Review of the Australian Competition and Consumer Commission Annual Report 1996-97

Report from the House of Representatives Standing Committee on Financial Institutions and Public Administration

March 1998

The Parliament of the Commonwealth of Australia

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House of Representatives Printing Service
Canberra

ISBN

Produced by the House of Representatives Printing Service, Canberra

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FOREWORD

Given the Australian Competition and Consumer Commission's significant powers which directly impact on the commercial operations of business in almost every market, and its role in consumer protection matters, the ACCC must be transparent and accountable, and be seen to be transparent and accountable, for all its decisions.

One very public and important way in which that transparency is being achieved is through the Commission's regular appearance before this Committee. This is the second occassion on which the ACCC has appeared before the Committee to discuss issues arising from its annual report.

In this report, as in its earlier review, the Committee focused on merger issues, although the matters raised in that context reflect concerns in the ACCC's actions more widely. In so doing the Committee has attempted to make a constructive contribution in clarifying and recommending improvements to aspects of the Trade Practices Act and the Commission's operation.

A major issue that emerged during the course of the review was the ACCC's legal representation in the Foxtel/Australis Media merger case. The Committee's concern was whether it was appropriate for an independent statutory authority to accept legal resources from a private organisation that has a vested interest in a particular case. A number of important issues and principles emerged through the Committee's review which may otherwise have remained unknown. We can only wonder if the Australian Government Solicitor would have reconsidered its judgement on the use of part external funding of lawyers if this matter had not been addressed by the Committee. When looking at this report it is important to consider the conclusions the Committee has drawn as well as the recommendations made.

The Committee is grateful to all those who contributed to its work in undertaking this small review.

The Committee's task has been greatly facilitated by the cooperation and assistance provided by the Australian Competition and Consumer Commission and the Australian Government Solicitor and by the contributions from the businesses who made submissions and provided evidence at an informal briefing. The Committee is encouraged that its work on the Commission's annual reports is becoming better known and used by the wider community as an avenue for raising their general concerns about the ACCC's operations. We have been able to detect improvements and changes in the ACCC's performance in the light of issues raised in the Committee's last review.

I am pleased that the Committee was able to reach unanimous conclusions and recommendations in this report. These reflect the view of all major parties on the operations of Australia's major competition watchdog. I thank all the members of the Financial Institutions and Public Administration Committee for their hard work on the review and the report.

David Hawker MP
Chairman

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TERMS OF REFERENCE

The Standing Committee on Financial Institutions and Public Administration is empowered to inquire into and report on any matters referred to it by either the House or a Minister including any pre-legislation proposal, bill, motion, petition, vote or expenditure, other financial matter, report or paper.

Annual reports of government departments and authorities tabled in the House shall stand referred to the relevant committee for any inquiry the committee may wish to make. Reports shall stand referred to committees in accordance with a schedule tabled by the Speaker to record the areas of responsibility of each committee.

The *Australian Competition and Consumer Commission annual report 1996-97* was tabled in the House of Representatives on 22 October 1997.

ACRONYMS AND ABBREVIATIONS

ACCC	Australian Competition and Consumer Commission
ACFSC	Australian Corporations and Financial Services Commission
ACT	Australian Competition Tribunal
AGS	Australian Government Solicitor
APADA	Australian Petroleum Agents and Distributors Association
COAG	Council of Australian Governments

RECOMMENDATIONS

1 That the Australian Competition and Consumer Commission include in the undertakings section of its regular publication, *The ACCC's approach to mergers: A statistical summary*, details of the undertakings listed. (paragraph 2.27)

2 That as a matter of priority the Australian Competition and Consumer Commission prepare guidelines on the interaction between private sector parties and the Commission on the preparation of cases. The preparation of the guidelines should involve public consultation and the guidelines should be forwarded to this Committee for its consideration. (paragraph 3.53)

3 That the Australian National Audit Office when undertaking its next financial audit of the AGS look closely at the issues outlined by the Committee and related matters. (paragraph 3.60)

4 That the Australian Competition and Consumer Commission monitor the impact of the change in responsibility for compliance programs and report on this matter in its 1997-98 annual report. (paragraph 4.7)

CHAPTER ONE

INTRODUCTION

Background

1.1 The Australian Competition and Consumer Commission (ACCC) is Australia's major competition watchdog. It was established on 6 November 1995 as a result of the reforms set out in the *Competition Policy Reform Act 1995*. That policy was endorsed in April 1995 by the Commonwealth Government in cooperation with all state and territory governments operating through the Council of Australian Governments (COAG).

1.2 The ACCC has been in existence for almost two years now, but 1996-97 was its first full year of operation.

1.3 The ACCC was formed by the merger of the Trade Practices Commission and the Prices Surveillance Authority and therefore draws on a long (23 years) tradition of trade practices work and experience.

1.4 The ACCC is an independent statutory authority. It administers the *Trade Practices Act 1974*, State and Territory Application Acts, and the *Prices Surveillance Act 1983*, and has responsibilities under other legislation as set out in its annual report[1]. The ACCC reports that by world standards Australia's legislation is very comprehensive and is generally admired internationally.[2]

1.5 The major role of the ACCC is to seek to:

> ...improve competition and efficiency in markets, foster adherence to fair trading practices in well informed markets, promote competitive pricing wherever possible and restrain price rises in markets where competition is less than effective.[3]

1.6 In evidence, and in all of its public documents, the ACCC stresses that it is a law enforcement agency, a regulator, and its central role is to '...apply the law in a straightforward manner without fear or favour to anyone...'[4]

1.7 The ACCC is not a policy advisory or policy advocacy body, although it notes '... We do some work in that area but not a great deal, and most often it is where government or someone wants to know a bit more about a market where they may be thinking of taking action.'[5]

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1 For a list of the legislation see: *Australian Competition and Consumer Commission annual report 1996-97*. 1997. Canberra, AGPS, p x.
2 Evidence pp 3-4 and 9.
3 *Australian Competition and Consumer Commission annual report 1996-97*, op cit, p ix.
4 Evidence p 4.
5 Ibid.

1.8 The Trade Practices Act's emphasis is on competition. However, as outlined in the Competition Policy Reform Act, competition is not an end unto itself, and it is only implemented to the extent that it is in the public interest to do so. So this also is strongly emphasised in the Trade Practices Act and by the ACCC in its work.[6]

1.9 A fact which is often misunderstood, and which the ACCC seeks regularly to correct, is that '...national competition policy does not just revolve around the ACCC...'[7] There are numerous other State, Territory and Commonwealth bodies involved, including the National Competition Council. When the reviews of the estimated 1800 pieces of legislation that restrict competition are taken into account, the number of agencies involved in competition policy increases enormously.

1996-97 changes and developments

1.10 1996-97 was a period of significant change and development for the ACCC. The major features of that year, highlighted by the ACCC in its annual report, are summarised in Table 1.1 and discussed below.

1.11 Probably the most critical change is that 1996-97 '...was marked by significant change in the mix of its workload as a result of new issues and responsibilities arising from competition policy reform.'[8]

1.12 Those changes include: universal application of the Trade Practices Act with previously exempt areas now within the scope of the Commission's activities, for example, the professions, agricultural marketing, public utilities and the health sector[9]; involvement in issues of market regulation as a result of privatisation of utilities and the formation of national markets in gas, electricity, telecommunications, airports, and rail; focus on the non-traded goods and services sector of the economy; greater involvement in micro-economic reform processes, especially work arising under Part IIIA of the Trade Practices Act; and primary responsibility for the competition and economic regulation of telecommunication services.

1.13 'Education and information activities continued to underpin all other areas of the Commission's work.'[10] During the past financial year the new areas of responsibility were also the focus of the Commission's education activities, especially developing guidelines or discussion papers on access regimes in Part IIIA and regulatory roles in telecommunications, gas and electricity.

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6 Evidence pp 4-5.
7 Evidence p 5.
8 *Australian Competition and Consumer Commission annual report 1996-97*, op cit, p 1.
9 Evidence p 5.
10 *Australian Competition and Consumer Commission annual report 1996-97*, op cit, p 5.

Table 1.1: Key aspects of the ACCC's* 1996-97 *annual report

- 1996-7 marked the ACCC's first full year of operation
- significant change in the mix of workload as a result of the new issues and responsibilities arising from competition policy reform
- ACCC now deeply involved in issues of market regulation as a result of privatisation of utilities and the formation of national markets in gas, electricity, telecommunications, airports and rail
- the focus is now on the non-traded goods and services sector of the economy away from areas exposed to import competition
- involvement in micro-economic reform processes represents a major and growing area of work, especially, work arising under Part IIIA of the Trade Practices Act which establishes a regime for third party access to facilities of national significance
- 1996-97 was the first full year of universal application of the Trade Practices Act with previously exempt areas such as unincorporated businesses (including professional businesses) and State/Territory government business enterprises and their diverse markets coming within the Commission's reach
- enforceable undertaking under s 87B (as an alternative to litigation) continue to prove an effective tool especially, for quick resolution of matters and achieving benefits for parties adversely affected by alleged breaches
- new enforcement challenges are being thrown up by technological change, especially, in electronics and the markets growing in its wake
- in its mergers work, the Commission continues to focus on sectors not exposed to the competitive discipline of import competition (especially, the public utility and infrastructure industries)
- the focus of the Commission's education activities was the new areas of responsibility especially, developing guidelines or discussion papers on access regimes in Part IIIA, regulatory roles in telecommunications, electricity and gas
- a major challenge was to develop the skills base and organisational flexibility needed to handle the new responsibilities without detriment to its core enforcement functions under Parts IV and V of the Trade Practices Act

Source Data: *Australian Competition and Consumer Commission annual report 1996-97*. 1997. Canberra, AGPS, xxiv 257p.

1.14 The ACCC said that throughout the year a major challenge for it was to develop and maintain the skills base and organisational flexibility needed to handle those new responsibilities without a detrimental impact on its core enforcement functions under Parts IV and V of the Trade Practices Act.[11]

Roles, powers and criticisms

1.15 In its annual report the ACCC advised that:

> Australia's decision, through the Council of Australian Governments, to ...[involve the Commission in issues of market recognition] is a departure from the traditional international practice of vesting public utility regulation in a variety of separate agencies. The objective is reform based on the achievement of competitive outcomes of broad national benefit, rather than the pursuit of traditional, narrowly defined regulatory targets.[12]

1.16 As a result of COAG's approach and the aforementioned reforms, the ACCC now has significant powers which directly impact on the commercial operations of businesses in almost every market. The ACCC stressed that it is expected to move fast because of market imperatives and its decisions have significant market impact and immediacy.[13] There is no doubt that the ACCC is a very powerful regulatory body. Not surprisingly, some groups have suggested that the ACCC has too much power and influence.[14]

1.17 This fact is well recognised by the ACCC. In evidence the ACCC points out that it sees the Trade Practices Act as quite a powerful law. It notes '...It affects the property rights of very powerful groups indeed in our society, and there is often very strong resistance to that, using every means possible...'[15] It goes on to argue that '...obviously businesses will fight very hard to protect their interests - and none more so than monopolies.'[16]

1.18 At the same time the ACCC reports it has an approach of trying to minimise regulation as much as possible. It says:

> ...That is one reason why in the last two years there has been a very sharp reduction in the amount of prices surveillance regulation. The commission was dealing with the order of about 70-odd firms who had to tell us in advance about their price rises...That number is down to 10...[17]

1.19 While there always have been safeguards in the Trade Practices Act to protect the rights of businesses, more recently the Commission appears to stress those mechanisms more strongly and frequently. The ACCC argues:

> ...the commission cannot affect people's rights against their will without going to court, as a general proposition - that is, if the commission thinks there has

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11 Ibid p 6.
12 Ibid p 1.
13 Evidence p S62.
14 Evidence pp S1-S5, S11-S21 and S99-S116.
15 Evidence p 4.
16 Evidence p 5.
17 Evidence p 4.

> been a breach of the law it has to go to the Federal Court and prove its case...So the main powers the commission has rely upon our going to court to get results or, alternatively, there being an appeal to the tribunal [Australian Competition Tribunal].[18]

1.20 However, this process is not as straightforward as the ACCC suggests, since many of its cases are never tested in the court because either the ACCC, or the business involved, withdraws.

1.21 While businesses may seek to protect their interest against the ACCC's decisions, over a long period of time they and others have made significant criticisms of the decisions and operations of the ACCC and its predecessor bodies. These days rarely does a week, on occasions a day, go by without some concerns about the ACCC being raised in the media. This is an important avenue of transparency of the ACCC's activities.

1.22 A recurring pattern of criticism pervading many of the ACCC's activities appears to be developing. As well, friction appears to be increasing as the number of sectors in which the ACCC operates expands - a fact that is acknowledged by the ACCC itself.[19] These concerns are particularly prevalent regarding the ACCC's activities in the mergers area.

1.23 While in the past the ACCC may not have given much attention to such concerns, this is becoming increasingly more difficult for the ACCC to overlook. The Committee will continue to monitor these reactions.

1.24 Further, the ACCC commands significant budget resources which were expanded, not cut, in the past financial year.[20] In 1996-97 the commission's budget allocation was $32.789 million which was supplemented by $1.110 million to provide temporary supplementary staffing to facilitate the transfer of telecommunications regulatory functions to the ACCC. Its full time and associate commissioners both increased by one (now six full commissioners and 12 associate commissioners) and its actual staffing level increased from 308 in 1995-96 to 317 in 1996-97.[21]

1.25 Given its critical role and substantial resources, the ACCC must be transparent and accountable, and be seen to be transparent and accountable for all of its decisions. The ACCC clearly recognises this and in evidence stressed:

> The Australian Competition and Consumer Commission is an independent statutory body appointed under an act of parliament, so it is clearly answerable to parliament and to the Australian people...We for our part try to be as open and public as possible because we see ourselves as serving the public interest...[22]

Who watches the competition watchdog: The review

18 Evidence p 5.
19 Evidence p 9.
20 Evidence p 106.
21 See *Australian Competition and Consumer Commission annual report 1996-97*, op cit, pp xiii and 137-139. and *Australian Competition and Consumer Commission annual report 1995-96.* Canberra, AGPS, pp xix, 130-132 and 134.
22 Evidence p 3.

1.26 One significant way in which this accountability is being achieved is through the Committee's review of the *Australian Competition and Consumer Commission's annual report 1996-97*.

1.27 The basis for that review is House of Representatives' standing order 28B(b) whereby annual reports within a committee's area of portfolio responsibility stand referred for any inquiry the committee may wish to undertake (see terms of reference at page ix). As the ACCC falls within this Committee's portfolio responsibilities, at its meeting on 28 August 1997 the Committee resolved to examine the ACCC's annual report for 1996-97.

1.28 The Committee's review of the annual report obviously is a public process. However, it is not as comprehensive as an inquiry into a specific reference, since the review is not formally advertised, and submissions generally are sought only from those organisations directly involved in the review process.

1.29 The current review builds on the Committee's work in early 1997 in reviewing the ACCC's first annual report covering the 1995-96 financial year.[23] That review focused on merger issues, particularly s 87B undertakings. At the time of drafting there had been no Government response to that report which made four important recommendations (see Appendix 5), but a response is expected from the Treasurer shortly.

1.30 The current review is also part of the Committee's wider program of reviews of major financial institutions (see the back of this review for a list of those reports). That work, which started with the review of the *Reserve Bank of Australia's annual report 1992-93*, has demonstrated the valuable contribution such reviews make to enhancing public debate and policy making in the financial and public sectors.

1.31 As well, this review will complement the Committee's review of the *National Competition Council annual report 1996-97*. Both the ACCC and National Competition Council reviews continue the Committee's involvement in national competition policy: in June last year the Committee tabled its report, *Cultivating competition*[24], which presented the results of a major inquiry in aspects of the National Competition Policy reform package.

1.32 The Committee's review of the ACCC's first annual report foreshadowed the current review and led a number of organisations with concerns about the operations of the ACCC, particularly in the mergers area, to make a submission to this review.

1.33 This review again focuses on merger issues.

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23 House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Review of the Australian Competition and Consumer Commission 1995-96 annual report*. Canberra, AGPS, xi 29p.

24 House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Cultivating competition: Report on the inquiry into aspects of the National Competition Policy reform package*. Canberra, AGPS, xix 134p.

1.34 Detailed specific documentation of businesses and others concerns with the ACCC is difficult to find. The Committee is pleased that in this review some organisations, particularly Santos Ltd, were prepared to put on the public record their concerns with the ACCC and have them tested. However, the Committee is aware that some other organisations have reported that they are unwilling to express their concerns publicly because they perceive they could prejudice future dealings with the ACCC.

1.35 On 20 November 1997 a public hearing was held with the ACCC. As the evidence provided at that hearing left a number of critical matters related to the ACCC's use of lawyers in the Foxtel/Australis Media merger case unresolved, a further hearing, specifically on that matter, was held on 4 December 1997. That hearing involved the Australian Government Solicitor as well as the ACCC. Details of those hearings and witnesses and an informal briefing are provided at Appendix 3.

1.36 In total the Committee received 16 submissions; a list of those submissions and their authors is at Appendix 1 and the exhibits received are listed at Appendix 2.[25]

Structure of the report

1.37 The remainder of this report is structured to reflect the major concerns with the ACCC. Chapter 2 focuses on the ACCC's administration in the mergers area, although the matters raised in that context reflect concerns in the ACCC's actions more widely; Chapter 3 examines the ACCC's legal representation in the Foxtel/Australis Media merger case; and Chapter 4 raises a number of more general matters, as well as some issues which the Commission agreed to follow up from the Committee's review of the ACCC's 1995-96 annual report, and draws together the Committee's conclusions on the performance of the Commission.

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25 The submissions and public hearing transcripts have been incorporated into several volumes which are available for inspection at the National Library of Australia, the Commonwealth Parliamentary Library and the Committee Secretariat. References to the evidence in the text of this report refer to the page numbers in submission volumes ('S' prefix) and public hearing transcripts (numeric sequence). Copies of the transcripts and submissions are also available on the Committee's internet site.

CHAPTER TWO

MERGERS

2.1 An important, and often controversial, component of the Australian Competition and Consumer Commission's (ACCC) work is its analysis of mergers and acquisitions. '...Section 50 of the Act prohibits acquisitions which would be likely to substantially lessen competition in a substantial market in Australia, in a State or in a Territory or are likely to do so...'[1] Some details on how the ACCC administers s 50 are set out in its new publication - *The ACCC's approach to mergers: A statistical summary*.[2]

2.2 Each year there are thousands of mergers in Australia, most of which do not go to the ACCC. In its *annual report* the ACCC noted it considered 169 new merger proposals in 1996-97, however, most did not require detailed assessment. Seven matters were not proceeded with or were amended. There were three undertakings given. There were no Court actions and no authorisation applications.[3]

2.3 The ACCC also reported that in recent years it has not opposed a merger proposal where imports have been substantial. It therefore continues to focus on sectors not exposed to the competitive discipline of import competition, especially, the public utility and infrastructure industries. In 1996-97 it closely considered a range of State and Commonwealth privatisations and asset sales, for example, the sale of Loy Yang Power and Hazelwood Power Stations, various Victorian ports, major Australian airports and the proposed sale of parts of the radiofrequency spectrum.[4]

2.4 In its new statistical summary publication the ACCC reported that it examines joint ventures in a similar way to the way it examines mergers. It notes '...Although the reasons why parties enter into mergers and joint ventures might be substantially different, the ACCC's interest lies in the effect they have on a market. In most cases, the effects of mergers and joint ventures are very similar.'[5]

2.5 In October 1997 the ACCC published its report *Exports and the Trade Practices Act*[6] to improve understanding of the way in which the ACCC assesses international competitiveness issues under the Trade Practices Act. That document is a supplement to the ACCC's *Mergers guidelines*.[7]

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1 Australian Competition and Consumer Commission. January 1998. *The ACCC's approach to mergers: A statistical summary*. Canberra, ACCC, p 1.

2 Ibid 44p.

3 *Australian Competition and Consumer Commission annual report 1996-97*. August 1997. Canberra, AGPS, pp 4-5, 26-27 and 29; and Ibid p 16.

4 *Australian Competition and Consumer Commission annual report 1996-97*, op cit, pp 4-5 and 30.

5 Australian Competition and Consumer Commission. January 1998, op cit, p 1.

6 Australian Competition and Consumer Commission. October 1997. *Exports and the Trade Practices Act*. Canberra, ACCC, iii 51p.

7 Australian Competition and Consumer Commission. Revised July 1996. *Merger guidelines: A guide to the Commission's administration of the merger provisions (ss 50, 50A) of the Trade Practices Act*. Canberra, ACCC, ii 77p.

2.6 While business generally supports the concept of the Trade Practices Act and the National Competition Policy agenda, they have been critical of the manner in which the ACCC conducts itself, particularly in relation to mergers and acquisitions. For example, Santos, the Australian Petroleum Agents and Distributors Association (APADA), Taxi 131-008 Pty Ltd, have raised a number of issues in several submissions to the Committee, several commentators have raised similar concerns, and many commentators have been surprised at the ACCC's approach to Australis, etc.[8] A summary of the issues raised is set out at Table 2.1.

Table 2.1 Concerns raised about the way in which the ACCC carries out its functions

- a tendency to transform markets to accord with its views of the best competitive outcome
- a willingness to act or draw conclusions on the basis of information which is poorly researched or incomplete
- a preparedness to act on the basis of media or hearsay reports which may often come from parties or participants in the transaction and are seeking to use the ACCC for commercial advantage
- a refusal to subject such hearsay to scrutiny either in terms of providing the name of informants or even in the nature of the material
- a propensity to change the grounds on which the ACCC acts against a company or transaction when information proves that the initial grounds were incorrect
- an unwillingness to admit that actions, or the information on which it acted, was incorrect
- a tendency to use its powerful statutory position to disseminate information and views which lack objectivity and which may overstate or distort official policy
- a tendency to inflict commercial damage on companies and have the ACCC's reasons untested, etc

Source Data: See Submission Evidence, especially pp S1-S5.

2.7 In coming to its conclusions Santos cited the following example cases in which it has been involved: Parker & Parsley acquisition; SAGASCO takeover; certain authorisations relating to Delhi Petroleum Pty Ltd and Santos Ltd; the AGL Letter of Agreement authorisation; the Review of SA Cooper Basin (Ratification) Act; and the Application of Part IIIA and the National Access Regime for the Natural Gas Industry.[9]

2.8 Santos argued:

> ...the powers and functions that the ACCC has, place it in a powerful position to influence commercial activities and policy development. This stems not just from their regulatory powers...

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8 Evidence pp S1-S5; S95-S98, S99-S116 and S205; Moran, A. ACCC zeal is distorting market-place. *Australian Financial Review*, 7 November 1997; and Gilbert, R. Petrol competition making ass of law. *Canberra Times*, 23 August 1997.

9 See Evidence pp S1-S4.

> In particular, the standing of the ACCC means that it can have a considerable influence on the development of public policy and in shaping of public debate. Because of the position that the ACCC holds, we believe that it has a very strong responsibility to ensure that it acts in an objective and balanced manner. Santos believes that the necessary levels of objectivity and balance are currently missing.[10]

2.9 The significant powers the ACCC has, and constraints upon them, have been discussed in Chapter 1.

2.10 Not surprisingly, the ACCC rejects the Santos assertions, stating '...The ACCC's records of the specific matters raised by Santos do not generally support the detail nor the thrust of its allegations.'[11]

2.11 The Committee is not in a position to, and does not see it as its role to, make decisions on the detail of the specific cases. Rather, it will comment on one aspect of the Parker & Parsley case and point to some recent changes in ACCC's procedures which should assist in alleviating some of businesses' and commentators' concerns.

2.12 The background to the Parker & Parsley case as set out by Santos is:

> Santos acquired a company, Parker & Parsley Petroleum Australia Ltd (PPA), which was a US owned company with minor interests in the Cooper Basin in South Australia. The ACCC opposed this acquisition and threatened the US sellers with legal action making it difficult for Santos to consummate the transaction. Notwithstanding this opposition and threats, Santos made the acquisition and the ACCC ultimately took no action.[12]

2.13 In response the ACCC stated:

> The ACCC did not at any time oppose the acquisition by Santos - it did however advise Santos on several occasions that the acquisition may raise competition concerns given Santos' existing interests and on four occasions requested that Santos provide advance notice before entering into any agreement to acquire P&P [Parker & Parsley] so that the ACCC could examine these concerns before any acquisition was completed.
>
> The ACCC similarly advised BHPP...
>
> The ACCC did advise Santos on 22 March that it reserved the right to seek divesture if Santos proceeded with the acquisition and the ACCC later concluded that the acquisition breached s.50.
>
> Furthermore, in view of Santos' failure to respond to the ACCC's previous requests to Santos that it provide advance notice, the ACCC advised Santos that it was considering taking legal action against any acquisition or proposed acquisition.[13]

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10 Evidence p S5.
11 Evidence p S23.
12 Evidence p S2.
13 Evidence pp S24-S25 and for a definition of s 50 see paragraph 2.1.

2.14 Santos was concerned that the ACCC's evidence '...could lead to the conclusion that Santos has misled the Committee (and hence Parliament) by providing it with false information [and]...is requesting that the ACCC formally retract such incorrect allegations.'[14]

2.15 In response the ACCC advised '...it does not believe that Santos has sought to mislead the Committee or to provide unreliable evidence...'[15] Rather, the ACCC explained:

> The initial response of the Commission to the original Santos letter assumed with justification that the Santos complaint was that the Commission opposed the merger and threatened legal action against it. The Commission's response was that it did not oppose the merger and did not threaten legal action against it. This remains a correct response to that complaint, and to the main thrust of the criticisms made by Santos...However, there was a degree of inadvertent misunderstanding by the Commission about the Santos complaint in that the Commission's initial response to the Committee did not recognise that Santos was referring to a threat of legal action made in a letter which was concerned to preserve the status quo and to put Santos on notice of the prospect of proceedings (intended to temporarily preserve the status quo), rather than to oppose the merger, and hence did not respond to that point.[16]

2.16 The Committee understands Santos's concerns in this case, because ultimately the ACCC took no action.

2.17 This and the other cases cited by Santos and others, point to the need for greater transparency and accountability in the ACCC's actions which were the subject of major recommendations in the Committee's review of the ACCC's 1995-96 annual report. The Committee reiterates its recommendation from its previous report that the ACCC investigate mechanisms whereby the process of accepting s 87B undertakings in merger cases can be made more transparent. Further comments on the ACCC's efforts to pursue those objectives arise in some of the following sections of this report. In particular, as transforming markets is partly related to undertakings it is commented upon in the next section of this chapter - transparency of s 87B undertakings; and the issues raised that relate to more appropriate use of information should be addressed by the new guidelines the ACCC plans to develop as discussed in Chapter 3. As an important regulator, there is much to be learnt from the ACCC's failures as well as its successes, consequently, the Committee sees value in the ACCC being as open in cases when it is not so successful, as when it is successful.

s 51 statutory exemptions

> Statutory exemption from certain prohibitions is available under the Trade Practices Act, within participating jurisdictions for:
>
> [amongst other things] conduct that is specifically authorised or approved by a Commonwealth or State Act, or a Territory law, or any other regulation under

14 Evidence p S49.
15 Evidence p S184.
16 Ibid.

> exemptions are limited for a period of two years from the date of the regulations coming into operation or two years from the date of action: the ACCC is required under s. 171 of the Act to report annually to Parliament on the use and effect of these exceptions;...[17]

2.18 The Committee queried whether the ACCC had detected a tendency for organisations to prefer the use of s 51 exemptions rather than authorisations.

2.19 The ACCC noted that while it reports on exemptions in its annual report it does not usually get involved in that process. It also reported that in the past s 51 exemptions were a way of getting around the authorisation process, but it had been clear government policy to steer people down the authorisation process due to its transparency and the onus put on those seeking the exemption to show countervailing public benefit. Rather, the ACCC said it is seeing an increase in authorisation applications, most of which are granted, but usually with conditions and a sunset clause.[18]

Transparency of s 87B merger undertakings

2.20 In its previous report on the ACCC's 1995-96 annual report, the Committee recommended the ACCC investigate mechanisms whereby the process of accepting s 87B undertakings in merger cases can be made more transparent and report on that investigation to this Committee at a public hearing when the Committee reviews the ACCC's 1996-97 annual report.[19] Background to this issue is set out in the Committee's previous report on the ACCC.[20]

2.21 While the ACCC said it enters into a couple of undertakings each week, most are not in the mergers area, rather, they relate to matters such as misleading advertising, price fixing, etc.[21] For example, in 1996-97 there were only three undertakings in the mergers area. As undertakings in the mergers area take place before the transaction is dealt with, most businesses do not want their undertakings offer to be made public.

2.22 Prior to the hearing with the ACCC, the APADA provided the Committee with a submission on the ACCC's response to the matters raised by APADA in its evidence to the Committee's review of the ACCC's 1995-96 annual report. APADA remains concerned about the lack of safeguards with s 87B undertakings. It was particularly concerned that: undertakings provide a party to a merger every incentive to bypass the authorisation process; the ACCC is not accountable for its decisions; there is no protection for public interest or the interests of third parties; the question arises whether the ACCC has the resources to

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17 Australian Competition and Consumer Commission. November 1995. *Summaries of the Trade Practices Act 1974 and the Prices Surveillance Act 1983.* Canberra, ACCC, p 34; and for a list of exceptions see *Australian Competition and Consumer Commission annual report 1996-97*, op cit, p 192.

18 Evidence p S201.

19 See House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Review of the Australian Competition and Consumer Commission 1995-96 annual report.* Canberra, AGPS, p 22.

20 Ibid pp 16-21.

21 Evidence p 36.

adequately monitor the undertakings; and there are no statutory guidelines for the way the ACCC is to approach the issue of undertakings.[22]

2.23 In July 1997 in a letter to the editor of the *Trade Practices Law Journal* A I Tonking, Selborne Chambers[23], challenged some of the issues raised by Mr Zumbo (APADA) and suggested that the issues raised were not novel, having been raised by the Industry Commission in its *Information paper on merger regulation*.[24] Tonking argues that '...Guidelines are of little use unless they can be enforced, but the proposal for a review process is impractical and would be largely counterproductive...'[25] Tonking goes onto list factors the criticisms ignore or fail to give adequate weight.

2.24 The ACCC's current views on its administration of undertakings are set out in its new publication *The ACCC's approach to mergers: A statistical summary*.[26]

2.25 In evidence the ACCC reported that '...with the undertakings there is probably a trend to greater transparency...'[27] It said it tries to make undertakings public and normally asks businesses to waive any confidentiality conditions. It also said undertakings are referred to in its media releases and annual report and all are included on the public register. The ACCC also noted that '...In some cases the context of the undertaking offered or the confidentiality constraints imposed will require different levels of transparency.'[28] More specifically the ACCC stated:

> ...As a response to you, we, as a general rule, carry out the most transparent process we can in each case. We will also regularly publish a comprehensive statistical report on the merger regulation which will include reference to undertakings in merger cases...[29]

2.26 The undertakings section of the first merger statistical report, lists 12 matters to the end of the 1996-97 financial year where the ACCC accepted s 87B undertakings which proceeded after the undertakings were accepted.[30] While the report provides details on the acquirer, target, and date the undertaking was accepted, there are no details on the contents of particular undertakings. Only a general discussion on the nature of undertakings (structural, access arrangements, and/or behavioural undertakings) is provided. However, some details on specific undertakings are included in the ACCC's current annual report.[31]

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22 See Evidence pp S9-S10.
23 Tonking A I. Letter to the Editor: Section 87B undertakings and accountability. *Trade Practices Law Journal*, vol 5, pp 274-275.
24 Industry Commission. June 1996. *Merger regulation: A review of the draft merger guidelines administered by the Australian Competition and Consumer Commission*. Information paper. Canberra, Industry Commission, xvi 99p.
25 Tonking A I, op cit, p 274.
26 Australian Competition and Consumer Commission. January 1998, op cit, 44p.
27 Evidence p 35.
28 Ibid.
29 Ibid.
30 Australian Competition and Consumer Commission. January 1998, op cit, p 15.
31 For example see *Australian Competition and Consumer Commission annual report 1996-97*, op cit, pp 30-36.

2.27 **Recommendation 1**

> **That the Australian Competition and Consumer Commission include in the undertakings section of its regular publication, *The ACCC's approach to mergers: A statistical summary*, details of the undertakings listed.**

2.28 While the new merger publication does not specifically address APADA's concerns, it is a start to improving transparency, while accepting the need for confidentiality in parts of the process. In this small review of the ACCC's undertakings work, a number of important issues have not been examined in detail. In particular the question of whether the administration of undertakings should be prescribed in more detail by the Trade Practices Act and the implications of the ACCC's administration of undertakings in the mergers area. The Committee would welcome further input on these issues from industry/business/legal interests when it reviews this issue again in its examination of the ACCC's next annual report.

Concentration thresholds

2.29 In its last report the Committee considered the issue of concentration thresholds.[32] This matter arose in response to criticisms from the IC that the ACCC looks at too many mergers, resulting in excessive administrative costs and discouragement of efficient mergers. The IC suggested the ACCC examine the implications of raising existing thresholds which set 'safe harbours' where mergers can proceed without further ACCC investigation.[33]

2.30 The ACCC undertook for the 1996-97 financial year to compare the number of matters triggering the two thresholds. The ACCC reported that '...In summary, in 1996-97 only seven matters which triggered the Commission's thresholds failed to trigger the Industry Commission's suggested thresholds. None of those seven were opposed by the Commission.'[34] The ACCC's qualitative examination of all matters for the 1996-97 financial year and up to the end of 1997 calendar year that fell between the two thresholds, revealed that each matter was worthy of investigation by the Commission, for one or more reasons.[35]

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32 House of Representatives Standing Committee on Financial Institutions and Public Administration, op cit, pp 10-11.

33 The ACCC's *Merger guidelines* include concentration thresholds below which there is unlikely to be any concern at all where the market share of the merged entity is below 40%; and if the market share of the merged entity is above 15%, the combined share of the four largest participants after the proposed merger is below 75%. In its June 1996 information paper *Merger regulation: A review of the draft merger guidelines administered by the Australian Competition and Consumer Commission*, the IC suggested the share of the merger entity being lifted to 50% before further analysis and the critical combined share of the three largest participants be 75% or more with the merged entity having 20% of the market or more. (see Australian Competition and Consumer Commission. January 1998, op cit, p 24)

34 *Australian Competition and Consumer Commission annual report 1996-97,* op cit, p 29. More details are provided in Australian Competition and Consumer Commission. January 1998, op cit, pp 24-25.

35 Australian Competition and Consumer Commission. nd. *Industry Commission suggested thresholds*. Unpublished, pp 2-7.

2.31 The ACCC concluded that:

> Given that: the number of mergers which fall between the two thresholds is not large; the small regulatory cost to most of the parties involved; and the Commission's concerns with at least one major merger falling between the two thresholds, the Commission is not convinced that a change to its thresholds is warranted. The Commission will continue to collect information against both thresholds. Until it has more conclusive evidence, the Commission will continue to use its current thresholds.[36]

2.32 The ACCC advised that it hoped its review will be complete in early 1998. The Committee awaits the final outcomes of the review.

Monitoring and evaluation of outcomes

2.33 Monitoring and evaluation of merger outcomes was another issue to which the Committee recommended in its last report that the ACCC give a high priority.[37]

2.34 The ACCC reported that it is still working on this. It reiterated that such evaluations are extremely difficult, resource intensive, expensive, and require industry cooperation which is difficult to achieve. Nevertheless, the ACCC noted that it has included them in its forward planning and corporate plan. Further, it has recently done an internal evaluation of s 87B processes and does internal reviews of its processes, especially the mergers area quite regularly.[38] The Committee encourages the ACCC to continue working on the market based evaluations as this is an important avenue for assessing the benefits of mergers decisions for the community. It also supports the ACCC's suggestion that 'Ideally some research body or University needs to do work like this...'[39] This however, does not negate the need for the ACCC to do work on evaluation.

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36 Ibid p 8.
37 House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997, op cit, pp 23-25.
38 Evidence pp S201-S202.
39 Evidence p S202.

CHAPTER THREE

ACCC LEGAL REPRESENTATION IN THE FOXTEL/ AUSTRALIS MEDIA MERGER CASE

Background

3.1 On 14 October 1997 the Australian Competition and Consumer Commission (ACCC) instituted proceedings in the Federal Court seeking an injunction to restrain the Foxtel/Australis Media merger. The ACCC stated that the basis of its actions was '...that the merger would be likely to substantially prevent, hinder or lessen competition in pay TV and telephony markets in Australia in contravention of section 50 of the Trade Practices Act 1974...'[1]

3.2 The ACCC argued that it opposed the merger '...because Optus would have withdrawn from pay TV and, even more importantly, from local telephone competition. This would have been a far greater disaster for jobs, investment and the prices paid by all Australians for local telephone services.'[2] The ACCC went on to stress '...the ACCC was faced with an unpleasant choice between possible Australis Media failure and possible Optus failure.'[3] As a result of its merger action, the ACCC came down on the side of Optus. The Committee does not necessarily support the ACCC's arguments for that stance.[4]

3.3 The opening up of the local telephone service to competition has been described by the ACCC as:

> ...the most important issue in competition policy today...The commission is very anxious that there be no mergers that illegally lessen competition in local telephony, because the potential gains from competition there are very big for consumers and business alike.[5]

3.4 On 31 October 1997 in an article in *The Australian*, Bryan Frith, in reporting on the ACCC's action to prevent the merger of the pay TV groups Foxtel and Australis Media, noted:

> ...the instructing solicitor from the Government Solicitors Office, was questioned about the role of Optus in the action.
>
> He agreed that the ACCC had accepted legal resources and advice from Optus and that it had received evidence from Optus. It also expected that Optus would provide witnesses.[6]

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1 Evidence p S88.
2 Evidence p S41.
3 Ibid.
4 See discussion at Evidence pp S41-S47, 18-22, 72-73, 101-102 and 111-113.
5 Evidence p 19.
6 Frith, B. Bitter Australis battle looks like getting personal. *The Australian*, 31 October 1997.

3.5 Those comments raised significant concerns with the Committee about whether it was appropriate for an independent statutory authority to accept legal resources from a private organisation that had a vested interest in a particular case.

3.6 The basis of the Committee's concern is the principle that, while the ACCC will inevitably stress that it 'take sides' in mergers that it believes are not in the 'public interest', the ACCC has an obligation to be not only independent, but also to be perceived to be independent, of commercial interests in its operations. Those operations impact substantially on commercial enterprises in almost every sector.

3.7 The Australian Government Solicitor (AGS) is retained by the ACCC to provide legal services. Evidence provided by both the ACCC and the AGS revealed that the AGS had supplemented its legal resources on the Foxtel/Australis Media merger case with two solicitors with specialist telecommunications skills through a consultancy (secondment) with Gilbert & Tobin solicitors (a firm of solicitors which normally acted for Optus). Further, that the seconded solicitors would be paid by the AGS at AGS salary rates (applicable to comparable AGS solicitors) with their salaries topped-up by Optus to their current salaries.[7]

3.8 The ACCC stressed that it made the decision to oppose the merger prior to any issues about the secondment coming up.[8]

3.9 In all of their evidence, both the ACCC and the AGS have emphasised that the AGS regarded the arrangements of using the seconded solicitors as lawful, proper, necessary in the public interest and involved no conflict. Also, in so far as there were possible conflicts, there were safeguards in place to address those particular concerns.[9]

3.10 However, from its initial submission the AGS conceded '...if the circumstances relating to the preparation of the ACCC's case had permitted, it would have been preferable to engage solicitors other than Gilbert & Tobin...'[10] The AGS also recognised '...the potential for concerns to be expressed in relation to the decision...'[11] As well, the ACCC reported it reluctantly accepted the arrangement stating:

> The AGS was of the strong view, and the ACCC reluctantly accepted, that the size, nature and urgency of the proceedings were such that the assistance of two Gilbert & Tobin solicitors, with their relevant industry knowledge, was essential for the proper preparation and presentation of the ACCC's case...[12]

3.11 During the course of the Committee's investigation it emerged that while AGS would pay Gilbert & Tobin for the two solicitors at AGS solicitors salary rates of the order of $250 per day, the AGS was charging the ACCC at rates of the order of $250 per hour (more equivalent to commercial solicitor rates). This is a remarkable difference in the rates. A summary of the evidence provided by the AGS and the ACCC on the fee arrangements is at Table 3.1.

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7 Evidence pp S88-S89.
8 Evidence p 93.
9 Evidence pp S59, S85-S87, 59-61 and 93.
10 Evidence pp S87 and 61.
11 Evidence p S86.
12 Evidence pp S60 and see 95.

Table 3.1 Summary of evidence provided on the Gilbert & Tobin solicitor fee arrangements

AGS Evidence public hearing 4 December 1997

One solicitor paid at $379 per day and the other at $291 per day

ACCC Evidence public hearing 4 December 1997

ACCC payment for each solicitor about $250 per hour

AGS Submission No. 11 (supplementary) dated 4 December 1997

Total hours spent by Gilbert & Tobin solicitors on the litigation 324 hours

Professional fees charged by Gilbert & Tobin to the AGS for the two solicitors:

Mr Glass 30/10/97 to 21/11/97 - 17 days @ $412 per day	$7,004
Mr Wheeler 3/11/97 to 21/11/97 - 15 days @ $316 per day	$4,740
Total	$11,744

Gilbert & Tobin standard rate of the level of fees earned by the two solicitors:

Mr Glass approximately $2,800 per day - 17 days	$47,600
Mr Wheeler approximately $2,200 per day - 15 days	$33,000
Total	$80,600

AGS estimate of the top-up amount to be paid by Optus	$58,856

AGS Submission No. 13 (supplementary) dated 23 December 1997

On basis of time information recorded by the two Gilbert & Tobin solicitors the actual amount that would have been billed by the AGS to ACCC for the work of those two solicitors is about $48,000

Components:	
Actual payments to Gilbert & Tobin, including the salary cost of a secretary	$17,000
Overheads for working in the AGS's Sydney Office 17 days	$23,000
Leaving AGS profit margin	$8,000

Change to current arrangements:

AGS now proposes to pay Gilbert & Tobin $250 per hour for both solicitors (which compares with normal AGS hourly rates of $250 and $210 respectively)

AGS charges to ACCC - $250 hourly rate plus amount to be agreed with the ACCC to cover the AGS's cost of employing those solicitors

Gilbert & Tobin will receive no topping-up from Optus

This arrangement will result in the AGS not making any profit on the transaction.

Source Data: Evidence pp S117-S121, S178-S179, 65 and 94.

3.12 Several significant issues emerged - the use of the Optus solicitors and the method of payment of those solicitors. The Committee pursued these matters in detail with both the ACCC and its solicitor - the AGS. Later several further issues emerged as significant - the AGS's backdown on its use of the Optus solicitors, the windfall profit of the AGS, and the opaque financial management and reporting systems of the AGS and the ACCC, - which it took this inquiry to reveal.

3.13 An outline of the circumstances leading to the engagement of the Gilbert & Tobin solicitors was prepared by AGS in consultation with the ACCC and provided in evidence by AGS[13] and a copy is at Appendix 4.

3.14 It should be noted that on 20 November 1997, News Corporation and Telstra terminated the merger agreement and on 24 November 1997 the ACCC discontinued proceedings with the consent of all respondents.

Was the engagement necessary in the public interest?

3.15 As previously stated, the AGS advised the ACCC, and the ACCC reluctantly accepted, that the engagement of the two Gilbert & Tobin solicitors was necessary for the proper conduct of the ACCC's merger case, the basis of which has been previously outlined. The justification for that decision was the size, nature and urgency of the case.

3.16 The AGS and ACCC advised that there was considerable work involved in identifying additional potential witnesses, filing affidavits from witnesses, production and inspection of both the ACCC's and the Respondents' documents. The nature of the material related to pay TV and telephony markets in Australia, with the later being the most important part of the case. The urgency of the proceedings arose because after the ACCC instituted proceedings in the Federal Court on 14 October 1997, it initially submitted a February/March date for the hearing, but the Court imposed 24 November 1997. In addition, the availability of legal resources with a background in telephony was limited with most of the legal firms with relevant expertise that might have assisted already acting in the proceedings for the other parties. The ACCC also reported that while the AGS has some limited expertise, the AGS officers were working on the Telstra float issue at that time.[14]

3.17 The AGS stressed the shortness of time but it appears that this is something the AGS should have expected since it also stated '...the courts usually try to have an interim injunction hearing take place within a very short time frame.'[15]

3.18 The Committee accepts that under the circumstances, the AGS and the ACCC appeared to have few alternatives to Gilbert & Tobin solicitors. The Committee makes no judgement on the professional competence of the Gilbert & Tobin solicitors.

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13 See Evidence pp S88-S93.
14 Evidence pp S59, S88-S89, 70 and 105-108.
15 Evidence p 81.

Was the engagement lawful?

3.19 The AGS advised that they considered the engagement lawful.[16] On 23 October the AGS wrote to the solicitors for other parties in the Court proceedings (News Corporation, Telstra and Australis Media) informing them of the proposal to second the Gilbert & Tobin solicitors.

3.20 The AGS advised that Mallesons Stephen Jaques, solicitors for Telstra, wrote objecting to the secondment. The AGS stated that the nature of the objections were: principally on the basis that Telstra confidential information may find its way to Optus via Gilbert & Tobin solicitors, and secondly Optus would have an influence in the strategic running of the case and decisions on the way the case was presented would be influenced by Optus. The AGS went on to say that Mallesons said there was a perception of inappropriate conduct and were concerned it was inconsistent with the model litigant policy.[17] In other words, Mallesons' concerns reflected many of the concerns raised by this Committee.

3.21 However, AGS said, Mallesons orally conceded there was no legal basis for objecting to the engagement and did not seek to raise the matter before the Federal Court. When the AGS outlined the proposed engagement in the Federal Court, there was no criticism from the Federal Court Judge.[18]

3.22 The Committee has no further information to suggest the engagement was unlawful.

Was the engagement proper?

3.23 The AGS also considered the engagement to be proper.[19] Steps taken to ensure this, included the agreement having the seconded solicitors work out of the AGS's office and that those solicitors would not act on behalf of any of the Optus group of companies for the duration of the secondment.[20]

3.24 Some additional safeguards were put in place to address other concerns, including those of Mallesons, for example, to protect the confidentiality of any sensitive Telstra information that might be passed to the Gilbert & Tobin solicitors. Such steps included: confidentiality undertakings signed by the two seconded solicitors; severe sanctions to be imposed if the solicitors breached the confidentiality of information which they received under the engagement; the solicitors did not have access to some Telstra information; and the inclusion of a warranty by Gilbert & Tobin in the consultancy agreement that no conflict with the interests of the Commonwealth existed or was likely to arise in performance of the consultancy services.[21]

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16 Evidence p S85.
17 Evidence pp S85, S91-S92 and 71.
18 Evidence p S85.
19 Evidence p S86.
20 Evidence pp S90-S91.
21 Evidence p S86.

3.25 The AGS advised that it had no reason to doubt Gilbert & Tobin's warranty and if in the future Telstra considered '...information gained by the seconded Gilbert & Tobin solicitors rendered it improper for Gilbert & Tobin to act for Optus (or any other party) in proceedings involving Telstra, it would then be open to Telstra to seek a court order restraining Gilbert & Tobin from so acting...'[22]

3.26 In addition, the AGS argued '...the engagement of these two Gilbert & Tobin solicitors did not conflict with any interest against the ACCC.'[23]

Gilbert & Tobin fee arrangement

3.27 As previously noted the seconded Gilbert & Tobin solicitors would be paid by the AGS at AGS salary rates (applicable to comparable AGS solicitors) with their salaries topped-up by Optus. A critical issue was the amount of the top-up.

3.28 Probably the most surprising aspect of the fee arrangement were the claims at times by the AGS and the ACCC of lack of knowledge of the existence and detail of the arrangement. This situation persisted throughout the Committee's review, and almost despite it. For example:

The AGS Interim Chief Executive Officer stated in his initial submission dated 1 December 1997:

> I was aware of the possibility that Optus might be paying an amount to Gilbert & Tobin to supplement what was payable to Gilbert & Tobin under the consultancy agreement with AGS...I do not know whether any supplementation in fact occurred or, if so, to what extent.[24]

The ACCC Acting Chairperson stated in his initial submission dated 1 December 1997 on this matter:

> The ACCC was not aware of the proposed top up arrangements until somewhat later and is still not aware of the detail.[25]

It later emerged that although the AGS advised the ACCC of the topping up when the secondment commenced, the ACCC said it didn't know of the detail because the AGS had not advised them of the details.[26]

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22 Evidence p S87 and see S86.
23 Evidence p 82.
24 Evidence pp S86 and 60.
25 Evidence p S60.
26 Evidence pp 93-94.

The AGS Interim Chief Executive Officer at the hearing on 4 December 1997 stated:

> I understand there was a topping-up arrangement by way of a flat fee arrangement for the opportunity revenue lost by Gilbert & Tobin as a result of undertaking a consultancy with the AGS, although at this stage I have no further information about that.[27]

The Acting Deputy Government Solicitor (Trade Practices) at the hearing on 4 December 1997 on several occasions stated:

> I knew that the salaries were being topped up, but I did not know by how much.[28]

The AGS Interim Chief Executive Officer in his submission dated 4 December 1997 specifically on this matter, in response to a request for the details from the Committee:

> The information contained in the third paragraph of Gilbert & Tobin's letter is the only detail that the AGS has of the arrangements between Optus and Gilbert & Tobin. Neither I nor any other AGS lawyer has been advised of the precise arrangements between Optus and Gilbert & Tobin...[29]

This comment was made despite the fact that the AGS advised the Committee that Gilbert & Tobin were prepared to inform the Committee of the arrangements if the Committee required them to do so.[30]

3.29 It was astounding that the AGS did not obtain this information as part of its initial decision making on whether to proceed with the consultancy or not. Further, that it did not inform itself of the details before appearing before this Committee specifically on this matter.

3.30 It also appears that the Chairman of the ACCC and the Interim Chief Executive Officer of the AGS had not been kept fully informed of the details by their respective staff.

3.31 It was obvious to the Committee that the salary rate paid by the AGS to Gilbert & Tobin solicitors was considerably less than the normal market rate. In response to questioning on this the AGS replied 'We try to get the best deal that we can.'[31]

3.32 Coupled with this was the Committee's astonishment that the AGS was unable to provide any indication whatsoever on the normal commercial charges for a top solicitor. The Committee was able to acquire this information from outside sources in minutes while the hearing was proceeding. The rate is of the order of $300 per hour.[32] The AGS did note that the engaging of solicitors, as opposed to barristers, is to some extent unfamiliar territory for it.[33]

3.33 A summary of the evidence that was provided on the fee arrangement is at Table 3.1.

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27 Evidence p 61.
28 Evidence p 78.
29 Evidence p S117.
30 Evidence p 77.
31 Evidence p 65.
32 Evidence p 78.
33 Evidence p 65.

3.34 Based on the data provided by Gilbert & Tobin, the AGS eventually estimated that the amount it would pay Gilbert & Tobin was $11,744 and the top-up amount to be paid by Optus was $58,856[34]. Although, using the Gilbert & Tobin figures, the Committee estimates the top-up at $68,856. In either case, this is a significant amount, particularly compared with the amount that AGS proposed to pay Gilbert & Tobin.

3.35 According to Gilbert & Tobin this was for 324 hours spent on the litigation by the two solicitors in the thirty two person days of the secondment.[35] However, the AGS noted there may be a discrepancy between its internal time records and the Gilbert & Tobin hours in the invoices. AGS said it may be necessary for them to negotiate with Gilbert & Tobin in relation to the actual number of hours to be billed. [36]

3.36 The AGS argued that the topping-up arrangement did not render the engagement unlawful and this was confirmed by both the senior (Mr John Sackar QC) and junior (Mr Simon White) counsel for the ACCC.[37]

3.37 The AGS also argued that the top-up did not render the engagement improper. It based its arguments on two factors. First, that it was common for the ACCC to receive assistance by way of affidavits or witness statements free of charge from persons having an interest in proceedings by the ACCC, stating such assistance is generally crucial to the ACCC's ability to perform its enforcement functions. Second, that it did not believe the top-up arrangement had any influence whatever on the decisions made by the ACCC in relation to the conduct of the proceedings.[38] While the Committee accepts the second argument, it does not accept the first. Assistance to the ACCC in the provision of affidavits or witness statements is quite different from employing solicitors to work specifically on the case. However, the AGS did not agree, stating '...I do not agree that it is totally different.'[39]

3.38 Both the AGS and the ACCC assured the Committee that there has been no topping-up arrangement of this type in any other case that they could recall.[40] The AGS further reported that there were no other cases it is aware of where lawyers' fees were paid by an outside party.[41]

3.39 The ACCC outlined a number of other cases where the ACCC in the past has received direct legal input from commercial parties, for example, 1989 TNT/Mayne Nickless express freight price fixing proceedings, 1991 Santos/Sagasco merger case, and 1997 Safeway/George Weston case.[42] Further details on such assistance are discussed under the later section on future arrangements.

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34 Evidence pp S117 and S120.
35 Evidence p S117.
36 Evidence pp S117-S118.
37 Evidence pp S86-S87.
38 Evidence p S87.
39 Evidence p 70.
40 Evidence pp 69, 93 and 108.
41 Evidence p 76.
42 See pp S61-S62 and S128-S129.

3.40 The Committee stated and the AGS agreed that '...one of the very pillars of our legal institution in Australia is that not only has justice got to be done, it has to be seen to be done...'[43]

3.41 Similar to the ACCC, while the AGS may have not acted illegally by seconding the solicitors it has not only to operate in a proper manner but also to be seen to do so. As previously stated, this issue is the basis of the Committee's concerns. The Committee believes it was highly inappropriate for the AGS to agree to allow Optus to top up the fees paid to the solicitors from Gilbert and Tobin.

Perception that there was a windfall for the AGS

3.42 During the course of the investigation the ACCC revealed that while the AGS paid Gilbert & Tobin at AGS salary rates (of the order of $250 per day), it charged the ACCC at considerably higher AGS hourly rates (of the order of $250 per hour).

3.43 The ACCC reported it had not become apparent that this had occurred until a day or so before the Committee's hearing on 4 December 1997. It said it thought the payment arrangements were to pay something like commercial rates and ACCC staff thought the topping-up arrangement was not a very large amount of money.[44]

3.44 The AGS justified its payment arrangements on the grounds that:

> ...we were in fact seeking to pay Gilbert & Tobin on the same salary-only basis on which we employ our own staff (without on-costs)...to recover the on-costs which we inevitably incurred in engaging the Gilbert & Tobin lawyers, and to make a return to the Government in relation to the overall handling of the matter as we are obliged generally to do...[45]

3.45 The AGS's estimates of the costs and profit margin are set out in Table 3.1. Using the time information recorded by the two Gilbert & Tobin solicitors (rather than the 324 hours time information estimated by Gilbert & Tobin), the AGS estimates its profit margin on the whole transaction at about $8,000.[46] It describes this as '...substantially less than what might have appeared at first sight.'[47]

3.46 If these figures are correct, it seems appropriate to ask, was the adverse publicity worth it?

3.47 Using the Gilbert & Tobin time information the profit margin is estimated by the Committee to be considerably higher - of the order of $40,000. There may also be a conflict of interest on the AGS advising on the choice of solicitors and making a profit on this advice.

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43 Evidence p 62.
44 Evidence p 94.
45 Evidence p S178.
46 Ibid.
47 Ibid.

Weighing perception and reality

3.48 The AGS has also argued that:

> ...ultimately, perceptions must give way to the substance of arrangements. Government authorities should not generally decline to act in a way which is in fact lawful, proper, and in the public interest, merely because of the potential for public perceptions that the conduct is in some way inappropriate...I also note that AGS had a duty to the ACCC as its solicitor to arrange for the best possible legal service to be delivered to it.[48]

3.49 This comment is difficult to reconcile with the AGS's acceptance of the fact that one of the very pillars of our legal institution in Australia is that not only must justice be done, it has to be seen to be done.

Future arrangements

3.50 In its submission dated 1 December 1997 the ACCC stated '...the Commission would not accept a situation again where lawyers acting for one of the protagonists are seconded and there is a top up in terms of what is paid...'[49] It took until the AGS's third submission dated 23 December 1997 before it accepted that view for itself.[50] However, at the hearing on 4 December 1997 the AGS did note '...We would no doubt have given much more consideration to the fee arrangement...with hindsight, we would have perhaps done some things differently but I believe that we would have probably proceeded.'[51].

3.51 The ACCC also stated:

> ...the commission proposes to instruct the AGS not to enter into topping-up arrangements in future. Because...in trade practices cases, there is a degree of interaction between private sector parties and the commission in the preparation of case - for example, on matters like helping with affidavits, and so on - it would also propose that there should be some guidelines drawn up. We would be proposing...to subject them to public discussion, and to submit them to this committee.[52]

And

> ...there was an instruction to phase it out and to start to build up someone from our own staff to work on this matter.[53]

3.52 The Committee accepted the ACCC suggestion.

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48 Evidence p S179.
49 Evidence p S62.
50 Evidence p S179.
51 Evidence p 85.
52 Evidence p 103.
53 Evidence p 104.

3.53 **Recommendation 2**

> **That as a matter of priority the Australian Competition and Consumer Commission prepare guidelines on the interaction between private sector parties and the Commission on the preparation of cases. The preparation of the guidelines should involve public consultation and the guidelines should be forwarded to this Committee for its consideration.**

The AGS backs down: Change to current arrangements

3.54 On the 23 December 1997 the AGS advised that it had been agreed with the ACCC and Gilbert & Tobin that the fee arrangements would be altered.[54] The new arrangements are set out at Table 3.1. In summary, Gilbert & Tobin will be paid at commercial rates; the ACCC will pay the same commercial rates; Gilbert & Tobin will receive no top-up from Optus; and the AGS will not make a profit on the transaction. Despite any qualifications it makes[55], this can only be described as a back down by the AGS.

3.55 In mid January 1998 the AGS drew to the Committee's attention the decision of the Full Federal Court of Australia delivered on 8 January 1998 in *Boys and Others v Australian Securities Commission & Others* which the AGS believed touched on matters relevant to this Committee's inquiry. A summary of the judgement is set out in the AGS's submission.[56] The AGS pointed out that in the findings of the leading judgement of Heerey J (page 28):

> It is neither necessary nor desirable to express any general view as to whether, as a matter of administrative propriety, regulatory agencies can or should accept free services as an aid in the exercise of statutory investigative or other powers in a way which might benefit the provider of the services.[57]

3.56 AGS also noted that in agreeing with that statement, Merkel J stated (at page 7 of his separate judgement):

> However, I would observe that the acceptance by a regulatory agency of free services in the circumstances referred to by Heerey J can be fraught with difficulty and should only occur after careful consideration has been given to taking appropriate steps to ensure that there is no conflict of interest or duty or appearance of partiality involved.[58]

3.57 In concluding its comments on that case the AGS stated:

> Overall, and without detracting from the advice I have given the Committee that the AGS will not knowingly be involved in similar top up arrangements in future, I submit that the Federal Court's judgement reinforces the point that the matter currently being inquired into by the Committee is not clear cut, but raises

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54 Evidence p S179.
55 Ibid.
56 Evidence p S206.
57 Evidence p S208.
58 Ibid.

> competing issues on which judgements have to be made and in respect of which reasonable minds can differ.[59]

3.58 The Committee notes the decision of the Full Federal Court of Australia, but this does not alter the Committee's view of the ACCC's legal representation by Gilbert & Tobin in the Australis Media case.

Conclusion

3.59 While the Committee does not believe that the AGS, and its Interim Chief Executive Officer in particular, was attempting to mislead it, the vague financial information provided on this case and the poor internal communications demonstrated, lead the Committee to suggest that the AGS's financial management systems and skills and internal reporting systems need to be improved. The changed payment arrangements, such that the AGS will now pay Gilbert and Tobin solicitors at commercial rates, would not have occurred if the Committee had not held these hearings.

3.60 **Recommendation 3**

> **That the Australian National Audit Office when undertaking its next financial audit of the AGS look closely at the issues outlined by the Committee and related matters.**

ACCC conflict of interest regarding Optus and restrictions on uses of 131 008 mobile phone access

3.61 As a result of the Committee's investigation of the above matter it received a submission from Taxi 131-008 Pty Ltd regarding the alleged failure of Optus to disclose to its customers the restrictions on 131 008 mobile phone access in some regional areas.[60] This view was reinforced in a submission from Mackay Taxi Holdings Limited.[61] In relation to the Committee's review of the ACCC, the company's main concern is the alleged failure of the ACCC to take any effective action against Optus in response to complaints from the companies and other 131 008 licensees.

3.62 In response to the question of whether Optus has engaged in conduct in breach of the Trade Practices Act, the ACCC replied: it would require extensive investigation and affidavit evidence; a breach would be difficult to prove; as Optus has agreed to take steps to ensure that their customers are properly informed of any limitations the ACCC doesn't consider further action is a justified use of its resources; the ACCC considers it an industry matter and is likely to be resolved through industry action - it has requested the Australian Communications Industry Forum Ltd to explore with industry the possibility of developing processes for informing consumers of the implications of these technical difficulties; and

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59 Ibid.
60 Evidence pp S99-S116.
61 Evidence p S205.

should the ACCC initiate action against Optus it is likely the taxi companies would be joined in any action for their misrepresenting the availability of a taxi through their use of the 131 008 number.[62]

3.63 The ACCC also totally rejected the allegation that it favours Optus and reiterated earlier evidence that it has taken legal and other actions against Telstra, Optus and other carriers when appropriate.[63]

3.64 More recently, the ACCC has informally advised the Committee that it has recently accepted an administrative resolution from Optus whereby Optus will implement immediately a disclosure regime covering dissemination of information to staff and dealers, prospective and existing customers.

3.65 This situation serves to reinforce problems that can arise for the ACCC from perceptions of bias in the Foxtel/Australis Media case.

3.66 The ACCC has been keeping the Committee informed on developments on this issue, and the Committee will review progress with the matter again in its next review of the ACCC's annual report.

62 Evidence p S197.
63 Evidence pp S197 and 111.

CHAPTER FOUR

RELATED ISSUES

4.1 This chapter raises a number of more general matters as well as an additional critical issue which the Australian Competition and Consumer Commission (ACCC) agreed to follow up from the Committee's review of the ACCC's 1995-96 annual report.

ACCC compliance work and s 87B undertakings

4.2 Serious concerns, which involve matters of principle, were initially raised by Gardini & Co, and then the Law Council of Australia, about the involvement of the ACCC in compliance work related to undertakings which have been given by companies under s 87B of the Trade Practices Act. Both believe that the ACCC should not be involved in such compliance programs in connection with the s 87B undertakings.[1] Mr Gardini advised that his company is also involved in such compliance work.

4.3 In summary the issues raised by Mr Gardini and the Law Council of Australia were: whether there was a statutory basis for the ACCC to carry on a business of carrying out compliance programs; whether there was a danger that there may be at least some inference that the choice of the ACCC to conduct the compliance program (required by the ACCC) has been unduly influenced by a desire to placate the ACCC; if in the course of conducting a compliance program the ACCC uncovers some fresh breach of the Act, whether the ACCC is under a duty of confidentiality, or whether it is free to prosecute; and whether the ACCC would be able to be an objective judge of the adequacy of its own compliance program as the undertakings invariably require the private company to provide a report to the ACCC both during and at the end of compliance work so that the ACCC may assess whether the compliance work meets the requirements set out in the s 87B undertaking.[2]

4.4 In late August 1997, the Treasurer's Office advised Mr Gardini that the ACCC had, on its own initiative, been reviewing its compliance work and looking at winding back its involvement in the area, particularly the provision of compliance training under s 87B undertakings.[3]

4.5 At the hearing the ACCC advised:

> As a result of the letter and as a result of the discussions that we had with the Law Council, we reassessed some of our own processes...we started to get involved in compliance programs - and still do in a very broad industry sense - with particular companies...because companies asked us...
>
> We seldom did in terms of 87Bs but occasionally did...

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1 Evidence pp S11, S13 and S20.
2 Evidence pp S11-S21.
3 Evidence p S18.

> Also, there were no people out in the marketplace who could particularly provide that kind of advice some time ago. There are now a number of companies...who provide such kind of advice to industry...As a result, we have totally altered our compliance activities. We will not be involved in compliance audits; we will not be involved in compliance issues related to section 87Bs. We will be involved only in broad industry compliance. So we are totally pulling back.
>
> We have copped a bucketing from some companies for doing that, because we are sending other people to very large expense as a result...[4]

4.6 The Committee is satisfied that this issue now has been resolved satisfactorily.

4.7 **Recommendation 4**

> **That the Australian Competition and Consumer Commission monitor the impact of the change in responsibility for compliance programs and report on this matter in its 1997-98 annual report.**

Bias and the Australian Competition Tribunal

4.8 Mr Jeremy Thorpe submitted a copy of his recent article in the *Trade Practices Law Journal* which raised the issue of an apprehension of bias through the ACCC's role as an amicus curiae, friend, for the Australian Competition Tribunal (ACT).[5] As the Tribunal has no staff to assist it in reviewing a Commission decision, s 102(6) of the Trade Practices Act allows a presiding member of the Tribunal to seek assistance from the Commission. Mr Thorpe suggested that:

> ...The Tribunal can lessen this perception by seeking the assistance of Commission staff with no prior involvement in the actual case before it. [where substantive new analysis is required] However, a more appropriate approach may be for the Tribunal to employ independent economic advisers. [making more liberal use of s 43B of the Trade Practices Act][6]

4.9 Mr Thorpe reported that in a speech in 1995 a long standing member of the Tribunal, Maureen Brunt, suggested that 'it may be desirable for the Tribunal to have access to independent expertise when the appeal is from the Commission.'[7]

4.10 In responding to the Thorpe article the ACCC states 'Recent and past ACT decisions make it clear that the ACCC has little influence on ACT decisions.'[8]

4.11 On the issue of ACCC staff involved in the Tribunal hearing not having prior involvement, the ACCC points to difficulties of cost with the Commission having to double handle matters and the issue of expertise. On the use of independent economic advisers it

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4 Evidence p 42.
5 Thorpe J. Bias and the Australian Competition Tribunal. *Trade Practices Law Journal.* September 1997. 5(3), pp 148-153.
6 Ibid p 148.
7 Ibid p 151.
8 Evidence p S200.

reiterates that the Tribunal can employ such advisers and notes '...The Tribunal has adopted a process where it will 'hear' all economists together in a 'hot tub' procedure ie all economists appear at the same time and are cross examined by Counsel, Tribunal members and by each other.'[9]

4.12 Given the importance of the Tribunal's role in reviewing a decision of the ACCC, the Committee raises this issue as one which, all involved, and other commentators, should continue to monitor.

Progress in implementing Wallis Report reforms

4.13 On 2 September 1997 the Government accepted almost all of the Wallis Report[10] recommendations, except those relating to continuing restrictions upon mergers between the four largest banks.

4.14 The ACCC reported it was rather happy with the Wallis Report. It said '...although there has been some criticism of our way of approaching bank mergers, Wallis essentially upheld virtually every key point in the commission's analysis of bank mergers...'[11] On the consumer protection side, the new Australian Corporations and Financial Services Commission (ACFSC) will takeover consumer protection functions for the finance sector from the ACCC and the Australian Payments System Council. The Trade Practices Act will continue to have universal application administered by the ACCC, with consumer protection sections applied by the new agency. The ACCC said '...there will be some kind of operating agreement between...[itself and the ACFSC] to make sure there is no overlap.'[12]

4.15 The Committee will follow up details of that operating agreement in its next review of the ACCC.

Competition, consumer benefits and regional variations

4.16 The expected benefits from competition reform for ordinary Australians are price reductions, lower inflation, more growth, more jobs and uniform protection of consumer and business rights. As a result of the cumulative effects of the reforms the Industry Commission estimated a long run annual gain in real GDP of 5.5% or $23 billion a year.[13]

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9 Ibid.

10 *Financial System Inquiry Final Report*. March 1997. Canberra, AGPS, xv 771p.

11 Evidence p 7.

12 Ibid.

13 House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Cultivating competition: Report of inquiry into aspects of the National Competition Policy Reform Package*. Canberra, AGPS, pp 1-3.

4.17 The Committee considered a number of specific cases of costs and benefits flowing from competition reform or likely reform, including, CD prices, local telephone calls, cost of mobile phone calls, meat processing.[14] The Committee will continue to watch developments in these areas and if necessary follow up as part of its next review of the ACCC.

4.18 It is generally accepted that the benefits of competition, in particular consumer benefits, are not being realised as strongly in rural areas as in the city. However, in evidence to the Committee's review of the ACCC's 1995-96 annual report, the ACCC did not fully support that view. Rather, it stated:

> ...there is a general benefit but that it is bigger in the city than in rural areas. I do not see rural areas as a loser on balance from competition policy but as simply deriving a bit less of the benefit.[15]

4.19 Nor did the ACCC believe the gap between city and country was any wider than in the past. This is still not the Committee's experience and it remains dissatisfied with the ACCC's explanation. Accordingly, as part of the current inquiry the Committee re-examined this problem, again using the example of petrol prices in rural areas.

4.20 In commenting on progress in that area the ACCC pointed to Woolworths' plan to sell petrol at a discount to buyers of groceries at their supermarkets. The ACCC reported:

> ...I am moderately optimistic that there will be significant fairly widespread effects over time...A year ago, country petrol prices was a totally bleak subject...but there are now some areas where Woolworths have gone in and prices have come down quite significantly. They propose to go into about 200 sites by the year 2000, and they are expanding every day - and where they do go in prices do come down by several cents a litre. There is nowhere they have gone that prices have not come down by at least 3c and in some cases by more than 3c a litre...without wanting to exaggerate, this picture is starting to look somewhat more promising. But time will tell.[16]

4.21 As part of its last report the Committee recommended the Treasurer initiate a study of the extent to which the benefits of competition are flowing to rural and regional Australia. The Committee cannot stress too strongly the importance of that recommendation being implemented. A related recommendation was that the Treasurer consult with business and industry, the community and the ACCC to ascertain an appropriate means by which the general impact on competition and benefits to the community, of the ACCC's merger decisions, could be reviewed over the medium to long term. A response from the Treasurer to that report is expected shortly.

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14 See Evidence pp 15-31.

15 See House of Representatives Standing Committee on Financial Institutions and Public Administration. June 1997. *Review of the Australian Competition and Consumer Commission 1995-96 annual report*. Canberra, AGPS, p 23.

16 Evidence p 14.

Conclusions on the performance of the ACCC

4.22 This review clearly demonstrates the important role which the Committee makes to the public accountability and transparency of the ACCC. Issues emerged which may otherwise have remained unknown. Overall the ACCC is performing reasonably well, but as this report shows there are still areas for considerable improvement in the ACCC's performance.

David Hawker MP
Chairman
25 February 1998

APPENDIX 1

LIST OF SUBMISSIONS

1	Santos Ltd
2	Australian Petroleum Agents and Distributors Association
3	Gardini & Co Solicitors and Consultants
4	Australian Competition and Consumer Commission
5	Australian Competition and Consumer Commission (Supplementary submission dated 20 November 1997)
6	Santos Ltd (Supplementary submission dated 2 December 1997)
7	Australian Competition and Consumer Commission (Supplementary submission dated 1 December 1997)
8	Australian Government Solicitor
9	Santos Ltd (Supplementary submission dated 2 December 1997)
10	Taxi 131-008 Pty Ltd
11	Australian Government Solicitor (Supplementary submission dated 4 December 1997)
12	Australian Competition and Consumer Commission (Supplementary submission dated 15 December 1997)
13	Australian Government Solicitor (Supplementary submission dated 23 December 1997)
14	Australian Competition and Consumer Commission (Supplementary submission dated 23 December 1997)
15	Mackay Taxi Holdings Limited
16	Australian Government Solicitor (Supplementary submission dated 23 January 1998)

APPENDIX 2

LIST OF EXHIBITS[1]

1 Professor A Fels
Chairman, Australian Competition and Consumer Commission
Comments on Santos letter to the House of Representatives Standing Committee on Financial Institutions and Public Administration. *Information kit.* 7 documents, various pagings.
(Related to Submission No. 4)

2 Mr Jeremy Thorpe
Bias and the Australian Competition Tribunal.
Thorpe, J. *Trade Practices Law Journal*. September 1997, 5(3), pp 148-153.

3 Mr Hank Spier
General Manager, Australian Competition and Consumer Commission
ACCC amended statement of claim re Foxtel/Australis merger.
The Federal Court of Australia. New South Wales District Registry No. NG 851 of 1997.
(Related to Submission No. 12)

4 Mr Hank Spier
General Manager, Australian Competition and Consumer Commission
Merger guidelines: A guide to the Commission's administration of the merger provisions (ss 50, 50A) of the Trade Practices Act.
Australian Competition and Consumer Commission. July 1996. ACCC, Canberra, 77p.
(Related to Submission No. 14)

5 Mr Hank Spier
General Manager, Australian Competition and Consumer Commission
The ACCC's approach to mergers: A statistical summary.
Australian Competition and Consumer Commission. January 1998. ACCC, Canberra, 44p.
(Related to Submission No. 14)

6 Mr Hank Spier
General Manager, Australian Competition and Consumer Commission
Industry Commission suggested thresholds.
Australian Competition and Consumer Commission. nd. Uunpublished, 8p.
(Related to Submission No. 14)

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1 The name, position and organisation of the person who provided the exhibit precedes the bibliographic details of the exhibit.

7 Mr Hank Spier
General Manager, Australian Competition and Consumer Commission
Corporate plan 1997-1998.
Australian Competition and Consumer Commission. nd. ACCC, Canberra, 27p.
(Related to Submission No. 14)

8 Mr Barry Leader
Deputy Government Solicitor, Australian Government Solicitor
Alan Harold Boys & Ors v Australian Securities Commission No.WAG71 of 1997.
Judges: French, Heerley and Merkel JJ, 8 January1998, Perth, various pagings.
(Related to Submission No. 16)

APPENDIX 3

LIST OF HEARINGS AND WITNESSES

Canberra, 20 November 1997

Australian Competition and Consumer Commission

Professor Allan Fels, Chairman
Ms Rhonda Smith, Commissioner
Mr Hank Spier, General Manager

Canberra, 4 December 1997

Australian Competition and Consumer Commission

Professor Allan Fels, Chairman
Mr Allan Asher, Deputy Chairman

Australian Government Solicitor

Mr Robert Alexander, Acting Deputy Government Solicitor (Trade Practices)
Mr Dale Boucher, Interim Chief Executive Officer
Mr Barry Leader, Deputy Government Solicitor, Office of Litigation
Mr Robert Owbridge, Senior Government Solicitor

PRIVATE BRIEFING

Canberra, 29 October 1997

Santos Limited

Mr JW McArdle, Executive General Manager - Commercial
Mr Paul Woodland, Manager, Government Affairs

APPENDIX 4

CIRCUMSTANCES RELATING TO ENGAGEMENT OF GILBERT & TOBIN SOLICITORS[1]

1. On 14 October 1997 the ACCC instituted proceedings in the Federal Court seeking injunctive relief to restrain the Australis/Foxtel merger. The basis of the ACCC's action was that the merger would be likely to substantially prevent, hinder or lessen competition in pay TV and telephony markets in Australia in contravention of section 50 of the *Trade Practices Act 1974.* The ACCC's Application was supported by five Affidavits. Three further Affidavits were filed on 15 October 1997. The matter was listed for a Directions Hearing on 16 October 1997. At the Directions Hearing on 16 October 1997 the Court directed the ACCC to file and serve the ACCC's Statement of Claim and any additional affidavits on the morning of 20 October 1997. There was also discussion in the Court as to whether the case should be fixed for an early hearing of the ACCC's claim for interim injunctions pending the final hearing or for an early final hearing. The matter was stood over for a further Directions Hearing to the afternoon of 20 October 1997.

2. At this time the senior AGS solicitor responsible for the preparation of the ACCC's case formed the view that the ACCC would need to be in a position within a short space of time to identify additional potential witnesses, file affidavits from witnesses containing the evidence on which the ACCC would rely in support of its case at whichever hearing the Court ordered and to deal with production and inspection of both the ACCC's documents and the Respondents' documents. The AGS considered that this would entail a very significant amount of solicitor's work. The AGS was of the view that solicitors in the firm of Gilbert & Tobin (the firm of solicitors which normally acted for Optus) would be the solicitors most likely to be available and have the necessary expertise for the work required. The AGS then held preliminary discussions with Gilbert & Tobin as to whether it would be possible for one or more Gilbert & Tobin solicitors to be seconded to AGS for the duration of the case.

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1 Evidence pp S88-S93.

3. When discussing the proposed secondment of Gilbert & Tobin solicitors to the AGS litigation team the AGS proposed that the seconded solicitors be paid by the AGS at AGS salary rates applicable to comparable AGS solicitors. The Gilbert & Tobin representative indicated that these salary rates were probably less than the Gilbert & Tobin solicitors were currently receiving. However, the Gilbert & Tobin representative stated that the secondment may be able to proceed if Gilbert & Tobin could come to an arrangement with Optus whereby Gilbert & Tobin could top up the AGS salaries paid to the Gilbert & Tobin solicitors to ensure that the seconded solicitors continued to be paid at their current salaries and Gilbert & Tobin would be compensated by Optus.

4. On 20 October 1997 a further Directions Hearing was held in the Court. At that hearing there was further discussion as to whether the matter should proceed to an interim injunction hearing or to an early final hearing. At that time Senior Counsel for the ACCC informed the Court that a draft Statement of Claim had been prepared but that further work was required on the draft to prepare the Statement of Claim in its final form. The Court ordered that the ACCC file and serve a final version of the Statement of Claim by Tuesday 21 October 1997 and indicated that the parties should assume that there would either be an interim injunction hearing or a final hearing in the Court commencing on 24 November 1997. The directions hearing was adjourned to 24 October 1997.

5. The ACCC's Statement of Claim was filed on 22 October 1997.

6. The case the ACCC wished to present to the Court in support of its claim for injunctive relief to restrain the proposed Australis/Foxtel merger was that the merger would have the effect of substantially preventing, hindering or lessening competition in pay TV and telephony markets in Australia. The ACCC regarded the effect of the proposed merger in telephony markets as the most important part of the case. However, as at 22 October 1997 little work had been done in identifying witnesses and preparing affidavits from witnesses with direct knowledge of telephony matters. Given the nature of telephony

markets in Australia and the significance of Optus in those markets AGS formed the view that a substantial number of the witnesses the ACCC should put before the Court in relation to the telephony issues would be Optus witnesses. The AGS was of the view that in order for these witnesses to be identified and the affidavits prepared in the short time available it would be necessary for the work to be done by solicitors with expertise in telecommunications in Australia and a good working knowledge of the way Optus conducted its telecommunications business. The AGS decided that the only practical way this could be done in the time available was for the Optus witnesses to be identified and the affidavits taken by solicitors from Gilbert & Tobin who had worked on Optus matters in the past. This work could be carried out by solicitors located at Gilbert & Tobin. However, it would also be necessary for the input from Gilbert & Tobin to be critically examined and settled by solicitors in the AGS litigation team and integrated with the work of AGS solicitors on other aspects of the case. These arrangements would be consistent with past practice whereby interested parties provide evidentiary assistance without charge to the ACCC in cases taken by the ACCC against their competitors.

7. Further it would be necessary for solicitors in the AGS team with telecommunications expertise to identify classes of Telstra documents likely to be relevant to the ACCC's case, assist in the drafting of Notices to Produce for those documents and assist in the inspection of the documents so produced. The AGS decided that the proper conduct of the case required that a small number of Gilbert & Tobin solicitors be seconded to the AGS to work as part of the AGS litigation team on the matter. Being on the AGS litigation team, those solicitors would be committed to advancing the ACCC's case and would be available on a full time basis. Those solicitors would also be able to assist in liaising with the other solicitors continuing to work at Gilbert & Tobin preparing other draft affidavits from Optus witnesses. Also with the two Gilbert & Tobin solicitors being put of the AGS litigation team, the AGS would have control over the legal work carried out by those solicitors in relation to the preparation of the ACCC's case.

8. Accordingly, on 23 October 1997 the AGS wrote to the solicitors for the other parties to the Court proceedings (News Corporation, Telstra and Australis) informing them of the proposal that two Gilbert & Tobin solicitors be seconded to the AGS litigation team with the conduct of the case on behalf of the ACCC. It was stated in the letter that the basis of the secondment would be that the seconded solicitors would not act on behalf of any of the Optus group of companies for the duration of the secondment.

9. On 24 October 1997 a further hearing was held in the Court during the course of which a copy of the letter dated 23 October 1997 was tendered into evidence.

10. Also on 24 October 1997 the Court was informed that the ACCC would file and serve an amended Statement of Claim and on 27 October 1997 the amended Statement of Claim was filed in the Court and served on the parties.

11. Also on 24 October 1997 the Court indicated that it would hear argument on 28 October 1997 as to whether the matter should proceed to an interim injunction hearing or to a final hearing.

12. On 28 October 1997 the solicitors for Telstra wrote to the AGS in reply to the AGS letter of 23 October 1997 advising that Telstra strenuously objected to the proposed secondment of the Gilbert & Tobin solicitors. Senior Counsel for the ACCC was shown a copy of the Telstra solicitors' letter and advised to the effect that no basis had been made out for AGS not proceeding with the secondment of the Gilbert & Tobin solicitors.

13. On 28 October 1997 the hearing was held in the Court on the question whether an interim injunction hearing or a final hearing should be held and the senior AGS solicitor in the AGS litigation team gave evidence in the Court as to the scope of the ACCC's case and the proposal to second the Gilbert & Tobin solicitors. At this hearing Senior Counsel for the ACCC handed up to the Court a copy of the letter from Telstra's solicitors dated 28 October 1997. The matter was adjourned to 29 October 1997.

14. On the morning of 29 October 1997, before the appointed time for the resumption of the Court hearing, AGS wrote to the solicitors for Telstra advising that the ACCC did not accept the validity of Telstra's objection to the proposed Gilbert & Tobin secondment and invited Telstra to raise the question with the Court that morning if it wished to pursue its objection. The AGS went on to say that it was proposed to implement the Gilbert & Tobin secondment that afternoon.

15. Telstra did not pursue its objection with the Court on 29 October 1997 or at any other time.

16. On 29 October 1997 Hill J. handed down his judgment on the question of what hearing should take place deciding that an interim injunction hearing should take place commencing on 24 November 1997. Hill J. then gave directions as to the interlocutory steps leading up to the interim injunction hearing including:

- that the ACCC file and serve its affidavits in relation to pay TV on or before 3 November 1997 and in relation to telephony on or before 7 November 1997;

- that any Notices to Produce be served on or before 3 November 1997;

- that production of documents take place on 10 November 1997.

17. On 30 October 1997 one solicitor from Gilbert & Tobin commenced work at the AGS Sydney Office as put of the AGS litigation term working on the matter and on 3 November 1997 a second Gilbert & Tobin solicitor joined the team at the AGS Sydney Office. The AGS litigation team comprised five AGS solicitors and the two Gilbert & Tobin solicitors. The ACCC understands that salary top up arrangements for the two Gilbert & Tobin solicitors were or are to be entered into between Gilbert & Tobin and Optus.

18. The secondment arrangement was considered by senior lawyers at the AGS Central Office including the Interim CEO, Mr Dale Boucher. The AGS considered that the secondment arrangement was lawful and could be put in place subject to safeguards to protect the confidentiality of Telstra's information, including that it not be passed on to Optus. The senior AGS solicitor in the AGS litigation team, with Senior Counsel, at all times maintained strategic direction and control of the ACCC's case. Arrangements were put in place to protect the confidentiality of information received by the seconded solicitors in the course of their work as part of the AGS litigation team.

19. The AGS litigation team settled and filed the ACCC's Statement of Claim (including the Amended Statement of Claim), 31 affidavits from witnesses, undertook a comprehensive production of documents exercise, issued subpoenas to give evidence and produce documents and engaged in significant correspondence on many issues. As a result of this work the ACCC was in a position to present a strong case to the Court against the proposed merger. The AGS considers that the secondment of the Gilbert & Tobin solicitors was critical to reaching that position.

20. On 20 November 1997 News Corporation and Telstra terminated the merger agreement and on 24 November 1997 the ACCC discontinued the proceedings with the consent of all Respondents.

APPENDIX 5

REVIEW OF THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION ANNUAL REPORT 1995-96: LIST OF RECOMMENDATIONS

(Tabled in Parliament on 23 June 1997)

1 That the ACCC investigate mechanisms whereby the process of accepting s.87B undertakings in merger cases can be made more transparent and that the ACCC report on this investigation to this Committee at a public hearing when the Committee reviews the ACCC's 1996-97 annual report.

2 That the Treasurer initiate a study of the extent to which the benefits of competition are flowing to rural and regional Australia.

3 That the ACCC give a higher priority to monitoring and evaluation of the impact of its merger decisions on market competition and that the ACCC report on its findings on a regular basis.

4 That the Treasurer consult with business and industry, the community and the ACCC to ascertain an appropriate means by which the general impact on competition and benefits to the community, of the ACCC's merger decisions, could be reviewed over the medium to long term.

COMMITTEE'S REVIEWS OF ANNUAL REPORTS - 38TH PARLIAMENT

Reviews of the 1995-96 annual reports of the Reserve Bank of Australia, Australian Securities Commission and the Insurance and Superannuation Commission
(Tabled 29 September 1997)

Review of the Australian Competition and Consumer Council's 1995-96 annual report
(Tabled 23 June 1997)

Forthcoming reports

Review of the Reserve Bank of Australia annual report 1996-97

Review of the National Competition Council annual report 1996-97