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SELECT COMMITTEE ON AGRICULTURAL AND RELATED
INDUSTRIES

Reference: Pricing and supply arrangements in chemical and fertiliser markets

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

Friday, 14 November 2008

Members: Senator Heffernan (*Chair*), Senator Farrell (*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, 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, Joyce, Milne, Nash 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

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Committee met at 10.07 am**FARGHER, Mr Ben, Chief Executive Officer, National Farmers Federation****McELHONE, Mr Charles, Manager, Economics, National Farmers Federation**

CHAIR (Senator Heffernan)—I declare open this public hearing of the Senate Select Committee on Agricultural and Related Industries. The committee is hearing evidence on its inquiry into the pricing and supply arrangements in the Australian and global fertiliser market. I welcome everyone here today. This is a public hearing and a *Hansard* transcript of the proceedings is being made. Before the committee starts taking evidence, I would 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 a 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 on 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 also made at any other time.

I welcome representatives of the NFF, that venerable organisation. Do you want to make an opening statement and then we will ask you a few questions.

Mr Fargher—Thanks for the invite. Obviously we have engaged with you before on this issue and numerous others. We put in a submission earlier on and obviously looked at the ACCC report. We have also got some further feedback from members on the issue today which I am going to ask Charlie to go through in a minute. That is interesting.

Just in terms of an opening statement on the general issue—and I know that many people around this table are as well aware of this issue as I am—I cannot remember the last time I went to a meeting in regional Australia where there was not someone talking about fertiliser prices; I cannot remember the last time. Whether it is cropping industries, irrigation communities, the dairy industry, the cane industry up north or state farm organisations, everyone has been talking about the price of fertiliser and asking questions about why the price is where it is. It is such an important input into our systems—in some cases, it is the biggest input cost for farmers.

We have been in a situation where we have had some good prices earlier in the year, through the winter cropping period, and, unfortunately, despite some people thinking it would be a bonanza for farmers, two things have now happened: (1) the commodity prices may well have been high but the input prices, including for fertiliser, are now very high; and (2) it was not the season we had all hoped for in the south-eastern part of the country, and people either missed out on a crop or—where, even as recently as a couple of weeks ago, they thought they were going to get a good crop—they did not get a good crop. So that is a concern for everyone. Input prices are

a concern. Fertiliser prices are a concern. Everybody is talking about it and people have got a lot of questions about it.

There is a lot of anecdotal evidence, and a lot of stories going around the bush, about fertiliser prices. People say, 'The fertiliser company said that there was no product, but we heard stories that there was product in the warehouse.' Is that true or not? I do not know. People say, 'We spoke to field reps and they say, "Well, we were caught short this year,"' and then other people say, 'Caught short? Ever since Noah built the ark we have sown a winter crop in autumn!' But there have also been international factors this year in terms of supply and demand for agricultural commodities.

Disaggregating out all that information is, for us, very difficult. I have mentioned this before. We hear so many stories around the traps—and Charlie has got some information that he is about to share with you. But, while we have got concerns—and I would even go as far as to say that many of our people are angry about it: not just concerned but angry about it—we have not come today with any specific accusation. We have come with questions ourselves.

So, with just that background about the feeling out in regional Australia, I will hand over to Charlie, who has got some feedback—mostly from the north because, of course, we have had the winter crop now. People are worried about trying to get that off, if they have got grain. But, of course, other industries, like our cane industry and other northern industries, are trying to buy fertiliser now. So, Charlie, do you just want to explain some of the feedback we have had.

Mr McElhone—Sure. I will just elaborate on some of that feedback. It basically revolves around prices that have been occurring on global and domestic markets over the last three or four months. What we have seen on the world market—and this is openly available data through the Fertilizerworks website, which is widely recognised as being an appropriate reflection of what is happening on world markets—is that world prices, particularly of urea, have gone down from about US\$850 a tonne to down below \$300 a tonne since August this year. On the flip side of that, we are seeing no movement on the domestic market—if anything, we are actually seeing new record highs, particularly in some of our northern members' production systems. So there is no reflection of the actual decrease in the world price. Some might say, 'Well, we have seen a 30 per cent depreciation of the Australian dollar in that time,' but in that time we have seen a decrease in the world price by over 60 per cent. If you do the analysis—and one of our members, AgForce, has actually gone through and done that analysis—then, even factoring in the exchange rate depreciation, if domestic price were in line with world price movements the domestic price would be somewhere in the vicinity of \$360 to \$370 a tonne. Instead, what we are really talking about are prices of between \$1,200 and \$1,300 a tonne.

Obviously reflecting Ben's earlier comments, they are angry, they are confused and they are asking, 'What is actually happening regarding this?' Bear in mind, when we are talking about sophisticated importers working within a market such as the fertiliser market, we would assume there would be extensive hedging practices taking place just like we do within the agricultural sector with our export markets to derive some additional insulation from that effect of the Australian dollar. Just reflecting Ben's comments, they are angry, they are confused and they are asking questions of how are we in this position where there is that ability to break away from what is happening in world markets.

Senator NASH—With that anecdotal evidence, and obviously it is only anecdotal, is there enough there for there to be some truth somewhere or is it possible that with all of this anecdotal evidence that we are hearing about, and it has been flooding in from all over the place, that there is not a grain of truth in it anywhere?

CHAIR—Have you finished your presentation?

Mr McElhone—Yes.

Senator NASH—We were merely filling in time until you got back. We never know how long it is going to be. I am happy to come back to that. Do you want to just answer that?

Mr Fargher—I have personally grappled with this for months and spoken to various people around this table about it in terms of the fact that people have these stories, these concerns and these frustrations. But even if you say to these people, ‘So what is going on?’ they say, ‘I do not know. There is something going on, but I do not know’. They say, ‘Don’t you know?’ and I say, ‘Well, I do not know. Maybe the ACCC or the Senate knows.’ We do not have any specific information; we have just got all these stories and that is what we are sharing with you.

Senator NASH—My question is: is there enough smoke to assume that there is a fire somewhere?

Mr McElhone—The other thing that we should note is that our members are only getting confirmation of prices on the phone. There is nothing written down because of the variability within the market. So, from that perspective, it is very hard to get concrete evidence on the ground. It is more the hearsay of what is happening on phone exchanges.

Senator STERLE—Can you just help me out—as I am someone who is not a farmer—and explain to me: is urea mined here, shipped in or both?

Mr Fargher—Most rock phosphate and those types of things are overseas.

Senator STERLE—Okay. How many companies supply urea on the market?

Mr Fargher—There are several but there is one big one.

Mr McElhone—We went through that in our initial submission, but on the east coast it is quite limited—three or four.

Senator STERLE—You have answered the question. That is all I need to know.

CHAIR—What he was really after is: what is the percentage of urea that is imported and what is the percentage that is manufactured locally? You do not know that?

Mr McElhone—I do not know that off the top of my head, but we can find out.

Senator MILNE—In the conclusion to your submission you say that, in the survey you did, nine per cent of the people said they are now confined to a single supplier source, therefore

exposing them to market power issues. You would have obviously read the ACCC report, so I would just like to get your analysis on the ACCC report in the light of that kind of finding from your own survey. From our point of view, we need a way forward here. There is a general understanding here that, yes, there is volatility in the world market. We understand that and there is also going to be volatility in the price. What we are trying to get at is whether the issue of this market power is actually a much bigger issue than ACCC would have us believe at this point. Perhaps you could just comment on that. If you have a suggested way forward, then I am interested in hearing that.

Mr McElhone—I would say that with regard to some of the analysis before the middle of the year it is a very convoluted space. We are talking about world movements of oil, so it is very hard to pin that down. Since that ACCC analysis has come out, we have seen a distinct break away from what is happening on world markets. Regardless of what is in the ACCC review and their findings, we are seeing some real movements in the last three or four months that have been a distinct break away from any of the findings that they might have come up with during that process.

Some of our discussions indicate that it is an area worth continual review rather than a one-off piece of work because it is a constant work in progress. We are concerned about the 10 per cent of farmers who only have the one supplier in their local region. That is coming back directly. But that does not necessarily reflect the full dynamics of it, because that is only talking about what they see directly in terms of the distributors. When we are talking about the suppliers behind the distributors, that is another level.

CHAIR—I was going to nail you on that. IPL did have 73 per cent of sales in eastern Australia; they now have about 70 per cent, and they say they do not have a monopoly. You may well have two IPL Incitec Pivot suppliers, as we do. We have one in Marrar, one in Wagga and one in Junee. There was an Incitec and Pivot in Junee. They ran them separately for a couple of years and then—bang. They closed it up two years ago and whack went the price. They do have a market power of, say, 70 per cent—for easy working. What you are saying is that they might be resellers with the same supplier.

Mr McElhone—Exactly. We even outlined one of the cases where there were in the vicinity of five to 10 distributors within a certain region, but as to the actual suppliers delivering them, there was only one.

CHAIR—In a discussion with the ACCC, they said that one of the comforts they got that there was not an issue was the evidence they received from the NFF. But it would be fair to say that you do not have the resources to gather court standard evidence.

Mr McElhone—Most definitely.

Senator NASH—Were they being a bit cute by spinning it that way?

Mr Fargher—I have not heard that comment. These are anecdotal stories from farmers, our members. This is not specific analysis of the fertiliser market in Australia. It is anecdotal evidence from our members. We are not a regulatory body; we are a membership based body.

We would expect the relevant authorities to investigate. I am not claiming that we have those resources or that ability.

Senator MILNE—This is where I am getting to about a way forward. What I am trying to understand from your analysis of the ACCC report is: were the right questions asked? Did the level of investigation go far enough? I just heard you say a minute ago that this should be something which is under constant monitoring, not just a one-off inquiry. Is your recommendation that the government ask the ACCC to have an ongoing process, or is it to have an annual assessment? Is there anything they did not do that you think they should have done, gone further with or ought to be included in such an ongoing review? I am trying to understand where we can take this so that we might get some real analysis over time and some proper framework for assessing this issue so that you are not left with just anecdotal feedback and no capacity to find out what the truth is.

Mr McElhone—What we would like to see is exactly the kind of information that our members have been bringing back to us. It is the open, publicly available world price movement data mapped out against the exchange rate pressures and looking at the domestic market price. The ACCC has the power to get a balanced view of that across the whole of the country and to monitor that over time. That is the only way that our members will have real comfort moving forward so that we do not get those same kinds of breakaways from the international price movement.

Senator MILNE—You would be happy if this committee recommended that the government request the ACCC to do just that?

Mr Fargher—We have not thought about it. But, given the nature of your questioning and trying to find a way forward, that would be a prudent move. I think farmers understand that business is business, but they want to know what is going on. They want access to information. If they can get access to information, they will make good business decisions. But if they do not know what is going on and there is all this anecdotal evidence flying around, particularly on a sensitive input cost issue like this, there will be ongoing frustration as we go into next year.

Mr McElhone—A large portion of them are subscribing to their own information and data sources. We have one example where they talk about the demand outlook for urea being so uncertain and conditions not existing for urea prices to recover on world markets. They are reading this, yet they are not seeing any indication of that in the domestic market.

Senator MILNE—Can you provide to the committee a proposal of what you would like to see monitored by the ACCC and the kind of framework in which you would like that information presented? If you could send us something like that then it will make it easier for us to frame a recommendation around that, if we chose to do so.

Mr McElhone—Yes. Thank you.

Senator NASH—Does the NFF have enough confidence in the ACCC to be able to do a good job of that?

Mr Fargher—We do not make any judgement on the ACCC's ability or otherwise.

Senator NASH—It is the appropriate body and the job they do is not up to you to comment on.

Mr Fargher—Yes.

Senator STERLE—It doesn't matter. The chair will do it for you.

CHAIR—We have them appearing this afternoon. We will test them then.

Senator STERLE—Gentlemen, on page 12 of your submission, under 'fertiliser distributors' you talk about the percentage break-up compared to distributors in the area. Do you have any evidence that the seven per cent of farmers who have six or more distributors in their area are getting their urea per tonne at a different price to the 90 per cent of farmers who have only one distributor in their area?

Mr McElhone—No, we do not.

Senator STERLE—It is a shame that you do not have that, because it would be very interesting.

CHAIR—I can give you that evidence.

Senator STERLE—Okay. I will put my next question to the chair: could you table that for the committee?

CHAIR—There is absolutely no difference, because generally they are the same supplier. They get a notice overnight. Scott Macdonald gave evidence on this other day. HiFert—

Senator STERLE—On that, Chair, I think it would be very helpful for the committee to have that evidence.

CHAIR—You have to see that against the background. It is the same supplier for most of those resellers. You are dealing with the same mob. We took evidence in Western Australia—

Senator STERLE—I just want to see the prices.

CHAIR—where they tried to buy 9,000 tonnes in one hit.

Senator NASH—While these guys are having a chat, can I ask—

Senator STERLE—We are not chatting. I am asking the chair questions.

Senator NASH—As you do. Has the NFF asked about the fall in urea prices while there is no corresponding drop in domestic prices? Has the NFF asked Incitec why this is the case?

Mr McElhone—No, we have not directly. But our members are in constant dialogue with their distributors and major suppliers

Senator NASH—What response are they getting?

Mr McElhone—Some feedback has come in about this. When questioned why the price had not dropped in line with the world parity, the answer was that they held stock from when the price was high. Yet, upon further questioning, there was the fact that when the world price went up so did the local price—

CHAIR—Immediately.

Mr McElhone—It went up almost immediately.

Senator NASH—It is a bit like fuel from the local garage.

Mr McElhone—It is about holding onto additional stocks and about the exchange rate.

CHAIR—This is what I call monopoly behaviour. Can I just butt in?

Senator NASH—Of course you can.

CHAIR—In September last year, a lot of fertiliser was delivered from the original supplier to resellers. I have evidence of that. I have to put on the record that I buy super. I bought super last year at \$760, out of a shed that I was lucky to get it out of. Later, that same super, from the same shed and by the same delivery was \$1,200.

Senator STERLE—How much later?

CHAIR—Three months. The resellers said: ‘Bill, we know the price is going up. We’ve been given intelligence through the system. We’ve bought forward to get \$400 a tonne profit over what we normally get.’ And they got it. We have evidence of the demurrage costs of shipping out of ports like Townsville was as cheap as having the fertiliser delivered to port. They want their cake on the way in by withholding and they want their cake on the way out when the price is falling by saying, ‘Oh, shit. It’s all the stock we’ve got in hand.’ A lot of it is Australian stock. Talk about monopoly behaviour.

Mr Fargher—We have heard the same story with regard to people ringing up, being quoted prices but being told they have to have it by a certain date. Then, several weeks later, it is several hundred dollars higher—and you would assume it is the same shipment. I say ‘assume’ because I do not know.

CHAIR—I have received evidence which I will put on the record later, in very succinct form, of industry consultants telling the industry: ‘We got away with it last year. We put it up \$100 a tonne a fortnight, several times more than we thought the market would bear.’ The phrase used at the conference, in the hall, was, ‘We got away with it.’ If that is not monopoly behaviour, you can have a lend of me.

Senator STERLE—Is there any other evidence in the agriculture industry of where commodities can be purchased and when the farmer goes to pick them up the price has doubled, tripled or gone up one dollar per tonne or per cubic metre or whatever?

Mr McElhone—No doubt, at different times.

Senator STERLE—I am not just talking about fertiliser. Is there any other thing—

Senator MILNE—Fuel.

Senator STERLE—I do not think fuel has ever gone up 107 per cent. I am not a lover of the fuel companies, but I do not think it has gone up 107 per cent in one year.

Mr McElhone—I would say that the fuel issue is another bugbear—

Senator STERLE—Charlie, don't start me on petrol and diesel!

CHAIR—Obviously that is a cartel and it is recognised as a global cartel.

Senator STERLE—The biggest bunch of crooks in Australia.

CHAIR—The first hurdle we want to jump is: do we think there is a global cartel at work? Do we think there is the possibility of monopoly behaviour in Australia? Then we want to look at the consequences that flow from that. I would have thought if you have 100 per cent of the manufacture in Australia and 70 per cent of the sales you do have market power that would fit the definition of a cartel. It will be interesting to see why the ACCC thinks there is not a monopoly.

Senator STERLE—You are talking urea.

CHAIR—No, I am talking DAP and MAP. I notice that the ACCC have not modelled single super. They modelled DAP and urea. The whole thing is flawed. I know they did not do a drill down. They did not drill down to get evidence level witnesses. I thought it was a farce. As I said publicly, I thought they were as useless as tits on a bull.

Senator MILNE—A considered analysis.

CHAIR—That is a term of endearment in some circles, by the way.

Senator MILNE—I have questions in relation to Roundup and the use of GM crops in the States and the Olympics this year also shutting down a number of manufacturers in China. It concerns me greatly that the introduction of GM crops has led to a massive increase in the use of Roundup in the States. That must be having an impact on global price and availability. That has come on top of the Olympics closing down a number of those factories in China. So the first thing is: after the Olympics, did they reopen those Chinese factories or are they permanently closed? What does that mean in terms of global supply and price?

The second thing is: with our move to no-till agriculture and so on, how much work are we doing on the margins in shifting to a more sustainable farming system as opposed to one that is dependent on Roundup? I say that because we have been up to have a look at what Christine Jones is doing with some of the grain cropping properties in Warren, for example. We were told there that the margins are now significantly better where they are doing that. I am interested in

the analysis NFF is doing on the shift to more sustainable practices and what that is going to mean. Can we go the next step and actually reduce input costs by getting off this stuff altogether or by significantly reducing it?

Mr McElhone—Regarding the first question, basically we have had no recent feedback regarding the Chinese plants. As far as we are aware, there is no significant change in the market situation.

CHAIR—Can I just give some guidance to the committee. We do have a reference on chemical. I would like to deal with the fertiliser issue before we get to chemical. I do not mind if there is a bit of commentary around chemical; that is part of our reference.

Mr McElhone—We do not actually have any new information on the chemical market to present to you today.

Mr Fargher—I am more than happy to either now or later go into GM issues, and I am actually keen to do so.

CHAIR—This committee will be dealing with that, so lets get to fertilisers.

Mr Fargher—We have a position on GM. We have done a lot of work on that and I am happy to talk to you any time about it.

CHAIR—I will just make one comment about the chemical side of it that may give you some comfort. Generic glyphosate was discovered by some sources to be not tolerant to the gene-tolerant crops for Roundup Ready type crops. One of the issues for shutting some factories in some sort of commercial arrangement was the fact that their particular Gladiator type Roundup was not doing the job with Roundup Ready. So they are some of the complexities that we will deal with later on.

We have received evidence—and I have the docket here—of sugarcane farmers on 30-day accounts having the costs to the reseller passed on to the users of the 30-day accounts from the original supplier at 18 per cent a month. Would you blokes like to say what you think being able to impose that sort of 18 per cent a month cost means in terms of market power?

Senator FISHER—What costs, Chair?

CHAIR—Well, if you are late with your 30-day account, the charge is 18 per cent—not annually but per month.

Senator FISHER—So it is a simple impost, is it?

CHAIR—Yes. I would have thought that it is well outside the market.

Mr McElhone—I cannot comment on that. I would have to look at—

Senator STERLE—Sounds like you guys have some homework to do.

Mr Fargher—As I said before, we are not pretending to have done a survey or even an inquiry or interview of every farmer in Australia. We deal with a lot of issues; fertiliser prices are one of those issues. People are talking about it in the bush, as I said, and we hope that the relevant authorities have looked into it.

CHAIR—To take you to another issue, if I could; we received evidence from a user who decided to get his fertiliser analysed. It turned out that on the analysis provided by the laboratory the fertiliser concerned was well off label. Has the NFF given any thought to that? I think this committee will most definitely give serious consideration to a recommendation that there be a system of mandatory analysis of fertiliser that comes from all over the place—rock phosphate from Nauru has a cadmium content, et cetera. I am a worn out farmer. I have been buying fertiliser all my life. I remember those bloody 180 pound bags we used to have to lump. We just took it for granted that what the bloke said was in the bag was what was in the bag. But there is actually no system to test that.

Mr McElhone—I have not heard anything about quality issues.

CHAIR—We have actually called in some analysis, just by way of routine, given that we received evidence from a reputable laboratory of an analysis where the thing was three or four per cent off label. Obviously we can smarten that up.

Senator FISHER—Chair, have we not also had evidence of testings that do stack up?

CHAIR—They were nearer the label; they were not on label. That was from Western Australia.

Senator FISHER—Perhaps we might ask the NFF to take on notice the question of whether or not monitoring quality is an appropriate thing to recommend. I mean, you have to do a cost benefit analysis of it. It will cost money and presumably those costs will be passed on.

CHAIR—It ought to be a statutory requirement. It is like labelling on a bottle.

Senator STERLE—Chair, as a committee member I think when we start having to rely on witnesses to give us the tick for recommendations it defeats the purpose of Senate committees.

Senator FISHER—My question is about the wisdom of the industry, because ultimately it is the customer that will be forced to bear the brunt of this cost. If it is a worthy cost then it will be done. So the question is: is it a worthy cost?

CHAIR—But that is a question for us. The NFF is not the industry.

Senator FISHER—They represent consumers—farmers. As a farmer I would have a view.

Senator STERLE—I suggest we put that on our agenda for the next private meeting.

Senator MILNE—I will return to where I was going before, in terms of the ACCC. I note that when the minister wrote to the ACCC he did not ask for a formal price inquiry under the act. He just asked for an investigation. Nor did he make an allegation, at the time, that there had been

any contravention of the Trade Practices Act. He basically asked them to look at it but he did not give them the powers to investigate in the way that you would, because it was not a formal reference for a price inquiry. I would just like to know the NFF's view. Do you think there should be a formal price inquiry so that the ACCC has the powers to go and do what it might do? Secondly, do you think, from the anecdotal evidence out there, that it would be reasonable to allege that there has been a contravention of the Trade Practices Act in terms of market power?

Mr Fargher—Firstly, in relation to an inquiry, we supported the inquiry and we support this investigation. Secondly, in terms of whether we are pushing for another inquiry with different terms of reference, we might need to take that on notice. I am just not familiar with the terms of reference. I have not looked at them for a while. Thirdly, we are not making any allegation. We do not make allegations without evidence. We do not have the evidence and we are not making any allegation. We are relying on the relevant authorities to do that work.

Senator MILNE—Yes, sure.

CHAIR—And this committee.

Mr Fargher—And this committee.

CHAIR—We have received evidence, through a former Premier in South Australia. I had better acquaint myself—was that in camera?

Secretary—No, it wasn't.

CHAIR—The evidence was, obviously, about what farmers saw as a breach of contract, because they had forward ordered—as I have done all my life. You know, being an early bird, you ring up in September and say, 'I'll take 50 tonne.' It is in the system, and away you go. This time, with this price signal from the global market that, 'Ooh, there's a big price increase coming up,' there was some hoarding and non-pricing. It is more than anecdotal. I can take you out and show you the sheds where the front-end loader was stuck in the front of the shed, the shed was full of super and the agent said, 'I've been instructed'—by his supplier; that is, the manufacturer—'that I cannot supply you; nor can I price this to you.' People were very, very angry about that.

Mr Fargher—That is right. I have heard stories as well—I am sorry that I keep calling them stories, but that is what they are—

Senator NASH—It is a good way of getting a good feel for it.

Mr Fargher—about that issue. As I said, some reps were saying, 'You've caught us short. The price is high because you've caught us short.' I am talking about autumn and the winter crop. But traditionally where they have had those early lock-in schemes they were not available. So they are saying, 'You've caught us short,' but they are not giving early lock-in schemes. So farmers are saying, 'Well, what is going on here?' And they are frustrated.

CHAIR—It was obviously a gouge. The ACCC bureaucrats are too bloody impractical to see that it was a market squeeze that happened. It was a one-off gouge for this price increase, and

now we are seeing a one-off gouge as the market goes the other way. I can quote you the Black Sea price FOB on Monday morning for urea. It was actually about \$450 and I can tell you the circumstances under which that occurred. As you may be aware, between 80 and 85 per cent of the world's rock phosphate is controlled by five entities. There is obviously a cartel, or a model, globally where people, like the bookies at the races, look at prices. There was—something like an OECD or OPEC thing—a plan to drop the level of manufacture in recent weeks. These Russian companies that deliver FOB to the Black Sea decided not to participate in slowing their manufacture. Instead of that they increased their manufacturing but dropped the price.

I had a comment from a person who does not want to give evidence to the committee because of the sensitivity of his position. He was the guest speaker at a function in Sydney a few weeks ago which was a forum on fertiliser and I was a guest speaker there too. He said to me, 'Bill, this is the beginning of the break-up, if it keeps going, of the global cartel in fertiliser.' That was a conversation I had yesterday. I suppose I could actually table the email. It is a gentleman from the United States who flew out here to address this committee and I can give you the details. He is the bloke who said to the committee, 'We got away with it last year globally.' He said the difficulty now is going to be that some people will want to try to not cop the decrease because of stocks in hand. That is going to be the problem. But if it is good enough to whack the price up with stocks that are at the old price then it should be the same set of rules if the price drops. It is exactly the same as petrol. It is just as big a con job as fuel. Farmers are sick of it, as you would know. I found offensive a letter from a manufacturer to a reseller to advise his growers in the south-west of New South Wales, 'Just tell them the price of grain is good and they can afford to pay this.' That was the excuse for putting it up, because it had nothing to do with the cost. Bob Katter was talking here the other day about the gas contracts et cetera to Duchess. Nothing has changed. Their costs have not gone up.

Senator NASH—On that basis, they should be crashing at the moment.

CHAIR—Yes. He was very much of the view that they got away with it, and I have to say that it is pretty bloody distressing to see people able to manipulate the market like that. Would the NFF have a view on a market share of 70 per cent? Wouldn't that be a monopoly power situation?

Mr Fargher—My question, without being a TPA lawyer or another expert, has always been in this inquiry about the difference, which we talked about last time, between market power and any misuse of market power. People have market power and they use market power to run a business. That is life. I guess there are laws that prevent misuse of market power and that is what people investigate. We have obviously got market power issues in the retail sector as well and other parts of the country. I do have a comment on the ratio of that price. Charlie—

CHAIR—Could I finish what I was going to say there? On the basis of the letter saying, 'Tell them the price of grain has gone up,' I do not mind putting a bit of my business on the table. Two weeks ago I sold some wheat. I like to hold wheat in storage for a drought reserve and it was worth, say, \$380 two or three months ago. It might have been worth \$400 when I dearly needed it because I was shitting razor blades it was not going to rain at all. I sold it two weeks ago for \$290. Yesterday the same wheat is \$210. The offence in the argument, 'Tell them the price of wheat has gone up,' now we have come to harvest and the price of grain has fallen away.

Mr Fargher—That is the issue of the ratio. Producers talk to me about the ratio of the input price to the price of grain. What we have seen is the input price go up. We had seen the grain price go up, and their concern going into next year is exactly as you say. If the input price stays up but the wheat price comes off, that is a real concern to them. What is that going to mean for the amount of fertiliser used next year? In a broader sense, we are trying to grow more grain, not less. The world needs more food, not less, and this is a very important input to us. That is what people are concerned about it. I hear people talking about how much fertiliser they are going to use next year.

CHAIR—I interrupted the previous answer.

Mr McElhone—All I was going to say with regard to the market share issue was that it is something that we grapple with from the perspective that we understand that there are efficiencies to be gained by expansion. But when you expand to a level then you open yourself to competition issues. It is finding that balance between the two. We do not necessarily advocate having a million and one different competitors in the market which are all inefficient and cannot get you the prices that you want. It is finding the correct balance with the efficiencies that you can get with size—and we do not know where that balance is.

CHAIR—I will table this email. This person was a speaker at a conference and he comments that evidence was given at this forum in Sydney two or three weeks ago—and I presume IPL were there somewhere—that a new mine is proposed for the Northern Territory which is going to equal the Duchess mine. It will be a million tonnes a year sort of set-up, but he says the difficulty for the industry is that, if they can maintain market power, it will not necessarily reduce the cost of fertiliser to protect themselves against the increase. That is pretty serious language, I would have thought. Do you have any questions, Christine, Senator Farrell?

Senator MILNE—No.

Senator FARRELL—No.

CHAIR—We are beside ourselves as to know what to do. The great threat now is going to be the argument ‘We bought this fertiliser in at the old price and therefore you’re going to have to wear it.’ I think farmers ought to be alerted to the fact that they ought to just withhold and say, ‘We’re going to get it somewhere else.’

Senator STERLE—Where else could they get it?

CHAIR—We have received evidence of people wanting to import. Picking up the urea price—some of the Northern fellas knew that you could bring it in and land it here for about 400, when they were paying 800 or 900. They were having problems with a threat from a manufacturer. They had written evidence of an Australian manufacturer saying, ‘We’ll bring up a dumping case if you proceed down that path.’ And I have received evidence over a period of years that people have tried to import, to try and get a cheaper supply, and there have been troubles with terminal space—much the same as importers of fuels get trouble with terminal space.

By the way, the government announced the ACCC inquiry after I announced we were going to have a Senate inquiry. It was in a rush to do something about it. I spoke to Chris Bowen, the minister, and he said, 'Bill, we're going to have it.' That was just a desktop study and I thought it was just a political stunt.

If there is anything further you want to add, please do. We may want to come back to you because, as Senator Sterle suggests, this ought to be something of an ongoing investigation. We may give an interim report and still continue an investigation.

Senator NASH—We are talking about the link between the price of grain and the price of fertiliser. Does the NFF have a view on why the price of grain has crashed so badly over recent months?

Mr Fargher—We have done a lot of work on the global financial crisis and the impact on soft commodities. We have been talking a lot to the banks and others about that. We have seen that come off. How long it comes off for, we do not know. We think the long-term fundamentals are good and the demand is good, but this short-term volatility will be an issue for us heading into harvest and storing grain—whether we need that liquidity or whether our farmers can hold the grain until next year, depending on what happens in the market. We will just have to wait and see.

Senator NASH—In your view, is it purely through the global financial crisis or have the wheat marketing arrangements had any impact?

Mr McElhone—Not purely, no. But it is fair to say that there is a lot of investor hedge interest which has come out of all commodity markets, including the grain market. But it also links in with some increased supplies from the Northern Hemisphere.

CHAIR—The question that would beg itself, and I am sure Senator Nash would like to ask, is: has losing the single desk destroyed the market?

Senator NASH—That was not my question. I was asking—

CHAIR—But it is a question a lot of farmers are asking.

Senator NASH—They are, which is why I am asking—

CHAIR—As you may or may not be aware, in recent times AWB have had to set their bet with the Chicago stock market. Everyone is setting their bet, so it is a global bet—and the global bet is keeping the price down. Ron Greentree may well do better because he is going to Japan—but, yes, the global market is in disarray.

Senator NASH—Perhaps these guys could answer as well. That would be useful.

CHAIR—Yes.

Mr McElhone—I just refer to what I said—the northern hemisphere coming on and grain stocks improving as a lot of countries have increased their movement towards grain crops

because they have been attracted by those higher prices, as well as the investor interest dissipating.

CHAIR—I have got to say, just by way of interest, that there are problems, but I do not want to signal who they are because we will make the market worse than it is.

Senator NASH—Could you not do that, please.

CHAIR—Yes. Exporters are finding it difficult to get paid.

Mr McElhone—It is something we will be monitoring pretty closely in terms of just the broader implications globally—in terms of the buyers of our produce on international markets.

Mr Fargher—We have heard some stories of people wanting to renegotiate contracts—this is in different commodities, not just grain overseas—and trying to get lines of credit into markets as well.

Senator NASH—As this inquiry will to be going for a while, if you have any further information along the way please feel free to provide it to the committee on an ongoing basis—don't wait to be asked for information—because it would be quite useful to look at it.

Mr Fargher—I know you already know this, but I wanted to reiterate just how important this input is to us—that is, fertiliser—and how concerned we are about these prices; obviously, input prices in general and not just fertiliser. I also want to reiterate that there is a lot of concern and frustration in our community about fertiliser prices and that there is a lot of anecdotal stories and, although we are of course not making any specific accusations, there is a lot of frustration. In that regard we wish you well and we appreciate your inquiring into this matter because everyone is talking about it. We will continue to monitor it extremely closely.

CHAIR—We are grateful for your having returned today. Obviously, farmers are basically just honest people out in the bush who want to make a living. With the, as you put it, anecdotal evidence, I take that as being a matter of the court system being about the law, but it is not necessarily about the truth—you can avoid the truth with a decent lawyer. But farmers have come along and said 'this' happened to me. I have got no reason to disbelieve it and, being in the field—and, MJ, you have your own experiences and if it was appropriate you could put them on the record—we have all felt that we have been duded. The interesting part for us is that we are at the other end of the equation where we are getting a kick up as it goes down. So it just proves that market power is what we are dealing with.

Senator FISHER—Could I seek to clarify something. Mr Fargher, you said that everyone is talking about it. Were you talking about the fertiliser issue or this inquiry into it, because we largely think that most people do not what we are doing?

Mr Fargher—They are talking about fertiliser prices. Thank you for your time.

Proceedings suspended from 10.58 am to 1.05 pm

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

GRIMWADE, Mr Tim, General Manager, Mergers and Assets Sales Branch, Australian Competition and Consumer Commission

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

PEARSON, Mr Mark, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission

CHAIR—The committee is hearing evidence on the inquiry into pricing and supply arrangements in the Australian global fertiliser market. I welcome you all today. This is a public hearing and a *Hansard* transcript of the proceedings is being made.

Before the committee starts taking evidence I remind you that all witnesses giving evidence to the committee 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 a contempt. It is also a contempt to give false or misleading evidence to a committee. The committee prefers to hear all evidence 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 the answer be given in camera. Such requests may, of course, also be made at any other time. I welcome the ACCC. If you want to make an opening statement we would be delighted to hear it.

Mr Cassidy—Just by way of a brief opening statement, I want to make a couple of points. You obviously have the report that we did on fertilisers, which we were requested to do by Minister Bowen, and which he released publicly on 22 August.

CHAIR—Yes.

Mr Cassidy—Reflecting on that report and on what I have seen of the transcripts of the committee's hearings so far, I think there are three points I would like to make. Firstly, fertiliser is an internationally trade commodity. Fifty per cent of the fertiliser that is used in Australia is imported. Australia's consumption of fertiliser accounts for a little over one per cent of world consumption. Basically what that means is that the price of fertiliser in Australia will reflect international prices. That is the case with all internationally traded commodities, and fertiliser is no different. The consequence of that is that I do not think it matters terribly much whether you have one domestic supplier, 10 domestic suppliers or 50 domestic suppliers, international fertiliser prices will basically be what determines domestic prices. The second point I wanted to

make is that there can be some short-term supply rigidities in the Australian fertiliser market. That is for two reasons: firstly because—

Senator FISHER—Short-term what?

Mr Cassidy—Supply rigidities. That is for two reasons—firstly, because imports are the swing source of supply so that if demand increases you need imports to arrive in order to meet that demand.

CHAIR—That is after we have exported 40 per cent of our—

Mr Cassidy—If I could just finish my opening statement—that, in turn, is because fertiliser is not easily stored; therefore, you cannot produce now and stockpile. That means you can get periods—and we think they can be anything from two to five months—where there are imbalances between demand and supply domestically before imports will increase or decrease, as the case may be, to equate with demand.

The third comment I would make stems from some of the comments I have seen about us perhaps just sitting and watching prices go up. Those comments imply that there is something we can actually do to stop prices going up. That is a discussion we have had in other committees on other subjects. The Trade Practices Act, as it currently stands, does not make unlawful so-called price gouging, price exploitation or any other name that you might want to use for prices rising more rapidly than perhaps they should. Whether they should or not is a matter for the government. As the law stands at the moment, there is nothing that we can do to stop prices from increasing. I will stop there.

CHAIR—Thank you very much. I saw the letter. Our terms of reference, I reckon, is a reference you have when you are not having a reference. By the way, the reference was referred to you after this committee was decided. It was a political response to the fact that we were going to have an inquiry. The government jumped in and asked you to do a snapshot of the different fertiliser suppliers in Australia. But, you would agree, it really was not a forensic drill down into the market and the way it works.

Mr Cassidy—As you say, we were asked by the minister to look at fertiliser prices, particularly in the context of the fairly sharp increase in fertiliser prices, starting from about March-April 2007. That letter is, to some extent, about looking at the structure of the industry. That was as a spin-off from looking at prices. I agree the inquiry was not about looking at the structure of the industry per se. It was an inquiry that we were asked to do in relation to fertiliser prices.

CHAIR—It was not an inquiry into the competitive tensions in the market.

Mr Cassidy—Yes, that is right. It was an inquiry into prices.

CHAIR—Could you provide us with a couple of things? Could you provide us with all the evidence that you received in your inquiry?

Mr Cassidy—The submissions that we received were, I think with only one or two exceptions, provided on a confidential basis.

CHAIR—Could you provide a list of the witnesses?

Mr Cassidy—I think we could certainly do that.

CHAIR—Could you then differentiate the in-confidence from—

Mr Cassidy—We can certainly do that.

CHAIR—Thank you very much. We have received a lot of evidence in camera as well because of what is seen to be the intimidation of resellers by a single supplier. Could you repeat the figures you gave in your opening statement about how much we import and how much we export?

Mr Cassidy—I did not refer to export. I said that—and this is for the calendar year 2007—50 per cent of the fertiliser consumed in Australia is imported.

CHAIR—Why didn't you include in that what we export and get a net figure? We actually export as much as we import. It is quite misleading to say that—given that we are a huge exporter of fertiliser.

Mr Cassidy—At the end of the day, it is a correct net figure in the sense that we consume in Australia X, of which—

CHAIR—Can you give us the figure we consume?

Mr Cassidy—Not off the top of my head. If you like, we can give you—

CHAIR—Before the end of the hearing. You are here for two hours.

Mr Cassidy—Let us take it on notice. We can show you how those figures were derived, if not now, certainly on notice.

CHAIR—Can you give them now, Ms Nowak?

Ms Nowak—I can refer you to page 5 of the fertiliser report. It talks about fertiliser consumption figures. Imports and exports are in figure 3 on page 7.

CHAIR—Have we got the 2008 figures?

Ms Nowak—No, figure 3 goes to 2007.

CHAIR—But why wouldn't you have 2008 given that the alleged story from the market was that there is this huge increase in demand for 2008? Why wouldn't you have included 2008?

Mr Cassidy—At the time we provided this report to the government, it was only halfway through 2008.

CHAIR—Do not give me that. You could have given us a comparison month by month, because we want to make the point.

Mr Cassidy—We could.

CHAIR—One of the imaginations out there in the market is that there is some sudden short supply in the market because there was a gush of demand because everyone was going to rip a lot of crop in. I tell you nothing has changed about the ordering patterns. Bear in mind that you are talking to someone who has been putting in wheat for 40 years. We always early-bird order in the spring. We know a lot of the works do their maintenance in the winter, they produce in the spring and they deliver in the autumn. So, with regard to the argument which you have put from alleged witnesses that somehow there is a huge bust in demand in the autumn, all those orders generally occur and are pre-empted in the spring and you just pick it up in the autumn. You say you cannot store it. What is difficult about storing fertiliser?

Mr Cassidy—I am not a technical expert on fertilisers.

CHAIR—You should not say something is—

Mr Cassidy—Sorry; let me go on. My understanding was that, at least with a number of fertilisers, you cannot store them for any period of time because they are affected by moisture.

CHAIR—With great respect, let me just say that you do not know what you are talking about. This inquiry was into urea and DAP—agreed?

Mr Cassidy—Predominantly.

CHAIR—You picked on the two fertilisers that do pick up moisture from the atmosphere. The bulk of the fertiliser used in Australia is MAP and single super. Who gave you advice, for some strange reason, to pick on urea and DAP?

Ms Nowak—Essentially we looked at the product categories of phosphate and nitrogen fertilisers in Australia and then we picked two of the major product groups in those categories.

CHAIR—But you did not. The bulk of pasture—you would not know, and I do not expect you to know; I do not know what your background is—is single super. Let me just tell you what single super is. Single super is 8.8 per cent P, 11 per cent sulphur and no nitrogen. You can store it more easily than you can store earth. You say it is hard to store. It is simple to store. It is not like grain. It is as simple as hell to store. It does not take up moisture. You can have it in your shed for five years and it does not deteriorate. Someone has filled you up with garbage that it is somehow hard to store. MAP is the same. MAP is 10 per cent N, 21.9 per cent P and 2.3 per cent sulphur. It is easy to store. DAP is the one that is difficult. It is 18 per cent N, 20 per cent P and two per cent sulphur and it takes up moisture, so if you do not cover it then it can turn into custard on you. Urea, of course, is 46 per cent N, no P and no sulphur. Gran-Am, by the way—I might as well get it on the record because I am sure you blokes do not know it—is 20.2 per cent

N, no P and 24 per cent sulphur, so that is the one you follow up with in canola. It is easy to store. I just want to kill the idea that somehow the reason this happened is that they could not store it. Of course they could store it, and they did.

Mr Pearson—But one of the things that we looked at—and I spent a good part of my life in the rural industry—

CHAIR—I am pleased to see you front up.

Mr Pearson—We looked at DAP and urea because the information we got from ABARE, ABS—the Bureau of Statistics—the National Farmers Federation, the South Australian Farmers Federation, rice growers et cetera all said that those two products were the major fertiliser products used in Australia. There has been a move for years away from single phosphate. Yes, there are still a lot of farmers who use it.

CHAIR—There are millions of acres of pasture done with single super.

Mr Pearson—But what percentage was that? The percentages that we were given—and all I can say is that we were given this from official statistics—were that up to 90 per cent—

CHAIR—Could you give us your official statistics, because I can tell you we do not use DAP to any extent unless you are going to use it right on the dot. It is the same with urea. Most people put urea on when you can see the crop coming to finish the crop, to get the protein et cetera.

Mr Pearson—Yes.

CHAIR—MAP and single super are the ones most people use—and, of course, Gran-Am. You have picked on two and then gone to the logic that, ‘You can’t store this stuff.’ Of course you can damn well store it. You often have two- or three-year-old fertiliser in your shed. It does not deteriorate. But if it is urea or DAP—which are the two you modelled—there are problems.

Mr Pearson—They will pick up moisture, yes.

CHAIR—In my view your terms of reference—according to your own brief—were the terms of reference you get when you are not getting a reference. It was really just a snap shot of the market to find out who were the competitors but it did not make any allowances for the fact that last September—and I declare an interest in this—a lot of resellers were requested by IPL, who have 70-odd per cent of the market in eastern Australia, ‘Would you please take delivery of’—say—‘500 tonnes of MAP.’ And a lot of them did. At the same time they got a letter, which we have here, that said, ‘The price of fertiliser is going up. We don’t want you to price this stuff; we want you to store it.’ And then they later sent a letter to the same resellers saying, ‘The price is ...’ and then it started to rise. The letter says, ‘Tell them the price of grain has gone up therefore they can afford the increase in the price of fertiliser.’ You cannot blame the resellers for being able to get it. Last spring, anyone that got in early, when they got the phone call asking them to take 500 tonnes, got it so that they could resell it for \$760 a tonne. You have got to say that you would do the same yourself. Because of the global marketing strategy that you talked about, and the signal out of that market, they ended up selling that for \$1,200 a tonne by not selling it when they got it. Some people took delivery of it and got the \$760 per tonne.

Righto, that is fair enough. You do not have that in your terms of reference. Australia's farmers are sick of getting it up the back passage on this. We knew it was a lurk. We all knew it was a lurk. We had the NFF giving evidence today and they said that everywhere they go everyone is sick of it. And now what we see—I will table it for the committee—is that the global market is going the other way. The excuse this time is, 'We've got some in the inventory that's at the higher price.' Well, if it is good enough for the goose on the way up it ought to be good enough for the gander on the way down.

Let me just put it on the record. The price for Middle East port FOB urea on the Fertilizerworks.com website—and we are going to give you blokes a new reference if we can talk the government into it—on 6 November was US\$240 a tonne. That converts, at 68c, to A\$362.95. Do you know what Incitec Pivot were selling it for that day? It was A\$1,200 per tonne. If that is not what you call market power, I will work for you as a slave. You say that that is outside your terms of reference; you cannot comment on that. Would you like to make a comment on that?

Mr Cassidy—Yes. My figures are \$246 and \$1,020, just as a matter of interest.

CHAIR—What day?

Mr Cassidy—The November average so far.

CHAIR—This is a specific date.

Mr Cassidy—But we are talking about the same sorts of figures. You have quoted the international price.

CHAIR—But—

Mr Cassidy—Sorry, if you are going to ask me a question, or if you are going to ask any of my colleagues a question—

CHAIR—You have to get used to the culture.

Mr Cassidy—No, I have to get used to being able to answer the questions that have been asked.

CHAIR—Righto; away you go.

Mr Cassidy—It takes time for imports to arrive here. I can look at my table and quote you similar figures where the gap between the domestic price and the international price is squeezed the other way. We use a lag of two months because we were told by industry that that is the most common sort of lag for imports.

Senator NASH—Could I just—

Mr Cassidy—Sorry, just let me finish. In other words, they buy and it takes up to two months—

CHAIR—You've been had.

Mr Cassidy—to get the fertiliser here. There is no science about that. It may be a bit less than two months and it may be a bit more but what is clear is that you cannot buy fertiliser on the international market yesterday and have it here in Australia today. It does take time for it to get here.

CHAIR—I agree with that.

Senator NASH—Can you give us an example of where you said it squares the other way?

Mr Cassidy—Sure. In April this year the international urea price was \$495, the domestic price was \$592, which is a gap of about \$150, whereas over time the average gap is about \$200, just to give you an example. It is not unusual. Some of you are aware, since we have had lengthy discussions about it, a similar thing happens in relation to another imported international commodity, petroleum, where you get a lag between the movement in the international price and that being reflected in domestic prices.

CHAIR—With great respect, I will table the graph which dispels what you are saying. Sure, there is a lag, and there was a lag this time last year too. There was one-off gouge in the market last year with fertiliser that was in the country. Bear in mind they produce a million tonnes at Duchess and they export about 400,000 of that. It was in-house. Some of it was standing off in ships because of the demurrage in the ships was as cheap as in the port. You blokes have not drilled into any of that, I take it. It was not in your charter. Did you have a look at what was withheld from the market?

Mr Cassidy—We had a look at and we are happy to talk about it—we had a look at what happened in late 2007 and early 2008, including claims of supply being withheld, price gouging—

CHAIR—You say in your report that the ACCC received numerous voluntary submissions from these parties many of which provided detailed information. You relied on the truth and accuracy of these submissions, and we do too.

Mr Cassidy—Yes.

CHAIR—You say the ACCC has tested the assertions before forming its view about other matters but that the ACCC has not, however, tested information claimed as confidential against the views of other interested parties. It was a very unforceful inquiry. I do not blame you because the terms of reference were, 'Quick, get out there and have a look.' That is how I interpret the terms of reference.

Mr Pearson—There was a substantial amount of work done. If you look at—

CHAIR—But I spoke to your chairman—

Mr Cassidy—Sorry, chair, we have got to get a few rules straight here. You ask a question, we answer it. I think it is unfair—

CHAIR—Away you go.

Mr Pearson—If I look at the companies and end user customers, retailers and distributors who provided submissions to us and a number who we spoke to, we sent out a lot of letters and went out to contact people. But if you look at, for example, the grower representatives, there is the Cattle Council, AgForce, the Farmers Federation of New South Wales, the National Farmers Federation. We had substantial submissions from all these individuals and we also went back and looked internationally through the United Nations to look at their reports on future fertiliser prices and what was happening in the international market. We had a look at ABS. We talked to ABARE. To say it was just a cursory look is not quite true. There was a fairly—

CHAIR—It was a cursory look, because your chairman told me the same thing that you just told me then and we had the NFF in and they told us this. The NFF in fact did not have the capacity to go and have a decent look and they did not report the problem. They just said, ‘We have lots of anecdotal evidence of what is going on. We have got Dean Brown in South Australia to take written evidence of contractual cancellations, of people who wanted to order in bulk and it had to be split up, of a whole lot of manipulation and gouging in the market. We can provide you with that evidence, but you need new terms of reference to take any notice of it.

Mr Pearson—We did get—

CHAIR—Don’t rely on the NFF, mate.

Mr Pearson—People gave us a lot of anecdotal argument but no hard evidence. We do not operate on anecdotal information. Even like the contracts. We talk about the contracts here. The ones we looked at or the things we are able to look at did not show—first of all, if it is a contractual issue, there are issues there that are not part of the TPA. But we also looked at some of these issues where there is a very long-term vagueness, if you like, to the way people deal with one another in the industry. That makes it extremely difficult.

Senator NASH—I am a little confused. On the one hand you say you have got substantial submissions and the next minute you are saying it was anecdotal evidence.

Mr Pearson—We got substantial submissions into the industry but we did not get any clear evidence of any of these breaches people are talking about. Nobody was able to come up and say—they did not come up and say, ‘Here is the individual, here is what happened, here is the date.’ That just did not happen. We looked through the NFF’s—

CHAIR—Can we go into camera with you and see your in camera evidence?

Mr Pearson—Because it is in confidence, we would have to go back to the individuals.

CHAIR—Would you do that.

Mr Cassidy—If you request, we can go back to those who provided us with confidential submissions—

CHAIR—We will request that. You can take that on notice.

Mr Cassidy—and ask them whether they are happy for us to provide them to you in camera. Equally, as Mr Pearson said, during our inquiry we did not get hard evidence of breaches or possible breaches of the Trade Practices Act. If you believe you have hard evidence, we would very much like to be able to get our hands on that.

CHAIR—We are going to come to that with Senator Milne on just what your terms of reference are and what they should be to have a fair dinkum inquiry into this, because we have plenty of evidence. I might say to Mr Pearson that traditionally in the bush with a contract for a forward sale, from 1969 until this year—40 years—we have ordered fertiliser every year and never signed a contract, because there is such a thing as a legally binding verbal contract. We have always made a verbal contract for early-bird orders—delivery in the autumn and ordered in the spring—which puts paid to that claim that all these orders came in. There was no difference in the ordering pattern to any other year.

Senator MILNE—Thank you, Mr Cassidy. Part of the problem that we have with the inquiry that you were able to conduct is that it was not a formal reference from the minister in terms of being a price inquiry under the particular provision of the Trade Practices Act. What I would like to understand from you now so that we can clarify some of these issues is: had you had a formal reference for a price inquiry, what powers would you have had? How would it have been different from the sort of inquiry that you conducted under the reference that you got?

Mr Cassidy—On your first question, we would have had the sort of powers we have under formal inquiry under part VIIA of the act. We have the power to subpoena witnesses, we have the power to subpoena documents and we can require people to give evidence under oath. We have that sort of general range of powers. With regard to what difference it would have made, I have to say that I am not sure it would have made a great deal of difference. We found in doing this inquiry that, with any information we wanted, we went and asked for it and obtained it. I do not think there was any point in the inquiry where anyone said to us, ‘No, we won’t give you that,’ and that includes the suppliers, distributors and so forth. So we did not at any point, as I say, have a situation where we thought to ourselves, ‘Here’s information we would like to be able to obtain, but we can’t.’

In terms of possible evidence of breaches, I have to say that in our experience you cannot use compulsory powers to force someone to tell you about what they believe to be a possible breach of the act. That has to be voluntary on their part; otherwise it simply does not work. It does not work for us in an evidentiary sense; it does not work for us in terms of being able to get at least the sort of basis we need to go forward with an investigation. The best that we can do—and we did that with this inquiry, as we do with our formal investigations—is to offer people the opportunity to come and talk to us on a confidential basis. We protect that confidentiality and, if someone gives us information which we think indicates a possible breach of the act, we then investigate that, but at all times we do whatever we can to try and protect the confidentiality of our informant. That applied with this inquiry just as it applies with our normal investigations.

Senator MILNE—Okay. There are a couple of issues there. I notice in what you said in the report that the commission relied on the truth and accuracy of submissions and statements from interested parties. Of course, you are naturally going to do that, but if you had had formal powers and people were required to swear to their statements then don’t you agree that people might have been more explicit?

Mr Cassidy—It depends what you mean by ‘explicit’. Whether they would have told us more, I am not sure.

Senator MILNE—I suspect in quite a few of the submissions there were some fairly sweeping statements which could generally cover the issues and so on, but if they had to actually stand by that as a sworn statement people might have been more inclined to be less sweeping, less generalised, and capture the specifics, in which case the gaps might have been more evident. That is the sort of thing I am talking about.

Mr Cassidy—It cuts both ways. If they tie themselves up with a lawyer, perhaps their statements and submissions start to become even more carefully worded if they are under oath. If we have someone saying to us, ‘Look, price gouging went on; I was taken advantage of,’ having them under oath to, in a sense, tell us the truth does not necessarily get them to tell us any more than they would voluntarily.

Senator MILNE—I would argue to you that some of the companies about whom the concerns have been raised might have had a few more concerns about what they said if they were under oath than in the submissions that they have made, but I will come back to that in a minute.

CHAIR—Could I just seek a clarification. The people that give you evidence—is that privileged?

Mr Cassidy—They gave it to us on a confidential basis, so we treat it on a confidential basis.

CHAIR—No, that is not the question. Does it have the status of the evidence in here, which is privileged—that is, you cannot be sued?

Mr Cassidy—It is a tricky question. In one sense, the answer is no.

CHAIR—It is a sensible question.

Mr Cassidy—But, on the other hand, if we keep the information confidential—

CHAIR—But if there is a leak, a misprint—it is at publishing, say. The people who come along and give you evidence are obviously going to do it with great caution because it is not privileged.

Mr Cassidy—Possibly, although much of the evidence we obtain from people we obtain voluntarily, as I say. Particularly in an evidentiary court sense, it is just not viable for us to have a complainant compelled to give us information.

CHAIR—No, I understand that.

Senator MILNE—Yes.

Mr Cassidy—That just does not cut it once you get to court, so the great bulk of the evidence we get in our investigations generally from complainants we get on a voluntary basis.

Senator MILNE—Mr Cassidy, one of the things that I have encountered consistently is that people involved in companies in particular who know what is going on are not going to come forward voluntarily under any circumstances because of their place in the hierarchy and so on. They actually need to be subpoenaed in order to come, because then that is a defence to their seniors that they had no option but to come forward. They are not going to come forward voluntarily. And then, if they are subpoenaed to come forward and then have to give sworn evidence, they can say what they may have liked to have said but never would have come forward voluntarily to say.

One of the issues here is that there have been a lot of allegations of standover tactics and all that sort of thing. If you subpoena people in some of the companies concerned, you are not just going to get the point of view of the head serang; you may be able to subpoena a number of people and get a better idea of what is actually going on in the company. Do you see what I am saying?

Mr Cassidy—Yes. I can understand what you are saying. Perhaps I should explain. As part of the inquiry, if we had had someone come to us and say, ‘Look, this has been done to me,’ say, and we thought that that looked to be a breach of the act, we could then have used our compulsory information acquisition powers to go and investigate that. Indeed, we have done that with previous inquiries. I think we have made it fairly public that out of our grocery inquiry there were some issues which we are pursuing using our compulsory information acquisition powers. But we need someone to actually come and say to us, ‘This happened; this was done to me,’ where ‘this’ is potentially a breach of the act. That is what we did not get in this inquiry. So that is not about the companies; it is about someone giving us the basis from which we can then pursue it. If they give it to us and it looks like a potential breach of the act, we can use our freestanding, if you like, compulsory information-gathering powers to then go after that.

Senator MILNE—Yes, that is absolutely the case, if someone comes forward first. My point is that in many cases nobody is going to come forward first unless they are subpoenaed, not because they do not want to give evidence—in many cases they actually want to—but they cannot come forward voluntarily, they need to be subpoenaed to protect themselves in the structure of the organisation. Given that a whole lot of this allegation concerns market power and how it is being exercised and whether companies are withholding stock in order to benefit from higher prices, you get the submission from the company which is going to be the company position. No-one is going to come forward unless they are subpoenaed to come forward to be able to test the truth of that submission from a number of players, I would have thought.

Mr Cassidy—I understand your general point. I suppose I would have to say something like withholding stock to benefit higher prices is not a breach of the Trade Practices Act. That is something that happens in commerce almost every day. You may regard it as a trivial example, but suppose you are selling your house, for argument’s sake, and you had a high expectation that house prices were going to increase fairly dramatically over the next 12 months. You hold off selling your house if you can until the prices go up. That is something that is quite common across a whole range of markets. That simply is not a breach of the Trade Practices Act. It may be a breach of contractual arrangements if someone has a contract and their supplier says, ‘Look, blow the contract. I’m not selling to you now because I reckon I am going to get a better price in six months time.’ But we do not have any power to enforce contractual arrangements.

Senator MILNE—But what about investigating breach of contract?

Mr Cassidy—We do not have any power to investigate a breach of contract. In order to investigate something, it has to be a possible breach of the law that we administer, and a breach of contract is potentially a breach of the contract law and contract law is common law, it is not something that we have jurisdiction for.

Senator JOYCE—I have a question on that. Did you have access under part 7A of the Trade Practices Act to formal price monitoring powers for this inquiry?

Mr Cassidy—As I was saying to Senator Milne, no.

Senator JOYCE—I am saying this for the record really. If you had access to powers under 7A of the TPA then you would have really been able to get behind the situation and give a much more lucid picture as to what is exactly going on, wouldn't you.

Mr Cassidy—As I was saying to Senator Milne, I think that would depend on exactly what information we were given by complainants. To put it bluntly, it is one thing to have compulsory powers, but somehow you have got to know what questions to ask. You have got to know what information you are looking for. You have got to know what the evil is, if I can put it that way.

CHAIR—Employ me and I will fix that up for you.

Mr Cassidy—As I said to you earlier, if you have got information about what you believe to be genuine breaches of the Trade Practices Act, we would very much love to be able to get our hands on it one way or another.

Senator MILNE—I come to this issue of the Trade Practices Act. You said that you did not believe there had been a likely breach of the Trade Practices Act by any participant in the Australian fertiliser industry. How did you make that judgement in relation to market power?

Mr Cassidy—I think probably what we said is that we had no evidence of a potential breach. It is a different thing. Don't get me wrong: I am not for a minute saying that we somehow reached a general conclusion that the fertiliser market is squeaky clean. As I keep repeating, if we can get our hands on any information to the contrary, we will pursue that. But on the basis of information that was provided to us in the course of this inquiry, we had no information to indicate a possible breach of the act.

We had some information about what people call price gouging, perhaps price exploitation, but that is not a breach of the Trade Practices Act as it currently stands. We had some information perhaps about supply being withheld, although that gets into an issue about the difference between supply being withheld and rationing. Be that as it may, neither of those in and of themselves is a breach of the Trade Practices Act. Supply being withheld is only a breach of the Trade Practices Act if it is done for anticompetitive purposes. So, for argument's sake, supposing Mr Grimwade and I were competitors and I said to him: 'Look, you stock my product and his product. I won't supply my product to you anymore unless you stop stocking his,' that is withholding supply for anticompetitive purpose and that is potentially a breach of the Trade Practices Act.

Senator NASH—Just theoretically, not necessarily relating to this, if you have got a monopoly provider that is withholding, obviously there is no competition, so it is not going to fall into any kind of anticompetitive framework. But they are still withholding. So, are you saying it is only if there is a competitive nature of the market that it matters if you withhold? If you have got a monopoly provider withholding, too bad, so sad?

Mr Cassidy—We do not have a monopoly provider in the Australian fertiliser market, unless you go into some very fine grades of fertiliser. As I said at the outset, 50 per cent—subject to clarifying the figures for you—of the fertiliser used in Australia is imported.

Senator NASH—And if you have got Joe Bloggs, a farmer in the community who has only got one distributor in his community, how do you expect him to access that importation capability? I am just trying to drill down to your overall principle of saying, ‘Yes, you can import.’ That is all very well; so it is a nice competitive market, but, if you are Joe Bloggs out in rural town X with one distributor, there is no way that as an individual farmer you can access the benefits of importation.

Mr Cassidy—That could be. But, on the other hand, 50 per cent of our fertiliser is imported, so a lot of Joe Bloggs’s have access to alternative suppliers.

CHAIR—That is 50 per cent of the importation—by how many entities?

Mr Cassidy—You are starting to test my knowledge.

CHAIR—In Queensland, the urea price fell by half internationally in the middle of this year and it kept peaking right up until late spring. There was a company in Queensland that wanted to import urea and it was threatened by the supplier—a bit like the oil terminal space and one of these monopoly suppliers in Australia: ‘If you go to do that, we will bring an antidumping case against you.’ Do you think that, given that 70 per cent of the sales in eastern Australia—it used to be 73 per cent—and 100 per cent of the manufacture of fertiliser in Australia is one company, that is reasonable market power? Wouldn’t an ordinary, sensible person sitting at the back of the room say, ‘There is a possibility that person would be able to incite monopoly behaviour in the market’—with 70 per cent of the sales and 100 per cent of the manufacture?

Mr Grimwade—Could I answer that question by perhaps alluding to some of the mergers that have occurred in the industry which have led to that level of concentration, particularly—

CHAIR—You approved them.

Senator NASH—You approved them.

Mr Grimwade—That is correct. The basis for some of the key decisions on mergers in the fertiliser industry by the commission has been the potential for import competition, in particular in relation to the Incitec acquisition of Pivot and then more recently the Incitec Pivot acquisition of Southern Cross, which have led to a very high level of concentration. In looking at those mergers, perhaps I should focus on the Southern Cross one because that is more recent and I am more familiar with that.

CHAIR—We would like you to go back and have a look at Incitec Pivot too because we think you are the—

Mr Grimwade—I can answer—

Senator NASH—Let us hear what he is going to say.

Mr Grimwade—I can explain. Perhaps I could brief you on the investigations in both and on how we reached the conclusions that we did in both of those. Going back to Incitec Pivot in 2002, we conducted our usual investigation, a public investigation, which involved consultation of various participants in the supply chain, including representative groups of farmers and retailers—

CHAIR—Based on the model that is here now?

Mr Grimwade—Do you mean in terms of how we conduct marketing inquiries these days on mergers?

CHAIR—Yes.

Mr Grimwade—Yes, it was pretty similar. In the information we got back we had some mixed views put to us, particularly by some of the competitors. We did get one response from a farming organisation—the Farmers Federation—which was to support the merger of Incitec and Pivot on the basis that imports would provide a competitive constraint. Also, retailers were positive about the merger. So the information that was coming out of the market in 2002 was not supportive of the finding that there was a breach of section 50, which prohibits mergers that substantially lessen competition. The commission in that case also identified that there were separate markets for potassium, nitrogen and ammonium phosphate based fertilisers. The commission did find that barriers to entry were high. Clearly, there was an issue to examine.

Currently in Southern Cross, the commission has reached the same conclusion that the best approach to examine these mergers is to look at those separate markets. In Southern Cross, we were quite concerned that you had an acquisition by the major importer of the only supply of MAP and DAP. So our focus was very much on the ammonium phosphate market. We were quite concerned when we initially investigated this because of the level of concentration there and also because our findings on barriers to entry were the same. The barriers to entry in manufacturing were very high.

We must have regard—and it is factor No. 1 in the Trade Practices Act—to the actual and potential level of import competition. If the threat of import competition provides a constraint and we have evidence to support that, then we have no evidence to make a case to oppose the merger. So, in Southern Cross, our focus of inquiry was again across a broad array of participants and the extent to which import competition could provide a level of constraint on market power of the merged firm which would obviously have a very high degree of concentration in the market. The evidence we got back, including from retailers—and we pursued a number of different farming organisations; we not only wrote to them but also followed them up—was, in the end, one submission from the Farmers Federation. That

submission again did not oppose the merger on the basis that it found that import competition was going to provide a level of competitive constraint on the merged firm.

In assessing all the information that we had, there was no case for us to prove in court—as we would have to if we were to oppose the merger—that there was going to be a breach through the acquisition. The merger led to a high degree of concentration, true, but everything we had assessed—and I think this came out of the fertiliser inquiry too—was that import parity pricing is active. The threat of import competition was going to be the key constraint on the exercise of market power by the merged entity, Incitec Pivot.

Senator MILNE—Can I follow that up, because I do not understand where this competition from import comes from when you have such a concentration of power in Australia with one lot importing things. Who was going to import from anywhere else? Is it just the threat that somebody might set up something in competition?

Mr Grimwade—Often the threat is sufficient to constrain the exercise of market power by the merged entity. Indeed, if there is import parity pricing then that threat does exist. Market participants did point to—I am trying to recollect in Southern Cross—a number of potential or actual importers, including HiFert, and the threat of import by other participants in the industry. I think ABB, AWB, GrainCorp and Interfert were pointed to as potentially able and as having the operational capability to import fertiliser. But the threat of import can be sufficient.

Senator MILNE—I know Senator Joyce wants to follow-up on this, but I just want to go back over it. What you are saying is that, to oppose the merger because of your concerns about the concentration of power, you would have had to have been able to demonstrate that there was essentially no risk of import competition? If you were to say, ‘We’re opposing this merger,’ you would have had to prove in court that there was no potential for competition? What you are telling me is that the potential for competition there was based on the notion that AWB or somebody might have had the institutional capacity to import if they wanted to. Have they ever had any history of doing that?

Mr Grimwade—Offhand, I cannot tell you. I understand HiFert is an actual importer at the moment, and that was pointed to at the time as being a potential constraint on the exercise of market power by Incitec Pivot. Going back to the first part of your question, it is correct that, when we are conducting a market investigation in relation to a proposed merger, we are going out to try to find sufficient evidence to prove a case in court to oppose that merger or to find evidence that will confirm a finding that it is not capable of being opposed. So, in terms of the market inquiries, we were going out to people and we were trying to find some information and some credible opposition, but what we were getting, particularly from retailers and farming organisations, was no opposition. We had some mixed views expressed by importers. There were some very strong concerns—this is in Southern Cross—coming from a particular distributor, which we followed up. Those concerns were a bit more vertical. The concerns were that the acquiring firm, Incitec Pivot, would increase the price that it had under a contract with Southern Cross. So part of the investigation was an evaluation by us of that contract to determine whether or not that was actually going to be feasible. It transpired that it was not.

Senator MILNE—My concern is about the number of others who might have been named as potentially able to import, regardless of whether or not they do. I think you mentioned three of them. How many of those have had a history of importing?

Mr Grimwade—I do not know. I cannot answer that question offhand. But what was important was that the market was saying that these participants could import.

Senator MILNE—If they wanted to.

Mr Grimwade—We did not have people saying to us that there was no capacity or capability for organisations to threaten the exercise of market power by Incitec Pivot.

Senator JOYCE—I have some questions on that. I hear what you are saying, but let us cut down to the track: does Incitec Pivot have substantial market power?

Mr Grimwade—I think it has a substantial market share.

Senator JOYCE—Thank you. It has substantial market share. But it does not have substantial market power, does it?

Mr Grimwade—In the acquisition of Southern Cross's market in phosphates—

Senator JOYCE—You have given the crucial answer, Mr Grimwade. It has substantial market share but it does not have substantial market power. Is substantial market power a point of consideration that you have to use in instigating any cases?

Mr Pearson—Not in mergers.

Senator JOYCE—In anything?

Mr Grimwade—In relation to section 46 action.

Mr Pearson—It is the exercise of market power. There is nothing illegal in this country or in any other country that I am aware of where monopoly power is illegal, nor market power per se. But it is the exercise of market power for an anticompetitive purpose that is illegal. What we look at in market power is exactly the same thing as Mr Grimwade was talking about in terms of mergers, and that is that, if you were to see an exercise of market power here, you would see prices way above import parity. You would have parties out there saying: 'Look, we've got market power. There is no risk of imports, then let's—

Senator JOYCE—The asking price is way above market parity.

Mr Pearson—I have stuff here from the National Farmers Federation which talks about the whole range of factors—international prices, chemicals, cost of natural gas and so on. So it is hard to say that there is.

Senator JOYCE—Mr Pearson, if there were an exercise of monopoly market power, can you advise me as to what part of the act you would use to bring about a divestiture of that company?

Mr Pearson—Under section 46 we do not have divestiture powers.

Senator JOYCE—Well, any part of the act. Is there anywhere in the TPA that you want to advise me of where you have divestiture powers?

Mr Pearson—We could order divestiture in a merger situation. There is a three-year limitation, as I recall.

Senator JOYCE—A very limited divestiture power in mergers and acquisitions.

Mr Pearson—And it is a three-year limitation—

Senator JOYCE—I am going on to mergers later on. At this point in time, with Incitec Pivot, is there any power of divestiture?

Mr Pearson—No.

Senator JOYCE—Thank you. So there is really no recourse once they have got a monopoly position. You cannot do anything about it.

Mr Pearson—If they are abusing it or misusing it, there is. We have two cases in court right now on section 46 misuse of market power, so to say that we cannot do anything about it—there are massive fines and injunctions and court orders—

Senator JOYCE—But there are no divestiture powers, are there?

Mr Pearson—No, there is no divestiture power.

Senator JOYCE—Thank you. That is the answer you have to give—that Incitec Pivot have market share and not market power and that for Incitec Pivot there is no divestiture power to actually redeem ourselves from any manipulation of the market. You can go and chase them around, but you cannot do anything about it anyhow. Have you received any complaints of bullying or intimidation in the fertiliser market?

Mr Pearson—Not that I am aware of.

Senator JOYCE—Not that you are aware of.

Mr Pearson—As I said, again, we have some broad anecdotal statements, but there have been no particular individual ones, as I am aware. If you have examples, I would love to see them, because that would put a smile on my face again—

Senator JOYCE—As the chair says. The panel said itself that the ACCC does not involve itself with contractual disputes. That was one of your statements earlier on.

Mr Cassidy—That is right.

Senator JOYCE—But what if there are allegations of bullying or intimidation?

Mr Cassidy—That is where we become more interested, because that potentially gets you into the area of unconscionable conduct.

Senator JOYCE—Unconscionable conduct—section 51AC.

Mr Cassidy—Yes.

Senator JOYCE—Do you think we should have a tightening of 51AC? Tell me about the strength of 51AC and what you think of the barbs and quivers that you are going to fire from 51AC.

Mr Cassidy—Sorry, Senator, I just do not understand the question. I could talk all afternoon about 51AC. What is the question?

Senator JOYCE—Okay, I will cut to the chase. How many successful cases have you prosecuted under 51AC lately?

Mr Cassidy—I still did not catch the tail end.

Senator JOYCE—How many successes have you had in the prosecution of cases under 51AC lately?

Mr Cassidy—Lately being when?

Senator JOYCE—Let us take the last year.

Mr Cassidy—We have three in court right now, as I understand.

Senator JOYCE—How many have come to conclusion and success?

Mr Pearson—I would have to double-check that. I will take it on notice.

Senator JOYCE—From your recollection, take me back to the last one where you had a finality to the case and a successful prosecution using 51AC.

Mr Pearson—I would have to double-check that to make sure that I am not misleading you.

Senator JOYCE—Do you know of any?

Mr Cassidy—Let us be clear. We have had successful 51AC cases.

Senator JOYCE—There must be one that has stuck in your head.

Mr Pearson—I have been thinking more of the three that we have in court right now because they are very tough, really hard fights, so—

Senator NASH—That was not the question.

Mr Pearson—I would have to go back and look at my notes.

Senator JOYCE—Thank you very much.

Mr Cassidy—Let us take it on notice—

Senator JOYCE—You see, we are saying that we are going to run out there with 51AC, but to the best of your knowledge—I have asked the panel—no-one can name me a dispute that has actually had a successful conclusion using 51AC.

Mr Cassidy—We will on notice, Senator, if you will allow us to finish our answers. I am starting to get a bit irritated. We will on notice.

Senator JOYCE—Thank you.

CHAIR—Don't get irritated.

Mr Cassidy—I will try not to get irritated.

CHAIR—We are just enthusiastic.

Mr Cassidy—Nonetheless, I have asked several times: you have asked a question; let us answer it.

Senator NASH—You are the witness, Mr Cassidy. Leave it to the chair to run the committee. It is not your place to run the committee; it is the chair's place to run the committee.

Mr Cassidy—But equally—sorry, Senator—we have a right under standing orders to be able to answer the questions that are asked.

Senator JOYCE—Believe you me, I am not trying to intimidate you; I am trying to flesh out the issue.

Mr Cassidy—But, equally, we would like to answer the question.

CHAIR—Don't get grumpy. I'm the only one that's allowed to get grumpy!

Senator NASH—That is exactly right.

Senator JOYCE—There are other members of the ACCC who tend to get grumpy with me. Can withholding supply be a breach of section 46?

Mr Cassidy—It can; it depends on the circumstances.

Senator JOYCE—Has the ACCC received any complaints that the supply of fertiliser has, from time to time, been withheld?

Mr Cassidy—During the inquiry that we did, we had people saying to us that they were not able to get supply when they believed supply was available. Whether that was actually withholding supply—we are now getting into semantics a bit. But certainly we had people saying to us that they were not able to get supply when they believed that fertiliser was available.

Senator JOYCE—Have you investigated those complaints?

Mr Cassidy—We looked into it as part of the inquiry. It seemed to us, on the basis of the evidence that we had, that what was happening was what is called a rationing process, where there was excess demand, so two things were happening to meet that excess demand. One was that prices were increased. The second was that some of the suppliers actually were rationing their supply amongst their traditional customers.

Senator JOYCE—So that is the level of your investigation? That is the level of investigation you went to—that they were rationing supplies, and that would do?

Mr Cassidy—As I said, there is no obligation in the Trade Practices Act that you must supply someone. There is nothing in the Trade Practices Act that says I must sell to someone. I can have quite legitimate reasons for not selling to someone. So, in order to actually investigate, as you put it, we need to establish or at least have a reasonable suspicion that the refusal to supply is for anticompetitive purpose.

Senator JOYCE—Is the ACCC aware of any anticompetitive conduct in the fertiliser market?

Mr Cassidy—At the present time, no, to the best of my knowledge. We have several hundred investigations underway, but I am not aware that any of those are in the fertiliser market at the moment.

Mr Pearson—I just got our reports today, and I think, out of something like 400 current investigations, there is not one involved in the fertiliser industry that I am aware of in that list.

Senator JOYCE—Are you considering conducting any investigations into anticompetitiveness in the fertiliser market?

Mr Cassidy—We cannot conduct investigations without having at least some evidence, something to operate on, because we cannot use our compulsory information acquisition powers, in terms of the law, without having what is called ‘a reason to believe’—that is to say a reason to believe that there may have been a breach of the act. We just cannot go off and decide we are going to investigate this or that.

Senator JOYCE—A fishing expedition.

Mr Cassidy—Yes.

Senator JOYCE—So really at this point in time you cannot say or not say—in fact, you cannot even quantifiably give an opinion as to—whether there is any anticompetitive behaviour in the fertiliser market?

Mr Cassidy—We have had no anticompetitive behaviour in the fertiliser market drawn to our attention.

Senator JOYCE—Is there a case for the ACCC to formally monitor fertiliser prices?

Mr Cassidy—There are two answers to that: (a) that is a matter for the government rather than for us, and (b) on the basis of the report that we did, domestic fertiliser prices are basically moving in line with international fertiliser prices. I am not quite sure what formal monitoring would actually achieve in that situation.

Senator JOYCE—Going back to what Senator Nash said, this whole threat of import competition goes into theoretical possibilities of what may or may not happen. As John Maynard Keynes says, at the end of the day we are all dead, so anything is theoretically possible. This is just a huge loophole that makes it almost impossible for you to pursue the case.

Mr Cassidy—In our merger analysis, we do not look out to the year dot, as it were. We basically work within more or less a two-year time horizon. The question we ask ourselves and the question we ask of people making submissions to us in relation to mergers is: what is likely to happen over the next two years if this merger occurs? It is not, ‘Well, in 10 years time there might be something happening’; we work within a two-year time horizon.

Mr Grimwade—Could I just supplement Mr Cassidy’s answer. I have just had brought to my attention some information that was provided to us as we were conducting our inquiry, and this goes to a question that Senator Milne asked before. We have had put to us that the current importers of fertilisers are Impact, with DAP, MAP, urea and muriate of potash; Interfert and Megafert, with urea and ammonium phosphates; Grow Force, with urea and MAP, amongst others; HiFert, with phosphate and nitrogen fertilisers; Elders, with MAP and urea; and ABB, with urea.

CHAIR—Elders are one of the major buyers from IPL. Could you then break that into what is in eastern Australia and what is in Western Australia?

Mr Grimwade—That was all in the east. In the west there is CSBP, with MAP, DAP, urea, ammonium nitrate, TSP, MOP and sulphate of potash; and Summit, with urea and TSP.

CHAIR—Then that brings the question of whether there is collusion in the market, doesn’t it?

Mr Grimwade—Between?

CHAIR—We have evidence of collusion.

Mr Cassidy—All I can say is that we would dearly love to get our hands on that evidence.

Senator JOYCE—Mr Grimwade, I got the impression from what you said before that if I was listening to you for the first time I would say that proving a case under section 50 is near impossible.

Mr Grimwade—No, that is not what I am saying. There is a standard of proof that we have to meet and there is a level of evidence we have to be satisfied will demonstrate a case. What I am saying is that in the fertiliser mergers that the commission has examined we have not had sufficient evidence to take a case; far from it, actually.

Senator JOYCE—Can you give me an example of any other similar cases—you might have more luck with this one—where you have had a success under section 50?

Mr Grimwade—Do you mean success in court or success in opposing—

Senator JOYCE—Yes, finality; not that they died, it was terminal, there was no-one there to represent them anymore and therefore we won, but you actually got to a conclusion of a case under section 50 and the ACCC won. You guys think I am shooting at the ACCC. I am always aiming at getting you greater power so you can do the job. That is my issue.

Mr Grimwade—Of the 400 merger reviews that we conduct a year, in the last year we opposed 11 mergers. Five we opposed on a public basis and six we opposed confidentially, because about half the reviews we conduct are confidential. The previous year there were slightly more; I think there were about 17 that we opposed. They are the matters where we think we have sufficient evidence to take before a court. When we advise parties we are going to oppose a merger, more often than not they will walk away from the transaction; we do not need to go to court. Occasionally we do. For instance, in Toll-Patrick we had to have evidence to go to court, AGL Loy Yang—

Senator JOYCE—We are talking about the powers to prevent a merger under section 50.

Mr Pearson—Can I give an example of one prior to Mr Grimwade's time, which was Cement Australia. We actually opposed that merger on the basis of lack of imports. The argument put to us was very similar to this one in fertilisers, that you could import cement, it was easy to do, it was a universally traded product. But when we did the same thing we did with the fertiliser and went around the country to talk, look at the infrastructure, look at the individuals who perhaps would import, we came to the conclusion then that there was no way that they could actually act as a constraint. So we opposed that and the parties quit that deal on the courtroom steps, for the same reason that Mr Grimwade—

Senator JOYCE—What percentage—and I have got the answer; I just want to get it on the record—of mergers do you approve or generally are approved?

Mr Grimwade—Over the last few years we have reviewed around 400. As I mentioned, last year we opposed outright 11 and we accepted undertakings that meant that we would have opposed but for receiving undertakings in the similar number. So it is a small percentage of what we review—

Senator JOYCE—It is about 96 per cent that are approved.

Mr Grimwade—That is correct, but there has to be a bit of context put around that. There are many mergers that come to us which are clearly not going to be problematic but out of an abundance of caution we have people approaching us seeking a clearance, for financing reasons—

Senator JOYCE—I mean, 96 per cent is almost 100 per cent. It is a clear test case: the Incitec-Pivot merger has called huge problems in the marketplace. I know we are debating the semantics but it is the tests and the thresholds that we use in assessing that problem. You are saying it is not a problem with the assessment test that we are given, but as far as the growers are concerned it is a huge problem. There is exploitation in the marketplace. So really we have got to change the assessment process, the guidelines, the tolerances of how we give you the power to have a greater efficacy in your job. I am not attacking the ACCC. I am attacking the powers that you have.

Senator NASH—Don't have.

Senator JOYCE—Don't have. That is always the issue. Does the ACCC have a definition of price gouging?

Mr Cassidy—No, Senator. As I said earlier, price gouging is not an offence under the Trade Practices Act.

Senator JOYCE—Does the ACCC have a definition of price exploitation?

Mr Cassidy—No, it is not an offence under the Trade Practices Act either.

Senator JOYCE—Is the high level of concentration we are now seeing in the fertiliser market a direct result of the mergers that the ACCC has allowed to occur?

Mr Grimwade—I think it is correct to say that.

Senator JOYCE—What is the ACCC doing to inject competition into the fertiliser market?

Mr Cassidy—As a general proposition, our job is not to inject competition into markets; our job is to try and prevent competition being wound back.

Senator NASH—You cannot give it but can take it away.

Mr Cassidy—It is a fairly important point. I think it is important just to make a point in relation to mergers. Quite often people say to us, 'Why did you let Firm A take over Firm B when it would have been much better if Firm C had taken over Firm B?' Our answer is that we have to, in a sense, respond to what is put to us. We are not allowed to engineer markets and say, 'Okay, this is the outcome we would like, so that's what we're going to engineer.' We have to respond to what is put to us, and basically our job is to try to prevent competition being reduced by various means. So the short answer is that we are not, if you like, doing anything to try and inject competition into the fertiliser market, because that is simply not our role.

Senator JOYCE—Are you in a position to advise this committee of any specific proposals that could be implemented to inject competition into the fertiliser market?

Mr Cassidy—No, I am not.

Senator JOYCE—Thank you.

CHAIR—Could I just impose a little discipline on the committee. For the information of the committee, what would be the latest time you could leave today that would be convenient to you?

Mr Cassidy—I think we would really like to be gone by three.

Senator MILNE—I have to go myself in a minute, but I just want to follow up this issue that a number of us have been trying to tease out today. You said that the refusal to supply is only an offence under the Trade Practices Act if it is a refusal to supply for an anticompetitive purpose.

Mr Cassidy—That is right.

Senator MILNE—Okay. The point we are making is: where there is no competition, there is no way you can breach that act, is there? But it means there is a refusal to supply going on. You have made the assumption that it is not a refusal to supply, because people are saying, 'We've decided to ration it,' or whatever, but surely we need a new offence there where there is the threat of competition but there is not competition. That is the reality for a lot of people. So, if someone decides to withhold supply, there is nothing they can do about it—there is nowhere else they can get it from—and so companies are using the fact that they have such a large market share and no competitors. They can withhold supply. They can say they are rationing or whatever else they like, but in fact they are withholding supply to drive the market in a certain way. If there is no offence for that now and we have a situation where it is just the threat of competition and not real competition, surely we need some kind of amendment—some way of capturing that behaviour—because it seems to us that that is exactly what is happening.

Mr Cassidy—I might say that you are starting to get into policy issues, which I do not think we should be sitting here commenting on.

Senator MILNE—No, but that is where we need your help, Mr Cassidy, because we want to make the act capture the sorts of behaviours that are going on out there. So I am not asking you whether you think it is a good idea or not. What I am asking is: how could that sort of behaviour be captured if we happened to think it was a good idea?

Mr Cassidy—That is where you start to get into some fairly complex issues. At the moment there is nothing which says I must sell to you. I could have all sorts of reasons why I do not want to sell to you: maybe you are a bad credit risk; maybe I just do not like the look of you or something.

Senator JOYCE—That is only if you are selling to me!

Mr Cassidy—No, of course I would sell to you, Senator, but there is nothing to say I must sell to you. Just so you think a bit about this, what you are starting to contemplate is whether there should be some sort of legal requirement that I should sell to you. You would have to think fairly carefully, if you were going down that path, about how you would frame that, because I think anyone in business should have the right to be able to decide who they sell to and who they do not. I do not quite know how you would do it. It would be a fairly complex issue to try and draft something which, if you like, started to sort out what you might call the genuine non-sale from the non-sale for non-genuine reasons. Do you know what I mean?

Senator NASH—I understand that.

Senator JOYCE—On a technical point, Mr Cassidy, that is not quite right. What happens if you do not sell to me because I am black, or you do not sell to me because I am gay?

Mr Cassidy—Again, that is not a breach under the Trade Practices Act. It may be a breach under other legislation but it is not a breach under the TPA.

CHAIR—Can I try and clarify something in everyone’s mind here. You may be able to assist me.

Senator MILNE—I need to go. If I can get back before three, I will ask questions.

CHAIR—Okay. We have evidence of the difficulty for Australians on the eastern seaboard is that there are a couple of people, HiFert and IPL, sort of big time. One lot went around and snapped up from the steelworks all the sulphate of ammonia and I would have thought that was taking competition out of the market. Good luck to them; that is business, I suppose. But we have evidence in a district where there might be two or three resellers and perhaps commission agents where it was suggested to two resellers in the one area that if they priced and sold the fertiliser they had in the shed, the future supply from the supplier would not eventuate and the other supplier, who was withholding and waiting for the price to rise, would get the supply. Is that anti-competitive?

Mr Cassidy—It could be. That is the sort of evidence we would dearly love to have put to us.

CHAIR—The problem with that, as I said to you a minute ago, is to tell you that without protection from litigation, because it is difficult to prove that sort of stuff. These people are, like farmers, seriously distressed about what is going on. The NFF was in this morning and said everywhere they go people are talking about fertiliser and what a rip-off. The difficulty I have is that the person who was told, ‘Don’t you sell that,’ does not want to lose their business, so they do not want to give your evidence and they want to keep their business.

Mr Cassidy—You will understand that I do not want to go to this too far given that it starts to get into the way we conduct our investigations. But if someone comes and talks to us and they have that sort of situation, there are ways in which we can get around that, including what we refer to as ‘friendly’ 155 notices. They do not need to tell us the whole story but they give us sufficient that we can say, ‘Okay, there is something suss here.’ If they then want that sort of protection, we can serve a notice on them, which then allows them to tell us the rest. They give

us information under notice, and that is highly protected. There are provisions in the act as to what we can do with that information and who can have access to the information.

CHAIR—That was in New South Wales. In South Australia there is a major pastoral house—that get it down to two or three—that gave me verbal evidence of absolute intimidation. And they are a major reseller of one company's product. They said, 'Bill, we can't give you evidence because we don't want to lose the contract.' What do we do about that?

Mr Cassidy—Again, if they are prepared to come and talk to us, they do not need to tell us the whole story, if I can put it that way. They just need to give us enough that we have a reason to believe that there may be a breach.

CHAIR—Thank you very much for that. I am sure they will be getting this transcript. With the indulgence of the committee, can I just take you to a tax invoice from Ayr in Queensland. It is from a reseller to a client. The interest charge which is passed on from their supplier on a 30-day account as stated on the account is 18 per cent a month. Do you think that that is excessive?

Mr Cassidy—Personally I think it is excessive.

CHAIR—So what can we do about that?

Mr Cassidy—We would need to know the circumstances of how that came about.

CHAIR—Would you like a copy of it? Oh, it is marked confidential!

Mr Cassidy—Let me explain. If it is a straight case of 'I am charging you 18 per cent a month' there is probably not much we can do about that. Sure it is a high interest rate and so forth. But if in some way you are locked into me—

CHAIR—That is exactly it.

Mr Cassidy—and then I have done something which says, 'Okay, I've got you now and therefore I am now going to charge you this sort of interest rate,' that could well come into the unconscionable conduct area. Let me give you an example. Suppose you and I sign a contract which says the interest rate will only be two per cent a month. If in the contract you have a unilateral variation clause which allows you to subsequently change the contract having signed it, you can change the contract and say that the percentage is going to be 18 per cent a month. That is something that is able to be examined under the unconscionable conduct provisions. I cannot give you a straightforward answer on that. It would really depend on the circumstances surrounding how they get charged the 18 per cent.

CHAIR—Here is another one from a different company—a major pastoral house. They are being charged a 1.32 per cent surcharge on the credit card as well as 18 per cent on the overdue account per month. It says, 'Why can fertiliser be purchased in PNG at half the cost of Australian fertiliser?' I do not know the answer to that. The document goes through the Nauru thing, where Incitec Pivot to put \$5 million into their works and then had contracts which they say were forward contracts at the old price, at \$40—but I notice they did not move until we started to inquire—and they are now getting \$80 to \$120 and the market is still \$200 or

whatever. Do people just have to cop it because this mob are their suppliers? Do they just have to cop the 18 per cent a month?

Senator JOYCE—There is something they can do, but I do not think the ACCC have the resources to do it. They are unilateral variation contracts and there is a possible breach of 51AC, but do you have the resources to go and pursue that? Do you have the team members there ready to go out and help that farmer?

Mr Cassidy—Let me be quite clear: this is not a resourcing issue as far as we are concerned. We have the resources to go after these things. We have over 400 investigations on foot at the moment. The fact is that someone needs to tell us.

CHAIR—Okay. Then we might be talking to you. To follow that up, there is a group up there in the sugarcane area that then went out and said, ‘Damn it, the price of urea is too high.’ They have the global monitoring thing, as we have here. They said, ‘Why should we be paying \$1,200 a tonne for urea when the world price is lower?’ They were threatened by the local supplier that there would be a dumping action brought if they attempted that. They did not want to go through the court process.

Can I take you to a couple of other things. I was recently invited to be a guest speaker at a thing called the Australian Fertiliser Outlook briefing, which was held on 27 October at the Sydney Marriott hotel. Some of this is sensitive, because I have had an email from America and a private conversation which I will not disclose. But there was a gentleman there—and I can disclose this because he said it in a room full of people—Mr Andy Jung, who is the research manager for phosphates in the British Sulphur Consultants, a division of the CRU, the independent authority. He is based somewhere in America. He got up and gave an outlook on fertiliser which generally indicated the falling away and not the sudden drop-off that has occurred now. He then went back to describe last year. This is to a room full of people, including people who have plans to build new phosphate mines in Australia. He was describing what happened last year and he said, ‘We got away with it.’ They were his words. He did not name the grades, but he said, ‘We were able to put up the price \$100 a fortnight and we did that two or three times more than we thought the market would allow us to bear.’ His words were: ‘We got away with it.’ Isn’t that cartel and monopoly behaviour?

I asked him some questions from the floor and then I gave a presentation. One question was: is there a global cartel? With what happened this week with Russia, where they have refused to drop their production and they have halved the market, there is a view that that might be the break-up of some of the cartel behaviour. His view was that they were able to get away with it. The market bore it. He got into a couple of sensitive areas and I do not know if I should put them on the record. He generally supported the idea that there was market power that enabled a group of companies. He said 80 or 85 per cent of the global rock phosphate market was controlled by five companies and they were like the oil mob in that they were able to control a fair bit of the pricing around the planet.

To use the language of your own mob: ‘We got away with it.’ We had evidence the other day from Bob Katter on the likes of the Duchess mine—that, for example, the gas prices are on a long-term contract and the various inputs are on a long-term contract, so it is not increasing costs. In recent times, there has been some sort of market push. Could I instance to you, Mr

Cassidy: the wheat market spiked at \$500 a tonne last year and is now \$220 a tonne for the same wheat in Australia today. That was someone taking a financial instrument position in the Chicago market. The same thing has been allowed to happen with fertiliser. If people can go to a meeting with a room full of people and say, 'We got away with it,' are we not entitled to be seriously distressed by that?

Mr Cassidy—Quite possibly, but it would depend on who the 'we' is that you are referring to. If by 'we' you mean it is the gentleman and some of his competitors then that is collusion.

CHAIR—I thought it was excellent evidence of collusion. In fact I invited him to give evidence to this committee, from which he ran and hid.

Mr Cassidy—When we get the transcript of this hearing we will have a closer look at what you say was said at that particular meeting.

CHAIR—There are other people who are able to back that up.

Mr Cassidy—It may sound naive on our part to think that someone would get up at a meeting and say that sort of thing.

CHAIR—I nearly fell out of my chair.

Mr Cassidy—I know of at least one previous investigation where someone got up in front of a couple of hundred people—it was not on fertilisers; it was in a completely different area—and said something fairly similar. I must say, it made very useful evidence. We will have a look at that when we get the transcript.

Senator JOYCE—Ms Nowak, can you please describe to me the definition of 'substantial lessening of competition' as described in section 50?

Mr Cassidy—I think we should be able to decide who answers questions.

Senator JOYCE—I just feel as though she has been left out.

Mr Cassidy—I am sure Ms Nowak is not feeling neglected. We will leave it for Mr Grimwade to answer.

Senator JOYCE—Mr Grimwade, can you please describe to me the definition of 'substantial lessening of competition' as defined by section 50?

Mr Grimwade—You might know that is not defined in section 50.

Senator JOYCE—Could you give me your definition of 'substantial lessening of competition'? We are trying to work out why these mergers have got us to this point where people have substantial market share but not substantial market power and therefore they are causing us a whole range of grief. I want you to give me your definition of what 'substantial lessening of competition' is.

Mr Grimwade—From jurisprudence I can tell you what there is on substantial lessening of competition. There is not much in the mergers sphere; there is very little. This is probably not going to be of great assistance to you, but we are looking at a material or real diminution in rivalry between competitors in the foreseeable future.

Senator JOYCE—Can you tell me where the interplay is between substantial lessening of competition and the assessment of mergers? Is there any interplay between substantial lessening of competition and the assessment of a merger?

Mr Grimwade—It is the key test to determine whether or not a merger is in breach of the Trade Practices Act. If it would have the effect or be likely to have the effect of substantially lessening competition in a substantial market—

Senator JOYCE—In a substantial market?

Mr Grimwade—in a substantial market—then it is a breach of section 50. Perhaps this might help. In section 50(3), there is a non-exhaustive list of factors the commission must have regard to in determining whether or not there is a substantial lessening of competition. No. 1 is the level of actual or potential import competition, the level of barriers to entry, the level of market concentration, the likelihood of price rises, market dynamics, the removal of a vigorous or effective competitor and several others, so there is some specific guidance. I should also say that the commission does have guidelines and indeed next week, potentially, will be releasing some revised guidelines that outline in a lot of detail how the commission goes about assessing whether or not there is a substantial lessening of competition. It is quite possible that by next Friday we will have something to release that will answer that question in much greater comprehension.

Senator JOYCE—And they were the guidelines that you assessed the Incitec Pivot merger by?

Mr Grimwade—Incitec Pivot was assessed by the commission back in 2002. The commission had merger guidelines issued in 1999, and those were the guidelines that would have been applicable and that staff would have operated under in the assessment of the 2002 merger.

Senator JOYCE—Has there been any change to the test for substantial lessening of competition that was used in the assessment of the Incitec Pivot merger in 2002 up to where we are now in 2008?

Mr Grimwade—No, there has not been.

Senator JOYCE—Thank you.

Senator NASH—Just on that Incitec Pivot merger in 2002, I am sorry; I am not sure who referred before to the NFF having submitted support for that merger.

Mr Grimwade—No, I referred to ‘a farmers federation’ that we consulted that had supported that merger. I did not identify which one it was.

Senator NASH—Which one was it?

Mr Grimwade—I cannot identify that, Senator. As Mr Cassidy alluded to before, submissions that we receive in merger investigations are confidential. I do not think I am betraying a confidence by identifying that a representative farmers group did provide, in a very brief letter to us, support for the merger.

Senator NASH—So that was a confidential submission to you?

Mr Grimwade—That is correct. All submissions—

Senator NASH—Are they all confidential?

Mr Grimwade—Yes, that is correct. There is a separate process called a ‘formal clearance process’ which has never been used. Under that clearance process, submissions are capable of being public, but in the informal—

Senator NASH—All right. So it was not the Farmers Federation. I just wanted to make sure that we were not—

Mr Grimwade—It was a farmers federation.

Senator NASH—Probably ‘a farmers association’ might be a better way to for you to put it, rather than perhaps indicating that the NFF had supported your merger.

Mr Grimwade—I was not indicating that at all, and I would like to correct the record if that is necessary.

Senator NASH—Without then breaching any confidentiality, what were the supporting reasons that the farmers association, whoever it might be, gave?

Mr Grimwade—I had a look at the information that was given to staff at the time of that merger. I was not actually in the branch at the time. It was a very brief letter. There was no substantive reason given.

CHAIR—From the NFF?

Mr Grimwade—No, no—

Senator NASH—No, a farmers association, but it is confidential.

Mr Grimwade—The representative farmers group put to us that they were not opposed to the merger. They did not believe it would have an adverse effect on price or service. This was put to the staff in their investigative process. The staff were out there trying to find information that would buttress a case against a particular merger or would confirm a finding that there is none. With that sort of information put to staff, it is not helpful in trying to make a case against that particular merger in court; in fact, quite the opposite.

Senator NASH—Hang on; let me have a go. Did you get submissions from other farmers associations?

Mr Grimwade—My understanding is that in that particular merger there were not. I do know certainly from the information I have seen that a number were consulted, but, as happens in a lot of merger investigations, not everyone necessarily responds. They may choose not to respond for a variety of reasons. They may not have the time. They might not have the inclination, the resources—

CHAIR—Or the capacity.

Mr Grimwade—Yes, or they might not have any problem with the particular transaction.

Senator NASH—So I am right in understanding that there was only one submission from any farmers association to you on a formal basis?

Mr Grimwade—In that respect, yes. There may have been individual farmers who made representations to staff. One of the reasons that staff would consult representative groups like farmers associations is with the expectation and desire that those associations would be either collating or encouraging the people that they represent to provide information.

Senator NASH—I am just trying to get clear, I guess, and make sure that there is no misunderstanding that there was a general support from farmers associations at the time for a merger. From what you have said, it was one association. There may be a whole number of others, including the NFF, that did not. So I just want to clarify that there was not an overall support from farmers.

Mr Grimwade—No, absolutely. The point I was trying to make before—in response, I think, to Senator Milne’s question—was really from an evidential standpoint. We are out there trying to collate evidence to substantiate whether or not there is a case that we can take in the Federal Court under section 50. When we receive submissions like that, they do not—the point I was making was that it was not evidence that would assist us in making a case.

CHAIR—Could I intervene for just one second?

Senator NASH—You may, just for one second.

CHAIR—Could you provide to us the evidence that you received in taking the decision for the merger—for instance, that letter?

Senator NASH—I have tried that; it is confidential.

Mr Grimwade—I have just explained to Senator Nash that we are unable to do that.

CHAIR—Why?

Mr Grimwade—Because all the submissions that we receive in any informal merger review are confidential.

CHAIR—Could you give us a list of the people who provided them?

Mr Grimwade—No, we would not even identify—

CHAIR—You offered to give us the list of the people in the earlier case today.

Mr Grimwade—That was in relation to the inquiry, I think.

CHAIR—You have offered the list, and you are going to ask them whether the confidential—

Mr Cassidy—Yes. The best I think we can do—as you would appreciate, we are terribly protective of the information that we get—

CHAIR—And I congratulate you on that.

Mr Cassidy—The best we can do would be to approach relevant parties and say, ‘Look, the committee has asked.’

Senator NASH—On the basis that you would provide it to us in camera, of course.

CHAIR—Yes, we would take it in camera.

Mr Cassidy—Even in camera, I am afraid that I think—

CHAIR—I will ring them up and ask them. I know who they are!

Mr Cassidy—we would still need to ask them. If you like, we will do that and see what response we get.

Mr Grimwade—It was six years ago, so I am not sure whether those people are still around or not.

Senator NASH—It is certainly worth a try, and I am betting pounds to peanuts that they have probably got the information that they provided to you on file somewhere, so perhaps they could check it out.

Mr Grimwade—But I can tell you it was—

Senator NASH—Someone would have the responsibility, I am sure, to say either yes, they were happy to release, or no—even if it was not the same people.

Mr Cassidy—It does raise an important issue, particularly in relation to mergers. Sometimes people say to us: ‘Why didn’t you oppose this merger? Why didn’t you stop this merger?’ But, as Mr Grimwade said, at the end of the day if we are going to stop a merger we have to be able to go into court and prove that the merger is going to substantially lessen competition, which means that we need evidence. We cannot just go into court and make a bald assertion; we have to be able to go into court and establish our case. We do have mergers—again, I am speaking

generally—where people say to us afterwards, ‘Look, you should have stopped that,’ but we say, ‘We can’t stop a merger unless we get sufficient evidence.’

Senator NASH—With hindsight, with what you know today, would you approve an Incitec Pivot merger today?

Mr Cassidy—We could not give you an answer to that off the top of our heads—

Senator NASH—I did not expect you to be able to.

Mr Cassidy—basically for the reason I was alluding to.

Senator NASH—You have to go out and take all the—

Senator JOYCE—Can I—

Senator NASH—I just have another separate issue. Is your question on this?

Senator JOYCE—Yes. What about in the USA? Do you think the Incitec Pivot merger would go through with their trade practices laws on mergers and acquisitions?

CHAIR—The answer is no.

Mr Grimwade—I could not answer that.

Senator JOYCE—Have a guess.

Mr Grimwade—I would assume that they would—

Senator JOYCE—Reject it.

Mr Grimwade—No, I would assume that they would adopt the same approach that we did. The principles of merger analysis are—

Mr Pearson—Their process is almost identical to ours. Tim and I do a lot of work with the United States Department of Justice and the Federal Trade Commission. Their review process is very, very similar. Tim actually runs training courses with the Department of Justice.

CHAIR—That will do us, Senators; we have run out of time.

Senator JOYCE—But the laws they have to back them up are far stronger than ours in stopping it.

Senator NASH—On a separate issue, in your submission you talk about the world and domestic prices tracking each other reasonably closely. What is your definition of ‘reasonably closely’?

Mr Cassidy—As I was saying earlier, there is a lag in getting imports into Australia, so there is a window of opportunity, if you like—

CHAIR—But that is—

Mr Cassidy—Hang on, let me answer—while imports are responding. You do not just see this with fertilisers, you see it with the other international commodities. You get blips up and down during the course of that lag. I think the basic point is that if you look at what has happened with international fertiliser prices over the last couple of years and you look at what has happened with Australian fertiliser prices over the last couple of years, and the charts are in our report, with a bit of noise the two basically track one another.

Senator NASH—It is interesting you say that, because if you look at urea March 2007 to March 2008 the world price which has gone up, looking at this graph, which is not particularly detailed, from \$395 to \$405 a tonne, barely shifted, maybe \$10 a tonne, and in the same period the actual retail price has gone up by about \$200. I do not see how you can possibly define that as tracking each other reasonably closely.

Mr Cassidy—You are working off this chart, are you, Senator?

Senator NASH—No, off the chart on page 19.

Mr Cassidy—I was looking at a different page.

Mr Pearson—There is an explanation to try and explain that in the actual report.

Mr Cassidy—You are looking at the gap that opened up towards the end there?

Senator NASH—I am. March 2007 to March 2008.

Mr Cassidy—We refer to that on page 18 at the bottom. If you run the data on, the gap did then close again. This is a problem of having to stop somewhere. We stopped when the gap opened up, but then it closed again.

Senator NASH—I understand the issue with the gaps opening and closing, and perhaps you can provide to the committee the run-on from that. But under any stretch of the imagination, I do not see how you can describe that kind of a gap, from a \$10 increase in the actual world price to a relative \$200 difference in the retail price, as tracking reasonably closely.

Mr Cassidy—When you are working off a base of \$600 or \$800 a tonne, the actual price—

Senator NASH—Sorry, the price—

Mr Cassidy—In other words, if you look at it in a proportionate sense. If you look at the collection of charts—

Senator NASH—Sorry, Mr Cassidy, I am assuming you are looking at the peak from March 2008 for the retail price of \$600 or \$800 a tonne. Is that what you are talking about?

Mr Cassidy—The point I was making is that those figures sound high in absolute terms but if you look at them relative to the price of the fertiliser, which is up around the \$600 a tonne mark—

Senator NASH—We are talking about the urea here. What are you talking about for the \$600 a tonne? The world price of urea that I am talking about this particular point in time varied from \$395 to \$405.

Mr Cassidy—Yes, it was \$10.

Senator NASH—I am trying to follow what you are saying about fertiliser being \$600 to \$800 a tonne. It obviously peaked at around \$710 when the world price was \$405. I am just trying to follow what you are saying.

Mr Cassidy—Now we are getting into two points. There will always be a gap between the world price and the Australian price, which is the transport cost.

Senator NASH—I understand that. I am going to give up in a minute, but I am trying to get to how you can determine it as reasonably closely.

CHAIR—To assist the committee, we are going to invite you back again, rather than get mumbo jumbo there. Can I give Senator Joyce the call and then I have got a couple of drop-dead questions for you.

Senator JOYCE—I am going to be really quick. There is a substantial lessening of competition test that the merger entity has the ability to put. Does the substantial lessening of competition test say that you have to have the ability to raise prices without losing business?

Mr Grimwade—In terms of an exercise of unilateral market power, that would be a description of the substantial lessening of competition.

Senator JOYCE—If the merger entity does not have the ability to raise prices without losing business then will the ACCC allow the company to merge?

Mr Grimwade—As a result of the merger there has to be a causal link between the actual merger and the ability to exercise market power, which might be through an increase in price or a diminution of service. That would be the parameter—

Senator JOYCE—So if Incitec Pivot cannot raise prices without losing some of their market share to other people then the ACCC has to allow the merger to go through?

Mr Grimwade—For the assessment done in 2002 in relation to Incitec acquiring Pivot, that essentially would have been the test.

Senator JOYCE—Thank you. Is section 50 harder or more difficult to prove than the test of market power in section 46?

Mr Grimwade—That question is quite a difficult one to answer. I do not think I could give an accurate answer to that question.

Senator JOYCE—This is all about mergers. Does section 50 prevent markets from becoming concentrated?

Mr Grimwade—Market concentration is a factor that we are required to take into account, but it is not the only factor—

Senator JOYCE—Is it a fatal knockout clause?

Mr Grimwade—A merger that increases concentration in a market does not necessarily breach the act because it may well have other constraints that preclude it from exercising market power as a result of the actual merger. Those constraints are, for instance, barriers to entry being low or import competition being actual or potential.

Senator JOYCE—Does a concentrated market provide a fertile environment or temptation for collusion?

Mr Grimwade—I think it is an indicator, but it does depend on a whole host of different factors that go towards the market structure.

Senator JOYCE—Do you ever go and review past merger cases to see if you got it right?

Mr Grimwade—There have been situations where we have received complaints about conduct by a merged firm post merger and we have examined those. I should say that, since there is no requirement under the act for parties to notify the commission of a merger, in a fairly significant number of cases every year we are actually reviewing mergers that have already happened and conducting a full-scale review. Indeed, there is one in the pesticide industry that we are reviewing right now—

Senator JOYCE—I have tried to truncate some of your answers because they seem to go on. I think that might be a habit picked up from other members. If Australia had divestiture powers, or even the threat of divestiture powers, do you think that would focus some corporations' attentions so that they were less inclined to exploit their market position?

Mr Cassidy—It may. On the other hand, in the US, where they have divestiture powers, they have been very rarely used. The famous break-up of Bell Telephone is one of the few instances where they have been used. So you then have to question: if you have a power which is very rarely used, how much does that concentrate the mind?

Senator JOYCE—You said before that 51AC concentrates people's minds even though they do not come to a conclusion. It concentrates their minds so that they are less likely to do it. I am just wondering whether that would be the case if we have divestiture powers.

Mr Cassidy—That is true. The only point I am making is—and if I can be cheeky—we have had a lot more 51AC outcomes than the US has had divestitures.

CHAIR—I want to flag something that is burning a hole in the heart of farmers right now. There will be farmers listening and looking. We have had what I would call a global collapse in the price of wheat. We have had the arrogance of the fertiliser industry in suggesting to Australia's wheat growers that they could afford the price of fertiliser because the price of grain had gone up. As I said, there was an artificial spike. It fell \$100 in a week when that person liquidated their financial instrument. I just want to read from a document from Mackay in Queensland:

Local investigations have revealed the following prices from a major retail supplier. When questioned why the price had not dropped in line with world parity, the answer was that they held stock when the price was high. Upon further questioning regarding the fact that when the world price went up so did the local price, almost immediately—

and bear in mind there was a lot of stock in store at the old price—

the reply was that the Companies had to forward plan and hence move all prices swiftly to match world price as parity was what they were allowed to price against and timing was then a matter of their commercial decision ...

So DAP pricing in this area is \$1,927 a tonne, and it was \$450 FOB the Black Sea on Monday. What are Australia's farmers to do, given that we had to cop it on the way up and we are going to cop it on the way down? Do you understand the frustration and the anger? By the way, the committee will have you back. We will give an interim report. We are not going to give up on this. We are not going to let our farmers down. There is collusion in the market. There is monopoly behaviour. There is a world cartel. It is a disgrace.

Senator JOYCE—And you do not have the powers to do anything about it.

CHAIR—Isn't that reason for us to be angry?

Mr Cassidy—I can understand what you are saying. We have said this several times and it goes to what Senator Joyce just said: I do not agree that we do not have the power to do anything about it. We do not have the evidence to do anything about it. I am just about pleading for people to come and tell us.

CHAIR—We will try and assist you with that, because we are not going anywhere. The document continues:

I have supplied further evidence to the NFF regarding fertiliser prices continuing to increase in—

a certain state—

despite the world price of urea falling from USD850 to USD350 FOB. I have received no evidence that fertiliser prices have decreased whatsoever! In fact, this week I had a report that Urea prices in one of our regions have increased in the last three weeks to a new high of \$1303/tonne (inclusive of GST).

So that is one problem. I hope people are picking that up and hearing it. You cannot give predictions on fertiliser. I would let these blokes burn in their own bloody juice.

I want to go to labelling and samples. We have taken evidence, and we have done a bit of quiet investigating, on sampling. In the fertiliser industry there is no requirement for the label to be tested routinely. As I said, I have been buying fertiliser since I left school in 1959. You just say, 'I'll get DAP or single super,' and you spread it and you never worry about what is actually in the sample. We think we should recommend that there be some mandatory sampling process. The particular sample that I have here, a fertiliser that is supposed to be 18 per cent nitrogen, according to the New South Wales Department of Primary Industries Diagnostic and Analytical Services—without naming where it has come from—is actually 16 per cent. Do you think that is a problem? Has the ACCC ever thought about testing the label as part of the responsibility for full and frank disclosure in the market? Obviously some of this fertiliser is all over the place.

Mr Cassidy—Again—not in fertilisers—we have taken a number of cases to do with misleading labelling. It is the same thing. Say you buy orange juice and it says on it '100 per cent pure juice' and it turns out it is only 80 per cent and 20 water; we have taken on a number of those cases. The misleading and deceptive conduct provisions in section 52 apply to that sort of thing.

CHAIR—I would not say this is deliberately misleading. I think there is a culture in the fertiliser industry of just believing the label.

Mr Cassidy—You would need to look at it.

CHAIR—I think there is a culture within the fertiliser industry where we just believed what we were told. We would go in and order 50 tonnes at whatever the price was. You believed it and you got it—up until this year, that is. So we have that as a problem. We have plenty of work to do in this committee. I am grateful for your attendance. We are a long way from finished. There is a new phenomenon occurring in the market now—that is, price gouging on the way down as well as on the way up. We would be grateful to have you back again at a suitable future date.

Mr Cassidy—Sure.

CHAIR—Also, we have a series of questions that we are going to put on notice to you.

Mr Cassidy—Okay.

CHAIR—Thank you very much.

Mr Cassidy—Thank you.

Committee adjourned at 3.00 pm