



COMMONWEALTH OF AUSTRALIA

SENATE

Official Committee Hansard

ECONOMICS LEGISLATION COMMITTEE

THURSDAY, 5 MARCH 1998

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SENATE
THURSDAY, 5 MARCH 1998
ECONOMICS LEGISLATION COMMITTEE

Portfolios: Treasury; Industry, Science and Tourism; Workplace Relations and Small Business

Members: Senator Ferguson (*Chair*), Senator Jacinta Collins (*Deputy Chair*), Senators Bishop, Chapman, Murray and Watson

Senators in attendance: Senators Bishop, Boswell, Ferguson, O'Brien and Schacht

Committee met at 3.15 p.m.

DEPARTMENT OF THE TREASURY

Proposed additional expenditure, \$204,346,00 (Document A)

Consideration resumed from 25 February

In Attendance

Senator Kemp, Assistant Treasurer

Australian Competition and Consumer Commission

Professor Allan Fels, Chairman

Mr Allan Asher, Deputy Chair

Mr Hank Spier, General Manager

CHAIR—I call the committee to order. I welcome Senator Kemp, the Assistant Treasurer, and officers of the Australian Competition and Consumer Commission. The purpose of today's hearing is to continue the committee's examination of the ACCC. I would like to thank Professor Fels for making himself available for today's hearing. Minister, do you want to make an opening statement?

Senator Kemp—No, I just want to mention that, at the request of the committee, we have been able to make arrangements with Professor Fels to be here. I can assure Professor Fels that I am sure that his being a Carlton supporter will endear him to all members of the committee.

CHAIR—Professor Fels, I understand that as a result of questions asked you may wish to make a couple of statements first.

Prof. Fels—That is fine. I have an idea what Senator Schacht's concerns are. I might say something about them.

Senator O'BRIEN—I promise not be any less courteous to Professor Fels because of his support for Carlton. Professor, I take it that the existence of an agreement to sustain a duopoly would be of concern to the ACCC.

Prof. Fels—In general, we are concerned. In particular, under section 45 of the act, if there is a contract arrangement or understanding which has the purpose or effect of substantially lessening competition, that is a breach of the law. A price fixing agreement is an automatic breach.

Senator O'BRIEN—If there was a third party involved in the agreement would that also concern the ACCC?

Prof. Fels—If three people were involved in the contract arrangement, and it had the purpose or effect of lessening competition, that would be a breach. The reason I hesitated for a second with your opening question was the one thing that is probably academic to what you are getting at. If there is an existing duopoly, then that is a fact of life that we have to deal with. The fact that a duopoly exists at the beginning of something is not a problem under the Trade Practices Act. If people reach anti-competitive agreements then it is a problem under the Trade Practices Act.

Senator O'BRIEN—You are no doubt aware of the arrangements that have existed at the Port of Melbourne between the port authority and the two container terminal operators.

Prof. Fels—Yes.

Senator O'BRIEN—That has been the subject of protracted litigation in the Supreme Court of Victoria.

Prof. Fels—Yes.

Senator O'BRIEN—The court documents in that matter suggest that at least some parties believe that this agreement has been in place since 1992. In any event, the agreement was revealed by Patrick's legal action in April 1997. When did the ACCC or its predecessors become aware of this agreement or have suspicion of it?

Mr Spier—We only became aware of it very recently in some press comments.

Senator O'BRIEN—When you say very recently can you put a time on that, please?

Mr Spier—It was an article in the *Financial Review* which was only six or seven weeks ago. I should say no-one has been near us on that matter at all.

Senator O'BRIEN—Patrick's legal action commenced in April 1997 and was quite notable, wasn't it?

Mr Spier—That may be the case, but we were not aware of the details of that action and none of the parties to that action came near us.

Senator O'BRIEN—What action have you taken in relation to that situation?

Mr Spier—There are, as you say, legal proceedings afoot. We are not sure what the outcome of those legal proceedings will be. We have had a brief look at the matter, but we have not been able to get most of the documents. It does not seem, on the face of it, that there are some doubts whether it is a breach of the law. It may be.

Senator O'BRIEN—You have not been able to get most of the documents? Do you have the documents from the Victorian Supreme Court?

Mr Spier—No, we do not.

Senator O'BRIEN—Have you attempted to get them?

Mr Spier—We do not have access to those unless a party gives them to us. No party has been near us.

Senator O'BRIEN—Are you sure you do not have access to them?

Mr Spier—We would have to talk again to the parties, but we do not have access, as a right, to most of those documents. It is a private action. We are not a party to it.

Senator O'BRIEN—My understanding is that those documents are available from the Victorian Supreme Court—or certain of the documents, in any case—without the need to obtain the consent of the parties.

Mr Spier—We can try again. As I said, we were not aware of the details of this action. We were not contacted by any of the parties. No-one has complained to us which, if there is an issue, is fairly unusual.

Senator O'BRIEN—Wouldn't you agree that the action of Patrick's in trying to enforce such an agreement after OOCL was announced as the preferred third operator in January 1997 was clearly an attempt to maintain the duopoly agreement?

Mr Spier—Without seeing the documents, that is very hard to judge.

Senator O'BRIEN—I am very interested in the attempts that you have made to obtain the documents. Have you approached the Victorian Supreme Court at all about obtaining the documents?

Mr Spier—No, we have not.

Senator O'BRIEN—Why do you say it is possible that the agreement is not unlawful?

Mr Spier—It needs to be a substantial lessening of competition—the agreement—and it may be. Certainly the type of scenario you put to the chairman would be something that we may investigate. Having said that, the matter is a subject of legal proceedings which may or may not have a bearing on any action that we can take. Also, the parties have slightly changed. One of the parties was, I understand, the Port of Melbourne Authority, which no longer exists as such.

Senator O'BRIEN—It is the MPC now, isn't it?

Mr Spier—Yes, that is right.

Senator O'BRIEN—I had presumed that, given the notoriety of the actions, the ACCC would have considered seeking to join itself to the Supreme Court action as an interested party.

Mr Spier—I remember seeing reports in the press, but the details of the report did not show that there may be a trade practices issue until a very recent press article.

Senator O'BRIEN—What did you think the case was about?

Mr Spier—An action in contract. It is also at the Supreme Court; it is not the Federal Court. Trade practices matters are, for instance, normally in the Federal Court.

Senator O'BRIEN—Yes, but why would parties who may equally be at fault in trade practices be seeking a trade practice action to enforce a contract that is in breach of the Trade Practices Act? It is a bit circular.

Mr Spier—I cannot answer if it is hypothetical. We do not have the details of this case. It was never brought to us. We tend not to get involved if matters are already in court.

Prof. Fels—If there is a contested case, I would have thought one of the parties would have raised the trade practices issue if there was one. It is a contested case, isn't it?

Senator O'BRIEN—Yes.

Prof. Fels—One of the parties would surely raise that—

Mr Spier—We have actually talked to a number of the parties—

Senator O'BRIEN—Unless they are equally at fault, Professor Fels, surely, and they have at the back of their minds a question as to whether raising that issue was a bit of an own goal—

Prof. Fels—No, because they would get it declared void. If it is illegal under the Trade Practices Act, it would be void at law and then that would be the end of the contract. The only thing they might fear—and what I think you were getting at—is that maybe they would attract a penalty or something. Most cases under the Trade Practices Act are actually private and not public. I doubt that would be a penalty issue myself.

Senator O'BRIEN—Just going back to your explanation, why would the Melbourne Port Corporation want to void its arrangements with the two stevedoring companies? Or, for that matter, why would either of the stevedoring companies want to void their arrangement for a lease of the dock area?

Prof. Fels—I do not know. I am just saying that if they are fighting one another in court, then it would have seemed sensible to raise that as part of the litigation.

Senator O'BRIEN—I wanted to ask what action the ACCC had taken to satisfy itself that similar arrangements were not in place in other ports where this apparent duopoly exists between P&O and Patrick's.

Prof. Fels—Under the act, the commission did not have any foundation or any evidence to start taking any action on that speculation.

Senator O'BRIEN—I can see that there is an element of speculation in it, but, on the face of it, there are duopolies in ports.

Prof. Fels—There are duopolies in numerous industries.

Senator O'BRIEN—There is on the record one agreement which, if investigated, might reveal that it was being maintained by an illegal agreement. I thought it followed that ACCC might think where there is a bit of smoke there is some fire and be a bit proactive in investigating other scenarios. You are saying that you have not?

Mr Asher—I am involved with the enforcement work of the commission. You are right. If we come across a transaction in the course of our business, we certainly follow them up. But those sources of complaint to the commission tend to be things that we discover ourselves from the papers on mergers or something like that. More commonly somebody will call us in relation to a price fixing agreement or a market sharing agreement, such as a party who is adversely affected by resale price maintenance or something like that.

In the case of arrangements of this kind, normally there would be a shipper or somebody who is adversely affected by it, or a party to the deal who does not get what they want. The bulk of our work comes from receiving complaints. That is quite a sensible trigger for an investigation. Of course, that does mean that some hidden conspiracies remain out of sight. But there again, it is almost impossible to see how, without a lead or without some indication that there is a breach of the law, you can even get access to it. Often where there is some private litigation, we will follow those matters up. The point that Mr Spier was making is that we are looking to see what comes out of it.

Senator O'BRIEN—Your role is reactive rather than proactive.

Mr Asher—No, it is both. In law enforcement, it is mainly in response to market complaints, but in many areas of the law it is entirely proactive. We spend a heck of a lot of our resources on compliance education and on encouraging people to know their rights and

responsibilities. But without at least the smoke that you refer to, how would one know where to look?

Senator O'BRIEN—Indeed. Where there is smoke you should look.

Mr Asher—Absolutely. I quite agree with that. I think that is profoundly the case and that is just what the commission does.

Senator O'BRIEN—Would there be a breach of the Trade Practices Act or any statute if the port authority failed to proceed with a lease because, for example, the stevedore was going to employ union labour?

Mr Asher—I think it would depend on how that was done. There could be ways in which it could be a breach, but it would be a question specifically of the way documents and conduct was drafted. And then the question of evidence; how you go to show what they did and why. There are many port authorities that are not even covered by the Trade Practices Act.

Senator O'BRIEN—How do we discern which are and which are not covered?

Mr Asher—Typically, the ones that are not incorporated and trading because they are parts of a government department or something like that, they are not.

Senator O'BRIEN—Yes. It is essentially the incorporated or corporatised bodies?

Mr Asher—Yes. Trading corporation, yes.

Senator O'BRIEN—If the government had corporatised its port entity then that would be covered by trade practices?

Mr Asher—Typically, yes, but there are still some exclusions of contracts with the government.

Senator O'BRIEN—I would have taken it that you would be aware of accusations that the OOCL deal in January 1997 did not proceed in Melbourne because they intended to proceed with union labour. Has there been any investigation of that allegation which was in the media?

Mr Asher—Not that I am aware of.

Mr Spier—No, there is not. As the deputy chairman just said, it is quite unclear whether that would be a breach of the law.

Senator O'BRIEN—It is quite unclear?

Mr Spier—Yes.

Senator O'BRIEN—That occurred. Was that issue investigated in relation to that matter?

Mr Spier—No.

Mr Asher—We certainly did not receive any complaint or even inquiry from any party. Typically—and that is what I was saying earlier—where there are disaffected parties, they will very quickly come to us. It is not the case that you get too few. Typically, people will come to us whether or not there is an issue. So in a way, where disaffected parties to a transaction do not come, it is often an indication that there is nothing there.

Senator O'BRIEN—Also, you talk about being proactive.

Mr Asher—Yes.

Senator O'BRIEN—That was a matter that was in the media and that was the allegation that was in the media. What you are telling me is that there was no consideration of investigating that matter.

Mr Asher—What I would be saying is that, the way we would normally investigate trade practices complaints, even where we pick them up ourselves from the media, you would want something more substantial than those few facts that were reported in the media.

Senator O'BRIEN—Yes. How would you view a request from a port corporation to a terminal operator to reduce capacity? Couldn't this reduce competition? What action would you take?

Mr Asher—If somebody came to us to allege that the market was being shared, if there was an approach for price fixing or capacity limitation, the commission certainly would be inclined to take those matters up. We would want to see the nature of the documents by which that conduct was evidenced and we would want to understand any explanation for it.

Senator O'BRIEN—Mr Paul Houlihan was reported to have indicated in an article in the *Weekend Australian* of 31 January that just such a request had been made of Mr Corrigan. Did you investigate that? It was just such a request, that is, that the port corporation in Melbourne requested Mr Corrigan of Patrick's to reduce the capacity of his operation. That is what Mr Houlihan said.

Mr Asher—Are you saying that Mr Houlihan has put that to the commission?

Senator O'BRIEN—Mr Houlihan has said that such a request was made and that is as reported in the *Weekend Australian* of 31 January. Mr Houlihan is one of the members of the board of P&C Stevedoring which is another company which is now operating on Webb Dock. I am sure you have heard of that.

Senator Kemp—I do not wish in any way to obstruct the officer. As an independent person, he will say what he likes. But I make the point that it is very difficult when people put some facts before the table and the officer is then asked to comment on those facts. He is not able to check whether or not those facts are correct, and that sort of question does put the officer in a difficult position. Nonetheless, as I said, he is an independent officer.

Mr Asher—Thank you for that. I wonder if we could offer to have a look at that and to respond fairly promptly to Senator O'Brien?

Senator O'BRIEN—I am happy for you to look at that and to tell me if the question is unfair. You are telling me you didn't investigate—

Mr Asher—Not didn't, but haven't, and there is a difference because, typically, investigations of this character proceed over many months. We will make information requests and people will reject those—

CHAIR—We will have to adjourn for about eight minutes because there is a division in the Senate.

Proceedings suspended from 3.35 p.m. to 3.45 p.m.

CHAIR—We will recommence proceedings.

Senator O'BRIEN—Mr Chairman, we are going to investigate further the particular matter we were just dealing with.

Has ACCC at any stage had discussions with the Commonwealth or Victorian governments, or their agencies, about competition on the Melbourne docks?

Mr Asher—With a number of mergers in the ports in Victoria: we were involved quite closely in the ports of Geelong and Portland; we have dealt with acquisitions of assets in those. We have had extensive dealings with the government in relation to tugs and the tug

arrangements, in both mergers and access to the ports, and also in relation to a range of regulations for control of traffic in the port of Melbourne. So, quite extensive—yes.

Senator O'BRIEN—Do you mean control of seagoing traffic or other traffic?

Mr Asher—It is in relation to the charging policies. It was a Prices Surveillance Act matter, as I recall. The commission was looking at the control of the charging rates for tugs and that there is legislation in Victoria that confer on the government some powers in relation to control of access to the ports.

Senator O'BRIEN—Have you had any discussion with the state or federal government about competition amongst stevedores on the Melbourne waterfront?

Mr Asher—We have certainly discussed it with the stevedores.

Mr Spier—From time to time we have had—

Prof. Fels—We did a study on port authority leasing about three or four years ago—and we did a published study on it. We have had a couple of privatisation questions come up in relation to ports, including Victorian ports. We have had one or two merger matters in that sector of the economy where—

Senator O'BRIEN—What do you mean, 'a study on port leasing'? What aspect of leasing?

Mr Asher—Equipment leasing.

Senator O'BRIEN—What about the facilities themselves, such as Webb Dock?

Mr Asher—We were looking at the efficiency of the ports as competition policy was being extended to them. Professor Brian Johns, our then deputy chair, did this—

Mr Spier—That was done in the days of the TPC, and it was not just Victoria, it was national. It was a report done as a discussion paper on port leasing and competition issues. It was never issued as a final document. It was only a draft for discussion.

Senator O'BRIEN—Do I presume that there was no discussion arising from that document of any importance?

Mr Spier—There may have been discussions, but it was simply collecting information, seeking comments from state governments on what was in that report.

Senator O'BRIEN—I was interested because I had asked questions specifically about the leasing arrangement between the Melbourne Port Corporation and Patrick's and P&O, which was the subject of the legal action. That is my understanding. The very lease that applied it, for example, to Webb Dock and the P&O operation, had been the subject of legal proceedings. So what you are saying—

Mr Spier—This was about four years ago now.

Senator O'BRIEN—Yes, I understand that. This lease would be subsequent to that, but there has been no follow-up since by ACCC in relation to that particular matter.

Mr Asher—That is quite correct. I think the nature of that work was more—in the words of Senator Ferguson—proactive work, where we had just been to shippers, to stevedores, to the port owners, to obtain general information. It would never have got down to particular terms in particular documents.

Mr Spier—It was particularly aimed at the port authorities—the way they handled the leasing issues—because most of them at the time were government owned or controlled.

Senator O'BRIEN—Have you had any discussions with the National Farmers Federation or P and C Stevedores?

Prof. Fels—I will take the farmers first. I did not quite hear the second bit.

Senator O'BRIEN—I am happy to deal with it in two parts.

Prof. Fels—Regarding the National Farmers Federation, we have had only one discussion and that was on the day that the Webb dock news broke and became public. We called up the NFF's Dr Wendy Craik. She is the Executive Director. We just called her up to find out what was happening because we thought we had better understand the commercial activities that were apparently going on. We did not know in advance what was going to happen at Webb dock or anything, so Mr Spier and I gave her a call and we just asked her what was going on, what it was all about and what the business proposition was. Also, I think she asked a couple of questions about the Trade Practices Act, our role in enforcing it and what happens when people breach the Trade Practices Act; and we gave a few answers. That was the only discussion we have had with the National Farmers Federation. I know that it has been reported a bit differently. That is the only discussion with Dr Craik.

Senator O'BRIEN—Yes, I think it was reported somewhat differently. Why did you ring the National Farmers Federation? Did you have concerns about competition?

Prof. Fels—We woke up and saw that morning what had happened and we appreciated that it was possible that there could be some competition or Trade Practices Act implications. I am hazarding a guess at this, but I think I might have heard a few noises straight away from some quarters suggesting there might be some boycott action there. If there were not any such noises, it certainly occurred to us as a possibility and we thought that we would need to inform ourselves of the commercial circumstances and the basics of what they were doing at the Webb dock. That was why we called them up.

Senator O'BRIEN—What about P and C Stevedoring, the actual company that has been set up, have you spoken to any of the principals?

Prof. Fels—No. And I should mention that, with the farmers, I think we parted on a note of something like they would call us, not—

Senator O'BRIEN—Don't call us, we will call you?

Prof. Fels—What I mean by that is that I think they said they might give us a call about developments and so on, and that did not happen. We did not call up that firm you just mentioned, but the other one we called up about it was Patrick's, just to get some information about the whole thing from them. We went through the same routine.

Senator O'BRIEN—You sought information from Patrick's about the lease arrangement that they had with P and C Stevedoring?

Prof. Fels—Yes.

Senator O'BRIEN—You may not have used those terms, but that is the name of the company.

Prof. Fels—Yes. We started out at the general level by asking, 'What is going on?' and 'Please describe to me what is happening?' et cetera. Then, we were in the process of getting the details of the lease. I think the request in relation to the lease went out later.

Mr Asher—Perhaps I could add to that—and it underlines the point that we made earlier—that in this case there were some statements made at the Industrial Relations Commission in February concerning that, where we felt that there were allegations that might raise trade practices issues, so we are now investigating that and obtaining all of the documents that relate to the transactions between Patrick's and P and C.

Senator O'BRIEN—When did you take that action?

Mr Asher—From 9 February, when those statements were made at the Industrial Relations Commission. Since then we have been in correspondence and investigating the matter.

Senator O'BRIEN—I wanted to touch on another area. I realise there is some sensitivity about time, but there is a matter I need to deal with, and that is on the question of hold cleaning. I understand that ACCC has some concerns about hold cleaning practices in the stevedoring industry. Have you done any assessment of the cost to industry of that matter?

Prof. Fels—Just to explain it generally, the commission's concern is not with hold cleaning per se. The commission's central concern is with whether there has been any illegal boycott action taken to support hold cleaning demands. The actual merits or otherwise of hold cleaning practices, who they should be done by, whether they are done at port or at sea and so on have been of only background interest to us.

The issue that is most central under the Trade Practices Act is whether or not there has been any boycott action taken to support the hold cleaning. At the moment we are engaged in a process of getting that information. We are currently using the powers under section 155 of the Trade Practices Act to compel information from quite a few people. That would enable us to decide whether there have been any breaches of the law and whether any action should be taken.

Senator O'BRIEN—Would provisions under section 155 allow you to access court documents?

Mr Asher—No they would not.

Prof. Fels—The commission does not use section 155 a great deal and there are limits on its use. First of all, according to the act the commission must have reason to believe that there may have been a contravention of the act before it can actually bring in section 155. There has been a long history of challenging our use of that power, so we do not use it terribly frequently.

Senator O'BRIEN—Have you had discussions with government on that issue?

Prof. Fels—On hold cleaning?

Senator O'BRIEN—Yes.

Prof. Fels—They have asked us in a general sense what is going on. That is the main thing I am aware of.

Mr Spier—It is well known, of course, in the industry that we are making those investigations. It is a fairly tight industry and they soon tell each other if they have had a visit from us or they have had a notice from us. The government has asked us what is going on. We have said we are investigating.

Senator O'BRIEN—That is the extent of your advice?

Mr Spier—We have told them that we are investigating.

Senator O'BRIEN—So if the government inquired of ACCC about the hold cleaning issue, you would simply tell them you are investigating?

Mr Asher—A little more than that. It is—

Mr Spier—We might tell them what it is.

Mr Asher—to describe where the allegations arose and to describe the nature of any investigation that would be required in order to obtain evidence. That is it.

Senator O'BRIEN—Would the revelation of your investigation in any way prejudice it?

Mr Asher—If there were an active investigation—if you were expecting to find individuals actively boycotting a ship, refusing to untie and things like that—then if that were described in great detail at that same time, it might lessen the likelihood of the conduct continuing.

Senator O'BRIEN—There were several other questions and we do not have time. There will be some questions that I will need to put on notice.

CHAIR—Are you happy to take some questions on notice?

Mr Asher—Could I suggest that we might speak directly to Senator O'Brien to properly understand the range of issues and to develop the questions.

Senator O'BRIEN—I am happy to do that if there is no problem with it. The only other issue is the matter I raised with you, Mr Chairman, about the evidence of Mr Gillespie and the advice we have from the Clerk.

CHAIR—I will need to discuss that with my colleagues; we will have to have a brief meeting as to what process we take.

Senator O'BRIEN—I am asking that the estimates process not be closed off, because that will then narrow the options from two to one.

CHAIR—Even if we do conclude this estimates, there is nothing to stop them being recalled, nothing to stop them at all, at any time. Even if we stop the public hearing now, there is nothing that precludes anybody from being recalled at a later date.

Senator O'BRIEN—All right.

CHAIR—Or the legislation committee can deal with it too. So you will not be frozen out—

Senator O'BRIEN—I certainly want the opportunity to ask further questions on Mr Gillespie.

CHAIR—Okay. Senator Schacht.

Senator SCHACHT—Professor Fels, was the decision to oppose the Foxtel merger arrangement taken unanimously by all the commissioners, or was it taken personally by you?

Prof. Fels—It was taken unanimously, in any way you want to describe it—formally, informally, there was no dissent, there was no staff dissent. There were a couple of press reports to the contrary. They were false. They did not come from the commission, they could not have come from the commission.

Senator SCHACHT—So at all stages in consideration before you went to the court, other than the normal due diligence that I would accept of people looking at all the issues, you are saying all staff were unanimous in the end. Before they took that decision that was to be unanimous, did you indicate your view?

Prof. Fels—I will tell you what happened. I think this will answer your question. The commission approached that merger with an open mind at the beginning. It did not start from the position that this merger was certain to be found illegal; it went into it with a genuinely open mind. During that time there were views, I would have said tentative views, by people—they had not really made up their mind, but people were leaning one way or the other. But as the process continued the staff began to believe that the merger was anti-competitive.

Senator SCHACHT—You use the term 'staff' to cover commissioners and assistant commissioners?

Prof. Fels—No—I distinguish myself, the commissioners and the staff.

Senator SCHACHT—Okay.

Prof. Fels—So the staff turned around. I should mention one other point too: that at all times we were in very close contact with our QC, Mr Allen Myers, who is a very eminent counsel, and his junior, and I think it is fair to say that, from earlier than the rest of us, they were of the view that this merger was pretty certain to be anti-competitive. So I make that exception. They had a clear view of what goes on in courts and they concluded that it would be found to be anti-competitive. Now the staff turned—

Senator SCHACHT—You have put it on the record about the staff.

Prof. Fels—Yes.

Senator SCHACHT—I do not think I need to press that any more; you have put it on the record. You are right, there was some press speculation. I just want you to—

Prof. Fels—It was just total misreporting in the press.

Senator SCHACHT—Fine. We only have half an hour and I have more pressing questions than chasing down what Mr Smith said to Mrs Brown, or something, inside the commission.

I want to ask a number of specific questions. You raised that they said it would be anti-competitive, Foxtel and Australis as pay TV operators, vis-a-vis interests of Optus. But then there has been a suggestion that once Australis went broke and disappeared off the scene, whoever picked up the pieces of Australis—basically, between them, Optus and Foxtel—at a fire sale—

Prof. Fels—Who said this?

Senator SCHACHT—Sorry. Say you take the decision and, in the end, Australis goes broke—

Prof. Fels—If they do.

Senator SCHACHT—If they do.

Prof. Fels—I have not noticed it yet, but if they do.

Senator SCHACHT—No. If they go broke, they struggle on, and you might say that is vindication for it. It just proves that people will say what they think is necessary to anybody in self-interest, just as I think what Optus has said to you is covered overwhelmingly with their own self-interest.

Prof. Fels—We would not have said that.

Senator SCHACHT—Which is not—

CHAIR—I think you are making a statement, Senator Schacht.

Prof. Fels—It is not the first time—

Senator SCHACHT—The question I want to get to—

Prof. Fels—I kind of knew that.

Senator SCHACHT—I responded to an interjection from a witness, actually. What I want to get to is this: if you recommend it is anti-competitive for Foxtel and Australis to merge, if Australis goes broke and disappears off the scene, there is a suggestion that Foxtel and Optus can then make arrangements to rationalise pay TV. Why isn't that anti-competitive?

Prof. Fels—We have never endorsed that—

Senator SCHACHT—You have not endorsed that?

Prof. Fels—No. But, again, there was a misreport. I know exactly—

Senator SCHACHT—You have not endorsed that view?

Prof. Fels—Absolutely not.

Senator SCHACHT—So, if Optus and Foxtel tried to come together after the disappearance of Australis, if that took place, you would not automatically endorse a merger or rationalisation of the pay TV infrastructure programming of Optus and Foxtel?

Prof. Fels—No.

Mr Asher—Senator Schacht, we expressly stated to all the parties that any such arrangement would be unlawful unless specifically authorised.

Senator SCHACHT—Fine. That is the second thing you have clarified, and I am fine with that. My questions now turn again to some of the evidence you have given me in response to questions on notice from the November hearings. By and large, Professor Fels, I thank you for the fact that the answers are, in some stages, lengthy, and contain a lot of information. I appreciate that. I also have to say that in my mind they raise further questions, and that is why we are here today.

Prof. Fels—Go ahead.

Senator SCHACHT—I also say, Mr Chairman, that I will probably put further questions on notice in view of the time.

Prof. Fels—I would not mind taking up a couple of your issues. With the one on experts, I would like to—

Senator SCHACHT—Yes, that is one thing I want to do. Mr Barnes is listed in the affidavit as an expert. Was he an expert provided to you via Optus or did you go and find him?

Prof. Fels—I think I can answer that. Just let me—

Senator SCHACHT—Just Mr Barnes.

Prof. Fels—Yes. I think I can tell you the right answer. If I am not giving you a good answer, you tell me.

Senator Kemp—He certainly will.

CHAIR—He has never been known to be shy, Professor Fels.

Senator Kemp—Do not encourage him, Professor.

Senator SCHACHT—Professor Fels and I have usually been on the same side on most issues over the last 10 years of this parliament. It is just that on this one we have a difference.

Prof. Fels—There has been all this stuff about whether we spoke to Mr Barnes before or after we made the decision and all that. In fact, we have been in touch with OFTEL continuously and regularly since 1985, not October 1997. Mr Asher visited them in September, and he visited them twice last year. I spoke to Cruickshank just after this, as a matter of fact. I have seen Carsberg 50 times. Our commission has been in very high contact with OFTEL, the FCC and a whole bunch of others over the years. I would not mind saying just a word or two about that. So far as Barnes is concerned, the answer to your question is: we approached him, we got the evidence. We had been in discussion with OFTEL about these issues not for two days, but for 10 years.

Senator SCHACHT—In the list of answers to the questions I put—annex B, I think it is called—it gives a whole list of affidavits from various people. Could you take on notice which

one of the affidavits from the various people were recommended to you to be sought from Optus?

Prof. Fels—Okay.

Senator SCHACHT—There is a long list—down to 46. I will not go through them one by one. The reason I ask about Barnes is that it was written by somebody you disagree with strongly—Mr Frith—about the fact that Barnes's evidence turned up on the 13th, sort of as a justification for your position.

Prof. Fels—Yes.

Senator SCHACHT—You are saying you had discussions with Mr Barnes on and off for 10 years—

Prof. Fels—With OFTEL.

Senator SCHACHT—and therefore, he is not suddenly turning up as a Johnny-come-lately?

Prof. Fels—No. Exactly.

Mr Asher—I think it is very critical to this point that the documents that we are talking about there are documents brought into existence for the purposes of the litigation, and of course they are only going to be developed at the point of litigation. It really should not surprise anybody that the affidavits that we file are ones supporting our case.

Senator SCHACHT—Yes, I understand that. I understand you will not file an affidavit that is actually against your case because you would be a mug if you did.

Mr Asher—Exactly so.

Senator SCHACHT—Absolutely, I understand that. The question that this role goes back to is the issue of the involvement of the firm Tobin and whatever it is called—

Prof. Fels—Yes, Gilbert and Sullivan. Sorry, Gilbert and Tobin.

Senator SCHACHT—If you are employing Gilbert and Sullivan, we are all in strife!

Prof. Fels—Sorry, Gilbert and Tobin.

Senator SCHACHT—It is about the involvement of the Gilbert and Tobin firm and their relationship with Optus. You win the evidence and then clarified the fact that the top-up arrangement from Optus to them was unacceptable to you and, when it was brought to your attention, it was stopped?

Prof. Fels—Yes.

Senator SCHACHT—I do not think the evidence in here shows this. When was it brought to your attention that they were being topped up by Optus?

Mr Spier—As I said to you the other day, Senator Schacht, in very early November—about 3 or 4 November—we got a hint. You will recall that we were not dealing with Gilbert and Tobin; A-Gs was.

Senator SCHACHT—Okay.

Mr Spier—We got a hint. We immediately asked, 'What is going on?' They took a little while—

Senator SCHACHT—So, at the hearing on 12 November when I asked these questions, you were not aware personally, Mr Spier, that Gilbert and Tobin were being topped up by Optus?

Mr Spier—I had a hint that something may have happened, but I had no details. I asked for details ASAP because we were not aware of anything.

Prof. Fels—I would like to take up this question of ‘experts’ for a minute. All right, I know time is short, but they are trying to paint us as having, at the last minute, gone to Optus and got a whole lot of evidence and so on. The commission has been involved in pay TV, as you would know, since at least 1992.

Senator SCHACHT—Who has?

Prof. Fels—Us, TPC, the—

Senator SCHACHT—Since when?

Prof. Fels—Since 1992.

Senator SCHACHT—I have been involved with it since 1989, so I beat you by three.

Senator Kemp—Don’t get diverted, Senator.

CHAIR—Senator Schacht, if you want to get your questions in, I suggest that you—

Senator SCHACHT—I just wanted to tell you that.

Prof. Fels—Well, the first Telstra inquiry was 1984. This question has come up repeatedly. The commission has had extensive involvement in this pay TV industry since 1992, when the Broadcasting Act went through. We gave evidence then. We have been involved in numerous cases since, numerous matters. All the parties have frequently seen us—Cosser, Price, Mockeridge, Chisholm—all those people.

Senator SCHACHT—The list of suspects is long.

Prof. Fels—Booth, Cousins—the whole works.

Senator SCHACHT—I know that. You are not proving anything to me.

Prof. Fels—I am, because—

Senator SCHACHT—If you had not been doing that, I would have been staggered.

Prof. Fels—The other day you were painting a picture that the commission suddenly got into relying on experts—

CHAIR—Senator Schacht, let’s not have a free-for-all.

Senator SCHACHT—I am just trying to save time. I know the point he is going to make.

CHAIR—Just wait until the answer is finished and then we will keep going.

Prof. Fels—We have been in extensive touch with all the players in that industry over a large number of issues—all the licensing matters. All the new players have come and seen us a lot. There have been program sharing arrangements. We have seen all the cooperation between licence A and B. We have been in a big litigation case involving Channel 7, Channel 9 and GWN. The original Foxtel-Australis merger matter took a huge amount of time. The commission is very well educated on this matter, and came to this case with very extensive knowledge and with hundreds of experts. I have the impression that some people are trying to say it all depended upon these three experts. We have had the players from the industry and also these experts passing through the building this year.

Senator SCHACHT—But you have listed them—that is fine.

Prof. Fels—Ordovery, Mitchell, Newberry, Brock, Wittington, Beazley, Veljanovski—they are just a few of the academics, besides the ones that Optus has used. So the commission has been in very deep contact with everyone in this industry—with numerous experts. We have

also visited agencies such as the Federal Communications Commission, the CRTC in Canada, OFTEL, and many others. That is very relevant to the points you raise. I just had to make that point about experts, and I could go on.

Senator SCHACHT—Okay. Let me get to some detail. The answers you gave on pages 9 and 10 were in response to me about the position of Optus. In answer to question 17 you say:

The ACCC was satisfied that if the merger proceeded, the Australian shareholders in Optus would not regard this extra \$1 billion investment as justifiable.

That is \$1 billion on top of the \$2 billion they have already put in, and the \$1 billion is needed to complete the roll-out of their cable program. When are they going to spend the \$1 billion? Now that you have stopped the merger, when are they going to spend the \$1 billion? Because the announcements they have been making since are absolutely the opposite.

Prof. Fels—Obviously, that is a question you have to ask them.

Senator SCHACHT—No, you should ask them because you have put in here, as a justification, that you have accepted them at their word; that, if this merger goes ahead, there is a billion dollar investment to complete the program.

Prof. Fels—As a matter of fact—

Senator SCHACHT—Mr Hal Davies—the one before last of the chief executives of Optus, and they have been coming through my office quicker than a merry-go-round arrangement as they keep changing—said to me, in about spring of last year, ‘We are not rolling out one more inch of cable anywhere because we basically cannot afford it. We have got to get the revenues up for what we have already done.’ As a result, Professor Fels, come to my city and notice the clothesline wire hanging all over Adelaide—the catenary wire that Optus has put up—which is not going to have any indication of whenever it will have a cable connected to it.

I find it extraordinary that you would accept them at their word. Since then, only in the last week, the chief executive of Cable and Wireless, which is the major shareholder now, has said he wants to change Optus significantly. In his public remarks last week, he said, ‘We have to accept we still have not got the cable on telephony working at the rate that we would like it.’ This is contrary to comments that Optus had made to me publicly elsewhere in the last six months that the technical problems had been solved. If they are not solved, there is no competition.

Prof. Fels—Our focus in this matter is on the decision that the commission made last October to go to court about it. Of course, we had a very high consciousness of this matter because we had actually taken action under the consumer protection part of the Trade Practices Act, over the advertisements for local telephony, when the technology was not working such that they could run the thing.

Senator SCHACHT—They misled the Prime Minister of Australia, didn’t they?

Prof. Fels—That is right. We were quite aware of this—

Senator SCHACHT—You have confirmed that they misled the Prime Minister of Australia when they had that big launch that this was the 20c call—that this was not actually the cable at work.

Prof. Fels—We pursued Optus over this whole thing and took action in relation to their advertising and so on and so forth. I do not know what they told the Prime Minister.

Senator SCHACHT—He was there to launch it.

Prof. Fels—But the ads, anyway, were unacceptable.

Senator SCHACHT—For all the free publicity they got off the Prime Minister, have they apologised to the Prime Minister for misleading him?

Prof. Fels—I have no idea whatsoever.

CHAIR—Senator Schacht, you continue to interrupt.

Senator SCHACHT—I get very agitated on some of this stuff.

CHAIR—That does not give you an excuse to interrupt.

Senator Kemp—Just ask the questions, Senator, and we can give you the facts.

Senator SCHACHT—I have, and he has confirmed that they misled the Prime Minister.

Mr Asher—The commission took enforcement action against Optus as a result, and obtained certain undertakings that they would not proceed with such advertising unless they were able to deliver.

Senator SCHACHT—Have they been able to deliver yet to your satisfaction?

Mr Asher—In relation to mass advertising, no.

Senator SCHACHT—And they have not been able to deliver because they have told you they cannot get the system to work?

Mr Asher—They have no obligation to us in this matter, except not to publish representations that they can do something when, in fact, they cannot.

Senator SCHACHT—As for the nub question on competition, I have heard all of your arguments, put at previous hearings in here, that it is telephony and that the reason the commission is against the merger is because telephony and the local loop from Optus's cable will provide the competition to Telstra.

Prof. Fels—That was one aspect of the case. That is all I want to mention.

Senator SCHACHT—What?

Prof. Fels—The case did not hinge exclusively on this issue, but it was a significant issue. We have given you our statement of claim. It hinged on the damage to pay television and to local telephony, so it was a much broader-based case than that, but this was an issue—I do not deny it.

Senator SCHACHT—Was it the major issue?

Prof. Fels—I would have said that there were a set of issues which we set out in our statement of claim. There were multiple issues—the impact on pay television and on local telephony—and there were quite a number of elements in the case.

Mr Asher—In any litigation, of course, one will raise the range of issues, and there is no hierarchy. The courts themselves might assign importance, but we would, of course, put in all of the matters—

Senator SCHACHT—I understand that but, Professor Fels, the impression given in many articles written in the media, and I am saying this so you can correct it if you want to, was that the overwhelming basis of the ACCC's intervention against the merger was the telephony issue: that the only way you could get competition in the local loop telephony was to have the cable operating, and if the cable falls over Optus falls over and the pay TV falls over because Australis's merger is too strong, et cetera, and it will not get the connection. That has been the consistent presentation by a range of journalists who seem to have interviewed you

on a number of occasions or sought information. Do you want to clarify that that is not totally correct?

Prof. Fels—There has been very biased reporting of this, obviously.

Senator SCHACHT—You make more complaints about the press than we do as politicians.

Prof. Fels—Sorry, it is just that one of the parties—

Senator SCHACHT—Have you taken a complaint to the Press Council?

Prof. Fels—No, but it has got a bit distorted. Also, the statement of claim that we made made it very clear that it was the dual aspect—the impact on pay television and the impact on local telephony, and possibly broadband services—and the case was set out at some length. It is true that at the level of popular discussion, as you will recall, all these questions about Australis came up. At that level the commission, in response to all these claims that Australis would go out of business and so on and so forth, pointed out the consequences if Optus withdrew and that that was an aspect of the case. I do not deny that point was raised because of the character of the public debate but, as for the actual case, we have given it to you. It is set out and it is a lot more—

Senator SCHACHT—I understand the reason you have to do that. One of those might actually be the winner in the case for you.

Mr Asher—Indeed. Could I say—and I am stunned that this is something that has been overlooked—that the commission was ready, willing and able to litigate the case. We still are. We did not withdraw from the case; the other parties did. In a sense, we have been denied the opportunity of having these claims tested.

Senator SCHACHT—They withdrew because you hit them with a sledgehammer and they knew it was all over bar the shouting.

Mr Asher—No, not at all.

Senator SCHACHT—Foxtel had to withdraw because they knew that they were going to get hung out to dry.

Mr Asher—If that was so, that was because a judge would find that their conduct was unlawful.

Senator SCHACHT—They were not going to hang around for—

CHAIR—Order! Senator Schacht, let us not have a debate. This is a question and answer session.

Senator Kemp—I have got to point out that we are actually having a debate here. I think that if there are questions which are going to be—

Senator SCHACHT—Someone had better have a debate about this issue—

Senator Kemp—The chamber is the place for a debate if you wish to have a debate, but the officials are here to answer questions.

Prof. Fels—I would like to make a point. I had hoped to make an opening statement on a couple of points, which would have cleared up these things, and that was one of the very points. I just want to mention the unusual legal circumstances of this case which were that, unlike in most mergers, the parties came to us and they said that this merger would proceed unless the commission took court action against it and/or succeeded in getting an injunction. That is very unusual in a merger—it is a signal to us that they wanted to fight it in court. The second thing was—

Senator SCHACHT—What about due diligence?

Prof. Fels—No, most of the time they do not put it that way.

Senator SCHACHT—In this case it was, and I commend them for going to you to say, ‘Is it going to get a tick or a cross or what is your view about it?’

Prof. Fels—Yes, that is what everyone does. But in this case there was a clear signal at the start that they wanted to go to court and fight it. This is very relevant to your comment just a minute ago that it was all over once we said we would go to court.

The second very important point is that on 8 October or thereabouts we had a meeting with them and we indicated that we had very strong concerns about the merger. We asked them if they would stop—I will have to get it exact—and we said that they should not take further steps without notice to advance the merger otherwise we would not have much option. They had an opportunity to discuss all these issues. In the previous merger, that is exactly what they did—they spent a month or more.

The point I am making is that they had the opportunity of talking to us about our concerns but, instead, they chose to reject our proposals to talk about it and that forced us into court. I assumed that they went to court in order to contest the case. If you are not going to contest the case, normally you stop and talk with the regulator to see whether you can talk them out of it.

Senator SCHACHT—I have a couple of minutes left. My main concern on this issue has been about competition.

Prof. Fels—Same here.

Senator SCHACHT—Which is your job, too. In the answer you gave in question 20 on page 10, and it has been reported elsewhere, you say:

Optus assured the ACCC that its cable network is working and able to deliver pay TV and local telephony services for current purposes.

Do you have any definition of current purposes for telephony from Optus?

Prof. Fels—That means in relation to what they are doing at the present time.

Senator SCHACHT—Does ‘current purposes’ mean they have told you they have a target for a number of connections for telephony per month or per year?

Prof. Fels—They have a strategy at the moment of extending the number of new customers.

Senator SCHACHT—They say that they advised you that they are getting 1,200 to 1,500 subscribers per week, which is about 65,000 per year so that in 10 years that will be 650,000. Telstra has seven million or eight million local connections. Is 600,000 going to be effective competition to eight million connections?

Prof. Fels—I think it can be. I remember at the 1984 inquiry on Telstra when there was no competition but the fear of it had a huge effect on their prices in the 1980s.

Senator SCHACHT—There were also other reasons. People were starting to kick about the lack of service.

Prof. Fels—No, it was not. That would be naive. It was the fear of competition.

Senator SCHACHT—Do you have yet a model in the ACCC to support competing infrastructure—and you have mentioned this publicly before—as a way to have competition? I am not a devotee of that position because I think of the mess it makes. I think unnecessary duplication is in fact inherently costly. When do you think the connections on the cable will

effectively mean the consumer in the local loop is going to get a 5c or a 2c or a 10c reduction on the 25c untimed flat rate call at the moment?

Prof. Fels—I assume that is a rhetorical question.

Senator SCHACHT—It is, but I would like you to have a go at answering it.

Senator Kemp—It is either one or the other.

Senator SCHACHT—No, it is a question to Professor Fels about when it will happen. I keep finding it hard to get from him, as the regulator—

Prof. Fels—I think it has already had a big effect because the moment they built it, Telstra spent several billion dollars. Is that not a competitive reaction?

Senator SCHACHT—But Telstra is still charging 25c in the local loop. When does Telstra start dropping its charge in the local loop—the 25c untimed local call—as a result of Optus's cable going past 2 million homes? When do we get competition?

Prof. Fels—I think one point I want to make about this whole issue—

Senator SCHACHT—But when do we get the competition?

Senator Kemp—Come on, Senator.

CHAIR—You have asked a question, now let—

Senator SCHACHT—He keeps diverting off to something else. He will not tell me what the question is and when we get competition on the price.

CHAIR—Senator Schacht, if you stop talking, he might have a chance to answer.

Prof. Fels—I believe that Telstra has been reacting to the threat from them and they have spent several billion on the cable rollout and that was a direct response.

Senator SCHACHT—But have they dropped their price, Professor Fels?

Prof. Fels—There has been discounting and so on. I think you are looking at the wrong end of this handle. The question for the commission was whether this merger would damage competition including the potential for competition. There is clearly the potential for competition from Optus, and everyone knows that. If they have got that huge cable rolled out, there is considerable potential for competition and the merger was going to damage that. If you want some numbers, central planning style on this—

Senator SCHACHT—No, no.

Prof. Fels—That is what you just asked me.

Senator SCHACHT—As the Australian Consumer and Competition Commission, I want you to tell the consumers when they are going to get a reduction in Telstra's local loop untimed call?

CHAIR—Senator Schacht, I am not sure—

Senator SCHACHT—And you cannot. That is what I find frustrating. If you delved more into local call resale, number portability, interconnect fee, those issues, you would provide competition in the whole of the local loop for 8 million people.

Prof. Fels—We are looking at all those things.

CHAIR—Senator Schacht.

Senator SCHACHT—Last question, I want it answered.

CHAIR—No, you have had the last—

Senator SCHACHT—When are those inquiries, particularly local call resale—

Prof. Fels—They are going ahead full steam.

Senator SCHACHT—They are under way at the moment?

Prof. Fels—Yes, they are going ahead. All that stuff.

Senator SCHACHT—When do you expect a report on local call resale?

Prof. Fels—Do not worry, they are going ahead full steam.

Senator SCHACHT—But when do we get the answer to them? The industry is asking how long it is going to have to wait.

Prof. Fels—Has it crossed your mind that those sorts of inquiries themselves might have some effect on pricing behaviour?

CHAIR—I am going to stop—

Senator SCHACHT—We may wish.

Prof. Fels—We will issue a discussion paper to begin the public inquiry process within the next month on local call resale.

Senator SCHACHT—When do you report by? Telstra is laughing at this.

Prof. Fels—June.

Senator SCHACHT—You will report on local call resale by June?

Prof. Fels—Yes.

CHAIR—Senator Schacht, I am going to ask you to stop there because it is after half past four.

Senator SCHACHT—Mr Chairman, can I have until close of business on Monday to lodge further questions that I have not been able to ask?

CHAIR—You can. Professor Fels, I know you wish to make a statement. If you have that statement, would you like it incorporated in *Hansard*?

Prof. Fels—No, I will just leave it for now, thanks.

CHAIR—You do not want to incorporate it?

Prof. Fels—No, because it was to be spoken about.

Senator SCHACHT—Do you want to come back next week for another hour?

CHAIR—No, and neither do I. Thank you Professor Fels, Mr Asher and Mr Spier for coming again. Thank you, Minister. That concludes the hearing of estimates.

Committee adjourned at 4.32 p.m.