



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

SELECT COMMITTEE ON AGRICULTURAL AND RELATED
INDUSTRIES

Reference: Pricing and supply arrangements in chemical and fertiliser markets

THURSDAY, 7 MAY 2009

CANBERRA

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**SENATE SELECT COMMITTEE ON
AGRICULTURAL AND RELATED INDUSTRIES**

Thursday, 7 May 2009

Members: Senator Heffernan (*Chair*), Senator O'Brien (*Deputy Chair*), Senators Fisher, Milne, Nash and Sterle

Participating members: Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Ellison, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Forshaw, Furner, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Minchin, Moore, Parry, Payne, Polley, Pratt, Ronaldson, Ryan, Scullion, Siewert, Stephens, Troeth, Trood, Williams, Wortley and Xenophon

Senators in attendance: Senators Farrell, Fisher, Heffernan, Nash, O'Brien and Sterle

Terms of reference for the inquiry:

To inquire into and report on:

The pricing and supply arrangements in the Australian and global chemical and fertiliser markets, the implications for Australian farmers of world chemical and fertiliser supply and pricing arrangements, monopolistic and cartel behaviour and related matters.

WITNESSES

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission.....	8
DENTON, Mr Graham, Private capacity	24
GREENTREE, Mr Ron, Private capacity.....	2
KAMENCAK, Mr George, Regional Director, South Australia, Enforcement and Compliance Division, Australian Competition and Consumer Commission	8
NOWAK, Ms Teresa, Assistant Director, Enforcement and Compliance Division, Australian Competition and Consumer Commission	8
TAYLOR, Mr Angus, Private capacity.....	28
WING, Mr Anthony, General Manager, Transport and General Prices Oversight, Australian Competition and Consumer Commission	8

Committee met at 9.02 am

CHAIR (Senator Heffernan)—Thank you very much, ladies and gentlemen. I declare open this public hearing of the Senate Select Committee on Agricultural and Related Industries. The committee is hearing evidence on the committee's inquiry into the pricing and supply arrangements in the Australian and global fertiliser market. I welcome you all. This is a public hearing. A *Hansard* transcript of the proceedings is being made. Before the committee begins taking evidence, I remind all witnesses that in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public, but under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to give evidence in camera. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course be made at any other time.

I ask witnesses to remain for a few minutes at the conclusion of their evidence in case the Hansard staff need to clarify any terms or references. I remind people in the room, including myself, to ensure their mobile phones are either turned off or switched to silent.

[9.04 am]

GREENTREE, Mr Ron, Private capacity

Evidence was taken via teleconference—

CHAIR—I welcome Mr Ron Greentree by teleconference. Would you like to make a brief opening statement about your travails in recent times, Ron?

Mr Greentree—Yes, thanks very much, Bill. We are farmers in north-west New South Wales and large users of fertiliser. We have been very frustrated with the way we see fertilisers are being retail priced to farmers. Our main use is a product called anhydrous ammonia, which is more commonly known as NH₃, which is a liquid fertiliser that is used instead of urea. We have tried to find out the prices of anhydrous ammonia compared with urea. The process is that from natural gas you make anhydrous ammonia first, and after you have made anhydrous ammonia, it must go through another process to make urea. The process to make NH₃ comes at a lower cost than urea. There are two plants in eastern Australia. There is a plant in Brisbane that is owned by Incitec Pivot Limited, or IPL, and there is a plant in Newcastle that is owned by Orica. There is also a plant, which is owned by an Indian company, over at Burrup on the north-west coast of Western Australia.

CHAIR—Just give the committee an idea of the scale of the issue for you, Ron, would it be fair to say that you put in a couple of hundred thousand acres of crop a year?

Mr Greentree—That is correct, Bill, yes.

CHAIR—Thank you.

Mr Greentree—The situation is that you can compare apples to apples. NH₃ has 82 per cent nitrogen and urea is 46 per cent nitrogen, but we do not seem to be able to get a price. We have a world FOB price, and IPL keeps talking about having to be competitive with what the world prices are. An FOB price out of the Burrup plant in Western Australia or any other plant in the world is around US\$200 to US\$220 a tonne, which in round figures around A\$300. If you work that out with \$40 ocean freight to come from Western Australia around here to the east coast, and another \$80 a tonne in expensive transport to get it up country, a \$30 farm delivery and \$20 for a commission for a retailer, that makes it around that A\$450 to A\$470 a tonne. Yesterday's equivalent price at the moment we can pay to get it on-farm through IPL retail was \$1,062 a tonne delivered on-farm. At the same time, yesterday's urea price was A\$660 a tonne.

It is very clever for one to be 82 per cent and the other being 46 per cent because they always just price the component of nitrogen at about two to four per cent below the NH₃ relative to urea. IPL buys a lot of NH₃ off the Burrup plant in Western Australia and they ship it around to Townsville. They make a lot of fertiliser for the mining industry in Queensland. IPL also owns the plant in Brisbane, but the plant in Newcastle is owned 100 per cent by Orica, which is my understanding.

In relation to the prices difference between the retail price delivered here on-farm to north-west New South Wales, which is nearly equal to the distance between Brisbane and Newcastle, the prices are always exactly the same from either plant, even though they have different owners. We do not have the opportunity from Newcastle to buy from Orica; we can only buy it through IPL, but IPL take a lot of product to the urea plant, which also is in Newcastle. Strangely enough, they also road transport a lot of that NH₃ product from Newcastle all the way to Townsville to put into their fertiliser products. If they can buy it from Western Australia at the price I have just said, they must be buying it a lot cheaper off Orica than IPL is charging us to come up to farmers.

CHAIR—Ron, is there an arrangement between the Newcastle plant and IPL that will not let operators like you into the market? They will not quote you?

Mr Greentree—That is right. They have this arrangement at Newcastle that they will not sell to farmers; it has to come through IPL. There is a little bit in that. There is a bit of infrastructure. It comes out as gas so it has to be transported in a pressurised vessel and you have to have the infrastructure here. But a lot of us now have started to build up a lot of infrastructure to be able to handle the pressurised gas. A lot of our farm managers have the skills because they have done the OHS courses, et cetera, to be able to handle the product.

CHAIR—I have to say from my own experience that you can certainly bring anhydrous into June. There are tanks and pressurised gear there. But what you are saying is that the market will not allow you to compete against IPL or, shall I say, break the arrangement of supply, and you are forced to go to a single purchaser.

Mr Greentree—Exactly. IPL has one price at which they sell to farmers and one price that they buy from Orica to sell into their own explosives products.

CHAIR—Do you have any indication of the price differences?

Mr Greentree—All I can go on, Bill, as I said earlier, is that is they can buy a spot price off Burrup in the north west of Western Australia, which the Indians own. The spot price there is that you can buy it for US\$200 or US\$220 a tonne FOB. I went through the ocean freight to get it around to Townsville, which would be around the \$30 to \$40 a tonne. That makes it about A\$340 or A\$350 a lot at Townsville, and we are paying \$1,062 on-farm here out in the north west of New South Wales. If they are taking it by road from Newcastle up to Townsville to their own facilities to make explosives, there is no way they would pay that price because they can buy it cheaper off the plant in Western Australia or from in fact anywhere else in the world.

CHAIR—What you are saying is that it might well be the argument in Western Australia that it is a global market price, but when it comes back to Newcastle it is whatever the market will bear locally.

Mr Greentree—Exactly.

CHAIR—Rather than the local price.

Mr Greentree—And, as I said, one plant in Brisbane is owned by IPL whereas the plant in Newcastle is owned by Orica, but the retail price delivered here to Moree or Goondiwindi or Mungindi, where I am, is exactly the same from both plants, even though one is owned by a different person. The retail prices which are up and available are exactly the same, every single day of every single year.

CHAIR—Would you say that there are indications of collusion on pricing?

Mr Greentree—Most definitely. The way that they have priced the NH₃ is in correlation because there is 82 per cent in that and 46 per cent in urea. They use the same equation per unit of nitrogen and it works out about the same—about two or three per cent cheaper for the NH₃—when it goes through a lesser process. But they do not want to sell the NH₃ a lot cheaper because it has nowhere near the process, and it is a true international price because we have another plant in Western Australia.

CHAIR—I am going to pass questioning to Senator Nash, but do you have anything you would like to tell us about the urea market?

Mr Greentree—Yes, I would, Bill. We have been pretty frustrated with the setup. We decided we would not take any more of this nonsense on this NH₃. We went through a local retailer to make sure we went through the right stages. We approached a company to import some urea ourselves. I tell you what, Bill, it has been one of my hardest experiences I have had. We eventually got it. The price of urea today that I can deliver onto my farm here at Mungindi has dropped. Now it is A\$660 a tonne. At the time we did the deal, it was about A\$820 and we finally landed the urea here on-farm through Yara, which is another major international fertiliser company.

We landed it here at that time, which was in March, at A\$525 a tonne. They put every obstacle in the way. The shipment was late. It was loaded out of Libya. We brought in 10,000 tonnes. IPL got word of it and really slowed it down because there was not a full boatload and it was made up with some IPL urea as well. They slowed it right down. In fact, that fertiliser did not arrive in Australia until about the middle of April whereas it was supposed to be here at the end of February when we had to do a stock swap, but they put everything in the way to ensure that we could not get it. But we won in the end and that saved us from in excess of A\$300 a tonne on a retail price. We still used a local retailer, so we are still comparing apples to apples.

CHAIR—In effect, the urea that would have been \$300 a tonne dearer if you had gone through IPL actually was in the same ship or in the same hold?

Mr Greentree—Well, it would have been. That was some of the stuff coming in because they were bringing product from the same plant out of Libya. But they made it very difficult for everyone involved, once they knew that there was a shipment coming for another supplier or for someone else using it, besides themselves.

CHAIR—I regret to hear all the trouble you had, but we are going to receive evidence later in the day of a similar experience from someone else who had a thousand hurdles put in front of them to bring in urea as well. Senator Nash?

Senator NASH—Thanks, Chair. Ron, the ACCC at our last hearing gave some evidence, and I will quote from *Hansard*: ‘We do not have a monopoly provider in the Australian fertiliser market.’ I just want to clarify what I think you said earlier, which was that you can only buy through IPL. It seems that they have a monopoly, if you can only buy through IPL. Would you disagree with the ACCC’s comments?

Mr Greentree—Yes, most definitely, Fiona. As I have just said, I think there has not been enough put into this. It is a bit more of a unique product than NH₃ and is predominantly used in the sugar industry in north-west New South Wales and a bit down through the central west. But, yes, that is the only plant. There is one other plant, Orica, that has the plant in Newcastle, but IPL is the only one that has the exclusivity contract with them, Fiona. They do have it and they price it accordingly, as I said, so that it always just matches their own retail urea price.

CHAIR—I must alert you to the fact in fairness that the ACCC are in the room and listening, and they did say that they would love to get the evidence and the facts that they can use.

Senator NASH—Which is precisely the reason for my asking the question. That is it from me, thanks Ron. You covered that very well.

Senator STERLE—Mr Greentree, it is Glenn Sterle from Western Australia. When talking about bringing in your shipment of urea, you used the term that IPL ‘slowed it right down’. How did they slow it right down?

Mr Greentree—What happened was that by the time we got the shipment and it actually had come from Libya, originally it was going to come from two other destinations, but it finally came from Libya because people then did not want to load the urea and sell to us. Obviously someone had a word to them and scared the hell out of them. We need for them to sell at the source and we had to go to three different places for confirmation and then get loading.

Senator STERLE—Mr Greentree, I am sorry to interrupt, as the rest of the committee would be, I really am keen to clarify ‘someone had a word to them’. ‘Someone’ being whom, do you think?

Mr Greentree—I am sure it was IPL. Who else would it affect?

Senator STERLE—I do not know, Mr Greentree. I am trying to get to that. This committee is dealing with a lot of hearsay.

Mr Greentree—Yes.

Senator STERLE—I have said very clearly on the record on more than one occasion that if IPL has done something unconscionable, they should have the book thrown at them. But is there any proof of that?

Mr Greentree—I will have to do my homework. Obviously I am on a farm in Mungindi and I have been dealing through a trader, Yara. I can only go on what I am told. It was supposed to be here at the end of February. It was booked and then it had to be loaded to make up a full shipload. It was always the story that it was put back slower and slower all the time. It was not to

do with any credit problems. It was not to do with there not being any supply because the stocks of all types of fertiliser in the world have just completely built up where every plant was just bulging at the seams, and has been for several months now. It came and we had to go to a third plant before we could actually get it loaded.

Senator STERLE—I do not have any further questions, Chair.

CHAIR—Senator Fisher, who has just come into the room?

Senator FISHER—I do not have any questions, thank you, Senator Heffernan. Thank you very much, Mr Greentree. There is nothing further you would like to add?

Mr Greentree—The only other comment I would like to make is one about Phosphate Hill. We do not use much phosphorous MAP or DAP, but we do use some. We find it quite frustrating that Phosphate Hill, owned by IPL, has only rail-out loading from that facility, which then has to go to rail and then down to a Queensland port and then come to different parts around Australia. They will not put in a truck-loading facility. Where we are located, we could bring triples, or three-trailer road trains, which would be a lot more price competitive to be able to bring it down. But their answer is that a company called Southern Cross runs Phosphate Hill, and they are in charge of what they spend on infrastructure. My understanding is that Southern Cross is a 100 per cent subsidiary of IPL.

CHAIR—It is.

Mr Greentree—They could be a lot more cost effective, but they do not want to spend the money to get fertiliser to their customers at a lower price. There would be a lot in Queensland and northern New South Wales. If we could get it directly to where we have got road trains, we could cut the price right back down. But they keep trying to do ducks and drakes about the different company, when it is a full subsidiary company.

CHAIR—There is a reasonable road linkage directly down through the guts of Queensland.

Mr Greentree—That is right. We just come straight down through Longreach and there is a good road all the way down.

CHAIR—What do they call that highway? I have forgotten the name.

Mr Greentree—We can bring triples down. We can pull three trailers and that would be more cost-efficient transport than going by rail to Townsville or somewhere like that, although I am not quite sure, and then it has to go by boat to Brisbane, Newcastle and then down to Melbourne.

CHAIR—Yes, it does. That has been a point of curiosity to this committee for a long while and obviously part of what could be seen as market control. I guess the quicker they open up that new phosphate deposit in the Northern Territory, which is only 270 kilometres from the main north-south railway line, the better.

Mr Greentree—Yes.

CHAIR—Thanks very much.

Mr Greentree—One last point just to reiterate: It has just got to be complete price fixing. Why is the NH₃ price always completely fixed to their urea price when it has less of a process to go through, but the price, regardless of when it is matched, when we have got up to A\$1,800 for NH₃ and urea got to A\$1,100 or nearly A\$1,200 a tonne, the percentage difference was always the same, all the way through. NH₃ is a product made 100 per cent by natural gas, and we all know what has happened to energy prices in the last 12 months.

CHAIR—It is also a by-product of the steelworks in Wollongong, is it not?

Mr Greentree—They have got a small one down there. My understanding, Bill, is that there is some cleaning process or something that they have got down there in the BHP plant. That is a very small scale one, which we have been looking at. If we have a natural gas line coming through Moree in the next two to three years, we think there is merit in starting with a small plant to make our own NH₃, once we get the gas coming through.

CHAIR—I understand that the Wollongong plant is also tied up so that no outsider can get a crack at it. You used to be able to, but in recent times, 18 months or two years, it has been tied to IPL as well. Thank you very much for your evidence, and we will be in touch.

Mr Greentree—Thanks very much, Senator Heffernan.

[9.25 am]

CASSIDY, Mr Brian, Chief Executive Officer, Australian Competition and Consumer Commission

KAMENCAK, Mr George, General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission

NOWAK, Ms Teresa, Assistant Director, Enforcement and Compliance Division, Australian Competition and Consumer Commission

WING, Mr Anthony, General Manager, Transport and General Prices Oversight, Australian Competition and Consumer Commission

CHAIR—I welcome officers of the Australian Competition and Consumer Commission. I remind Senators that the Senate has resolved that an officer of either a department of the Commonwealth or a state shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanations of policies or factual questions about when and how policies were adopted. Officers of the department are also reminded that any claim, that it would be contrary to the public interest to answer a question, must be made by a minister and should be accompanied by a statement setting out the basis for the claim. We will be delighted to hear what witnesses from the ACCC have to say.

Mr Cassidy—I will outline what we would perhaps like to do, subject to the committee's wishes. When we appeared last time we discussed our public report. As part of that, we were asked to continue the various data series that we had in the report. We have done that. We would like to distribute to you some tables and charts. I will ask Mr Wing, who is on my right, to talk to those a bit. In particular what we find interesting are some developments in the international and domestic fertiliser prices around late 2008 early 2009, and how that relates to the new entry that has occurred with a number of players starting to import fertiliser.

We would also like, if we could, to perhaps take a reasonable amount of time to give evidence in camera and perhaps unusually I can explain why we should hear evidence in camera: it is to talk about the investigations we have been undertaking in relation to various fertiliser matters, some of which have actually come to us from this committee.

CHAIR—Thanks very much. Righto, away you go.

Mr Cassidy—I will distribute the tables and charts of the recent data, and I will get Mr Wing to talk to those.

CHAIR—While you are preparing to do that, I might just note and I must declare an interest, Mr Cassidy. I am a farmer and I use fertiliser. I am sure if Senator Nash were here, she would make the same declaration, and Senator Fisher.

Mr Cassidy—I might say that I had picked that up, Chair, that you have a particular interest in this issue.

CHAIR—Senator O'Brien said, 'I use some in the garden too', so perhaps we all have an interest. But as an observation, though, I must say that you would have to be Blind Freddy not to have followed the press on this matter. In the previous year when there was cheap fertiliser in companies' inventories, and subject to global pressures, there was a build-up in the global price. But we received evidence from the industry of price rises that were not really justified, but the market would bear them so they put it up. As they said in that Sydney conference that I attended, much to my surprise, 'We got away with it.' That is the market at work, I suppose, and a restriction of competition in some ways.

The issue with the big rise was that even though what is in our inventory is cheap, we will offer it to you at the global market price. Then in the next year, which is the one that you are about to refer to, when the global price came down, the well-articulated argument in the rural press was that companies had all this expensive fertiliser in our inventory, therefore people will have to pay for it. The industry was not going to drop the price. I have to say that a lot of farmers did pay a huge price. Within weeks of the exposé of some imports, suddenly they dropped it \$600 or \$700 a tonne and people both ways got hurt. I just think it was pretty unfortunate.

Mr Cassidy—That is some of what we perhaps would like to talk about. I might hand over to Mr Wing to take you through the tables and charts.

CHAIR—Thank you very much.

Mr Wing—Senators, the four tables that we have given you relate to DAP, which is the first of the prices data that we continue to collect following on from our collection last year. Last year's went up to about May 2008. We currently have data up to February 2009 and it covers some of the further information that we have just been talking about. The first is simply the data. That is just for reference at this point in time.

The second is a chart. Chart one is a continuation of the charts that we had in the 2008 report, just to show how that continues on. Those charts show that world prices lagged by about two months, and Australian import prices lagged by a month to allow for shipping times. We have been told since then that on the way down, those lags do not have much meaning, or so people say. Some people may have stuff which they bought months before; others may have very short lag times, so they are moving around. Nevertheless, we have produced that extension of the chart for consistency, to show how it goes forward.

I suppose one difficulty with that chart is that it covers about four years. The area of interest is bunched up to the right, so it is actually quite hard to dig into it. The two charts I am going to take you through today are charts two and three, which have expanded out that period. It is probably worth having them sitting next to each other because they are basically showing the two relevant parts. Chart two has unlagged prices. It simply shows the world price at any month versus the Australian wholesale price, all in Australian dollars. The world price is the yellow price and the Australian price is the red price. Chart three simply shows the difference between the two so that you can see how the difference is moving around.

I will go fairly quickly through the earlier period which was covered last year. The price rises obviously started in late 2007 and went up quite steeply through to about April and May, which is what we discussed last time and when the last set of data went to. You can see from that that world prices, the yellow prices in chart two, went up quite steeply from October and at April they reached A\$1,279 and they started to level off. Australian wholesale prices followed them up. You can see there that at times Australian wholesale prices are actually lower than the world price, but that simply reflects that they were selling stuff that had been bought a couple of months before. As the world price continued to go up, those wholesale prices continued to go up.

CHAIR—It would also reflect, surely, that the half million tonnes or so that is produced out of Mount Isa actually does not leave the country; it is in stock. Even though we are in a global market, the global price really does not affect the price of their stock because their production costs had not gone up. They cannot lose on it.

Mr Wing—They are making profits here, Senator, yes.

CHAIR—It is reflected in the share price and everything else.

Mr Wing—Agreed. This is only the gap between the two prices. This does not reflect that they are losing money. They are certainly making profits on the way up, yes. The world price plateaus, really, for some months there, through until about October, but the Australian wholesale price continues to go up. That is again reflecting that prices are going up. Prices go up, and if we look at chart three, which shows the gap between the two, what is happening there is that, by April when prices have really reached the plateau, the gap is negative; but, over time, the wholesale prices get raised so that the gap becomes positive again.

By September and October, it has got back to its historic levels. The white line there on chart three represents the average historic gap over the last 10 years, which is about \$139. What happens then is that by October the wholesale price has got back to its historic amount over the world price, but then the world price starts to fall dramatically after the collapse of world demand for it. So the world price drops from \$1,322 in October to \$949 in November, and to \$578 in December, but you can see from chart two that the wholesale price in Australia stays up for a while.

There were suggestions at the time that prices may have been sticky, and it looks like they were temporarily sticky. In fact, the difference between that wholesale price in November and the world price a couple of months ago is almost exactly the historic amount. So, yes, they were trying to keep selling their product.

CHAIR—Their inventory.

Mr Wing—Yes.

CHAIR—They sure were. And by the way, it was not for the bulk of it. I am sorry to interrupt you, but the plant produced a million tonnes and for convenience of cash flow, et cetera, they export some 400,000 or 500,000 tonnes and bring it back in. But it is not dear in their inventory. It is just dear reflected on the old world price. Actually it is a bit of a con.

Mr Wing—What happens of course is that obviously that is unsustainable on the competitive market, so by December you can see that the gap has reached about \$800, which is a very large gap between what the wholesale price is and the world price at that time. That is the point at which new entrants come into the market. DFI, for example, on the east coast, and in January there were some on the west coast as well: AgImports, Ravensdown and Elders also made a shipment into the west coast at about that time as well.

DFI is obviously offering to buy at the world price at that time. They have no inventories. They offered a price at that time of \$1,000, but minus a future rebate, depending on what the actual price was at the time they bought. That caused the general price across industry to fall very quickly to meet that price. Obviously no customers were going to buy at the old price once the new one was in the market. By the time the actual imports came in during February, the price that was being quoted by DFI was \$870 minus a rebate and again prices had continued to come down. The gap fell over that time as new importers came into the market.

We have full data up until February. We are still collecting data past that. I guess that all I can give you past that period is anecdotal data. The gap has continued to decline. In fact, as I understand it, IPL announced yesterday a further reduction of about three per cent in its prices. That goes through DAP. We have similar charts for you regarding urea.

CHAIR—MAP would be the same. For a farmer MAP is a more storable commodity because DAP takes up moisture and it is a bit of a problem. It stores the nitrogen content. It would be fair to say that there had to be some tough decisions taken in that December or that October to December period, even by Elders. Elders decided to tear up the money to be able to get rid of its inventory, and so took a decision to take a loss there. But IPL, which still owned probably 70-odd per cent of the wholesale market in eastern Australia, is a bit of a blind. It had dear stock in its inventory because it is only at the cost of production. The global market potential is what they say is the price of the stock in the inventory, but of course the global price had collapsed. Thanks very much for that.

Mr Wing—If it is helpful, we can take you through the urea price as well.

CHAIR—We would be interested. Would it be fair to say that as an observation by the ACCC that the introduction of competition changed market behaviour?

Mr Cassidy—I suppose our take on this is that it goes back to the issue of the earlier mergers and so forth. One of the reasons why we allowed the earlier mergers to occur was because we had a view that, with fertiliser being an internationally traded commodity and if domestic prices moved significantly out of line with world prices allowing for lags and so forth, you would get new entry and other competitors bringing in imports. Just looking at chart three, you could characterise that as the period from January 2007 up to late 2008 when maybe the differential more or less moved around in terms of its historic average. But then in late 2008, for reasons you can speculate about whether they be genuine commercial reasons or domestic companies seeking to make above-normal profits, the differential opened out quite widely. That is when we then had new entry occurring.

Our point of view and our role or what is important to us is to make sure that that new entry can occur if the differential between international and domestic prices opens out beyond where it

should be, which is the reason we are very interested in any suggestions and evidence about impediments being raised to new entrants to the market who want to do their own importing. If you like we would see this story as being in a sense consistent with the view we had of the market when we did not oppose those mergers. What is important is that we make sure that new entry can occur.

CHAIR—I would have thought there is an obligation to make sure. Obviously the former managing director or chairman, whatever he was, of Incitec Pivot has now left the scene, but he did say in the lead-up to that October period that they had no intention of dropping the price. It was there in cold black and white in the press—wear it. As a consequence agents and anyone I spoke to, I do not mind saying, I told, ‘I wouldn’t be buying there for bloody quids’, because at the time the urea price Black Sea was \$380 or whatever it was.

I think farmers in the States were getting their MAP for about US\$400 delivered on-farm. It was patently obvious that there was a bit of a game on. I would have ventured to think that if there was not an attempt by some people, you could bet a pound to a peanut that these fellows would have worn their inventory out at the higher price before they went to the lower price. As Mr Greentree has just pointed out, it has been a very difficult exercise for some of them. It is pretty easy to put up hurdles in all sorts of ways

Mr Cassidy—Indeed. But equally we would observe that in a way what has happened is the market working. Maybe one particular company would say it was not going to drop its price when the world price is coming down, but on the other hand in a competitive market, if someone sees an opportunity, they can import fertiliser at the lower international price and make a dollar, and they do so. That is what we believe happened in late 2008 early 2009.

CHAIR—Hopefully, there will be a new phosphate mine opening up in the Northern Territory anyhow, which by the way is a bigger mine than is Mount Isa. But it would be fair to say that if a couple of those people had not attempted to enter the market, and that graph had been where I am pointing, what could or would the ACCC have done about it? If the global price was as indicated there, obviously it looks to be about a two-fifths of what they were charging in that global price in December 2008 and if there had not been other entrants in the market, would the ACCC have been in a position to go to IPL and say, ‘Mate, I think you’re ripping the growers off’?

Mr Cassidy—No. As I think we discussed last time in the Trade Practices Act there is no provision that deals with prices that you might regard as being too high or exploitative. If you like, our role is to try to make sure that the markets work and people do not, particularly for anti-competitive reasons, try to impede markets working. But, no, we do not have any power in relation to prices that might be regarded as being too high.

Senator O’BRIEN—The average difference in your chart three of \$139.91 takes into account the average margin over that period. What was it in perhaps the equivalent period before? Obviously, the spike in the difference at the end of 2008 would elevate that average somewhat.

Mr Wing—Senator, that is true, but I would guess we do not have the period before. This is actually over the last nine years so we will average out a lot of the spike and the drop, but we do not have the period before that.

Senator O'BRIEN—Do you know?

Mr Cassidy—Yes. It is all collected as data. It was not readily available so we had to go and collect it. I am afraid we only have it going back to a certain period. You are right: the spike would have lifted that average a bit.

Senator O'BRIEN—Did it?

Mr Cassidy—You could construct an average which left out, say, the last six or nine months. If the committee is interested in that, we can obviously do that. It would drop that white line in the chart a bit. I do not think it alters the fundamental story of what has happened through the last couple of years.

CHAIR—With your indulgence, Senator O'Brien, does this reflect what was the traditional early bird order. Back in September 2007 when there was a positive margin, as I read it there.

Senator O'BRIEN—No. You see, the zero line is below the white line. That is the average.

Mr Cassidy—The white line is the average over the decade.

CHAIR—So the red above in October, what does that indicate?

Mr Cassidy—I am sorry, Senator. I missed that question?

Senator O'BRIEN—It above average.

CHAIR—That was the early bird order time when traditionally—and, you know, I am a bloody farmer and I have been doing it for 40 years—you order your fertiliser in the spring and they deliver it in March-April, or whenever. That is the time when we ordered and the price was set. I got set at \$760 or \$740 then and then by December they said, 'We can't supply to a lot of people', and then you have that trough in April 2008 when the fertiliser would have been delivered. You pick up what is happening on the day in the market rather than when the fertiliser was ordered?

Mr Wing—These two graphs do, yes.

CHAIR—Because my fertiliser was ordered at a price.

Senator O'BRIEN—This is wholesale, not retail.

Mr Cassidy—We do have a bit of a problem. We do not know the answer to it in terms of what the appropriate lags are. We were told by industry that it is six to eight weeks, but as Mr Wing has observed we have also been told that that moves around according to what is happening with international prices—whether they are on the way up or on the way down. Then the further complication is that with the new entrants, such as DFI, they are running a rebate system whereby you buy with DFI today at whatever the world price is and adjusted for transport costs and so forth. DFI then go and organise themselves some transport and so forth and make the actual purchase. If they can buy at a price which is lower than what you have been

quoted, they give you a rebate. That sort of practice would tend to shorten the lag from whatever it would otherwise be. In looking at the differences between world price and domestic price, if you like, world price and domestic price, there obviously is a lag in the physical process in getting the fertiliser from wherever it is bought overseas to Australia. For the purpose of comparing prices, just exactly what that appropriate lag is I must say is by no means clear. You can do these charts again using a one-month lag, and it does not look greatly different.

CHAIR—It would be enormously complicated by the early bird order system.

Mr Cassidy—Yes, that is right. But also, as I say, some of the pricing practices of the new entrants are changing what you might call the effective lag in this as well. That is why, in doing the charts two and three, and charts four, five and six, we have not lagged the prices at all. We have just looked at the actual prices. But, as I say, certainly using the one-month lag, the story has not changed all that much.

Senator O'BRIEN—And your chart one, which is showing the margin between lag world price and retail price, is larger in early 2007, if I am reading the scale of that correctly—the yellow line to the blue line?

Mr Cassidy—Larger than when, I am sorry, Senator?

Senator O'BRIEN—It seems that there is a period between September 2006 and March 2007 where that appears to be about the largest of the gaps—the largest margin between world price and retail price.

Mr Wing—Oh, yes.

Senator O'BRIEN—If you are looking at what the farmer is paying as against the world price, that would be a period off a lower base, but where there was a higher margin.

Mr Wing—Yes. That would perhaps reflect that the lag is not making much sense once we get into that 2008-09 period.

CHAIR—Some of that flat—

Senator O'BRIEN—I am sorry, can I get the answer without an interruption, please?

Mr Wing—That seems correct, Senator. That would perhaps reflect that the lag has stopped making a lot of sense later on.

Senator O'BRIEN—Right. So we are not going to get much sense looking at that graph and trying to read it through into retail price.

Mr Cassidy—Yes. The more we think about it and the more we hear from the industry, both the charts we had in our original report and chart one and chart four which is an extension of them using a two-month lag makes us fairly wary of placing too much reliance on that.

Senator O'BRIEN—Okay.

Mr Cassidy—But, unfortunately, we cannot say to you, ‘Here we are. Here is another one that has this lag in it, and that’s pretty spot on’, because the lag does seem to be moving around.

Senator O’BRIEN—I guess if we are interested in the impact of market behaviour on the consumer, we have to know how the retail price is factoring into all of this. We do not have anything before us in this presentation which gives us a true indication of what is happening there from your Excel spreadsheet?

Mr Cassidy—We can happily redo these for you using a retail price rather than the wholesale price, if that would help. But, again, eyeballing that off the data in the tables, that sort of story we have, with quite a significant gap opening out in late 2008 down to 2009 is fairly robust. But if the committee would find it helpful, as I say, we will redo these using the retail price rather than the wholesale price.

Senator O’BRIEN—I would not mind that comparison if it is a meaningful document.

Mr Cassidy—Let us take that on notice and we will do that for you.

CHAIR—Could we also include in that the difference in behaviour upon the acquisition of Mount Isa by IPL? There was a behavioural difference in the market—

Mr Cassidy—Yes.

CHAIR—That occurred when IPL took possession. I see they have their diligent and hardworking spy in the back of the room there. There was a difference in behaviour and attitude to suppliers, especially. The bunnies in this market, Mr Cassidy, were people who were not direct agents but were resellers, and they were given a bloody bad run. At the point at which Mount Isa became fully a subsidiary of IPL, there was a marked difference in attitude in the market. Could you reflect that in your response to Senator O’Brien’s request?

Mr Cassidy—Okay.

Senator O’BRIEN—You just want a point marked on the chart where that happened. Is that what you are saying?

CHAIR—Yes.

Mr Cassidy—Okay. We will have a look at prices around that particular time.

CHAIR—I do not like to repeat myself—

Senator O’BRIEN—Oh, come on! There is a credibility gap there, Senator.

Senator STERLE—Yes. I know—that is a bloody *Hansard* tactic.

CHAIR—But it would be fair that in 100 per cent of manufacture in Australia in a lot of products and 73 per cent of the wholesale market in eastern Australia you do have considerable market power under the old arrangements.

Mr Cassidy—Indeed. I would not disagree with that statement, keeping up to The Nationals question.

CHAIR—And that market power was used to advantage the crooks against the better interests.

Mr Cassidy—I do not in any sense walk away from the fact that there probably was an exercise in market power going on at least around the end of the last calendar year and early this calendar year. But what I am saying to you is that that brought a market response. What is important is that we try to ensure that that market response can occur so that you do not get those sort of differentials opening out.

CHAIR—Hear, hear. I agree with that.

Senator NASH—Gentlemen, can I just briefly revisit a couple of things we touched on last time. My apologies for not being here for the beginning of your evidence. Did you respond to Mr Greentree's claim that he thought there was a monopoly?

Mr Cassidy—No, but I can. I agree with the Chair's statement that IPL has significant market power. Given they have 70-odd per cent of the east coast market, I am afraid I would still stand by my earlier statement that they do not have a monopoly, but that is not to say that you do not get—and this is a general market comment—situations where a particular buyer may only have one realistic seller, so you may have regional monopolies, if I can put it that way.

CHAIR—That is exactly right, yes.

Mr Cassidy—But in terms of the overall market, my characterisation of it would be that IPL, as the Chair said, has significant market power, but IPL is not a monopolist in either the east or west coast markets.

Senator NASH—If we take the premise that there might be regional monopolies, we were talking last time about supply being withheld is a breach only of the TPA if it is done for anti-competitive purposes, can you look at it in the context of a region? Is the ACCC in any way able to look at it from the perspective of a regional monopoly so that this can be taken on?

Mr Cassidy—The way we do our analysis and the way the law is framed, it talks about things happening in a market. One of the things we need to do is decide what the market is. Clearly if it was, say, a farmer in New South Wales, what is happening over in Western Australia probably is not relevant. If we were looking at particular conduct, we would define the market as being the market that is relevant to where that conduct has occurred so that we do not look at just the whole of Australia. We define the market depending, if you like, on what the realistic regional alternatives are for the buying and selling of whatever it is.

Senator NASH—So if somebody came to you with a charge of what they believe to be withholding, and you look at it in terms of what would be a regional monopoly, it will then fall under the TPA?

Mr Cassidy—Indeed. Whether there is a monopoly does not really determine whether it falls under the TPA. The TPA is all geared to conduct.

Senator NASH—Okay.

Mr Cassidy—Conduct, and its effect on in reducing competition.

Senator NASH—Okay. I asked that only because I am trying to get this clear in my head.

Mr Cassidy—Sure.

Senator NASH—Then we were talking about withholding it. You can look at it under the Trade Practices Act only if it is done for anti-competitive purposes.

Mr Cassidy—That is right.

Senator NASH—Last time we were discussing if there was a monopoly, it would not fall under the TPA.

Mr Cassidy—That is right. There is no obligation in the law for me as a supplier to sell to you. I may not like the look of you and say, ‘Well, no, I’m not going to sell to you.’ That is my right as a commercial trader. But if I start to say, ‘Well, I’m not going to sell to you because I’m worried that you might on-sell to Senator Heffernan and that’s going to undermine my market’, that starts to get into my refusing to sell for anti-competitive reasons. That is where the law does come in.

Senator NASH—It is a very difficult area, is it not?

Mr Cassidy—It is.

Senator NASH—A very difficult area.

Mr Cassidy—Senator Joyce is not here, but I am sure he would come in on this. That is why section 46 of the act, which relates to abuse of market power, is a fairly challenging one because what we are trying to do there is distinguish between anti-competitive conduct and conduct that may have a genuine commercial purpose or reason.

CHAIR—You would have to be dumb to show your hand. In other words, if you do not show the hand, you cannot be got at. I have seen that in Newcastle with that act.

Senator NASH—Yes.

Mr Cassidy—Section 46 cases are very difficult because we have to find or gather evidence that there was either an anti-competitive purpose or an anti-competitive effect. As you say, that is difficult. We have done it. Indeed we have a couple of section 46 cases in the courts at the moment. We can do it, but you are right—it is a difficult area of the law.

Senator NASH—The issue that Mr Greentree raised about Newcastle, is that something that the ACCC has previously been aware of—that particular claim?

Mr Cassidy—Not that particular one. We will talk to Mr Greentree about some of what he had to say to you.

Senator NASH—That was my next question. That is now something that you will follow up?

Mr Cassidy—Yes. We will look into that.

Senator NASH—Can I also talk about the threat of importation, which we spoke about last time. There was some discussion around the fact that simply the threat of importation would constrain the exercise of market power.

Mr Cassidy—That is right.

Senator NASH—It was not until, and certainly objectively from our perspective, until DFI entered the market that we saw that price come back significantly. I am just trying to get a comparison. That is obviously a real importation that is possibly causing some market reaction, and yet you said in evidence last time that merely the threat of importation can often be enough. But if you look at that particular circumstance, clearly the threat of importation really was not doing anything at all. It was not until it physically, tangibly happened. Do you have any comment to make around that?

Mr Cassidy—I can understand your saying that, and I think perhaps there is in a sense something in that. But I suppose that what I would say to you is, having had that experience, if you were to then run forward, supposing in another six months time or whatever, and the existing domestic wholesalers were to think to themselves about opening up another price gap between the domestic and the international prices, they may well think twice next time, having had the experience in the late last calendar year and early this calendar year. It has been demonstrated that if the gap opens up sufficiently, competing imports will occur.

I understand what you are saying. It may be that the existing domestic suppliers—it is not easy, obviously, and it takes a bit of effort for someone to enter the market and start importing themselves—and I think Mr Greentree was going through some of that earlier. Given it has been demonstrated that that can happen, I think we would still argue that the threat of imports can be an important deterrent to what you might otherwise regard as excessive pricing.

Senator NASH—True. It could be. It is just in contrast to reality when it actually—

Mr Cassidy—Oh, yes. I am sorry.

Senator NASH—Diminishes the claim. The threat of import really does act as a deterrent.

Mr Cassidy—Yes. We have other instances. It depends on the structure of the industry and so forth. In some cases, the mere threat of imports is enough to constrain prices. In some cases you do need entry to occur before you will get that constraint happening.

Senator NASH—That reaction. Last time we had some discussion around the ACCC's use of the phrase, when we were talking about these charts and world and domestic prices tracking reasonably closely, I think we got quite close to the hearing and we were running out of time.

Mr Cassidy—That is right. I remember that.

Senator NASH—We were discussing urea. From memory, the domestic price had moved only about \$395 to \$405, and the retail price went up about \$200. We never quite got to the end of how the ACCC could define that as tracking reasonably closely when there was only about a \$10 movement in the actual price itself and the retail had gone up \$200. It was the chart in your original report, the 31 July 2008 report.

Mr Wing—Senator, we are just about to hand up a continuation of the urea charts as well.

Senator NASH—Page 19. Does someone want to elucidate?

Mr Cassidy—I am sorry; I did not realise. You want some of the urea charts. I thought you had them all.

Senator NASH—No, I am sorry. It is quite simple. We never actually got to how the ACCC could define that 'tracking reasonably closely'.

Mr Cassidy—I know what you are saying. I suppose I would categorise it this way. Fertilisers are an internationally traded commodity. If the international price of fertiliser doubles, say, I think for anyone to expect that the domestic price would do anything other than more or less double as well is just like trying to get water to run uphill. In that sense we say that domestic prices basically are determined by international prices.

That said, you do get varying lags, particularly when prices are moving. Really in a sense this gets up back to the late 2007 early 2008 story. Depending on the degree of competition you have, that will in a sense determine just how closely your domestic prices will follow your international prices. But I was not trying to say to you, 'Hey, look, you are going to get the two lines, so to speak, exactly tracking one another', because there will be reasons why they do not track one another, including—and I am not an idealist about this, I do not think—firms in the domestic market which, if they see an opportunity to keep their price a bit higher for another couple of weeks, they will probably do that.

Senator NASH—True.

Mr Cassidy—I realise that that is not to be dismissed. But what is important is that we have the market working so that prices currently are not kept high on a sustained basis.

Senator NASH—And I understand that, but perhaps you would not mind taking on notice this particular instance and coming back to the committee for that precise reason.

Mr Cassidy—Okay.

Senator NASH—This is actually over a year. The price shifted from only about \$10 a tonne over the entire year, yet we saw the retail price of urea go from \$580 to \$780. On the basis of ‘tracking reasonably closely’—

Mr Cassidy—Can I just clarify what your year is?

Senator NASH—I am sorry, this is March 2007 to March 2008.

Mr Cassidy—Okay.

Senator NASH—They are the figures I am using.

Mr Cassidy—Okay.

Senator NASH—I think any sensible person would not define that as ‘tracking reasonably closely’.

Mr Cassidy—Okay. Let us have a look at that for you.

Senator NASH—That would be great.

Senator FARRELL—Thank you, Mr Cassidy, for coming along today. Just going back to your comments about section 46, can you give us a bit more information about how many proceedings have been commenced under that section, and how they have gone when they have been launched?

Mr Cassidy—Okay.

Senator FARRELL—Do you have some examples of when you have been successful.

Mr Cassidy—Senator, section 46 has a bit of a chequered history, to say the least. We had a couple of High Court cases going back to 2003 or 2004, I think from memory. It was the so-called Boral High Court case?

Senator FARRELL—Which one?

Mr Cassidy—Boral. There was a series of them. There was Melways, the street directory people, Boral, the northern gas case, and the rural press. There was series, as it turns out, of High Court cases. Over a period of a couple of years that really raised the bar somewhat in terms of what we needed to establish to prove there had been a break of section 46. I have said this in various Senate committees over a period, because of that we never dropped off on section 46 at any point in time. We always have at least six or eight section 46 matters under detailed investigation. Currently as it turns out we have about 10.

The problem we were having was that we would go and investigate and gather the evidence and so forth, but then when we got to, if you like, the external lawyers, they would look at the High Court cases and say, ‘No, on a basis of law as it has been interpreted by the court, you haven’t got a case here.’ Recognising that, there have been two lots of changes made to section

46. The previous government made one lot of changes in about mid-2007 and then the current government made another lot of changes early mid-2008. These were changes that we had advocated through the Senate Committee on Economics and an inquiry that it undertook into the Trade Practices Act and small business.

Our view is that with those two lots of changes, section 46 has been taken back to what many of us believe the section was meant to say, if you like, before these series of High Court cases. We have had a bit of a hiatus in terms of having section 46 cases in the courts because of the difficulty we had with the way the law had been interpreted. But currently we have two section 46 cases in the courts. With the law now clarified, if I may put it that way, we would have high expectations that the number of section 46 cases that we will be running will increase from what it has been over the last few and difficult years.

Senator FARRELL—Do I take it from that that there have been no successful prosecutions?

Mr Cassidy—No. We have certainly had successful prosecutions, although not all that many, I would have to say. It is a challenging area. Interestingly, a case that went all the way to the High Court was against Baxter Healthcare, in which the High Court determined late last year. That was successful although, as I said, we had to fight it all the way to the High Court. That was a case about the bundling of products of Baxter Healthcare and selling them to state health departments. They were saying to them, ‘We’ll sell you this, but only if you also buy this off us, and if you don’t buy it off anyone else.’ That is anti-competitive bundling.

CHAIR—Yet you still had to go to the High Court.

Mr Cassidy—I am sorry?

CHAIR—You had to take that all the way to the High Court.

Mr Cassidy—Yes. I think the history of it was that we won at first instance before a single judge. I think we lost it on appeal by Baxter Healthcare to the full bench of the Federal Court. We then appealed to the High Court and the High Court upheld the original judge’s decision. But I would say to you that I think that was a reflection of the uncertain state of the law. We are confident that with the law now clarified the way it has been, although it will still be difficult because it is a difficult area of the law, we will have more success in pursuing section 46 cases.

CHAIR—I guess it also demonstrates that the courts are patently not about the obvious truth; they are about the law.

Mr Cassidy—The role of the courts is to interpret the law as they see it.

CHAIR—I mean, it was a fix.

Mr Cassidy—As I say, it is a difficult area of the law because you are trying to distinguish between conduct which is anti-competitive and conduct which can have good commercial reason. Sometimes the differences between the two types of conduct really turns on what the particular firm was intending or trying to do. As I say, it is a difficult area of the law, and not only here. It is a difficult area of the law all over the world. But as I say, we feel that they

changes that have been made, both by the previous government and by the current government, to section 46 will help us considerably in pursuing section 46 cases.

Senator FARRELL—Thank you.

CHAIR—Could I just take you to the next step, which is part of the terms of reference of this committee. You say that global market power is brought to bear in the Australian fertiliser market, which is true.

Mr Cassidy—Yes.

CHAIR—But we are also looking at whether there is global cartel behaviour. When you have 85 per cent of the world's rock phosphate tied up by five entities, is there not a risk that the global market in which we operate here—even though there is a million tonnes of MAP and DAP produced in Australia and 40 per cent of it is sent overseas to test the world market and then brought back against all the freight components and bloody tariffs in China and all the rest of it—that the market in which that operates can itself be a cartel? You have only to look at the Morocco situation. Is there nothing you would like to reflect upon in terms of the global difficulty for Australian farmers to get a fair price, not only with 73 per cent or whatever of the wholesale tied up and 100 per cent of the manufacture but also 85 per cent of the world supply controlled by five entities?

Mr Cassidy—Certainly if there was what you call an international cartel and that was affecting the price of fertiliser in Australia, that is something that we could go after. I draw a parallel with, say, the international air freight cartel, which we have gone after and where we still have some of the airlines in court. So far we have obtained \$41 million in penalties. That will go up because it is still in play. If we have evidence of what you call an international cartel where the product from that cartel is being sold in Australia at a price which is inflated by the international cartel, that is within jurisdiction so far as we are concerned. But I have to say to you that we are not at the moment looking at any evidence.

CHAIR—But we are.

Mr Cassidy—You may have.

CHAIR—With oil, would OPEC be seen as a sort of cartel?

Mr Cassidy—Yes, but the trick with oil is, if you like, that it is a cartel of governments.

CHAIR—But that is a cartel.

Mr Cassidy—Yes, but I think the regular OPEC meetings agree on the price of oil.

CHAIR—All right. With regard to fertiliser, Morocco is very much a political thing. Morocco supplies rock phosphate.

Mr Cassidy—Yes.

CHAIR—In recent times when I think the price went back to, say, \$60—I will stand to be corrected—for urea FOB Black Sea—

Mr Cassidy—Yes.

CHAIR—There was pressure put on certain manufacturers in Europe to cut manufacture to prop up the global price. You would be aware of that?

Mr Cassidy—Yes.

CHAIR—The decision of that particular group of manufacturers was not to drop their rate of manufacture but to increase it, which started the collapse of the price of urea. Have we just got to stand by and cop that, as it were, up the back passage?

Mr Cassidy—It is a bit like what I said about your domestic market context. If you believe there is evidence of an international cartel that is affecting fertiliser prices in Australia, we would be interested in it because that is within jurisdiction.

CHAIR—That Black Sea behaviour where they were imposed upon to cut manufacture to prop prices, is that something that has come to your attention?

Mr Cassidy—No, it is not.

CHAIR—Perhaps we had better get that evidence for you.

Mr Cassidy—Okay.

CHAIR—Mr Cassidy, would now be an appropriate time for us to go to in camera proceedings?

Mr Cassidy—Yes, if there are no more questions.

CHAIR—Would you like to have a cup of tea or something before we do that?

Mr Cassidy—I would not mind having a coffee.

CHAIR—We will have a five-minute old man's break, and then we will clear the room.

Mr Cassidy—If we have a five-minute break while we go in camera, and then we can talk to you about the investigations.

Evidence was then taken in camera but later resumed in public—

[11.18 am]

DENTON, Mr Graham, Private capacity

Evidence was taken via teleconference—

CHAIR—I welcome Mr Denton to this committee. As you know, you are under privilege. Do you want me to read you your rights, or are you familiar with your rights?

Mr Denton—I had a look at the website. I think I am pretty well informed about that.

CHAIR—Would you like to make an opening statement?

Mr Denton—I believe that because of its 70 per cent share of the eastern states fertiliser market, Incitec Pivot should be held accountable for the selling price of its products and the levels of the profits that it makes. I draw the attention of the committee to the Goldman Sach JB Were Pty Ltd report I provided that details the 238 per cent increase in Incitec Pivot's profit from that traditional fertiliser business in 2008. Perhaps even better evidence of the level of the company's profit is the income statement page that I also sent from its 2008 annual report. It shows that in 2007 it made a before-tax profit of 21 per cent on sales, and that increased to 29.1 per cent in 2008.

Those are extraordinary levels of profit for selling what is virtually a commodity—in fact, for selling anything. It also increased its expenses by 78 per cent in 2008 and at the year end I am sure it must have had every available hollow log around the place stuffed with money. The Trade Practices Act does not address this type of price gauging, but it would be good if the ACCC could revisit its June 2006 decision permitting Incitec Pivot to acquire Southern Cross Fertilisers and correct some of the things that it got wrong. Putting Incitec and Pivot together was anticompetitive, but allowing Southern Cross Fertilisers to be added was really a no-brainer.

The ACCC incorrectly concluded that the prevalence of import parity pricing of these products would constrain IPL's post-acquisition prices and profits. However, Incitec Pivot's Phosphate Hill plant is an integrated facility with its own rock phosphate source adjacent to the plant, and it is among the world's lowest cost producers of DAP and MAP. Incitec Pivot's competitors are keenly aware that they are unable to compete on price with the Phosphate Hill products and, as a result, they simply do not try and shelter under Incitec Pivot's price umbrella. In fact, they buy Phosphate Hill products from Incitec Pivot, which again reduces the competitive pressures.

Because of these circumstances, Incitec Pivot is able to operate a two-tier pricing system, selling on export markets at world prices—it does not have much option about that—and the highest price that it can achieve in the imperfect competitive situation locally. When Mr Huxtable of Direct Farm Inputs started selling a single shipment of imported fertiliser last year, Incitec Pivot immediately reduced its prices—I am not quite sure by how much, but by many hundreds of dollars per tonne. In conclusion, I contend that Incitec Pivot could have reduced its fertiliser prices in 2008 by 20 per cent and still made a very respectable profit.

CHAIR—Thank you, Mr Denton. Senator Nash?

Senator NASH—Mr Denton, in your submission you attach information from Incitec Pivot and state that global demand catch-up is required. Towards the end of that document is a paragraph attributable to the PotashCorp Chief Executive Officer Bill Doyle, who said:

While buyers have delayed purchases since Q408, the need for potash and other fertilisers cannot be denied. The fundamentals of our business remain extremely favourable with historically low global ground stocks, supportive crop prices, depleting customer potash inventories and expectations of type potash supplied demand dynamics for at least the next five years.

How do interpret the comment in that document about supportive crop prices? Are they just saying that, given that the prices of the crops at that point were reasonably high, it was just going to be what the market would bear?

Mr Denton—I think so. I think this was a bubble. We had extraordinary oil prices that were driven by hedged funds. I am not saying that hedged funds are in the fertiliser business but I think people were hoarding some fertiliser on the basis that the price might go up or would go up. I have no feeling of relationship between the fertiliser price and the price of grains.

Senator NASH—If my memory serves me correctly I think the committee heard at some point in the past that the price could go up, merely because the price of grain at that point was high, so basically farmers would have the money to pay for the fertiliser.

CHAIR—I can confirm that. I have a letter written by a fertiliser manufacturer to a reseller stating, ‘If you want to justify the price increase we have just imposed on you’—and this was for fertiliser that was already in their inventory—‘just tell them the price of grain has gone up and they can afford to pay it.’ That was written by a manufacturer. As we know, one manufacturer has 73 per cent of the market so you would not have to be a genius to work out who it was.

Senator NASH—Thank you, Mr Chairman. Mr Denton, I wanted to clarify that that was your understanding of the phrase ‘supportive crop prices’, which is quite interesting.

Mr Denton—To my mind it is unrelated but I am not an expert on the subject by any means.

Senator O’BRIEN—Mr Denton, essentially—

Mr Denton—I am a little deaf. If you could speak up a little that would be good.

Senator O’BRIEN—Essentially your submission is that the ACCC made a terrible blunder in allowing anticompetitive mergers. That is what you are telling us, is it not?

Mr Denton—Yes, that is what I think. I think that Incitec Pivot is an ambitious company that has branched out. As I said in my written submission, it has about three-quarters of its assets now in explosives. It is pushing profits hard in the fertiliser business to make the overall company profit respectable. The explosives business is not nearly as profitable as the fertiliser business, at this point in time anyway. Currently I believe it is trying to hold up prices as high as it can for what it calls the ‘window’ of the cropping season. I know that financial analysts pop

out their heads every day to see how domestic fertiliser prices are holding up because that is a big part of the profit of Incitec Pivot.

Senator O'BRIEN—And I suppose, therefore, the share price?

Mr Denton—Yes.

Senator O'BRIEN—But you do not seem to be alleging that there has been some illegal activity?

Mr Denton—No, I do not believe so. I do not know what can be done about it, quite honestly. I think the opportunity for the ACCC to look at the merger has gone. The merger has happened and it is now history. It would be nice to think that companies that find themselves in this sort of powerful market position would have some constraint on them, in particular, when it is servicing the agricultural sector, which tends to be price takers and to have little option but to buy the product.

Senator O'BRIEN—You have some experience in business. How difficult would it be for farm collectives or the like to try to make their own arrangements about fertiliser?

Mr Denton—I think Mr Huxtable is trying to do that. He knows that, if he simply offers a low price, Incitec Pivot will stomp on him, as it has done already. He is talking about a cooperative and he is talking about giving farmers rebates on what they buy from him. Incitec Pivot is now a very big powerful and wealthy organisation. It is pretty hard to get one of these things off the ground. I wish Mr Huxtable all the best, but it will be a tough job.

Senator O'BRIEN—You do not think that you will get the support of farmers to do it?

Mr Denton—I think farmers feel fairly strongly about fertiliser prices. They feel that they have been poorly treated. I think they would like to, but what will happen is that with the very low-cost production of DAP and MAP at Phosphate Hill, Incitec Pivot has the ability to make it very hard for anybody.

Senator O'BRIEN—Thank you.

CHAIR—What you are really saying is that we need another vine to open up in Australia and to conduct a similar operation. There is the potential for that in the Northern Territory, so the quicker it happens the better.

Mr Denton—Yes. They need some competition.

CHAIR—Are you suggesting that if a forensic accountant were to go into the books of IPL it might discover cost-shifting from a profitable business to an unprofitable business to disguise profits?

Mr Denton—I think so, yes. It reports its profits at an EBIT level or, when it looks at the sectors, an EBIT less depreciation and amortisation. That disguises the financing cost, which is

probably spread over everything. I am not an expert on it, but I think it would certainly bear looking at.

CHAIR—Thank you very much.

Mr Denton—It has substantial finance costs now. It has about \$8 billion tied up in the explosives business.

CHAIR—It might have bought a custard pie at the wrong time.

Mr Denton—Yes. I believe that it bought it at the top of the market.

CHAIR—Thank you for your input today, Mr Denton. We look forward to continuing our deliberations. It is patently obvious that one thing Australian farmers need is competition in the fertiliser market—competition of a true nature.

Mr Denton—Yes.

CHAIR—Some people who are trying to enter the market have discovered that there are all sorts of ways people can put up hurdles against them.

Mr Denton—The other thing that might be helpful is to publicise—and I am not sure how this will be done—the facts about fertiliser prices. The spot DAP price is now about \$316 a tonne.

CHAIR—Is that United States dollars?

Mr Denton—United States dollars, yes, ex Tampa.

CHAIR—You are right; it is \$400 landed on farms now in the United States. It is an interesting exercise. Even if you go to the farm gate price of produce and the supermarket price which I have just had a look at over there you find that Australian farmers are certainly getting good experience at the profits of corporates that have market power.

Mr Denton—The corporates have had a field day.

CHAIR—Thank you very much for your time.

Mr Denton—I thank the committee and wish you well.

Evidence was then taken in camera but later resumed in public—

[1.02 pm]

TAYLOR, Mr Angus, Private capacity

CHAIR—I welcome Mr Angus Taylor to this committee hearing. Angus, would you like to make an opening statement?

Mr Taylor—I am a director of Port Jackson Partners, which is a management consulting firm. I am here acting on my on behalf, not on behalf of a group of farmers who have been working with me. Their preference is not to be acknowledged, if you like. I will explain that in a moment in my statement.

CHAIR—Thank you. If you would like to make an opening statement we would be delighted to listen.

Mr Taylor—Earlier this year I was asked by several farmers to work with them on a pro bono basis—they are not paying for me to do this work—with regard to a dispute that they had with a fertiliser supplier. They asked me because of my background and experience both in agriculture—I have a number of economic interests in agriculture, which are unrelated to these farmers—as well as my professional background as a management consultant and in economics.

I have attached a brief outline of my CV on page 9—at the back of the document that I have distributed. These farmers had purchased fertiliser from a supplier in August 2008, more than six months ahead of their requirements in their farming program. They were buying the fertiliser for a winter cropping program this year, in 2009, whereas they purchased it back in August 2008. They chose to purchase in advance, as I think a number of farmers did at that time, because of representations by industry players that further price rises were possible—perhaps likely—and reductions were unlikely. I am sure you have heard that story in recent times.

CHAIR—I certainly have. We were told to do the same thing and we erred on the side of caution.

Mr Taylor—There was no shortage of farmers who were told to do that. I am sure that you are aware that, at the time, fertiliser suppliers had built significant inventories in anticipation of the season that followed, in particular in response to the shortages that they had had in the previous season. These farmers locked in and they took delivery of the fertiliser. That was in August. They asked me to look at the way in which prices were moving internationally. What I chose to do was to look at the way prices were moving internationally at the time that the representations had been made and at the time that they had taken delivery of the fertiliser.

The unfortunate situation that they were in—which I think is the situation that many farmers are in—was that they did not understand the way the international price of fertiliser moved. They did not have access to the information about the international price of fertiliser and the delivered price—an important issue to which I will come back to in a moment. They chose to lock in, in the absence of what turned out to be quite critical information. You will see on page 4 of what I have put together that it was clear by August that the delivered international price of fertiliser

had stabilised and that in fact it was falling. At that point it was primarily the result of falling freight rates.

Later, in particular in September, it was further driven by the reduction in the product itself. As is said, that information which I pulled out came from a Bloomberg terminal to which I have access. It is not information to which most farmers have access. If they had access to that information it is clear that they would have chosen not to purchase the fertiliser. At the time they did not understand that the delivered prices were moving down. I guess that raises what I think are the important implications of that situation. They have to negotiate this dispute, which is still outstanding, which is why they would prefer me not to talk about their identities.

There are two options to avoid a situation like this in the future. The first is that we expect the fertiliser suppliers to be forthcoming with that kind of information. Given the nature of the relationship between farmers and service providers and how that has evolved over recent years, I think that is unlikely as a practical outcome. I suspect that the more practical outcome to avoid a situation like this in the future is that farmers' organisations, government or others—as yet it is unclear to me who should do this—should publish the international input price information, delivered and properly calculated which in itself would take some work.

That information should be distributed to farmers on a real-time basis and in a way that is accessible to them.

CHAIR—That is a good idea.

Senator NASH—It is a very good idea.

Mr Taylor—In this case—and I suspect in a number of other cases—their decision would have been different if they had had access to that information. I think there is a further implication of that, which is that if that information was available and farmers were able to change the timing of their purchase, I think we would see some fairly dramatic changes in the nature of the pricing behaviour of the fertiliser suppliers. It would be much more difficult for them to hold up prices as international prices are falling, and as a result you would see much more responsiveness of the domestic price to the international price.

That is where we are at in relation to how the situation might have been avoided. I guess the question that has to be resolved is how they resolve the dispute themselves. I am not sure whether this committee can actively engage with that. Of course, the outcomes of the inquiry might have some bearing on that.

Senator NASH—Is that essentially because they were not supplied with the information to make the best decision? What is the dispute?

Mr Taylor—Correct. That is the dispute. As you can see from the document that I have distributed, during August and in the lead-up to August, the information was clearly available. As I said, that information has been pulled off a Bloomberg terminal.

CHAIR—We have a public document that might be of some assistance to you. This document is from the ACCC. and it shows that the ACCC tried to hold the margins.

Mr Taylor—Looking at that, I would one thing. The calculation of the freight rate in the world price needs to be carefully done to ensure that farmers really understand what is going on. The freight rate was falling quite dramatically by the time that these purchases were locked in. Farmers needed that critical piece of information in order to be able to make their decisions.

Senator NASH—What was the reason for that freight rate decrease?

Mr Taylor—The freight rate began to fall back in June. In fact, you can see on page 5—

Senator NASH—It just plummeted, did it not?

Mr Taylor—Yes. This is the Baltic Capesize freight rate, which is a good indicator for any bulk freight, whether it is grain, fertiliser, iron ore, or coal. In fact, I was working with one of the major resource companies at the time and we were watching this start to collapse from May. That was largely as a result of what was happening in global finance. In fact, at that time China was starting to slow. It was very clear. The interesting thing about the Baltic Capesize freight rates is that they are seen to be a lead indicator of bulk commodity prices—an extremely useful way of anticipating when bulk commodity prices might start to fall. As I said, at the moment that information is not easily available to farmers.

Senator STERLE—In any event, Mr Taylor, it sticks out like a brick toilet.

Mr Taylor—It does.

Senator STERLE—One has to ask: Where are the farming organisations? One would think that this would be a basic service provided to those hard-working men and women on the land who fork out their dollars to be represented and to have this sort of information. You might want to state your own association, Mr Taylor. I am sure that it is more successful than that group of people. I do not think the evidence we heard was in camera—but pull me up if it was—when we were talking to the National Farmers Federation. We quizzed them to establish whether they did any work on the price of fertiliser. When I asked them that question you would have thought that I had asked them about how to grow corn in the desert.

Mr Taylor—It is interesting. The farmers' organisations have not focused on this. Historically, the fertiliser price was much more stable than it has been over the past few years. That might be a generous interpretation of why that occurred. I think for a range of inputs, not just fertiliser, there is a real need that this information should start getting out to farmers. Farmers' organisations are one very natural vehicle for that to happen.

Senator STERLE—And with the greatest respect, farmers do what they do very well. Farmers are not sitting studying graphs; they are working out on the land.

Mr Taylor—That is right.

Senator NASH—I wish to ask you a question about that issue as I think it is an extremely useful suggestion. If the farming organisations did not have resources that the Department of Agriculture has, some similar body should put its resources into doing that?

Mr Taylor—Yes. I say in the document that I think it should be done either by government or by farmers' organisations. They just need the leadership. It may be in time that private organisations start to take that up. In farming that is how it tends to happen.

CHAIR—In this committee's deliberations in another reference there was a suggestion that we have fallen well off the pace in AgResearch. It is almost like a doctors shortage in AgResearch. It has been suggested that we may have to reconfigure what we see as DAP here along the lines of the United States DA. Mapping this sort of stuff would be everyday work for them.

Mr Taylor—Yes. I think that is right. Whether it is the agricultural departments or the farmers organisations, frankly, I have not given that a lot of thought. Either way, it should reach beyond fertiliser; it should probably extend to fuel. Some of the major commodity chemicals such as Glyphosate really trade in light commodities and, of course, they are bought in large quantities. I think there is a range of inputs where that could occur. Outputs are reasonably well covered by private providers and others.

CHAIR—I have to say that the NFF more or less said that it did not have the resources to collect do it. The ACCC concluded that there was not a problem. The NFF said that it did not have the resources to go and collect the evidence.

Senator NASH—Mr Taylor, in relation to the information that you have provided, if I were a farmer—which I am actually—how would I go about accessing that information? If I thought, 'I want to get a handle on all this so that I can make a well-informed decision about whether or not I will buy', how would I access that information right now in this kind of palatable form?

Mr Taylor—You would buy a Bloomberg terminal, which would cost you upwards of \$20,000 a year, and you would pull the United States dollar source fertiliser price for MAP, DAP, or whatever it is that you are buying. You would then have to get the Baltic freight rate and you would have to calculate how many days it is from the source of the fertiliser where the prices are quoted to Australia. You would then have to calculate that out. The mathematics of that is not very complicated, but 99 per cent of farmers either would not be capable of doing that or they certainly would not have the resources to buy the Bloomberg terminal to do it.

Senator NASH—In the first instance. I imagine that the fertiliser companies are well aware of that?

Mr Taylor—Yes.

Senator NASH—By and large, the farmers who are buying this fertiliser cannot access this type of information on which to base their decision?

Mr Taylor—I do not know that for certain. But if you read, for example, what Julian Segal was writing later in the year, you would find that it was clear that they understood they could hold up prices at a time when they were falling. That could be possible only if farmers did not have access to information about the international prices. I think that is a reasonable assumption or conclusion to draw.

Senator O'BRIEN—Mr Taylor, you provided us with a copy of an article, I take it, from the Land, which quotes Craig Swan, President of the Australian Fertiliser Services Association?

Mr Taylor—Yes.

Senator O'BRIEN—He is purported as saying that there were no indications that the price would come off?

Mr Taylor—Yes.

Senator O'BRIEN—You are providing us with information that, in fact, at that very time the price was coming off?

Mr Taylor—Correct.

Senator O'BRIEN—Would Mr Swan have had any responsibility for his comments?

Mr Taylor—I do not know. I do not know Mr Swan, and I do not know what information he had access to at the time. However, I would say that information was around at the time. If that information were available to farmers and to farm advisers—who in many cases are agronomists and so on—they would not have access to that information. It would have then led them to question what he was saying.

Senator O'BRIEN—I guess one of the questions in my mind is: What responsibility do commentators have, in particular, those connected with an industry that benefits from encouraging people to buy now rather than later? What responsibility do they have, if either they are ill-advised or they do not take the opportunity to advise themselves or, perhaps worse, that they are intentionally being deceptive with their comments? Should we have some remedy for that circumstance?

Mr Taylor—I am not a lawyer. I was trained as a lawyer, but I am not a lawyer.

Senator O'BRIEN—I thought you were from your CV.

Mr Taylor—I am not really now.

Senator NASH—Your CV is very impressive.

Senator STERLE—It is a piece of paper.

Mr Taylor—From a commercial perspective I would say that it depends on how service providers and suppliers are holding themselves out. If they are holding themselves out as having a fiduciary relationship with the farmers, clearly they have a responsibility to advise farmers on the way that the price is moving and, therefore, what the right actions are. I think most farmers are now sceptical of that relationship with their service providers, in particular, the larger ones.

Senator O'BRIEN—Clearly, they are not sceptical enough.

Mr Taylor—But that is the point. To translate that scepticism to empowerment, if you like, to act in their own interests, they need access to the right information, and they did not at the time.

CHAIR—It is spectacularly telling.

Mr Taylor—By the way, I did not know before I did that analysis, that you could access this information. As soon as I got the call I jumped on the Bloomberg terminal and I thought, ‘Gee that is interesting; it is all there.’

CHAIR—Obviously at the time the groups that had the market power tried to keep the inventory intact in the market so that they could get rid of it.

Senator O’BRIEN—A lot of people who operate in rural Australia hold themselves out to be advisers. They are equipped to assist people to make the right decisions. This sort of information is the sort of information that you would expect them to have. You are saying that it is not that hard to get either?

Mr Taylor—At the moment it is expensive information. If I took a small farm consulting organisation of three or four partners, frankly I think it would be beyond their means to access this information at the moment. But that could be changed very quickly by finding a way of reducing the cost, or finding a way of distributing the information.

Senator O’BRIEN—By spreading it over more clients?

Mr Taylor—That is right. I suspect that the smaller farm consultants would find it difficult to afford a Bloomberg terminal. It is not surprising that they do not have access to this sort of information at the moment.

Senator O’BRIEN—What does it cost?

Mr Taylor—As I said, I think it is about \$20,000 a year.

Senator STERLE—To get that information?

Mr Taylor—No, to access a Bloomberg terminal which gives you access to this information, plus a lot more.

Senator STERLE—You would want to get a lot more for that \$20,000, would you not?

CHAIR—It would be money well spent.

Mr Taylor—Yes.

Senator O’BRIEN—It is peanuts compared to what those people are up for.

Mr Taylor—In hindsight that is quite right.

CHAIR—Mr Taylor, some of us are farmers, which is what you are. In my district we have people who were caught at \$1,450 a tonne. They were buying fertiliser as a precaution because they were told that the price would go up to \$2,000 a tonne.

Mr Taylor—Yes, that is right.

CHAIR—Of course, it was really only \$800, or something like that.

Mr Taylor—That is right.

Senator O'BRIEN—Who said \$2,000? When was that said and why?

CHAIR—It was like that in Milan. It was pure speculation.

Senator O'BRIEN—I guess that is a question. Do the newspapers also own some of the responsibility? They are prepared to disseminate information and they would have had the resources to look at Bloomberg that is for sure.

CHAIR—Members of the press were present at the time. I do not know whether you recall the press, Mr Taylor?

Mr Taylor—Yes, I do. They probably have the resources. I am not sure whether they have the skills or the inclination. That is why I said ultimately I think the government or farmer organisations have to take the lead on this. I have no doubt that if farmer organisations and/or governments start to do it, the media and the service providers will follow. Ultimately it might not be—

Senator O'BRIEN—I would have thought that editors of rural papers who purport, effectively, to comment on market situations, have some responsibility to inform themselves properly. If they have not and, effectively, they have given bad advice, I think they should be called on to answer for it.

CHAIR—I think I mentioned to the committee that I attended a fertiliser forum in Sydney at which they said that they got away with it. Predictions were made there by the peak body of the fertiliser industry globally, which I have. I will dig them out and we can make some comparisons. I think they said that, in the short term, there was a bit of a fall, but not much. I think they said that in 2011 the world production was going to do some damn thing.

Senator STERLE—They should be sitting in front of us.

CHAIR—Yes. We have some ways to go in relation to this matter. Mr Taylor, your evidence is very valuable to us.

Senator FISHER—Mr Taylor does his father justice. I used to work for the New South Wales Farmers Association at the time that Mr Taylor's father was president, which takes me to my question: Have you approached any of the farmers' organisations with this concept?

Mr Taylor—No, not yet. I think that is an obvious next step, but, no, I have not. I have talked with New South Wales Farmers about them providing better information to farmers. Their usual response is similar to what Senator Heffernan said, which is that they do not have the resources. They are strapped for funding, so it has been difficult for them to do this sort of thing. If that is the reality perhaps it is a job for the Department of Agriculture.

Senator FISHER—I take it from your submission that the private sector organisation for which you work is not contemplating or designing a product?

Mr Taylor—No. Our line of work is working for major companies in Australia and around the world, some of whom from time to time include players in this industry.

CHAIR—This is just the country in the boy coming out.

Mr Taylor—That is right. I have to say that I felt very sorry for the farmers who were caught in this position.

Senator FISHER—Many of us share the inability to extract the country.

CHAIR—That is right. You cannot get the country out of the boy, but you can take the boy out of the country.

Senator NASH—Thank goodness for that.

CHAIR—Thank you very much, Mr Taylor. We are eternally grateful for your evidence today.

Mr Taylor—Thank you very much.

Committee adjourned at 1.29 pm