Senator XENOPHON: No, this week; the last two or three days.

Mr Cassidy: The last two or three days he has not. He was in the media over the weekend, following an AAA report.

CHAIR: Senator Edwards is next. Thank you.

Senator EDWARDS: I am very disappointed Mr Sims is not here. I am not an Independent, so I am going to acquiesce to my senior colleague. Most of what I wanted to talk about was in relation to Mr Sims's position on going forward. It was not about particular issues, so I will put them on notice. They were not partisan and they were certainly in the interests of what I thought were the Australians, but he is not here.

CHAIR: Senator Ludlam.

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**Senator LUDLAM:** I have a couple of questions that I want to put from the point of view of a customer. I am a MasterCard cardholder and I would like you to tell me, under competition law, what my avenues are as a consumer, and then I will put a couple of other questions from a different point of view in a second, around the financial blockade that was placed by MasterCard and other financial service providers on the WikiLeaks organisation a year or so ago. Is there anything within your remit that you are aware of that I can do to get redress? This organisation that has not been accused of having committed any crimes anywhere in the world has had in excess of 90 per cent of its funds cut off by what to me looks like a coordinated financial blockade. I will ask you about the rights of the organisation in a moment, but if I could restrict it to my rights as a consumer of financial services for the time being.

Mr Bezzi: The issue that you raise is not one that we have looked at. I am not aware of receiving any complaints about it.

Senator LUDLAM: I could directly contradict you right off the bat, if you like. Carry on.

Mr Gregson: We have had some contact in relation to those matters.

Senator LUDLAM: Yes, you have.

Mr Gregson: The details are not present in the front of my mind. There are a couple of issues there, including the financial services division with the ACCC versus the Australian Securities and Investments Commission. That is not always a black-and-white issue; there are areas of grey. It is only when it comes to credit cards that there are some grey areas. I apologise, I do not have that in the front of my mind, but I would be happy to try and help you, if you would give us more details.

**Senator LUDLAM:** I would greatly appreciate that. I can confirm that the people who I am aware of who have complained to you have been maybe fobbed off between various regulators around the place who have all backed up and said, 'This is nothing to do with us.' My colleague Senator Brown wrote to the ACCC some time ago, on 11 January last year. Are you aware of that correspondence?

**Mr Gregson:** As I said, something rings a bell about receiving a number of approaches on this. Whether Senator Brown is one of those persons, I cannot tell you. I am happy to take that on notice.

Senator LUDLAM: I can confirm that he was, because you replied to him on 3 March 2011. You were not able to help him but you did seek more information. You told us that the act prohibits certain arrangements between competitors to withdraw services. Can you just point out, from the point of view of competition law, whether MasterCard had to have rung Visa? Do I have to prove that the two colluded in order to knock out an entity that was not a competitor?

Senator Arbib: Just to help the official, could we possibly get a copy of the letter you are quoting from?

Senator LUDLAM: I probably can do that.

**Mr Gregson:** While you are doing that, certainly we are talking about the competition provisions of the Competition and Consumer Act now, which do not have those grey zones in relation to the ASIC-ACCC divide. They are solely within our purview. You are referring there to the cartel provisions that prohibit agreements or understandings between competitors. There are a number of ways in which you can look at agreements or understandings. One way is to look for direct evidence of communications and therefore agreements. There are other ways you might be able to infer that. Obviously the burden is higher if you have to infer something.

## Senator LUDLAM: Infer?

Mr Gregson: Indeed.

Senator LUDLAM: In this instance I have got no evidence of collusion. I am just wondering whether that is the threshold test, apart from the fact that the blockade came down across five or six entities that I am aware of, globally, on the same day.

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Mr Gregson: Yes, collusion is indeed the genre you are looking at here.

Senator LUDLAM: That is the test?

Mr Gregson: So we would need to demonstrate that there has been collusion, either direct or, as I said, some sort of understanding generated by a wink and a nod, you might say.

Senator LUDLAM: Interesting. Do I have any recourse to these companies, or MasterCard in particular, to lift that blockade? I would understand, for example, if this were a criminal entity. If they had been accused of organised crime offences or whatever, I would understand that. In this instance the organisation has not. It is a publishing organisation. It was given a Walkley Award last December. None of its staff have been accused or convicted of particular crimes. So what are my avenues as a consumer? What can I do to MasterCard or, better yet, what can you as the regulator do to them?

**Mr Gregson:** My response is not going to be very helpful for you. I probably do need to know a bit more detail. I am sorry, I have not come with those tonight but I would be happy to take any of that on notice, and try to assist you.

**Senator LUDLAM:** Are you aware that there is an antitrust complaint lodged at the European Commission, and a decision is reasonably imminent on that? Are you keeping a watching brief on those developments?

Mr Gregson: I am not familiar with that. There is a chance my staff would be.

Senator LUDLAM: If I am referring to this matter in future correspondence with the ACCC, it is you; it is your office?

Mr Gregson: Feel free to send it through to me. I will give you my card afterwards.

Senator LUDLAM: Okay, that is great. So it is the cartel-like behaviour provisions of the act that we are after?

Mr Gregson: From what you are referring to in the correspondence, it does sound like that is what they are referring to. There may also be some other provisions that would be worth looking at.

**Senator LUDLAM:** That is from the perspective of me and a large number of other Australians who object to having an inability to transact with partners of our choice. What about the organisation itself? Does WikiLeaks have any particular rights or standing under your act to put a complaint to you?

**Mr Gregson:** The competition provisions, as indeed the consumer protection provisions, apply not only to enforcement from the regulator, the ACCC, but also provide private rights of action. To the extent to which there is exposure under our legislation, that is available to private parties.

**Senator LUDLAM:** I hope I am not drifting into hypothetical terrain here. I am sure the chair is going to pull me up if I do. There is no evidence of collusion but, nonetheless, in an uncoordinated way, magically on the same day, 90 per cent of transaction flows to this organisation were cut. Will you tell me that there is nothing you can do?

Senator Arbib: It does sound pretty hypothetical.

**Mr Gregson:** Again my response has to be that we would need to look at those circumstances. There may be circumstances where a party is acting inconsistently with prior representations—that is, the financial service provider might be acting inconsistent with prior representations. There might be some other issues in relation to contractual matters that may or may not touch on the consumer provisions.

Senator LUDLAM: Okay.

Mr Gregson: I am not helping here because I really do not have in the front of my mind the circumstances-

Senator LUDLAM: No, you actually are, a bit. Do I have an implied right of being able to transact with whichever party I so choose, as long as they are not—

**Mr Gregson:** No. I guess the general proposition when we come to these issues is you do not start from a proposition that a trader has to facilitate your dealings with others. There is no implied right to be dealt with by a certain party, but there are a number of provisions that might start to kick in, depending on the circumstances. They are the types of things we look at. Was there collusion? Is there a prior inconsistent representation? Was there potentially unconscionable conduct? They are the types of things we can tease out.

**Senator LUDLAM:** I thank you for the answers. It is well over a year since the blockade came down. Is there any reason why I am needing to raise this in a budget estimates committee? Did the ACCC lift up the rock to see what was underneath it when these events first occurred?

**Senator LUDLAM:** I would appreciate that. On notice, could you provide us with a breakdown, consistent with your privacy obligations, of how many complaints you have received on this matter in its broadest extent.

Mr Gregson: We would be able to do that.

**Senator LUDLAM:** I am going to completely change the subject for a moment. The ACCC last night declared Telstra's wholesale ADSL. According to one report in the *Fin*, Telstra is proposing to contest the decision. Did the ACCC have an agreement from Telstra that declaration of their ADSL services was a necessary precondition to the acceptance of their structural separation undertaking?

Mr Cosgrave: The answer to that question is no.

Senator LUDLAM: There was no implication? There is no agreement?

Mr Cosgrave: There is no agreement.

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Senator LUDLAM: It is coming as something of a surprise to Telstra that you have proposed to declare those services?

**Mr Cosgrave:** No. We have conducted a public inquiry into the declaration since December last year, which went through a process of public consultation. That decision, as you say, was announced yesterday.

Senator LUDLAM: Will the ACCC accept the undertaking without the declaration of ADSL if Telstra does indeed contest the decision?

**Mr Cosgrave:** At the time Telstra submitted a revised undertaking in December, we indicated that we thought the price equivalence arrangements in that undertaking, insofar as they related to wholesale ADSL, were weak. We had arrangements in place in relation to regulated services that we thought were acceptable. We had had a number of complaints over some time in relation to conduct relating to the provision of wholesale ADSL services. That is why we conducted the inquiry.

Senator LUDLAM: All this was about solving disputation in telecommunications and it looks like we have landed ourselves with another big ball of hair. Have you any idea how long this kind of process can take if Telstra decides to dig its heels in?

Mr Cosgrave: Are you talking about if Telstra exercises appeal rights?

## Senator LUDLAM: Yes.

**Mr Cosgrave:** The decision to declare is an administrative decision. Telstra, like any company, would have ADJR rights in relation to that decision. If they chose to exercise them it would be subject to normal court processes and the vagaries of the court system. I cannot provide you with an exact estimate of the time.

**Senator LUDLAM:** What is the status quo of the undertaking in the meantime? Is everything just going to grind to a halt while Telstra decides whether it is happy or not?

**Mr Cosgrave:** As I say, Telstra submitted a revised undertaking to us on 9 December 2011. The commission's powers in relation to the structural separation undertaking are either to accept it or reject it. There is no power to vary it or to make proposals that must be accepted. We said at that time we were minded to accept that undertaking, subject to a round of consultation with industry that made clear to industry that it was around new issues or significant drafting issues. The industry did raise significant drafting issues that we thought required remediation. We have been in discussion with Telstra since December around those. We indicated yesterday that, from our perspective, the concerns we had in relation to those matters have been satisfied, but they will require revision of the undertaking. The mechanics of the legislation require Telstra to submit that undertaking, so presently the ball is in their court.

**Senator LUDLAM:** The ball is in their court in the sense that we had Mr Quigley from NBN Co. last night in another committee telling us that he is running dangerously close to stalling the project. They are running late; they cannot actually proceed with the volume rollout until this is settled. Now Telstra are playing for time and it is starting to cost taxpayers money. What can we do to bring this situation to a quick resolution?

Mr Cosgrave: I can understand Mr Quigley's frustrations, albeit it relates to contractual arrangements that NBN Co. entered into with Telstra that are precluding him, if that is right, from further progressing. I do understand there are arrangements in the definitive agreements between Telstra and NBN Co. in relation to the

provision of information. I think that is fairly broadly known. As I say, the mechanics of the act require an undertaking to be lodged with us. We have talked to Telstra about a revised undertaking. I note the announcement they made to the stock exchange this morning, which was very brief but did indicate an intent to progress towards acceptance of the undertaking by the ACCC.

Senator LUDLAM: I will come back to this a little bit later if I can. In rejecting the recommendations of the Senate Economics References Committee on Reform of Competition Law—I might have to throw to you, Minister, if you like—the government said:

The competition provisions of the act should not be reviewed until the ACCC has had the opportunity to further test the law in the courts.

My question is how long that is expected to take and whether that is an appropriate process for judging reform, given that this committee made quite strong recommendations in that space?

Senator Arbib: It is probably a question more appropriate for Minister Conroy in terms of communications.

**Senator LUDLAM:** I do not know if it was just relating to communications, to be honest. I think it was relating more to broader reforms of competition law. We just have to wait until this stuff is fought out in the courts over a few decades to see whether the laws are broken or not.

Senator Arbib: I am happy to check in with—unless Mr Cassidy has something—

**Mr Cassidy:** I think that comes up in two particular provisions. The one on the abuse of market power was section 46 of the act, which has been subject to fairly significant change. The other area where it comes up is the unconscionable conduct provisions. We feel we do need to test both of those in court, simply because there have been significant changes and it is not clear, until we test them, whether the changes have made the two sections fully operative, if I can put it that way. We currently have five cases of unconscionable conduct before the court. We have had two cases of abuse of market power decided by the court, one of which partially covered the period of the new provisions, the other of which entirely covered the period of the new provisions. We have another 19 misuse of market power matters under detailed investigation and we would expect some of those at least to be coming to court in the not too distant future. So we are in fact in the process of testing those provisions in the courts at the present time.

Mr Bezzi: The most recent judgment we had was in December in that misuse of market power area, so we are quite active in this area.

CHAIR: Senator Ludlam, I am going to have to bring your questions to a close.

Senator LUDLAM: That is fine. Thank you, Chair.

**CHAIR:** We will next kick over to Senator Ryan. I understand that the opposition wants to proceed with the ACCC through until 10.45 and not call the Australian Bureau of Statistics. I have not had the opportunity to discuss that with you, Senator Ludlam. Do you want to call the ABS and your colleagues in your own party?

Senator LUDLAM: I am okay with that.

**CHAIR:** So, officers from the ABS, you are not required and we thank you for your patience in attending. We will continue with the ACCC through until 10.45. Senator Ryan.

Senator RYAN: Senator Bishop, I am going to yield five of the minutes you have allocated to me to Senator Cormann. Feel free to tick me off when you need to.

Senator CAMERON: Senator Cormann cannot ask a question in five minutes!

Senator CORMANN: He is provoking me.

Senator RYAN: Mr Pearson, we could ignore them. Where is the table you tabled earlier from? Is that internal?

**Mr Pearson:** That is a table that we produced. I got it today from our petrol staff. Before we begin, I would like to apologise to Senator Bishop, the committee members and Senator Arbib. My only excuse is that I have nine brothers and sisters and spent six years at boarding school.

Senator Arbib: No need to apologise in the Senate.

Mr Pearson: I did want to put that on the record. I apologise to the committee.

CHAIR: Thank you, Mr Pearson. Your sentiment is appreciated.

Mr Pearson: We produce these tables on a regular basis.

Senator RYAN: Is this part of a briefing note or something? It just says 'table 2'. It is obviously part of a large document.