and Regulation Division

Mr Rohan Buettel, Assistant Secretary, Networks Regulation Branch