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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

INQUIRY INTO RADIOCOMMUNICATIONS

DR D. ROBERTSON, Presiding Commissioner
DR N. BYRON, Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON WEDNESDAY, 7 NOVEMBER 2001, AT 11.15 AM

Continued from 30/10/01 in Canberra

DR ROBERTSON: Good morning, ladies and gentlemen. Welcome to the public hearing for the Productivity Commission Inquiry into the management of radiocommunications spectrum. My name is David Robertson and I am presiding commissioner in this inquiry. My fellow commissioner is Dr Neil Byron. The inquiry started with a reference from the assistant treasurer on 16 July this year. It requires the commission to review radiocommunications acts and the market-based reforms and activities undertaken by the Australian Communications Authority. It's part of the national competition policy legislation review process.

We have already talked to a lot of people informally from a range of organisations that have an interest in this particular topic and we have had a number of submissions which is published on the Web, something approaching 40 now, I think, and we're grateful for those earlier discussions and we now move into the formal process of hearings. The purpose of these hearings is to provide an opportunity for interested parties to discuss their submissions and their views on the public record. We have had hearings already in Sydney and in Canberra and we have hearings here in Melbourne today, tomorrow and Friday. We're working towards preparing a draft report which will be released for public comment probably in February of 2002 and we will invite participation to another round of hearings after interested parties have had time to read that draft report.

We like to conduct all hearings in a reasonably informal manner but I remind participants that a full transcript is being taken. For this reason comments from the floor cannot be taken freely but if I have an opportunity over the next three days to offer an opportunity I will allow other people to speak by invitation. Participants are not required to take an oath but are required under the Productivity Commission Act to be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be made available to participants and will be available from the commission's web site following the hearings. Copies may also be purchased using an order form available from the staff here today. Submissions are also available on the Web.

So now I would like to welcome the representatives from Telstra, Mr Mitchell Landrigan, and Mr Stewart Wallace. What I suggest since we only got the submission this morning, you might like to summarise what's in it and perhaps pick out the key points that you wish to emphasise before we start discussions.

DR LANDRIGAN: We'll do that.

DR ROBERTSON: The other thing, would you announce yourself when you speak so that we can identify your voice on the tape. Thank you.

DR LANDRIGAN: Sure. For the record, I am Dr Mitchell Landrigan, group regulatory manager on air at Telstra and I'm joined today by my colleague Mr Stewart Wallace, manager of Spectrum Regulation. We would propose to read onto the transcript and opening statement which broadly reflects the themes and

issues that we have raised in the submission which is publicly available now and I do apologise for its lateness. I hope that by reading through our opening statement we will be able to alert you to the themes and issues that we have raised in the submission itself. In general terms we wish to discuss three issues. Firstly, the current state of the radiocommunications industry as it relates to the telecommunications environment and the industry trends of converging technologies and services.

Secondly, we would like to discuss the consequences of spectrum bidding limits that have been imposed to date for the development of the market and the efficient satisfaction of the universal service obligation, the USO. Thirdly, we would like to talk about the challenges confronting the existing system of fixed tenure periods for spectrum licences which are created by the competing tensions between the need to provide greater investment certainty on the one hand and the need for band clearance for future more efficient uses of spectrum on the other. Collectively these issues raise policy tensions that are not altogether easy to reconcile and certainly in Telstra we don't purport to have all or even substantially all the answers. However, we do take a keen interest in this inquiry as indeed we did with the commission's separate inquiries into the broadcasting environment and also into telecommunications regulation, and in addition to that, the national access regime inquiry, and we will endeavour to provide the commission with all available assistance throughout the duration of this inquiry so as to assist it in its deliberations.

The commission's review comes at a time of tremendous technical innovation and quantum leaps in product and platform development convergence. This is leading to rapid products and market convergence. The significance of these influences for regulation of the industry in general and for spectrum management in particular is enormous. In the past communication services were largely defined by the technology that was used for their delivery. The free-to-air broadcast industry predominantly developed around wireless unidirectional broadcast technologies while the telephony industry was based on centralised switches using circuit switching technologies to create a continuous link between the two communicating parties.

However, technological changes now increasing allowing the delivery of multiple communications services through multiple technologies. Boundaries between these once distinct technologies and services are now being blurred and the arrival of new entrants often from previously separate markets is shaping a dynamic new and broadening market. Clearly this is happening at different rates in different industry sectors. For example, convergence in the traditional broadcast media markets has, we think, already occurred. Satellite fixed wireless and cable provision of broadcast television already compete with traditional free-to-air broadcasters. New entrants compete in broadcast transmission, for example, Telstra, Austar and Optus, and in broadcasting, Foxtel, Austar and Optus Vision. Mobile and traditional fixed line communications are rapidly converging into the one market. A later development may well be the merging of narrow band voice and data markets but

other events may well overtake this convergence of voice communications markets. We think within eight to 15 years the emerging two-way broadband market may subsume both narrow band voice and data markets.

Further convergence is likely from third generation mobile telephony and possibly other technologies as well. These developments are already bringing media giants most notably those who broadcast via satellites, independent mobile carriers, and a range of entirely new players into direct competition with telecommunications firms. A major impact of these processes on the industry has been the dramatically increased level of uncertainty affecting business planning. There is uncertainty as a result of business uncertainty. There is business model uncertainty and there is uncertainty quite clearly as to sources of competition, many of them new, and supply. Telstra's view is that in these circumstances policies must be flexible enough to allow for the evolving use of spectrum over time for different purposes of alternate substitute and perhaps currently unknown technologies and uses.

Although allocation of most significant spectrum has arguably already occurred, we urge the commission not to regard this review as having any less significance, and indeed, we urge the commission to look forward to the implications of its review in relation to the optimal utilisation of emerging technologies, many of which may change. It is not inconceivable for example that convergence may require even in the relatively near term a complete rethinking of spectrum allocation, reallocation and management. In such an environment it's clear that maximum flexibility is necessary to ensure that the market is readily able to efficiently utilise emerging technologies and products. Arbitrary policy settings which constrain the acquisition of spectrum in order to facilitate new entry or to foster greater competition end to under-estimate the changing market dynamics that convergence brings.

Having discussed the impact of industry movements and technological development in general, I would now like to outline Telstra's more particular concerns through specific illustrations of the impact of past and present policies and regulatory rules. To begin with we seriously question whether the imposition of bidding limits and related constraints on spectrum acquisition can be justified either on the basis of good policy or on the basis of sound economic reasoning. Accordingly, we urge the commission to focus its attention on freeing up these impositions. In our view, bidding limits and the geographic parcelling of spectrum distort the market by artificially structuring and constraining its proper development. These limits have the undesirable consequence of inhibiting Telstra's ability or perhaps in the future other carriers' ability to efficiently meet the universal service obligation, the USO.

The USO is perhaps the most significant and indeed the most costly regulatory requirement in the telecommunications industry. It has the objective broadly speaking of allowing equitable access by all Australians to basic telecommunications services. Aside from the largely under-funded nature of the

obligation the costs of meeting the USO in rural and remote regions are quite clearly vastly greater than those incurred in CBDs and major metropolitan regions. I think that's uncontroversial, as is indeed the under-funded nature of it. Eventually, however, the costs of meeting the USO must be met by the very people to whom the obligations of providing coverage, quality and reliability are owed. Accordingly, we consider it essential that the USO be met at the lowest reasonably attainable cost while at the same time ensuring that equitable access and compliance continue in relation to it.

In this regard we are greatly concerned that existing spectrum allocation arrangements in fact inhibit Telstra, potentially other universal service providers, from deploying the most efficient technology to meet the USO, and which thereby increase the costs of USO provision. This is particularly in our view the case in rural and regional areas which, as we have noted, are expensive to service. Technological developments and economies of scale have enabled deployment of a variety of technologies, wireless local loop, MMDS, satellite and mobile networks. These new infrastructures may have various benefits over the PSTN in areas of lower density because they all have relatively lower some costs of installation. In meeting the USO that trade-off between sunken variable costs is one factor which helps Telstra in determining which infrastructure is the most efficient for it to use to meet the USO in any particular area.

Where Telstra's choice is constrained by regulatory limitations on the availability of the spectrum, the community eventually must bear the costs arising from the increased - or the decreased efficiencies in Telstra's inability to utilise the optimal mix of sunk and variable costs that are intrinsic in any technology choice. This background we hope highlights Telstra's major concern with the current spectrum allocation process. The existing spectrum auction rules artificially constrain the natural development in our view of the market. The rules are designed to give preference to some bidders in technologies over other bidders and technologies overall, or in particular, geographic areas.

Telstra understands in this respect that it is a political and policy decision to promote new entrants over incumbents yet there is no, or at least no transparent mechanism to ensure that conferring that preference results in economically efficient outcomes. What this has meant is that participants who potentially place the highest value on particular spectrum have not been permitted to participate in its auction. By way of example we think it an important example, Telstra was prohibited from bidding in the 3.4 gigahertz spectrum in major cities and towns and was limited in how much spectrum it could acquire elsewhere. The consequence was that Telstra withdrew from the auction completely. Bidding limits create further market distortions by artificially suppressing or constraining competitive bidding at auction and therefore deflate market based valuation of the spectrum.

It is even possible that bidding limits may encourage inefficient spectrum purchase and used by parties without the resources to fully exploit the spectrum to

acquire such licences. This is arguable in Telstra's opinion in relation to the acquisition by a third rail of the 3.4 gigahertz spectrum and by AAPT of its LMDS. Under the rules imposed to date bidding limits apply only during the period of the auction itself and any secondary market trading spectrum is subject only to the competition law provisions of the Trade Practices Act. The importance of the secondary market has recently been illustrated by the post-auction purchase by Telstra of 3.4 gigahertz spectrum, access to which as I have mentioned it has been effectively denied by the auction rules, to assist it in part to meet the USO.

By way of background to this issue to meet the USO in several regions Telstra is currently using fixed radio access, FRA, technology under an apparatus licence. Because that licence will expire and be cleared in 2002 Telstra needed to identify other means of meeting its USO in those regions. Continued use of the spectrum under a spectrum licence was a clearly desirable alternative and yet Telstra was excluded by the auction rules from acquiring the 3.4 gigahertz at auctions in those areas that I have mentioned. Fortunately Telstra was able to acquire subsequent to the auction on the secondary market a small amount of spectrum relating to those areas which we acquired from another licensee, and I think as a matter of public record it's known that the party from whom we obtained that spectrum was the rail.

The point here is that Telstra acquired the licences predominantly so that the spectrum could continue to be used to support the existing telephone services that were currently operating on the fixed rate technology in those areas. Without the opportunity to purchase that spectrum on the secondary market Telstra may have had to redeploy copper PSTN in infrastructure or other costly technologies in order to satisfy the USO. The costs of migrating existing customers to another platform would, in Telstra's estimation, have significantly exceeded the costs of Telstra acquiring the spectrum licences from that other company. In our view this example highlights quite starkly the potential high cost of totally excluding the universal service provider from a spectrum auction. Unless a purchaser at the auction is prepared to later sell that spectrum on the secondary market the universal service provider may incur significant additional costs which would eventually be borne by the community.

In this regard we further submit that the commission should give consideration to whether it would be preferable to allow the market to operate only subject to the competition rules under the Trade Practices Act, in particular, the merger and acquisition provisions which already apply, rather than any less perhaps well considered special provisions that are specially devised for a particular spectrum auction. We are also generally concerned with the current approach of parcelling spectrum on a geographic basis and imposing technological constraints on the uses to which particular spectrum band widths may be put. Dealing with the issue of geographic parcelling of spectrum lots first, we consider that separating urban centres from regional and rural or remote areas is quit clearly inefficient and leads to market distortions. As I mentioned earlier economic efficiency in the utilisation of spectrum is more readily achieved when a carrier is able to maintain its network

deployment costs according to particular circumstances.

When considering the mix of urban and non-urban service areas economic efficiency in our view is best achieved when network deployment costs can be amortised across a wide geographic area including both. The relative costs of delivering services in rural, regional and remote areas where traffic densities are generally low can be substantially offset by linking those areas with nearby high density urban areas. The cost averaging effect of linking these lower density areas with associated urban areas allows the underlaying economic surplus in the urban areas to ensure a wider variety of services to regional and rural areas at tariffs lower than the marginal cost of delivering those services to such outlying areas. This of course is illustrated by Telstra's complete withdrawal from the recent 3.4 gigahertz auction where it had become clear to Telstra that Telstra would not be able to access the associated urban areas.

The next major area which Telstra wishes to raise before you today is the system of spectrum licence tenure which we have indirectly alluded to already. As we turn to this issue we do so recognising that there are in fact conflicting policy tensions between firstly the need for security of tenure to provide appropriate investment incentives which in turn determines the efficient use of spectrum, and on the other hand the need for flexibility and spectrum management to facilitate band clearance which is in turn necessary to accommodate more efficient future uses of spectrum. To resolve these competing tensions we suggest that the commission will need to fully assess the costs and benefits of the current system of time for limited licences against alternative systems of licence tenure such as perpetual leases or alternative leases with a first option to renew that may perhaps provide greater certainty of tenure going forward, and we have elaborated these issues in more detail in the submission.

As the commission is clearly aware, current spectrum licence arrangements provide a maximum tenure of 15 years and upon expiry they may be resold by the ACA. The spectrum licence may be reissued to the same licensee only if the licence is being used to provide a service declared by the minister to be in the public interest or if the ACA is satisfied that special circumstances exist. On the other hand, apparatus licences which are usually issued for a renewable one-year period but can be issued for a period of up to five years can be suspended, varied or cancelled by the ACA without any necessary requirement to pay compensation. We acknowledge, however, that the usual practice is to either extend the licence or relocate apparatus licence holders to a new frequency if the spectrum band they occupy is needed for other purposes.

We acknowledge at this point that there are some benefits in using time to limited tenure such as the opportunity for periodic band clearing. However, it's our view that the need to seek renewal within what a relatively short time-frame when compared with the life of an investment may in fact impede decision-making in the public interest. Because investments are long lived and highly specific there are

significant sunk costs in infrastructure associated with spectrum use. It is therefore necessary to ensure that there is adequate investment incentive for investors to make appropriate decisions. Because of these significant sunk costs there is also an asymmetry in the bargaining power between the ultimate owner of the spectrum, currently the Commonwealth through the ACA and the infrastructure investor which makes the use of that spectrum.

Once the licensee has sunk significant investment into the necessary infrastructure the Commonwealth has every incentive to extract significantly higher licence fees from a licensee with a successful investment if licence renewal is sought. Conversely there is no symmetrical provision to compensate the licensee for unsuccessful investments. It's Telstra's submission that this behaviour, these arrangements, are costly to the community. Because of the tensions between the lack of investment security and the ability to free up spectrum for evolving uses we urge the commission to consider alternatives to time to limited licences. Specifically we suggest that an analysis of the potential costs and benefits of firstly perpetual leases, secondly, leases with first option to renew, and thirdly, fixed term leases renewable by the licensee subject to a public benefit test might be considered.

Perpetual leases may be considered similar to the granting of a freehold right and may have a number of positive attractions. Particularly it offers scope for the secondary market to ensure the most efficient use of spectrum by the party who values it most highly. However, as in property law where the crown retains the ability to resume land, shape planning and management of the property asset, so the Commonwealth and the regulator may indeed retain the ability to plan and manage appropriate use of spectrum through public and transparent processes, likewise we think that leases with a first right of renewal would offer a greater degree of investment security balanced by the conditions imposed on such renewal.

Time to limited leases with the right to renew if a public benefit test is satisfied would also offer another option to the commission to consider. The test could have regard to the use of the spectrum by the use of the incumbent, the economic role, and value to the community of the service provided to the spectrum and other possible uses under new or alternative technologies. In sum, we look forward to working with the commission in examining each of the options and the costs and benefits of each. We have confined the issues that we are considering for the moment to a fairly narrow set of considerations but certainly are enthusiastic about looking at some of the more detailed issues that are before the commission throughout the duration of the inquiry.

As I mentioned at the outset we recognise that the issues with which the commission is grappling are substantial and difficult. We also acknowledge that as appears to be the case with many of the commission's inquiries there are many disparate interests at stake and that no matter how well reasoned the commission's considerations might be it is unlikely to appease or please all. To the extent that we can, however, we are prepared to offer the commission every assistance to enable it

to address the considerations that we put before it and the other issues that are on its agenda including by providing further submissions and follow-up responses to the questions raised both here today and at later points in the inquiry. My colleague Stewart and I will be now happy to take the commissioner's questions.

DR ROBERTSON: Thank you. Stewart, you didn't have anything to add? Are you happy with that?

MR WALLACE: No, we have worked on that initial opening statement for some time and we think that it captures the essence of all that we wish to present as our main focus.

DR ROBERTSON: There are a number of interesting questions have come out of what you have had to say and the opportunity I had to read the submission. We had been hearing a lot about convergence and the reasons why that suggests we should ensure that the market works effectively in allocating spectrum so that the best use is made in terms of the particular technologies. There are, however, some problems with competition in the market quite clearly that we have already come across. One of them, the emergency services and government departments who think they shouldn't have to pay licence fees which sort of immediately throws a spanner in the works of trying to run a market. Secondly, are there enough competitors? Obviously one of the objectives I would have thought behind the process of limiting bidding has been to try and get more operators into the use of spectrum so that there was indeed more contestability in the market perhaps, and given that we seem to have come to the end of something of a bubble in investment in radio communications and telco, can we believe that there is sufficient contestability in the market for it to work effectively?

There follows from that of course questions about a secondary market but I think perhaps you would like to comment on those first observations on the subject of the market.

DR LANDRIGAN: Perhaps Stewart might talk about the emergency services and I'm happy to talk about the contestability issue.

MR WALLACE: In response to the emergency services concerns, there is an underlying presumption that they themselves are able to most efficiently provide the communication services that they build for themselves, and I don't think that that's necessarily a given. Their primary function is provision of their particular emergency service. They're not experts in the communications business. So the presumption that they need their own spectrum I think is open to a great deal of question. In fact, it may well be in the community's interest and to a greater benefit if those communication services were able to be leveraged off other communications resources. In fact, in our particular case with the national network we believe that Telstra is in a terrific position to be able to provide those services at much more efficient sort of arrangements and costs.

It could even be subject to certain specific rules. I mean, we are the emergency call person now that channels all of the 000 calls so provision of emergency services communications I think could be subject of some sort of regime like that. So I question this whole supposition that emergency services themselves need their own dedicated spectrum.

DR ROBERTSON: You would still have the problem of pricing your services to the emergency services, wouldn't you?

MR WALLACE: Yes, but we grapple with that problem now under the USO regime and we come to an arrangement with the government on that basis. Now, it may not necessarily be in completely agreed arrangement but it's an arrangement.

DR ROBERTSON: Yes. Well, you have run into the same problem which is, you know, how much do they pay for the service you provide.

MR WALLACE: That's right.

DR ROBERTSON: It's an interesting response because we have had, and will have, a lot more people making special claims for use of spectrum.

MR WALLACE: I think you only need to look at the amount of money that all of the emergency services collectively spend on communications, on building their own, just for the sense of security that it gives them; that they have their own, but if you add up all of that amount of money and compared that with an absolute cost of someone providing a much more leveraged and integrated service I think you would find that they're actually spending more money than they need. It's a costly exercise. It's coming out of the community pocket.

DR ROBERTSON: That's right, and one of the problems we have discovered is that they can't agree among themselves as to what they want.

MR WALLACE: Exactly, yes.

DR ROBERTSON: Have you actually offered that kind of advice, Telstra, that is?

MR WALLACE: We have. It's a topic of discussion at the moment of some volatility with the current intergovernmental spectrum harmonisation committee which we have suggested we would contribute a lot to but we haven't yet been invited to participate and contribute to that, to some consternation on our part. We think that some of the deliberations there may otherwise be misconstrued or may not cover all the relevant issues.

DR ROBERTSON: Okay, thank you.

DR LANDRIGAN: On the question of contestability we would think that assessing the need for continuation of the existing bidding limit arrangements in order to potentially foster even greater contestability really is a matter of considering the efficiency implications of the current arrangements as opposed to the greater efficiencies or lesser efficiencies for that matter that competition might bring absent those arrangements which really is an empirical question I think, and an empirical question that I'm not sure that the commission is proposing to delve into in the course of this inquiry but quite difficult nevertheless to answer in abstract. Certainly I think the available evidence including from not the ACA but the other regulator that works indirectly in this environment, the ACCC, the Australian Competition and Consumer Commission, the evidence from several of its inquiries is that the mobiles market in particular is a highly competitive one and in contrast to many of its decisions in relation to fixed network infrastructure has adopted generally speaking a light-handed or lighter handed approach to the regulation of the mobile sector.

So on the one hand there might be a recognition that the bidding limits have fostered some competition in the mobile sector. The difficulty I think is weighing up what the arrangements would look like, what the competitive environment might look like absent those bidding limits, and as I mentioned I think that's an empirical question. Our view is, as we have said quite clearly, that the bidding limits are no longer appropriate but I think in addition to the kind of - or the nature of contestability, the other dynamic at work here, an important dynamic, is the regulatory impositions that are met through the universal service obligations, and indeed, related community service obligations, but as we have said here today, the particular concern that we wanted to raise with you was the ability of spectrum and spectrum-related technologies to meet that particular obligation.

DR ROBERTSON: Anything you want to add?

DR BYRON: Just to follow up on that point, it seems to me that the case you're arguing is that in a highly uncertain rapidly evolving environment any shackles on an incumbent or an 800 pound gorilla may create unintended distortions and I guess the judgment call that you allude to is whether the costs of those sorts of distortions are worse than the apprehended consequences of not imposing those limits. In fact, the potential for some sort of anti-competitive behaviour. I would presume that with the 3.4 gig the reasons for the limits were that this was seen as a wireless alternative to the copper can and so if one policy objective is saying, "Well, we need to have pro-competition and anti-monopoly sort of rules in place," on the other hand there are the risks that you allude to of the distorting the rapidly evolving environment and it seems to me that the ACCC and the ACA need to make some sort of judgment call of which of those two risks is greater.

MR WALLACE: Just if I may make one comment on the 3.4 gig scenario, it appears to us that the reason that we were excluded from those markets was because there was in fact an erroneous understanding that our copper can could completely substitute for the 3.4 gig delivery platform. That's not true. The copper can had

distinct distance limitations line length from exchanges. That was not well understood at the time and it was thought that the ADSL technology platform could in fact extend ad infinitum on any copper line anywhere and that was not the case, and that was the reason we had implement FRA in the first place. So as a consequence we were excluded on a false presumption. They thought that we could deliver high speed services and therefore we didn't need 3.4. That was not the case.

DR BYRON: Could you explain for me what the sort of radius of service out of the provincial towns, whether it's Ballarat or Townsville or somewhere, how far out can you actually supply using the wireless technology? Are we talking hundreds of kilometres from the town itself?

MR WALLACE: Essentially hundreds of kilometres. You certainly need repeater stations just to extend it but in principle you can add on repeater stations as long as you want. Because it's all digital there is not the noise principle of years gone past. The only factor that ultimately does limit it is just how many subscribers. It has got an absolutely capacity limit so you expand until you hit your capacity limit of the central hub switching station and then you would have to start a new sub network to provide a new capacity so it's capacity limited in terms of that radio FRA one. In terms of ADSL, just to fill in the other blank though, I mean, ADSL - there's a trade-off between effective bit rate and effective distance and to get high speed, 1.44 kilobit or higher and you limit it to about 3 or 4 or 5, maybe 5 if you have got good copper pairs, 5 kilometres blindly from an exchange and that's the end. You can extend it further but your effective bit rate drops off to the point where you can be getting down to something less than current modems in town, you know, 9.6 kilobits, and you might be able to get 8 or 9 kilometres but if you get a poor line and quite an old line that might be subject to climatic conditions, it might be considerably shorter than that, so we're talking significant range differences between the FRA and the ADSL.

DR BYRON: Just on the issue of geographic parcelling that was raised, my understanding of what you were saying was that by servicing the hinterland around a provincial town or city you can in effect cross-subsidise the provision of the more remote parts of that headland from the costs of the town and city but does that also leave you open to being undercut in the town market by a competitor who doesn't need to service the remote rural hinterland who just wants to provide a service within the town limits of Ballarat or Townsville or somewhere?

MR WALLACE: Quite right. It does leave us open to that and if a competitor so chooses to cream-skin those urban areas and neglect those adjoining regional areas then, yes, we become subject to the rules of competition and that's just part of the game. I mean, that's what we're prepared to embrace.

DR BYRON: Thanks.

DR ROBERTSON: Following on from whether or not we can establish a market is

this question of the secondary market. We talked about this at some length with different people in the last two lots of hearings. Basically there seems not to be evidence of a lot of secondary trading and without that one doubts whether the objective of a competitive market in spectrum can work. You mentioned the 3.4 and third rail and we did know about that.

MR WALLACE: Yes.

DR ROBERTSON: But on the whole otherwise most companies tell use there are impediments provided by the tax system and stamp duties. Now, as long as those remain would it be correct to say that there is not really much chance? In spite of all this convergence and alternative approaches we have rarely been able to get genuine trading in own spectrum by companies.

DR LANDRIGAN: Yes. Stewart is itching to talk about the tax issues but I might just mention briefly that I think another impediment might be the relatively confined use to which the spectrum might be put. I think the question, and indeed the geographic area in which it might be utilised, and I would add to that consideration the possibility that there may in fact be freer trading in the spectrum if the use to which it could be put was not as confined as what it is under the current arrangements.

DR ROBERTSON: Excuse me just coming back on that, you mean that the licence is defined too closely what can be done with the spectrum - - -

DR LANDRIGAN: Exactly, yes.

MR WALLACE: Sorry, I am forgetting to mention my name as I speak. Hopefully it has been caught up. It's Stewart Wallace. In respect of the tax impediments, yes, they certainly exist, and it is definitely an impediment but not always. In the particular case of the 1800 megahertz spectrum it is the most significant impediment and at the moment the 1800 megahertz block could arguably be said to be notably under-utilised because that is holding up a rationalisation program and the efficiency of usage is being held back as a consequence. However, the only reason that that is an impediment is because we're trying to swap lots which were bought under two separate auction scenarios, each of which were subject of significantly different market dynamics at the time and we have got very, very different pricing or notional pricing attaching to the lots and so in swapping lots you do have very large capital loss, capital gain situation.

In other areas where the lots were sold at one single auction or otherwise similarly valued then you certainly don't have a capital gains tax imposition and it's not a problem. Stamp duty could arguably be said to be an imposition but compared to the overall cost of deployment of a network the stamp duty is not a lot really. We don't see the stamp duty as being a major issue given that all lots are equally valued. The other factor about secondary trading is that by and large to date the licensees

who have acquired spectrum have had very clear purposes in mind when they have acquired that spectrum. There has only been a few cases where the licensees have subsequently found that they can't follow through and then the spectrum comes up for auction. So the fact of the apparent slow secondary market is more a case of everybody really wants to use their spectrum. They have a really firm, clear idea what they're going to do with it. They're not thinking about trading it. It's only in those few cases. I would not say, given the early days, that that indicates the secondary market is failing. I would say the secondary market is looking pretty good so far, if we can resolve a couple of these other problems like the capital gains tax on the greatly different market valuations.

DR ROBERTSON: Some people use that as evidence for hoarding.

MR WALLACE: Yes. I don't think anyone really in this business can afford to hoard. It's not good usage of capital and as we look out on the global telecommunications market generally I think the tightness of capital and so on, there are much better things to do with your money than just put it in warehouse spectrum. So I don't think that that's a - I'm aware of one small, and very small area, where that may be happening and that's to do with these low power open narrowcast Elcon licences but that's the only one. I don't believe there is any other hoarding going on and I don't think anybody else can really afford to do it.

DR BYRON: Coming back to the purpose of the spectrum that you wanted on the secondary market, is it conceivable that if there hadn't been spectrum for sale you might have been able to - well, the term is sublet contract or rent use of spectrum for a period of time and space from some other owner of the spectrum rather than having to actually own the segment of the spectrum yourselves?

MR WALLACE: Look, that's true. In principle that's an option. The situation in particular with the 3.4 gig is that another licensee may well have viewed Telstra as being in a bit of a sensitive situation. It was either take this price or leave it or else you can shut down, and they knew that we would have been in a fairly sensitive position, a fairly exposed position. We have managed to overcome that but there certainly are from time to time negotiations going on on that basis and I am aware of one that's going on at the moment.

DR BYRON: So that there is both a rental market and a secondary purchase market?

MR WALLACE: Yes. I would say the rental market is considerably smaller than the secondary purchase market but it does happen. I mean, we ourselves already have quite a large number of arrangements with operators of fixed length, fixed microwave lengths, where we actually have third party tenancy agreements with those people to use our spectrum and that's because they have historically used that spectrum, it's difficult for them to move. They're in areas which don't impact their own operations and we're quite happy to do it.

DR BYRON: On the basis of the question of duration of tenure, you know, it seems to me fairly self-evident that it would be desirable for any company to have right to use the spectrum for a period of approximately the same as the expected life of the equipment, but as your submission spells out, that even if it's one year licences, if there's a presumption of sort of almost automatic renewal, then it may not be a problem. There was some discussion at the hearings in relation in Canberra last week whether the issue is really the duration of the licence or really just the terms and conditions under which the licence will be renewed, and if the renewal terms are clarified such as a default or a right of first refusal or barring some exceptional circumstances, then it doesn't really matter whether it's a one year, three year, five year or whatever, as long as you know what the rules are for renewal.

DR LANDRIGAN: I don't agree with that comment entirely actually. In our view there is no necessary distinction for example between a freehold title to the spectrum and a leasehold title to the spectrum. We might just mention in passing that in our investigations we noticed that the Australian Capital Territory which you may well be familiar with, the land entitlements there is subject to purely leasehold arrangements and yet you have a relatively flourishing real estate market. Now, granted that the leasehold areas for 99 years as opposed to one, two, three, five or 15 but we agree entirely that whether it's leasehold, whether it's freehold, and indeed, whether you're talking of a grant of a right in perpetuity or for some fixed period, the key issue is not the duration per se but rather than terms and conditions on which renewal might occur, so we agree with your point.

DR BYRON: It was one that was suggested by somebody else in the previous hearings.

MR WALLACE: I think it's probably worth highlighting that at the outset we acknowledge that there's a tension between the need to be able to turn over usage of spectrum to continue to gain the benefits for the community of new technologies at the same time trying to give investment certainty to current licensees, and that tension is not an easy thing to work out but - - -

DR BYRON: All other markets, real estate markets and share markets and so on tend to handle that same question fairly well.

MR WALLACE: They do.

DR LANDRIGAN: That someone thinks that they can get a better return on the asset than the income but they purchase it on the market.

MR WALLACE: I think in our paper we have presented a bit more detail on those three major options that we foresee but I think we're completely in agreement with you.

DR LANDRIGAN: I mean, certainly the granting of rights and the conditions upon which land might be sold or traded in was not free altogether of regulatory impositions and I think that to that extent the apparent disparity in a treatment of land and spectrum might not be as marked as what might appear at face value. You know, quite clearly for example in relation to land you have land being granted subject to rights of use. Some land is designated for particular purposes such as schools, hospitals and the like. Some land is designated never to be utilised by private investors (indistinct) of wilderness significance or some heritage status. So there are some ways in which the grant of rights with respect to land do mirror the arrangements with respect to spectrum. I guess we would hesitate to say that there is a wide disparity in the treatment currently of land and of spectrum for that reason but quite clearly I think in the grant of either leasehold or freehold for land the tenure with which you have that land or that title and the uses to which it can be put are perhaps not nearly as confined as what was the case for the spectrum.

DR BYRON: A lot of the submissions that we have received have argued for longer duration of apparatus licences and compensation for non-renewal or cancellation but it seems to me that the value of a secure right for 10 years is much more than 10 times the value of an unsecured one-year right.

DR LANDRIGAN: Indeed, you're right. In my view you need to get behind some of these claims or these express desires about a 10-year apparatus licence. Why are they really asking that? To my mind, with due respect to the various players that make those requests, the primary driver for that is to give them security from competition. They just want to have an exclusive occupancy for 10 years. That would be fine provided we had two up-front conditions. I think one is they pay the actual market value of the denial of spectrum, a true spectrum denial cost, so they pay for that exclusivity. The second thing is that as long as there is clear conditions attaching to that licence from day one which define the conditions under which the licence may be renewed but also the conditions under which the licence may not be renewed. In that sense if you had that, that provides you your certainty and the actual length of the licence then becomes a non-issue. I mean, it could be five, it could be two, it could be 10, it could be anything. I mean, personally, having talked around this issue for quite some time now, the figure of five years is not unreasonable in the apparatus licensing regime, provided the certainty was not given necessarily in terms of the time length but the certainty was provided in terms of the conditions under which renewal would occur or non-renewal would occur. But then five years would be a reasonable amount of time, again provided the spectrum denial cost was paid completely up front.

DR BYRON: Thanks.

DR ROBERTSON: Of course, with an apparatus licence you're pretty well defining use, aren't you, in the sense that it's the equipment that will define it. When you look at a spectrum licence this is where we run into your other problem which is you want to have freedom of use really. You would prefer there were no conditions

on it, if I understand what you're saying, which is a quite different situation from the apparatus licence.

DR BYRON: Yes.

DR ROBERTSON: So I think we probably need to keep them quite separate in the way that we look at them. That really brings me I suppose to the spectrum licence which is how much do you think that should be defined. I mean, let's assume for the moment it doesn't go for in perpetuity but we're talking still about a 15-year lease. We'll come to the longer period later, but what kind of conditions do you think should be applied to that and how would they differ from the present situation of a spectrum licence?

DR LANDRIGAN: When you say "conditions" do you mean the criteria on which renewal might occur?

DR ROBERTSON: No, I was thinking more of the use to which the licence can be put.

DR LANDRIGAN: Okay. Yes. Look, we make an opening statement in our paper saying that we don't necessarily have all the answers. We certainly thought and pondered over them. This is certainly a tricky question. Whenever a piece of spectrum has been reallocated it has always been reallocated with some kind of underlying objective in mind and that can't help but to influence the conditions on which it is reallocated. So there is always going to be some kind of at least impression of what it was originally intended for. How to get rid of that entirely is a good question. However, the regime also needs to recognise that technology may well change in between times and that the licence conditions should not be so restrictive that it tends to constrain that change of technology if a licensee wishes to do that. I think we're going to be confronted with a situation like that within the next 10 years as we convert from current mobile technologies into the 3G and possibly even begin to look at 4G scenarios. So those licence conditions need to be - they need to be defined in such a way that they achieve their ends which is the non-interference, but they need to allow for changes in technology and, look, as I indicated at the beginning, I don't think that we can get away from the fact that the original reallocation had some purpose in mind and that there is going to be at least some impression, but we ought to try and minimise that.

DR ROBERTSON: That I suppose leads on to the other question which was, "Is 15 years, generally speaking, going to be long enough for technology?" Now, I know that's a purely hypothetical question because clearly the duration of new technology is always unknown, but in sort of general terms do you think that the technologies that may come on stream would require greater certainty than 15 years?

MR WALLACE: I'll leave Mitchell to answer that one.

DR ROBERTSON: Sure.

DR LANDRIGAN: I think rather than focusing on the tenure period per se, I think as your colleague alerted to in his earlier question, the question is really the conditions on which renewal might occur - and we have tentatively developed, and we're happy to talk about them today - some suggested criteria for, for example, a public interest assessment for renewal. I think that in an ideal world you might well have a tenure period that extends beyond the current 15-year period. Having said that, whether it's 20, 25 or even 30 years, which may well in fact be better than the existing arrangements, the crucial issue really is upon what conditions can renewal occur and are there some clearly articulated criteria which an investor in the infrastructure related to that spectrum can be aware of, can rely upon, particularly towards, say, the second half of the investment period that's associated with that spectrum.

MR WALLACE: Yes, I think that's right, and I think even if we were to consider the current period of 15 years, provided an investor was given the certainty concerns associated with what the renewal conditions were or what the non-renewal conditions were, I mean, the actual term then would probably become a bit immaterial - the certainties provided by his knowledge of conditions, not the term. That sort of to our mind is really the crux of the certainty. It's those conditions. I think going on, it sort of logically leads - we were focusing on spectrum licensing then, but it logically leads into consideration of the term for apparatus licences as well, and as I have mentioned previously, possibly a term of five years at the discretion of the licensee, whether he wants to pay for five years up front or not. He may wish to continue just paying year on year, but providing the conditions of renewal and/or non-renewal are clear then he has got as much certainty that he can ever hope for.

DR BYRON: On the spectrum licences with the 15 years, one suggestion that was put to us was that at year 10 there should be some sort of review process and an outcome of that review might be to extend the licence from year 15 to year 25 so that the licensee then has another 15-year planning horizon and then in year 20 you look at it again and decide whether it's going to stop at year 25 or you might add another five or 10 years to it.

MR WALLACE: Indeed.

DR BYRON: It's that sort of rolling horizon.

MR WALLACE: That was in fact one of our major proposals of our submission to the department's review of the Radcom's Act some two years ago, we suggested that very rolling review-type procedure. We would agree with that.

DR ROBERTSON: Why do you think so many people actually stick to one-year apparatus licences when they could have five? I mean, there are a couple of large companies got their fingers burnt.

MR WALLACE: Yes. Actually, the situation of five-year apparatus licences is not that different to one-year licences. A five-year licence merely says, "We will give you this apparatus licence on a one-year renewal basis for the next five years." All it does is says, "The fees don't change." It can still be resumed. It can still be reallocated with only a two-year reallocation notice. It doesn't give you any greater certainty of title. It's simply the fees will stay the same. It won't cost you any more on a year-on-year basis. That's all.

DR ROBERTSON: But there has not been a rush to go five-year leases?

MR WALLACE: No, there's no benefit. I mean, there is no real benefit for anybody in it. The other point if I may make while we're talking about apparatus versus spectrum is that I know there has been suggestions that the two licences ought to be somehow amalgamated or melded together to form a universal one. That in itself is also a complex question in our view and indeed we ourselves have oscillated from one view to the other over the last several years. I think our present position is though that the apparatus licence is a licence built around sharing where sharing can in fact occur, that's technical sharing. Spectrum licences is certainly much more applicable to other services which don't rely so much upon that sharing, and in our view at the present time there is probably less reason to consider melding those licences, and in fact more reason to retain the distinction. The only reason that we could possibly see for bringing them together might be administrative simplicity but in doing that there is going to be a much greater technical complexity introduced. So we're not so convinced of the merits of bringing them together any more.

DR ROBERTSON: Have you read the ACA submissions?

MR WALLACE: We have, yes. I can see from the ACA's point of view there may well be administrative advantages to bringing them together and avoiding the separation of the processes but there certainly are some very significant technical complexities to consider in doing that.

DR BYRON: Yes. Can I just change the subject slightly to go back to 3G and the possibility of 4G. From a quick reading of your submission you make the point that the US hasn't really allocated spectrum for 3G and there is therefore the possibility there was somehow sort of leap-frogging to a 4G. Could you elaborate and sort of speculate a little bit more on the consequences of those sorts of decisions for both spectrum planning within Australia and also the equipment availability. A number of the submissions have made the point that the hardware that we get here will basically be designed in North America, Europe and Japan, based around the spectrum - the frequencies that they have decided to use there, and to a large extent we're sort of passive recipients in whatever is available. So what if the allocation decisions or non-allocation decisions in the US lead to some major breakthrough in terms of 4G, given that we haven't had too many working examples of 3G in the world but - - -

MR WALLACE: Look, I think the point of our highlighting of that matter was simply to suggest that we need to maintain a high level of flexibility in our overall spectrum management and planning regime because these kind of events and scenarios can unfold in the global sense which will cause us to have to revisit our current spectrum management regime, and it was simply to illustrate that we need to maintain a forward-looking open-ended sort of situation. It wasn't to suggest any particular outcomes as a consequence of that unique circumstance over there at the moment. That was all it was aimed at.

DR BYRON: Yes.

DR ROBERTSON: In a way of course our flexibility is limited by the ITU, isn't it, and what goes on there? There you have got something of a clash between the Europeans and the Americans over spectrum allocation.

MR WALLACE: Yes. That's true to a large extent, although the granularity or resolution that the ITU imposes on our spectrum plan, it's fairly high level, and it defines major blocks of allocation. It doesn't get down to the micro planning levels that we need to actually implement things. That's the first point. The second point is that the ITU itself is subject of lobbying and until it happens you never know what the outcome is really going to be. You can get an inkling sometimes but there is a hell of a lot of lobbying that goes on at ITU level by the various trading blocks and so on to shift it around, and whilst we have the benefit that the - to some extent it's a benefit - that the ITU takes some time to arrive at its final outcomes, where it's going to be in 10 years from now, we don't really know.

DR ROBERTSON: Don't you think that that might in fact be one of the major restraints on spectrum allocation generally; that the ITU is perhaps lagging behind the technology and it's mainly disputing between major players?

MR WALLACE: I guess that's a comment that has been made in numerous media and, yes, I think that's a fair comment, yes.

DR ROBERTSON: It puts a country like Australia in the spot really.

MR WALLACE: It does, yes, but it's kind of just another factor in the equation that we have to live with. That's what we have to work with so we do.

DR LANDRIGAN: Certainly in raising the issue of the US influence in our submission, and indeed in our statement today, the more general point that we were seeking to make was that on one view which we don't think is correct the Productivity Commission's consideration of the spectrum arrangements is a little passe given that all the significant spectrum allocations have occurred. The point really that we're drawing upon there is that international influences may in fact cause quite a dramatic rethinking in the way the Australian arrangements are currently structured.

MR WALLACE: In fact, building on that a little bit more, I have heard comments from the ACA, and I know with due respect to at least one person from the ACA here today, I have heard comments from the ACA saying in respect of future spectrum options, "Well, the cupboard is almost bare. There is no more to sell." Well, we would refute that saying, "Well, we don't know yet." The American situation is one indicator that that may not be true; that there may well be other major spectrum auctions coming up that we are just not aware of at the moment as a consequence of their solution to their problem.

DR BYRON: That leads into another question that I was going to ask you. We were told last week in Canberra, and I am not sure this is an exact quote, but something like, "There's no shortage of spectrum. There's just a shortage of good spectrum management. If only we had a finer pencil and, you know, more time and more skills et cetera, and if we closed off some of the more wasteful applications." The argument was the scarcity of the spectrum was something of a furphy. Any reaction to that?

MR WALLACE: Yes. Look, we wouldn't agree with that at all - would not agree with that at all. Spectrum is certainly very limited and there does need to be several layers of spectrum management. We need the grand plan from the ITU because we just can't put high-powered radios or broadcasting transmissions next to cordless phones. It just doesn't work technically. So you need to have that broad segmentation of the spectrum. What that does is then impose naturally a certain degree of scarcity. The statement that there is no shortage of spectrum is just completely untrue and belies a misunderstanding of the usage of spectrum, the optimum usage of spectrum. There was one other point I was going to make but it just escapes me at the moment.

DR BYRON: You can come back to it.

DR LANDRIGAN: Certainly as a general principle, in spite of the issues that we have raised with you here today and in our submission, in terms of the general management of spectrum, if the suggestion that was made to you in Canberra was to imply that there are fundamental problems with the actual management of the auction processes and spectrum regulation then that is not a view that we adhere to at all. In fact, we strongly oppose that view.

MR WALLACE: You know, in fact we think that the current management of the spectrum by the ACA has done extremely well. In fact, we would say that it's probably amongst the best in the world.

DR BYRON: Thanks.

DR ROBERTSON: I am going to put you on the spot now I think. We have had representations from FACTS and the ABA and tomorrow or Friday anyway we have

got the ABC, and I'm sure they're going to say the same as the other two, which is that they would prefer the ABA to manage all spectrum relating to broadcasting and that the ACA shouldn't have any part in it. I notice that you suggested that the ACA should be left to handle spectrum. One of the points that we made was that we thought that was probably true and that the ABA should be left to handle content but it's being fiercely opposed by the broadcasting community. Would you care to give us the evidence that you have for wanting the ACA to manage spectrum in the broadcasting areas?

MR WALLACE: Look, fundamentally there is no technical impediment to the ACA managing broadcasting spectrum, no technical impediment. They have got all the skills they possibly ever needed. In fact, the ABA was borne out of the same original group of people. I have to choose my words carefully here but I think it's understandable that both FACTS and the other broadcasters wish to maintain the distinction between the ABA and the ACA. It gives them some kind of precious protection and it refuses to acknowledge the very fact of convergence and emerging substitutability. The longer they can keep that up the better for them. The premise that somehow the management of broadcasting spectrum is fundamentally different and that we need to protect these free-to-airs I think is untrue. It is unfounded. With the convergence and substitutability regime now emerging with the fact that the ACA does have or can readily get - it certainly has the technical expertise to manage it. Whether it has the experience or not is simply a case of recruitment. In fact, they have got a bunch of ABA people there that they could bring in to accumulate that experience, so the whole premise is on shaky ground, I think.

DR ROBERTSON: Yes. In fact, one of them I thought defeated its own purpose in saying that they should move out of the broadcasting zone and into other parts of the spectrum so it could be properly managed for broadcasting so the reverse is clearly true as well.

MR WALLACE: Yes. We have found, in reading the FACT submission and talking to them, because they have had this view of course for quite some time, but I have never found any sustainable argument they have yet been able to produce to convince me that they somehow are different.

DR ROBERTSON: And this is part of your argument for convergence really.

MR WALLACE: Yes.

DR ROBERTSON: Yes.

MR WALLACE: And aligned with you I think the ACA needs to integrate and coordinate the overall spectrum management resource given that it's a very valuable community asset and the ABA then needs to focus on its primary task of the content. As you have stated that's its primary role. There is no need for the stapling in our view of a licence for use of spectrum goes along with the licence for content

broadcasting.

DR ROBERTSON: No, that's right.

DR BYRON: I was just thinking about the mention in your submission to the 700 meg and the 2.5 gig that's currently used for TV. I guess all the major players can see some spectrum that somebody else over the fence is using that would be far better to force their own hands and that includes defence as both a plaintiff and defendant, yes.

MR WALLACE: There are other bands too. I think a candidate - in fact, we have just had, and it's still going on at the moment, an ITU conference going on in Sydney at the moment where a number of bands are coming up for discussion and that's going to create the same kind of tensions again with various interests.

DR ROBERTSON: One thing we haven't talked about, and I would like you to elaborate a bit, is on the question of conditions for bidding and keeping out - you know, selecting the people that would be allowed to bid at an auction for spectrum, and then the follow-up which is this Trade Practices Act section 50. I am really asking simply if you can explain that to me again.

MR WALLACE: Explain the arrangements or explain our position?

DR ROBERTSON: Well, explain first of all the arrangement and the use of the Trade Practices Act section 50.

MR WALLACE: I see.

DR ROBERTSON: And then reiterate perhaps your position.

MR WALLACE: In terms of the application of the trade practices provision, I mean, the acquisition, the purchase, the supply in fact of assets generally throughout the economy is subject to section 50 of the Trade Practices Act, the merger and acquisition provisions, which generally speaking the ACCC has a fairly well understood and coherent view on. I mean, there are some issues about market definition and about what a substantial lessening of competition is for example in the application of the particular merger provision that we're talking about, but as a general construct the application of that provision is well understood I think throughout industry generally, and amongst its advisers. What we're suggesting there is that - and of course section 50 already as you would know applies to the acquisition of spectrum by application of the Radcoms Act itself. What we're suggesting is that there is in fact nothing in our view that should impede the pure application of section 50, quite independently of any bidding limits that are applied pre-auction.

As for the application of the rules pre-auction it's a little difficult to critique

those in detail actually given that the whole problem as we perceive it in the application of those rules is that they lack transparency. They are on one view perhaps extreme arbitrary but certainly I think a more mellow or perhaps middle ground view would be that they simply lack any detailed transparency as to how they're applied.

DR BYRON: I was wondering whether sort of section 50 which clearly applies ex post, if you were going to just use the ex ante before the auction takes place would it not be a bit - I hesitate to say slow and cumbersome - but would it not be well suited for the frenetic energy of the auction process to be relying on something like section 50, and I guess in a more sort of legal sense that if Telstra was the sole provider of some local services then bought all the spectrum that was available for a wireless local loop, section 50 wouldn't actually operate because there was one provider before, there is one provider after, there is no substantial lessening of competition, and what you are seeing is the non-appearance, the non-emergence of a prospective competitor. I am just wondering out loud the reasons why they might have felt a requirement to oppose a very different ex ante condition than the one that applies ex post.

DR LANDRIGAN: I certainly think the answer to that question goes towards that kind of general policy/philosophy of encouraging new entry, albeit with rules that arguably lack of a lot of transparency. I mean, the questions as to how the merger provisions might apply to the acquisition of particular spectrum and the markets in which that spectrum relates are I think things that the ACCC, if not having turned its mind to already, will certainly be - the ACCC will be turning its mind quite sharply to in the very near term, particularly as 3G emerges. The question as to whether the merger provisions already might apply ex ante, I think in a sense that they may do already, given the parties, and given that the ACCC has powers of divestiture, know that there may be a risk and presumably their legal and economic advisers would alert them to it as well, that even independently of any bidding limits, that the acquisition of spectrum if it's likely to lead to competition concerns, would be a risky prospect, and I guess I'm not sure whether it's possible to say that the merger provisions only apply ex post or ex ante at the moment. I think in some senses they apply in both respects actually.

DR BYRON: But I mean, if you conduct the auction and get an outcome which then fails the section 50 test, then presumably you waste a great deal of time when you have to do the auction again with - - -

DR LANDRIGAN: Yes, or find that your asset is completely divested from your stock, yes, that's true.

DR BYRON: Yes. Again it would seem to me that there is a lot to be said for having clarity.

DR LANDRIGAN: Yes, we agree.

MR WALLACE: I would question the view that you have to wait until the end of the auction before making a decision as to whether section 50 clicks in or not. Would it not be feasible to devise a system such that the implications of section 50 are made known to all the potential bidders up front so that they're fully aware of it and then to maintain a vigilance throughout the auction which would enable some kind of an action, whether that would even be to put a bidder on notice if he begins to cross the line?

DR BYRON: There's a warning bell that goes off when you approach section 50 conditions.

MR WALLACE: That's right, such that you don't waste the time and don't cause the auction to fold up after it's done.

DR LANDRIGAN: I mean, I might just mention that I think I'm right in saying that the ACCC would have injunctory powers throughout that process in relation to the application of section 50 so that if it believed that section 50 could be breached throughout that process there may be the opportunity for it to in fact seek some kind of injunction from a court to prevent the acquisition occurring. So, you know, we have yet to think through the mechanism in any great detail but it may in fact be one I think superior alternative to the way the existing arrangements are structured. I mean, quite separately to this the related parties - let me call it the prohibitions just for the sake of the argument - I think are reasonably well understood but there is a lot that goes on behind the scenes in the application of the bidding rules to date that is not nearly as clearly well understood, with obviously a number of players, regulatory players, being engaged in the formation of those rules.

DR BYRON: Isn't there a major difference though between a lessening of competition and the failure for greater competition for emerge? The test that you would apply - it's very easy to see what has happened but it's hard to see something which hasn't happened or has failed to occur.

DR LANDRIGAN: Yes. I agree entirely with the point.

DR BYRON: Sorry, I interrupted you. I was just trying to make it clear for myself. In effect your complaint as I understand it is that when an auction occurs the bidding rules are not made public in such a way that everybody knows what's going on. It's just that you're excluded or somebody else might be excluded from the bidding process, but the bidding process and the outcome are both subject to section 50. Is that right?

MR WALLACE: Yes.

DR BYRON: So you would prefer to make it clear that it all occurred under section 50 of the Trade Practices Act and not have these behind-the-scenes rules if

you like.

DR LANDRIGAN: Just pulling back from that specific question for the moment, I mean, we do, and I think we have articulated a little obliquely, but let me clarify it for our purposes now. We do not agree with the imposition of the bidding limits, whatever transparency they might have per se. We think that things have moved on essentially and we think we're on pretty safe ground in saying that not only does Telstra consider that particularly in the mobile sector we have a very, very competitive environment, but the evidence that has come out from the Competition and Consumer Commission which I mentioned earlier echoes. Certainly amongst the mobile industry generally there is a very strong recognition I think that it is a highly competitive environment and most of the public record statements that have been made today about the nature of that competitive environment, have in fact been made before the introduction of mobile number portability, and if anything I think the onset of mobile number portability would have increased the depth and the extent of competition generally.

Given all that, we don't agree with the imposition of the bidding limits at all. They are made all the more problematic by the lack of transparency that exists with respect to their formation and their application. Sorry, does that - - -

DR ROBERTSON: Yes, that's exactly what I wanted to know, thank you.

DR BYRON: On quite a different tack, apparatus licences, it's being suggested to us that because of the history of Telstra and its predecessors, that you have got the best locations for things like fixed links and that type of thing, to sites that were available for putting transmitters, that nobody coming along subsequently could get access to, and that there is a historical advantage that you have because you're going back to the days of the PMG, that makes it very difficult for any newcomer to emulate a performance. Is that a fair statement?

MR WALLACE: Look, I don't think it is at all. We have an access process and a procedure where we accept and entertain all comers to come and access our sites, access our towers. I think we have a very open and very readily available regime in that respect. It's curious that we often get that kind of complaint in certain forums where often we're talking about spectrum reallocation, where the people making the complaint have never ever knocked on our door, and honestly, we have great difficulty understanding that because we have a lot of people use our sites and they are on what we think are very equitable technical arrangements. I mean, we help them as much as we can in having to explain and do various interference and other technical calculations. We have very well-established contractual arrangements that are out there, people can ask for. We negotiate those. They're not absolutely set in concrete. I think we have a very open regime. So I think that's a very unfair sort of accusation.

DR BYRON: Do you?

MR WALLACE: We have a lot of people on our sites.

DR BYRON: Thanks very much.

DR ROBERTSON: I think I'm about through here. Do you have any more questions?

DR BYRON: No, I don't think so.

DR ROBERTSON: I had a lot to start with but I think we have covered the ground. Would you like to say anything to wind up, either of you?

DR LANDRIGAN: Just to say that we, and we have already mentioned it in our opening statement, but we take a very keen interest in this inquiry and the lateness of our submission is by no means a reflection of the enthusiasm with which we regard the commission's deliberations. In fact, I think they're probably in an inverse relationship. Other than that, no, we look forward to working with you throughout the duration of the inquiry.

MR WALLACE: I would just like to make a comment on one particular aspect that has come up from previous submissions and that's concerning a claim that in any spectrum reallocation the notice is too short, the notice period, you know, that it's very difficult for an incumbent to suddenly relocate within two years, and the claim that two years is too short. I think that that's misrepresenting the actual situation that prevails in a reallocation. Usually a reallocation is first mooted when usage of spectrum or the change of use of spectrum first comes up at ITU level and then goes through quite a lengthy deliberation process through the world radio communications conferences, the WARCs, and they have a three-year cycle. It usually takes two of those cycles before you get a major change in spectrum use. Then the ACA and the department, if they're contemplating a reallocation, will put out the draft reallocation declaration for consultation by the industry and they put it up on their Web site and that consultation usually will take at least a year.

Then after that they usually then go out on consultation again for something of the order of another year on the proposed draft conditions attaching to a licence so that when you add it up there's something like between seven and nine years usually between every reallocation declaration that's occurred in the past. So I think that claims that some people make saying there is insufficient warning are just completely unfounded and that's because those people, possibly at their own peril, refuse to keep an eye out on their business environment. You know, it's the horse and the water problem, that we make every effort to keep everybody advised so I think such claims of short notice are just completely unfounded.

DR ROBERTSON: Thank you. Thank you both. We certainly will be in touch as we try and put our thoughts together, as we will with others of course, but thank you

very much for coming and giving us such a clear presentation.

MR WALLACE: Thank you.

DR LANDRIGAN: Thank you.

MR WALLACE: I declare this session closed. We re-meet at 2 o'clock.

START MISSED

DR ROBERTSON: - - - if we were having any trouble with them or we believe that there should be any changes.

MR LOMMAN: That's quite right. I didn't mean to say that your submission was not welcome or not perfectly legitimate. It's just that as you say it seems like there may have been a bit of a misunderstanding but can we go back and could you just tell us a little bit more about the network, the sort of things you do and the number of members you've got and that sort of thing.

DR ROBERTSON: Yes, certainly I can do that. On my submission we did give you a little bit of a - on the bottom of page 1 and into page 2 - there's a bit there. We were formed in 1993 at the suggestion of an officer in the ACA that we do this because the group of people that were travelling in the outback were growing in number so we did that. We were allocated frequencies over the years by the ACA. We then began forming alliances with lots of groups along the way but found that with members' vehicles out with radios in them, were of great use to them so we became affiliated with many state police associations and bushfire associations. We run now 10 bases across Australia that are staffed by volunteers and we have bought that equipment by volunteer fundraising throughout the years and also from some of the membership dues. People pay a membership. We don't actually charge them a licence fee because we're the licence holder, the network is the licence holder.

MR LOMMAN: Just to interrupt there, would the licence be a major part of your organisation's expenses every year? How much of the membership fee actually goes towards paying the ACA for your licences?

DR ROBERTSON: I would think that - I haven't worked those exact figures out but it would be - the licence fees are in the vicinity of probably around $15,000 a year and that would take out probably 30 per cent of the membership dues.

MR LOMMAN: Thanks very much.

DR ROBERTSON: So do you wish me to continue on what we do?

MR LOMMAN: Yes, please.

DR ROBERTSON: Out of those bases we obtain road reports from the Roads Department in each state and then we promulgate that on the air very much in a way that the RFDS used to do with their usual skits to advise people, and if there's a bushfire warning, usually in the north of the country, the Northern Territory or Western Australia, we can put that out to members so that they don't actually drive into a bushfire area. We also have a regular schedule time where people can actually call in and make contact. They can log their position. If they're on the Canning stock route or the Simpson desert or whatever they can do that and by the

same token if they need assistance for a medical reason or a vehicle breakdown or directions if they become cut off by flood waters by that, our network is there to speak with the relevant authorities and get them that information. We often work very closely.

One incident, or some incidents, you would be aware that the Simpson desert floods or has flooded in this past year because of the heavy rain, and we work very closely with the South Australian police of Oodnadatta to help get those people out of the desert, find where they were out there, and actually get them out of the desert, so that's our main focus. As well, probably 1 or 2 per cent of the operation would be talk between vehicle to vehicle members making their own contact, but the main operation is running a base service.

MR LOMMAN: Thanks.

MR BYRON: All we can do on that really is look at section 57(d) and look at it with respect to the way the ACA operates. What about your second question which is this business of review? I mean, there isn't anything in the act at the moment that requires review, the main reason being because the ACA spends its time consulting with all interested parties and if they then had a review process. It could become a complete circle. You start with consultations and you go through three people, let's say, and the last one says, "Well, I want to change something." If that's the case you have got to go all the way back to number one and start again. So you can see it just keeps going round and round, so what they do is just use the consultation process rather than having a review process.

I would have thought that being the case your particular problem should probably have been handled by another letter to the ACA or indeed making an appointment to go and see somebody.

MR LOMMAN: Okay, I take that on board and I take Neil's comments on board that maybe we should have done some more about that. We made an application. We received a letter back from the ACA saying that it was definitely made. We then wrote to Mr Peter Allen and his letter came back saying, "Thanks for your letter but we can't review it."

MR BYRON: Yes.

MR LOMMAN: So from our point of view that indicated to us as we read through the words that were on that letter was that the door was shut, that's it.

MR BYRON: If I tell you that the ACA issues something like 150,000 licences a year you can see that they have got a lot of licences going through. I mean, I'm offering advice, although it's not my job, the thing to do would be to contact the ACA and go and talk to somebody if you're still not happy.

MR LOMMAN: As I said, we'll take that on most definitely. We'll see what we can do about that. That brings up another issue that this network has with the ACA and I don't know, that might not be in your sphere to have a look at that, but we find - and I'll mention it just so that you know what I'm talking about - we find that our head office is based here in Adelaide and we deal with the Adelaide office here. We don't get an opportunity to see anyone from anywhere else and it appears that the guys that we deal with here in Adelaide have no authority or very little opportunity to put their point forward to central office. That's just our experience, and not only this issue, but in other issues of asking for licences to be granted for data frequencies and so on, when it just appears not to get through to the central office and yet we're aware of other organisations who are a commercial nature seem to flow through much more easily.

MR BYRON: Yes, well, I can't comment on that. The only point I can make I think is that you realise the frequencies you want to use are extremely popular and there is probably over-demand. I mean, I'm guessing because I'm not an expert, but the demand for spectrum is increasing almost exponentially now and I suspect that some of those frequencies that you have got on your letters in fact may be areas where there is enormous demand, but that's not something I know about. I'm not an expert on the way the ACA works, but look, we'll take those points on board in our review of the way the ACA works and I think that's all we can do for you unless - - -

MR LOMMAN: Certainly, that's acceptable. We were looking for a forum in which we could express our concerns on how we saw the system operating, and I do understand your comments about the spectrum being under high usage but by the same token there should be no difference in the way groups are treated. That's a point that we're making. We don't seem to be able to find a way to get to ACA or to find someone in ACA who is prepared to listen and sit down and say, "Well, yes, you do have a point." When you make an application on 20 August to have a licence issued in one year and don't get the answer until April of the following year, I think you would have to agree that that's an unusually long time, even if ACA has a tremendous workload.

MR BYRON: The interesting thing is that on the whole we get very good reports about the ACA. Yours is the first complaint we have had.

MR LOMMAN: I guess there is going to be one. I'm not here to bag the ACA. They have obviously got a difficult job to do. What I'm here to do is to try and seek a forum in which we can make some people aware, or make someone aware, other than those in the ACA, that we're aggrieved about how the process works and the time that they take to actually respond to inquiries by apparently a - as they term us we use recreational frequencies and there seems to be an inordinate delay with anything that is to do in that area and yet other businesses are very quickly within one month able to have frequencies issued to them. There appears to be no way to actually sit down and discuss this issue.

MR BYRON: The only thing I can suggest is that you approach them again. I mean, I can't solve it for you and we certainly can't. It's not in our remit to look at individual cases at all. So the only thing I can suggest is that you get back to the ACA and try again.

MR LOMMAN: Okay, thank you very much for that. I mean, we were seeking an opportunity. As I said we might have misunderstood the commission but it was just an opportunity where our group could make a representation forward and perhaps get some information out. I don't know how long your hearings are going to take. There may be in the future someone else who has suffered a similar type of thing to us.

MR BYRON: We hope not.

DR ROBERTSON: I guess not.

MR BYRON: No, I said I hope not in the sense that obviously you're very unhappy. But anyway, look, thank you very much, Mr Lomman, for bothering to send us a submission and rest assured that we have got it in our minds as we start to do a draft report.

MR LOMMAN: Okay. Look, I would thank you for giving me the opportunity to at least be able to expand on our submission and at least put in a submission.

MR BYRON: Thank you.

DR ROBERTSON: Thank you very much. I declare this session closed.

AT 2.38 PM THE INQUIRY WAS ADJOURNED ACCORDINGLY

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