HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Reference: Australian Competition and Consumer Commission annual report 1996-97

CANBERRA

Thursday, 20 November 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Members:

Mr Hawker (Chair)

Mr Albanese
Mr Anthony
Mr Causley
Mrs Gallus
Mr Hockey
Mr Latham
Mr Martin
Mr Mutch
Dr Nelson
Mr Pyne
Dr Southcott
Mr Willis
Mr Wilton

Matter referred to the Committee:

Australian Competition and Consumer Commission annual report 1996-97

WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Australian Competition and Consumer Commission annual report 1996-97

CANBERRA

Thursday, 20 November 1997

Present

Mr Hawker (Chair)

Mr Albanese	Mr Martin
Mr Causley	Mr Mutch
Mrs Gallus	Mr Pyne
Mr Hockey	

The committee met at 10.28 a.m.

Mr Hawker took the chair.

CHAIR—Welcome. I declare open this public hearing of the House of Representatives Standing Committee on Financial Institutions and Public Administration. This is the second occasion that the Australian Competition and Consumer Commission has appeared before the committee to discuss issues arising from the ACCC's annual report. On this occasion we are looking at the 1996-97 annual report.

Given the 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 way in which that transparency is being achieved is through the commission's regular appearance before our committee, and we are looking forward to a very frank and constructive exchange with the three of you this morning.

The committee is pleased to note that in its annual report the ACCC has followed up on a number of matters we raised with you at our last hearing—for example, greater transparency in the section 87B undertakings and other processes and data on concentration thresholds. We are also pleased to see that the ACCC now has a corporate plan and a service charter, and has addressed the issue of staff training and development.

The committee has a wide range of matters it wishes to discuss today, so I will proceed immediately to the calling of the witnesses and the commission's opening statement.

[10.30 a.m.]

FELS, Professor Allan, Chairman, Australian Competition and Consumer Commission, 470 Northbourne Avenue, Dickson, Australian Capital Territory

SMITH, Ms Rhonda Lynette, Commissioner, Australian Competition and Consumer Commission, 470 Northbourne Avenue, Dickson, Australian Capital Territory

SPIER, Mr Hank, General Manager, Australian Competition and Consumer Commission, 470 Northbourne Avenue, Dickson, Australian Capital Territory

CHAIR—I welcome representatives from the ACCC to today's public hearing. I remind you that the evidence that you give at this public hearing is considered to be part of the proceedings of the parliament, and I therefore advise you that any attempt to mislead the committee is a very serious matter and could amount to a contempt of the parliament. Professor Fels, I understand you would like to make an opening statement.

Prof. Fels—Thank you very much, Mr Chairman. I thought I would speak for maybe 10 minutes about general issues concerning the ACCC. I was actually going to leave out one small topic, namely, the Foxtel-Australis merger. I am sure you will ask me questions about that, and I think I should speak more generally at the beginning. I am happy to deal with that perhaps a little later.

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 recognise the importance of your committee and the hearings that you have on us and what we do. We for our part try to be as open and public as possible because we see ourselves as serving the public interest. The more open matters are the better, from our point of view.

To review the Trade Practices Act and the functions of it for just a minute, the main parts of the act and our role in it, part 4 prohibits anti-competitive conduct, cartels, anti-competitive mergers and so on—we are kind of the police who enforce that. Part 5 has consumer protection and fair trading provisions. Part 7 is authorisation. It enables anti-competitive behaviour to be authorised by us where there is a sufficient public benefit, but there is a right of appeal to the tribunal.

The new part 3A is about access to essential facilities. That is a well-known problem. Say that Optus wants to compete with Telstra on long distance, then at present it needs to get access to the Telstra local loop into your home or business to compete. So the access issue is about that type of thing.

We also have another part of the act dealing with unconscionable conduct with respect to consumers and unconscionable conduct with respect to small business. Of

course, the government has announced that it will be bringing in legislation to strengthen that part of the law shortly. We also administer the Prices Surveillance Act, and we have a new part of the act about telecommunications. So that is the range of functions that the commission is involved in under the act.

We are sometimes asked how we approach having all those obligations. We do have a fairly clear focus. One of the reasons for that is that the Trade Practices Act itself is a very sound piece of legislation that has been devised over many years of legislation. It has an emphasis on competition, but there is a very big public interest element in it. There is generally consensus on the suitability of the Trade Practices Act.

Our role in particular is that we are a law enforcement agency—that is, we apply the law in a straightforward manner without fear or favour to anyone. It is our central role. In doing so, we take account of the fact that the Trade Practices Act is about competition. That is a central issue, whether we are dealing with about all of those functions I mentioned earlier, but of course there are also public interest considerations that may override the competition concerns in various parts of the act.

We are, as I said, an enforcement body. We are not in general a policy advisory or a policy advocacy body. 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.

Our priorities as far as competition is concerned lie in the non-traded goods and services area. Much of the work we would otherwise need to do is done for us by import competition in that sector. Although there is still some work to do there, the main focus is on the non-traded goods and services sector and, within that sector, on the less competitive areas of it.

We also have an approach of trying to minimise regulation as much as possible. 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 two or three years ago. That number is down to 10 and, of them, the main one is petrol. We have recommended deregulation of petrol, and the government has accepted that in principle.

Also, in so far as trying to have a focus, every two years we publish a fairly detailed statement of our priorities, including our litigation priorities, so that not only ourselves but also the whole marketplace knows what the commission's top concerns are. That is our role. We are a law enforcement body applying the law. The Trade Practices Act is quite a powerful law. 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. The commission's task, however, is to uphold the law without fear or favour in the public interest.

There is, of course, general support from the community for the act and for the fact that there should be a Trade Practices Act. The business community supports that but, when the commission becomes involved in matters affecting them in particular, usually there is a lot of resistance because we deal with very important matters, and obviously businesses will fight very hard to protect their interests—and none more so than monopolies.

In this regard, parliament has very wisely, in my view, laid down a whole lot of safeguards. Above all, the fact is that 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 been a breach of the law it has to go to the Federal Court and prove its case. If someone seeks an authorisation, we make a judgment, but there is a right of appeal to the tribunal, often exercised. With all the access decisions, in general there is a right of appeal on them to the Australian Competition Tribunal. 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.

I will mention a couple of recent developments, if I may, regarding general trends, Mr Chairman. Recent important developments have been the fact that, from July 1996, the Trade Practices Act has applied universally, covering beyond doubt the professions, agricultural marketing, public utilities and the health sector—important new areas of Trade Practices Act jurisdiction.

The next point I want to mention, which is certainly well-known to all of you but is worth mentioning in any overview, is that the national competition policy does not just revolve around the ACCC. That is sometimes misunderstood. The fact is that the Council of Australian Governments agreed some time ago that all governments would review, by the year 2000, all laws—federal and state—in every sector and every department that had an effect on competition to see if they were justified and, if they were justified, if they could be done in a less anti-competitive manner. That is a very major element in our national competition policy. We are not involved in that process. When there are debates about whether the Wheat Board should have a single desk export for something or whatever, we are not involved in those issues.

Our role is a more limited one. We apply the law, and there are a number of other people, including the important National Competition Council, which have a very important role to play in competition policy. I have mentioned that we have the new access law. You will know that the penalties have gone up quite a lot—by law in 1993 to $10 million per offence, and also the courts have been imposing much higher penalties. If you study the trends in the courts, the courts are applying the act far more rigorously. We are stressing to firms the importance of taking steps of their own—compliance programs—to avoid the risk of breaching the act.

The commission has become much more closely involved in microeconomic reform

in recent years, particularly with its transfer over to the Treasury portfolio. Though we are independent of Treasury, that is our portfolio. In particular, we are now spending a lot of time on the communications, especially telecommunications, energy and transport sectors. They are key areas of microreform.

In electricity, the main activity has been to deal with the rules of the national electricity market, which is a very important development for competition, obviously. In effect, they are setting up a new market to get interstate competition going, and there have to be a whole lot of rules about how that operates. The commission is at present adjudicating upon whether those rules are acceptable as being in the public interest from a competition point of view. We have put out a draft determination that is quite detailed on that matter. We will have some regulatory role regarding transmission pricing in 2001.

With gas, there are similar developments where we will have the role of transmission regulator under the national third party access code for natural gas pipeline systems. There are other players in that matter, but we are quite closely involved in the gas.

With telecommunications, as you will know, parliament passed the deregulatory package of measures which took effect on 1 July. The commission is now quite active in regard to a whole range of areas of regulation of the telecommunications industry.

With transport there is also some activity. With airports, we are doing some oversight of airports that have been leased or privatised. Also, we are becoming a bit involved in some rail access issues.

The coalition government has reinstated sections 45D and E of the Trade Practices Act. We have taken one significant action under that in relation to the TWU. We think that that section of the act is very likely to be rather relevant to waterfront and shipping reforms.

We have been quite active on consumer protection areas. I suppose, if I had to identify particular areas, they would be the finance sector, the telecommunications sector and some of these international matters like the Internet and complications of buying, by electronic commerce means, from overseas.

On the Wallis report, for what it is worth, the commission was rather happy with the Wallis report. The commission itself had recommended that Wallis should recommend a whole lot of changes that would increase competition in the financial services sector, not necessarily because we recommended it. The report happened to have rather similar recommendations to what we thought was appropriate for having more competition in that sector.

Also, there was a fairly solid working over of the commission's analysis of

mergers in this area. I think it is correct to say, and I have not heard anyone dispute it, that 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 on questions about regional market definition, on questions about whether banking should be seen as separate from the rest of the financial services, and so on.

I suppose this committee is interested in the consumer protection side as well. The commission is generally happy with the Wallis recommendations regarding the idea of trying to rationalise and sort out consumer protection in the financial services sector and with the idea of establishing a new agency, the Australian Corporations and Financial Services Commission, the ACFSC. There was one point of controversy, but it was not of concern to us—that is, some people wanted the Trade Practices Act not to apply to the financial services sector. But Wallis did recommend that and, as far as I know, the government is adopting that. The new agency can apply the act, and there will be some kind of operating agreement between us to make sure there is no overlap.

On the fair trading report, we just draw your attention to the fact that following the government's announcement of its approach to small business issues, that will require the ACCC to do some additional work. There will also be a strengthening of the unconscionable conduct law. We would be looking for opportunities to apply that law, no matter how unpopular it may be with some areas of business. The commission has made it quite clear to everyone that if there are cases of unconscionable conduct, then it will go to court fearlessly to apply that part of the law. But there are also a number of other things the government is thinking of doing which involve some work for our commission.

That is a very quick overview. I have not mentioned mergers either. I am happy to, but perhaps I should stop talking, Mr Chairman.

CHAIR—Thank you very much for that, Professor Fels. That is a very helpful overview that I am sure will lead to a number of questions. I might kick off with one of the earlier points you raised, on the operations of the ACC, and in relation to the NCC. In your report last year you made some mention about the progress on competition policy. This year you have chosen not to. I was just wondering what the relationship is between the ACCC and the NCC now that things have progressed quite a bit.

Prof. Fels—In practical terms, cooperation and so on, it is excellent. More generally, let me just demarcate the roles a bit. As I have said, we just enforce the Trade Practices Act—that is about it. We are the police. The NCC has two or three roles that are quite different from that. The first role is a general role in regard to this review of legislation that is anti-competitive.

Just describing them in my words—although they probably could do it a bit better then me—the general idea is that all of these reviews have to be looked at by the NCC to see if in its view they are done satisfactorily. Then the NCC is involved in recommending

to the government whether or not the payments—which I think are going to be many, many billions of dollars—are made. They are heavily involved in judging whether the competition reviews are being done properly, whereas we are not involved in that.

If a state were looking at, say, an agricultural marketing board and whether it should retain its monopoly, we would not be involved in that, but they would have a role in judging whether that review has been done properly. So that is a fairly profound difference in our role. I for one have always been rather happy that we have not had that role—I think it is best to separate by and large the police function from this other one. There are a couple more technical issues where we are involved in areas that involve elements of overlap and so on, but I think everyone has judged it is still best to have two people looking at it.

With the access regime, the first element in an access issue is whether or nor someone's facilities are declared to be 'essential facilities' covered by the provisions of part 3 of the act. If someone wants to use the facilities of someone else, for example, if you have some rolling stock on railways and want to use someone's railway line, then if there is a dispute the applicant goes to the National Competition Council, which makes a decision on whether they should have access. Then there are a number of appeal rights and so on, but we are not involved in that matter.

If they are declared and after that there is a dispute about the price of the access or the terms and conditions, then we would be the arbitrator. There is a right of appeal on our arbitration. Just to make it a little more complicated—although I believe that is a nice, clear, sharp distinction—there is also provision in the act that to circumvent that process the owner of the essential facilities can come to the commission and offer an undertaking to make its facilities available. If we think that that is in the public interest, then we will give an undertaking and you bypass the declaration act. So we have to do some coordination with the NCC over that.

Where there are states who have an access regime they have a role also in deciding whether or not that is an effective regime and acceptable when the states want to handle access themselves. So that is a start on this. Those are the main areas that the NCC is involved in. On the other hand, they do not do a law enforcement function.

CHAIR—But they do have some financial influence?

Prof. Fels—Yes, they certainly do. I am sure that is a factor that may help bring about some change sometimes in these legislation reviews, but it is not my business.

CHAIR—I just mention in passing that the committee will probably get the NCC to come and have a public hearing with us early next year as well. I just thought I would touch base on that one, because we did raise it before. Twelve months down the track it is interesting to see where the developments are going and where you might see there is any

gap.

Prof. Fels—Yes. In terms of a gap, in a sense you could say that the Australian competition policy has by world standards got very few gaps and it is very comprehensive. That is generally internationally regarded as something to be admired, although it does cause some frictions here and there when the competition policy extends into new areas.

I think you could say that, before the heads of government got together in 1991, set up the Hilmer report and agreed on the outcomes, there were a lot of gaps in the national competition policy. A whole lot of very anti-competitive arrangements were buried under the logs and no-one knew anything about them or was doing anything about them. Now they are all being brought out into the open.

CHAIR—On the question of mergers, there was an article in the *Financial Review* earlier this month by Alan Moran which argued that the ACCC has a tendency to transform markets to accord with its view of the best competitive outcome. Do you accept that sort of complaint?

Prof. Fels—No, I think he has got it quite wrong. It was not a very well-informed article. I will go through a few merger statistics. Last year we looked at 140 mergers that raised some potential competition issues. Obviously, each year there are thousands and thousands of mergers in Australia which do not come to us and that we do not look at because there is no sniff or whiff of a competition issue.

But there were about 140 that did raise the possibility of an issue or the parties came to us and said, 'We would like you to have a look at it,' or someone complained about it. I am just looking up my numbers to make sure I get it correct. In the year that you are looking at 140 were looked at, seven were opposed and of those seven two were the subject of undertakings. I know from your previous public comments, Mr Chairman, that you have particularly in mind this question of undertakings and the article by Alan Moran was about undertakings. I just want to make the point that the number of undertakings in mergers is quite slight. Most mergers go through. Seven last year did not go through. That is five per cent and, of them, two were resolved by undertakings.

Let me just say a word about undertakings where they occur. Prior to parliament enacting section 87B in 1993 there was very often an all or nothing choice about a merger. That is, someone came to us with a merger and the commission had to say yes or no. Sometimes people would say, 'Well, after the merger we will do X and Y and Z,' but this type of promise had no legal affect, no legal enforceability and it was not unknown for people to reinterpret their promises once the merger had been approved and say, 'We meant something else than what you think we meant' and so on.

So parliament said, 'Let's have section 87B.' There was a lot of business support for that, business being very keen on the use of undertakings. And that has enabled a

number of mergers to occur which would not otherwise have been possible, or which would have had to have gone off to court anyway and which we would have had a fair chance of winning, based on our track record.

So the undertakings have a number of safeguards. First of all, they have to be offered up by a firm. We cannot impose them. Secondly, if there is an enforcement issue, we have to go to court to get the court to actually enforce those undertakings. So that is a start on this answer on undertakings. Undertakings are used much more heavily in the non-merger area to resolve a lot of smaller matters or matters where you can avoid litigation.

CHAIR—I will just follow up with the specific case of Santos—or part of some of Santos's concerns—of which you are well aware. In a letter to the committee, Santos, in talking about the Parker & Parsley petroleum takeover states:

> The ACCC opposed this acquisition and threatened the US sellers with legal action making it difficult for Santos to consummate the transaction.

But, notwithstanding this opposition, Santos made the acquisition, and the ACCC ultimately took no action. The letter goes on to say:

> The ACCC opposition was initially based on a poor grasp of industry issues, incorrect information and hearsay, but changed its grounds when the initial grounds proved invalid. It refused to disclose the identity of the provider of the deliberately misleading information and as far as Santos is aware, took no action against that party.
>
> The fact that the ACCC ultimately advised that there 'was insufficient evidence to support court proceedings' raises the question as to what grounds it formed its views to oppose acquisition and threaten legal action if not 'evidence'.

They are fairly strong words.

Prof. Fels—The commission is not always popular with monopolies. Gas is a tremendously important industry and, let us be frank, it is less than fully competitive and the Australian consumer is not getting the best deal in the world from it. But we will talk about this Parker & Parsley matter. I will say a few things about it. It seems to me that, if you even listen to what was just read out to us by you, Mr Chairman, that the ACCC was simply investigating a matter. It investigated the matter and, at the end of the day, it decided not to take legal action. That is what happens with law enforcement agencies.

Why did we investigate? There were concerns and complaints expressed by customers. It is quite important to look at gas from the point of view of users—of customers. There is more to the gas industry than the interests of producers. There are a lot of business interests. We have submitted to you—either handed to you, or are giving to you—a detailed response to the Santos letter.

CHAIR—We have not got it yet.

Prof. Fels—I am sorry. We will submit it to you straight away. It is rather long but I will still make a few points about it straight away.

Resolved (on motion by Mr Causley):

That submission No. 4 be authorised for publication.

Prof. Fels—I will just go into this a little more against the general theme—the commission was doing its investigatory job and all that kind of thing. We heard an obvious concern from people, and there was quite a lot of media coverage of it, incidentally. There were a lot of articles—which did not come from us but obviously came from the user end—expressing concern about this offshore acquisition. The first concern was that Santos might well gain positive voting control of the South Australian Cooper Basin Unit, and that would have had significant effects. It would also have set up a situation where they could exclude possible future rivalry—competition—by a new vigorous producer who entered the market.

The merger was actually unusual in that it happened offshore. So we wrote to Santos. We did not threaten legal action but we did raise queries and we drew attention to their responsibilities under the Trade Practices Act. Basically, Santos told us to go away. They did not give us any information. There are reports that they were the frontrunner in the bidding, so we again asked about advance notice, because of the obvious competition issues. Santos did not give us any information. They went ahead with the merger in Dallas and simply told us that in the opinion of their legal advisers it was okay under section 50.

We then sought some information from them under section 155 of the act, where we can require them to give it to us. We were particularly looking at this voting control issue, which we think is a pretty important one in the gas industry. But, as these things developed, new issues came up. In this information vacuum, we talked around the place to customers and others, and it became clear that a further concern was that the acquisition by Santos of Parker & Parsley would foreclose possible future entry into the basin unit of a new player. So we—

CHAIR—Am I correct in saying that this would have only added one per cent to the South Australian Cooper Basin?

Prof. Fels—Yes, but it would have taken them over the top. I have forgotten my exact percentages, but there has been considerable disputation about what would, in effect, give them total control. Excuse me for not having the exact numbers in my head, but they required something like 66 per cent of the voting power amongst the joint players there to have total control of decisions. If you cannot get 66 per cent, you do not have control. Our concern was that that one per cent would take them over the top. It was not some minor

academic concern. If you like, we can write to you on that point, to make sure I have the numbers right.

CHAIR—Okay.

Prof. Fels—Market inquiries and expressions of concern by business and user interests raised this other issue, and so we asked them some further questions. We reached the conclusion that there was insufficient evidence to initiate court proceedings. Santos was advised of this, and all the outstanding notices were then revoked.

It is not true to say—as Santos does in its letter—that the ACCC opposed the acquisition. We did not oppose it. We were constantly pressing for information, which on the whole we did not get until we used section 155. It is Santos's right not to cooperate with a public agency seeking information about the impact of the acquisition on the public.

In the Santos letter it says that we threatened legal action. We did not. We did reserve the right to take legal action. There have been a lot of court cases where it has been rather important for the commission to draw attention to the possibility of court action. When Santos failed to respond to requests, we advised them that we were considering taking legal action against any acquisition or proposed acquisition—considering.

The letter says that in the opinion of Santos, we had a poor grasp of the issues. However, all the complainants would have a different view. We are responding, typically, to complaints from the marketplace. We do not sit there in the office and make complaints up. People come to us and complain, and sometimes their complaints are totally ill-founded. Sometimes we know that. Sometimes we have to ask the parties. Other times they are totally on the ball. Other times they are half truths. Our job is to investigate serious complaints. For our part, we thought we had a fairly good grasp of the issues.

About the taking action against someone who complains to the ACCC, they seem to be saying we took no action against a member of the public who came to us and expressed concerns about the impact on them. Does Santos think they should be punished? It is true we decided that there is insufficient evidence to support court proceedings after that round of inquiry. We told Santos that.

CHAIR—Given that you now have given us a copy, hence your response to that, could I leave it on notice that, if the committee has anything further, we could put it in writing?

Prof. Fels—Yes, I would be very happy to do that.

CHAIR—Thank you.

Mr CAUSLEY—In the area of energy and telecommunications in particular, I see that the real crux of competition is in the distribution network. Would you see that competition would be more effective if the distribution networks were separately owned or corporatised separately?

Prof. Fels—I think that is a very profound issue. Incidentally, the Santos Sagasco merger, which we opposed and which is complained about in that letter, was an attempt by a dominant gas producer upstream to get the downstream distribution monopoly linked. Just to address a couple of formalities in regard to your question, the issue is important. That is a short answer.

The commission itself typically is not often caught up in that sort of issue other than where there is a merger. If there is an existing entity that is vertically integrated, we have no divestiture powers under the Trade Practices Act to split them up. In the US they can, as you know, but we do not. There has been a lot of splitting up of the public utilities of late. That has been done by government. We only get a guernsey on that issue as a rule when there is a merger.

Mr CAUSLEY—You can have an opinion though.

Prof. Fels—Yes, we have opinions. I think I could outline a couple of points for and against that at a highly general level. When you have some vertical acquisition of the sort you have in mind, it can well have anti-competitive effects by making it impossible. Say a producer grabs distribution, if someone else wants to produce, they may have no other means of distribution and they will not have a market or they may be dependent on someone for the distribution of the product. They feel very uneasy and it deters investment; it may even deter entry.

Mr CAUSLEY—It also encourages duplication and cost.

Prof. Fels—Yes. There are a couple of arguments the other way, which means you cannot be dogmatic about vertical integration. There may well be efficiency gains from integration for a whole lot of reasons. They can run the business more smoothly; they may be more certain of the market demand for their product if they control distribution. If it is a fairly competitive industry, vertical integration does not matter. I am sure you had in mind more monopolistic settings. If there is vertical integration in an industry with 10 or 20 players, you are not worried. But where there are just one or two players it can be a serious problem.

Mr CAUSLEY—I have a couple of questions I want to ask. This ties in closely with this monopoly policy and how you address it. I notice in your report under the improvement in market conduct, with some satisfaction, on page xii you say you would:

. . . undertake market based research on competition and related issues and widely disseminate

results and recommendations:

Are you talking about assessing people as far as the flow-on to the consumers from competition policy and then publicising a list?

Prof. Fels—Yes, there is an element of that in it.

Mr CAUSLEY—I have raised with you before my concerns about whether the consumer is getting the benefit of competition policy.

Prof. Fels—Yes, indeed. Well, going back to something earlier, this of course comes up particularly in the new areas of energy, communications and transport, where it is not really enough to just mechanistically apply the provisions of the law without studying the environment in which competition is occurring, particularly as there are some more discretionary regulatory decisions there. So we are doing work more in energy, transport and telecommunications there. That is the setting.

I know of your particular concerns about flow-ons, especially to country areas and so on. I believe that with the recommendations of the committee on that the government has to come back with a response to your committee, and no doubt they will. But we keep an eye on things, including the petrol issue. As you know, because you have been extremely interested in it, with sugar we did send in some data to the several committees that have actually been dealing with it. I am afraid that the evidence is rather inconclusive on the flow-on effects—it is very hard to draw a clear conclusion from statistics about whether or not the benefits were pocketed by the confectionery people or passed on. That is, I am afraid, the honest answer.

We have also been keeping some eye on petrol in country areas and it seems the Woolworths thing is starting to have an effect in the areas they have gone into.

CHAIR—But very little effect outside of where they are.

Prof. Fels—No, I agree with that. I accept that. However, I am moderately optimistic that there will be significant fairly widespread effects over time. Let me express myself this way. A year ago, country petrol prices was a totally bleak subject and I could not look in the eye any single member of parliament from a country area on this 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, but they have not gone everywhere yet. There are maybe some other things that will ginger up country competition but, without wanting to exaggerate, this picture is starting to look somewhat more promising. But time will tell.

Mr CAUSLEY—Just on that, I thought that that was a good opportunity, because there are winners and losers in the competition policy and, if they can be identified, governments have to take into consideration who is losing and maybe in some instances apply CSOs.

Prof. Fels—With respect, the committee ought to keep thinking about pushing that point. No doubt we will see what the government response is. I do not want to sound negative; I know it is really an important concern and issue about measuring the outcomes of competition policy in the broad and the winners and the losers. We have just got to do it in these several areas where there is a high degree of regulatory intensity, but we have not got the resources to take it further than that, and it would also probably require a direction or something from the government, or something like that to really push someone harder in this area.

Mr CAUSLEY—Just to follow on before I go—sorry for hogging this, Mr Chairman—

CHAIR—No, go on.

Mr CAUSLEY—Akin to that, I suppose, is the concern I have had for some time about predatory pricing and price transferring. I have been pushing in the primary industries committee for an inquiry into some of the abattoir operations, and I noticed in the media that it was announced that the ACCC was interested in having a look at one of my friends, ConAgra or AMH. I am wondering whether you could give us some information there, because you can probably do it better than the committee can.

CHAIR—And confirm this article is accurate, or the thrust of it.

Mr Spier—I will talk to you just briefly on that article. It is a bit exaggerated, but the general gist is that we are looking at allegations against AMH in relation to predatory pricing, particularly in Queensland but also elsewhere. Perhaps Ms Smith can clear up more of the details.

Ms Smith—There is not a lot that I can actually add to that. There have been complaints and we are looking at those complaints. It is predatory pricing in a slightly unusual form. What has happened here is that the claim is that AMH are buying at excessively high prices and, therefore, outbidding other processes in the marketplace. Then they are contracting to sell on export markets, specifically to Korea and Japan, at relatively low prices.

There may be various explanations for that. It may be anti-competitive; it may be intended to adversely affect competitors in the marketplace. Certainly, the marketplace is fairly vulnerable at this stage. It has been through a fairly difficult period with low prices internationally and difficulty with the reputation of Australian producers following the

contamination scares and so on.

On the other hand, we have to remember that AMH is part of an international operator, ConAgra, and it may simply be that this is part of ConAgra's broader plans for how it operates in the global market. So, at the moment, what is happening is that we are simply investigating these allegations. Once we have more information, we will make an assessment of them.

Mr CAUSLEY—It can have some fairly serious affects on competition policy though if you are an international player and you are able to carry losses of $82 million a year and drive the competition out of the marketplace.

Ms Smith—Yes, I am certainly not saying that there is a justification. I am simply saying that we have to investigate to find out just what the facts are.

CHAIR—I might come back to that subject. I have another specific case in Portland.

Mr ALBANESE—Professor, today in the *Financial Review* there is a report re the ACCC decision on newsagents which suggests that a decision has been made, essentially, to allow the continued position to operate and suggests that there will be an appeal by the 7 Eleven organisation against that. Has the report, in fact, been done? If so, why has it not been released rather than leaked?

Prof. Fels—First of all, that leak did not come from me or the commission.

Mr ALBANESE—No, I was not suggesting that.

Prof. Fels—The *Financial Review* certainly did not contact me. I do not know if they contacted anyone else. They did not contact us. So the facts are, however, that we have not made a decision. There are always three words of truth in an article that is—

Mr ALBANESE—It is a pretty definitive article.

Prof. Fels—Yes. The three words of truth are that we did have a discussion about it a couple of weeks ago. We are looking at it quite closely, but we have not made up our mind at this stage. But we are aware that we have to make a decision on this matter very shortly.

Mr ALBANESE—Is there any political pressure being put on you given the fact that the Prime Minister made commitments to the newsagents before the last election?

Prof. Fels—There are two letters from the government about the matter. They are on the public record, and I am happy to supply them to you.

Mr HOCKEY—I can supply them to him as well.

Prof. Fels—But we have had two reasonably vigorous letters from the public—if you want to call that pressure. But what is the case is that, under the act, the way of dealing with these matters is that the government has the capacity to put in a submission. Over the years there have been a few submissions on these matters—especially newsagents, but they have been on a few other subjects. The idea is to follow a public process. The government has expressed its views very clearly on this matter.

Mr ALBANESE—You are not close to making a decision?

Prof. Fels—No, we are close to making one. I am aware that we have to make this decision shortly. There are a couple of obvious dilemmas because there is the tribunal decision, which sets out a view about the newsagency industry, and there is also a government submission which has a different way of approaching all these matters.

Mr ALBANESE—The second issue I want to raise is one that I will certainly declare a direct interest in, both in terms of my electorate and the fact that all of us on this side of the table should declare an interest, to do with collusion between the airlines. Both Qantas and Ansett appear to have come to an agreement, for example, that there will be no flights out of Canberra after 8 o'clock at night and to have a policy which is consistent—and I say this as the most airport affected member representing the electorate of Grayndler—with the joke that is called competition in the airline industry in Australia. Do you have any comments about that sort of collusion which is pretty consistent?

Prof. Fels—It is often alleged on that kind of thing with scheduling and so on.

Mr ALBANESE—It is pretty consistent.

Prof. Fels—The act says that there has to be a contract arrangement or understanding that has the purpose or effect of fixing prices and schedules or whatever. It has to be a contract arrangement understanding. The commission has gone blue in the face and gone to court with parallel arrangements where there is no actual evidence of the parties having talked to one another. We have presented truckloads of information to courts and shown parallel behaviour. That has been found not to be a breach of the Trade Practices Act.

You have to have some evidence of actual communication. We would not be thinking of taking that kind of thing to court in the absence of evidence of some kind of agreement. Even a nod and a wink would be enough for us—some communication. I think I should say that when we get complaints we look at them. We have had a few about even greater coincidences between the airlines. They have not disclosed anything.

It is the case that in many industries there can be parallelism without them actually

having to have a meeting about it. Indeed, the more concentrated the industry the less they need to fix anything because they understand one another's position so well. In the airline industry, they had years and years of regulation where they had the same prices, the same schedules and everything else. When there was deregulation they came off a position where they knew all about one another and they had been parallel all the time, so it was not too hard to keep a lot of parallel things going.

There have been various studies over the years about scheduling. I would not want to endorse them too much, but sometimes the parallel scheduling arises from the logic of the planes needing to be in certain places at certain times. I do not quite know why they do not take people after 8 o'clock at night. You would hope, in a more competitive market, that they would if there is a demand. If it is a competitive market, you would hope they would do so.

Mr ALBANESE—Yes. Commonsense would suggest that if, on day of change minus one, both airlines had flights after 8 o'clock, to suggest that the flights of both airlines after 8 o'clock became commercially unviable at the same point in time exactly, would be an absolute case. I think that is evidence in itself, as is—and, as a member of the Sydney airport community forum, the member for North Sydney would back me up on this—the fact that, on every single argument, they put forward exactly the same point.

Frankly, I wish we in the Labor Party had the same sort of discipline that we see from Qantas and Ansett in running absolutely parallel arguments. It is a very clear case which undermines, I think, the consumers' faith in this whole process as to whether we are fair dinkum about competition policy or whether competition policy is about being to the benefit of the larger players.

Prof. Fels—You are probably raising a question about the basic nature of the law, in a way. As I have said, we have gone down that path quite a lot, and the law is clear. Courts would not infer an agreement, even from the facts that you have stated. If we thought they would, nothing would delight us more than to go to court.

Mr ALBANESE—Would you like to see a change in the law so that those sorts of circumstances would clearly come under the provisions?

Prof. Fels—I would not like to see an automatic ban on parallel behaviour, because often it is capable of many explanations and interpretations. I do not really have a terrific solution for it, and not too many people around the world have come up with one. It is the same in Canada. This problem comes up in a lot of places.

Mr Spier—And it is the history of having two players or fewer players in industry, and they just keep acting like that.

Mr HOCKEY—I have a number of questions in relation to communications and

telecommunications, but I will leave Australis for a later moment. I will start with local telephone calls. I understand that you are on the record as opposing Telstra's local call service being opened up to competition. Is that right?

Prof. Fels—No, almost the opposite.

Mr HOCKEY—You supported the unbundling of the local loop, but I understood that you were opposed to the sale and opening of access to Telstra's local call service.

Prof. Fels—I do not think so. But I am happy to tell you my views on local telephony service.

Mr HOCKEY—Yes, okay, fire away.

Prof. Fels—You have raised the most important issue in competition policy today: having competition in the local telephone service. That is what all the fuss is about at the present time. 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.

Mr HOCKEY—From what you have just said, there is a veiled reference to this Australis merger. But I would like to put that aside for the moment.

Prof. Fels—Fair enough.

Mr HOCKEY—It has taken some months to get local number portability. That is only going to take place for Optus in May of next year, which is some time away still. As far as I am aware, there are no detailed discussions at the moment between Telstra and others to be able to give access to that local number portability. Can you comment on why it has taken so long, and what the view of the ACCC is in relation to that?

Prof. Fels—I will give you some comments, and I may need to come back to you on a couple of details to get it dead right. The Optus-Telstra matter is easier to deal with first off.

As you know, we have only had a regulatory role in relation to this type of issue since 1 July; it was previously with Austel. Frankly, I do not know what was happening, and Austel do not know—and I do not mean that in a critical sense. But, when we arrived on the scene on 1 July, it was obvious that local number portability was a really important issue in competition, as you have correctly identified.

I believe that the whole question is, in turn, tied up with the completion of a numbering plan for the whole of Australia, and that you have to have the numbering plan sorted out before you complete the portability. A lot of work was being done at Austel on

that subject. Nevertheless, for our part, arriving on 1 July, it was clear that it was a really important issue.

So, within about three months, we issued a directive to the Australian Communications Authority about number portability. We had to do some study of it. Then we gave them a directive on how they were to proceed in dealing with that issue. We also sent a copy of that to Minister Alston. He picked it up and made it a licence condition, which made that directive bite a little more.

The situation now is that the ACA, which is the technical body that does all the technical side of this fairly complicated matter, is working away on getting number portability. My mind happens to have been on the Optus side of it, and I am just having a little bit of trouble telling you the application of this to others. I can certainly say that, so far as we are involved, we think it is a really important issue. We are doing everything we can to move it along.

Mr HOCKEY—What are you doing?

Prof. Fels—Everything within our powers, because we do not make the local number portability decisions, or anything; it is the Australian Communications Authority, the former Spectrum Management Agency and Austel. But we have a power to give them some directives on the competition parameters regarding this. So that is what we have done, and we have sent them off this directive. But, as I have said, the minister's directive is even more important because it is a licence condition; it is more important that they comply with it.

Now, I have not quite answered an important aspect, maybe the key aspect, of your question. We do not have a telecommunications person with us. Could I possibly respond to the bit about the application of that directive beyond Optus?

Mr HOCKEY—Can I just continue with local telephones for the moment?

Prof. Fels—Yes.

Mr HOCKEY—At the moment, you have Telstra agreeing to a 3.3c point of interconnect charge at each end. So it is 6.6c per minute for local telephones. After three minutes, basically, if there is to be competition for local telephony outside of Optus—which obviously has its own cables—no-one will be able to compete with Telstra's flat fee of 25c. I think Telstra have talked about making available to other carriers a point of interconnect at a flat rate of 21c or 22c. This means that, basically, people really are not able to compete with Telstra for the local telephone call market. Do you have a response to that?

Prof. Fels—Yes, we are looking at that issue and all the interconnect prices at the

moment. We inherited some access prices at the beginning; we also inherited the situation where there are time based local call charges. We gave an interim decision, which took effect immediately we took over, on access pricing. That brought the price down. I will supply that price to you exactly, but from memory it is a bit lower than 3.3. It is in the high 2s. The important issue before us is that Telstra has lodged a draft undertaking which we are looking at very intensively as to what the access prices should be. That will be evaluated over time. In the meantime we have set a price. We are getting every view you could think of on whether it is too high or too low.

Mr HOCKEY—What price was that?

Prof. Fels—The interconnect price.

Mr HOCKEY—Yes, but what price did you say it was?

Prof. Fels—Our decision on 1 July was an interim one. People want this sorted out on a more substantive basis. So they have put up an undertaking about access prices to the commission which we have published and which will be the subject of pretty intense consideration. With AAPT there is a dispute over the price at the moment, and we will be arbitrating that price if they do not resolve it in the course of the arbitration. I regard the access pricing as extremely important for competition.

Mr HOCKEY—You must accept, though, that we will not have real competition until the local telephone market is opened up. The fact that consumers and retailers are saying quite bluntly that they are not interested in having separate bills for international and STD phone calls to their local phone calls is a reflection on the fact that there is not as much competition in telephony as there could be. This is a crucial issue.

Prof. Fels—There has been competition in other divisions, but I agree with you. This is an issue of profound importance that you are raising: the need for competition in local telephony. This commission is highly committed to that, no matter how much flak there may be about our decisions on that. We are highly committed to this essential competition issue.

Mr HOCKEY—When will it be resolved, Professor?

Prof. Fels—As I said, there are some prices in place until we resolve the fairly complicated questions about pricing criteria and so on. We expect that process will continue into the first few months of next year at least. It is a complex question as to what the price should be, what the principles should be—we have published some principles—and how the principles should be applied. That will not be for a while. In the meantime we have some access prices in place.

Mr HOCKEY—At the moment there is a very strong view that the ACCC is

going soft on enforcing competition in this area. There are lots of words coming out but there is not a lot of action.

Prof. Fels—I have not noticed that in the press lately.

Mr HOCKEY—We have not got to Australis yet, but it is certainly the case in relation to trying to get access to the local telephone market.

Prof. Fels—There is a lot of misunderstanding by the service providers, and we have actually picked this up. I think some of this concern has died down a little lately. There was a lot of misunderstanding of what the new law was about. A lot of the service providers and others from whom you have obviously heard about this seem to think that the old regime would continue. It is quite a big change in the regime that parliament introduced on 1 July. They cannot just come in and get the sorts of things that they used to under the old regime. It is much more competition oriented and much less interventionist. There have been a lot of misconceptions about what can be done. Some of these people think that the commission can simply walk in with a magic wand and set an access price. There are procedures to follow. This is a really important question, and it has to be gone into properly. There are appeal rights and everything but we—

Mr HOCKEY—But you said a little earlier that it is not enough to mechanistically apply the law in communications. Now you are using it as a defence.

Prof. Fels—No; what I was trying to say there, incidentally, was that in this area where there is a high regulation element, we have to study the economic environment in which this is occurring to make the right decisions. Because Mr Causley is interested in some country price matters, and sugar and petrol, I was trying to say that we cannot do comprehensive economic studies of all those industries all the time so we tend to just apply the law. In this area we are trying to get a general picture of the industry to inform our decisions, but we cannot go outside the law. We are sticking absolutely to the law on this. Within that we are fairly active. But a lot of people do not understand it.

Take this question of disputes between service providers and Telstra on pricing and so on. We can only in the end, to a large extent, be involved where there is a notified dispute. So I read all this set of complaints by the service providers and I said to them, 'Well why haven't you notified us of a dispute?' None of them has, except AAPT and now we are into arbitration. The moment AAPT arrived with a dispute, straight to arbitration; and any other disputes we will deal with quickly. But the legislation also is trying to get the industry to sort some of these problems out itself. You will find in all the speeches that that is given quite a lot of emphasis. We have been trying to explain this more fully. We have an education job to do to explain to people: if you want results under the act, read the act and understand the procedures and so on.

Mr HOCKEY—I want to ask you one more question on telephony. It relates to

mobile phones. It is a simple question: why are mobile phone calls so expensive? To go from a fixed phone to a mobile phone, you say point of interconnect on one side, it is 30c to 35c a minute going to the three service providers. There are three service providers. You said a little earlier that two is enough for competition—

Prof. Fels—Hang on.

Mr HOCKEY—Well you would like to have three service providers. But why is it still 30c to 35c a minute?

Prof. Fels—Yes, indeed!

CHAIR—He is asking the question.

Prof. Fels—We do not regulate that price. We are fairly new arrivals on this scene. And we do not determine the number of players in the mobile phone industry. That is the result of legislation and the effects of legislation. But if you are saying that it would be healthier if there were more players in the mobile phone industry, I would have to agree.

Mr HOCKEY—No, that is not what I am saying. I am saying there are three players now and that 30c to 35c a minute is an outrageously high interconnect price. For example, in Finland, it is on parity with the cost of a fixed call. So why are we still allowing the three carriers to get away with 30c to 35c a minute?

Prof. Fels—There is no regulation on their price, so you have to go back to the state of competition between them in this area—

Mr HOCKEY—That is right.

Prof. Fels—and I think basically to the fact that there is a limited number of players. You do hear explanations from them about the high prices. I do not necessarily accept them. I do not want to—

Mr HOCKEY—You do not accept the price is high?

Prof. Fels—I said you hear explanations from them about why their prices are what they are. I do not necessarily accept them. I do not want to be their apologist here. They say new technology is expensive. Also they say they have had losses in other areas and so on.

Mr HOCKEY—You do not think there would be any grounds for an investigation on the basis of unconscionable conduct?

Prof. Fels—No. It is just obvious, isn't it, to everyone that you could envisage a

more competitive mobile phone sector? One of the pretty important variables there is the number of players in it—three only. What is a very important policy element is the spectrum auctions that are around. If they lead to more players being involved in mobile telephony, prices will be likely to come down—I would guess; that would be my feeling. There is no automatic link between the number of players and price. But my general impression of the industry is that the more new entrants the more likely consumers and business will get greater price relief in this area.

Mr HOCKEY—I am not satisfied with that answer; it is a general explanation of competition policy. There are three players that are charging 30c to 35c a minute. What you are saying is that there is not enough competition, and what I am saying is that there are already three players out there, so why isn't the ACCC doing anything to encourage them to lower their prices, to force them to lower their prices?

Prof. Fels—If you want to pass a law giving us that power, we will use it. We stick to the powers we have. We have some powers which we exercise, and we do not go outside them. We, our commission, have been most conscientious in sticking to the law. We do not go outside the law.

Mr HOCKEY—You said earlier that it is not enough to mechanistically apply the law on communications.

Prof. Fels—No, I did not say that. Let me make clear what I was driving at there. In reply to Mr Causley's question, who was asking about a comment in a report about our doing general economic studies of some parts of business, I said that we do not have the resources to do that everywhere but we are doing it in some of these areas to inform our decision making. I said that in a number of other areas we cannot do that and we have a more straightforward mechanistic application of the law. That is what I was trying to say.

In this other area there are two reasons we do the studies. We have to stick to the law, and I think I mentioned that there is a little bit more discretion in a couple of those regulatory areas—for example, setting prices and so on—whereas in the other areas it is more straightforward. If there is a breach of the law, our job, as police, is to go off to court and enforce it. So it is slightly more discretionary there. Because they are important and new, we are doing studies of the environment. But, in the end, we cannot go outside the law—and you are not suggesting it, I hope.

The other thing is that, on price control, we seldom have a role. There is the Prices Surveillance Act, but everyone is trying to reduce the role of price control under it. We would not be recommending to the government, for example, that there be a power to control the price of mobile phones, where they have to come to get a tick from us or anything like that. That is why I go back to the analysis of competition as my simple explanation of why the prices—

Mr HOCKEY—So you are satisfied there is no collusion or anything of that sort?

Prof. Fels—I do not think Telstra, Optus and Vodafone are getting together on mobile phone prices. I have no reason to suspect that at all. But the structure of the industry may have something to do with the high levels of prices.

I come back to the question you asked me earlier. I want to make sure that I was right. The short answer to your point is that by 1 May Telstra will bring in local number portability for all—it is not just Optus. Under the new system, from 1 July, the Australian Communications Authority cannot make a number portability rules plan unless directed to by us, the ACCC. That has been done. The Australian Communications Authority now has general administration of the plan, and they are required to consult people by 1 January, and by 1 May Telstra will bring in a local number portability for all.

Mr HOCKEY—Have they negotiated a price with Optus on the cost of that portability, or is it just flat?

Prof. Fels—This is local number portability. The pricing issues have not been resolved at this stage. That will be part of the total solution to the matter. As I also mentioned, Minister Alston has imposed a direction under the Telstra licence about this action on number portability.

CHAIR—We might come back to this because, obviously, this local call issue has quite a lot of involvement with this and it is fairly central to our Australis matter too, but Mr Pyne is very keen to ask you a question.

Mr PYNE—You said before, Professor Fels, that the ACCC was not always popular with monopolies. I would like to ask a few questions about a subject which is close to my heart and also to the heart of consumers, which we have talked about before: the monopolistic behaviour in the music industry with respect to the prices of compact discs.

Mr HOCKEY—Six companies providing a monopoly!

Mr PYNE—Sadly, they do. You can be an apologist for the music industry, Joe. Others are apologists for the consumer.

Mr HOCKEY—What about the motor vehicle industry? Let us get on to that.

Mr PYNE—I am an apologist for the consumer. My questions start with the current debate about the price reduction that would occur with the lifting of the ban on parallel importation. The music industry cartel has been claiming that the reduction would be around a dollar, if that, yet there are many other estimations that are higher than a dollar. In terms of current prices, do you have any better and further particulars on the

price reduction that could occur under a lifting of the ban on parallel importation?

Prof. Fels—Yes. The price would fall by several dollars at least, if not more. Why do I say that? Because the gap between US prices and Australian prices for new CDs over the years has been $5, $6, $7 and $8—that kind of range with a consistent gap. From one day to the next there is slight variation depending on exchange rate movements and so on.

The studies of this matter started with the Prices Surveillance Authority inquiry that I chaired in 1990 when the record industry handed in vast amounts of data on CD pricing; they also had a very advanced econometric manipulation of the results. Those of us who just looked at the raw data found that throughout the 1980s the US was fairly low, Europe was a good deal higher and then Australia and New Zealand were top of the pops—and that is correcting for taxes and exchange rate differences and allowing for the fact that on any one day there might be the reversal of that order.

That covered the whole of CDs. It was not just three or four; it was the whole set of products because at that stage ARIA was handing over data freely for public inquiry and so on. Since then, it is pretty clear to most people that there is a difference of about $5, $6 and $8 on new CDs.

Mr HOCKEY—Who is that clear to, Professor Fels? Where do you get that figure from?

Prof. Fels—I was in New York recently and went into Tower Records—$12.99 for a new CD and add on tax; a new CD, top 10/top 20. Most of them were $12.99. There are some places where you can get them cheaper. Add on the tax, convert the exchange rate: $19—in Australia $25 to $29, and everyone knows that. Where? I will tell you where to go. Just walk down a street in New York, as I did a few weeks ago.

Mr HOCKEY—So the New York market—

Prof. Fels—And walk down a street in Washington and Los Angeles.

CHAIR—Sorry, there are too many questions at once. This is Mr Pyne's turn.

Mr ALBANESE—This is democracy! This is exuberant democracy!

CHAIR—Mr Pyne still has a question.

Mr PYNE—Professor Fels, did you finish answering the first one before you were interrupted?

Prof. Fels—I was trying to make a point that the US price has been consistently way below the Australian price and it is ridiculous for ARIA to be claiming that it is not.

Even ARIA is grudgingly admitting there are differences. I admit that they have very low numbers. But this is after tax correction.

The second point, in reply to the question from Mr Pyne, who has been a very strong supporter of getting the price of CDs down for young people, old people, for everyone—

Mr ALBANESE—Unemployed musicians.

Prof. Fels—We will talk about them in a minute. In a world of free trade and in the absence of import restrictions, when there is a gap of that magnitude between prices in the US and prices in Australia, given the low transport cost of CDs—the cost of bringing a crate of CDs here is very low—it is quite clear that the price difference is likely to disappear or at least to be sharply reduced. Also, it is clear that it will be passed on at retail. I am happy to address that issue. That is my opening statement. The big price gap would disappear if you removed restrictions.

CHAIR—With a lot of help from our friends.

Mr PYNE—I would like to ask you a few questions touched on by Mr Albanese and Mr Hockey. A lot of retailers seem to think that lifting the ban on parallel importations will somehow hurt them. They do not seem to understand that, under the current system, you can buy CDs over the Internet for between $10 and $11.50. In fact, the most recent Bob Dylan CD is selling for $11.50 on the Internet.

Prof. Fels—Absolutely correct—everyone knows that.

Mr ALBANESE—Who wants it?

Mr HOCKEY—He does.

Mr PYNE—Retailers seem to assume that this is going to hurt them rather than help them. What is your opinion with respect to the influence of the Internet and to the dangers to retailers from the Internet and cheap CD prices?

Prof. Fels—The tragedy is that if we do not change the law a lot of jobs are going to be lost in Australia because people will buy CDs on the Internet instead of going down to their local shop and buying them. The present policy is exporting jobs.

Mr PYNE—That is absolutely right. Since 1991, when the Prices Surveillance Authority handed down its report into the price of compact discs and parallel importation, there has been an estimate—made about two or three years ago—that the profits the music industry earned over that period was about a billion dollars. Have you got a more recent estimate of they profits they have reaped?

Prof. Fels—I do not have one, but they were earning amazing profits when we looked at them. An independent consultant professor, Bob Walker, went through the numbers, and he has produced a public report—

Mr HOCKEY—Is that Professor Bob Walker from New South Wales?

Prof. Fels—Yes. And it is a fairly straightforward issue. The commission went over this matter. It also agreed with the analysis. It is quite clear that they earn extremely high profits and continue to do so, and the money goes back. It is not as if they look after artists or performers well in Australia. They treat them badly.

Mr PYNE—Why do you think that the retailers have been so convinced—

Mr ALBANESE—Outrageous.

Prof. Fels—A lot of people agree with that—most performers.

Mr ALBANESE—There are no performers supporting the change.

Prof. Fels—There are plenty.

Mr PYNE—Why do you think it is that the retailers believe that this will be more damaging to them?

Prof. Fels—I do not know, because it is obvious, as your question indicates, that a fall in prices will lead to a boom in sales.

Mr ALBANESE—Why?

Prof. Fels—The number of CDs sold in Australia is—

Mr PYNE—Because more people will buy CDs.

Prof. Fels—about 40 per cent less than the number sold in the US. More young people would buy CDs if the CDs were cheaper. Therefore, there would be more retail sales. To the extent that there are imports coming in, they need retail outlets. Also, as you have suggested, a lot of the Internet sales would be diverted to local retail shops, and that would be good for jobs.

Mr PYNE—Many years ago, Norway lifted their ban on parallel importation and then put it back on again a few years later. But, recently, both New Zealand and Norway have talked again about lifting the ban on parallel imports because of the Internet and other issues, and they are interested to see the experience that will occur in Australia. Do you see that other countries would move in that direction?

Prof. Fels—That is what the pressure is about. The multinational record companies are stirring up things here because of the international precedent. It is not really an issue about the local industry; that is just the excuse. Obviously, if they say to the public of Australia, 'We're going to have to have more competitive prices, not only in Australia but also in New Zealand, Norway and elsewhere,' there will not be any sympathy for them. So they have concocted this rather absurd campaign about the fact that this is all about protecting local performers—who they have treated very badly over the years.

Mr HOCKEY—All the performers are coming out in—

Prof. Fels—Not all of them.

Mr ALBANESE—Name one who wants to change.

CHAIR—One at a time, please.

Prof. Fels—Most performers do not make money from CDs; they make it from live performances.

Mr ALBANESE—Yes, that is right.

Mr PYNE—I have two very brief final questions. Following on from Mr Albanese's question, do you think there is any coincidence between the performers who have been making ads for ARIA and the performers who have contracts with corporations that have anything to do with ARIA?

Prof. Fels—I would imagine that there is a 100 per cent overlap. It would be a complete set.

Mr HOCKEY—That would be extraordinary, wouldn't it?

Prof. Fels—In mathematical terms, a complete overlapping set. They should declare these things, you know. I believe that the fans of these performers are entitled to know that they have contractual relationships.

Mr HOCKEY—Absolutely.

Mr ALBANESE—They know that.

Mr HOCKEY—Of course, they do not know that.

Prof. Fels—They do not declare it.

Mr ALBANESE—So what? Where is that relevant?

Prof. Fels—Earlier at this meeting, you said that you believed in declaring interests, and I took you to be really serious about that.

Mr ALBANESE—And I was, but it is stating the obvious.

Prof. Fels—But the performers are not declaring their interests.

Mr ALBANESE—But it is outrageous to suggest that there is something sneaky about performers having an interest. Of course, anyone who produces a CD does, and everyone knows that.

Prof. Fels—No, they do not. The young people do not know that.

Mr ALBANESE—They do not know that they produce records?

Prof. Fels—They do not know about the—

CHAIR—By the end of this exchange, it will be well and truly known right around Australia.

Prof. Fels—I hope so.

Mr PYNE—No-one suggested that there was anything sneaky about it. It was simply pointed out that there was a 100 per cent overlap between those people involved in the ARIA ads and the contracts they might have with the record companies.

Mr MUTCH—Those who want to protect the present situation are saying that today's players helped to stop the mass import of illegitimate CDs and the practice of what I believe they call 'schlocking'.

Mr PYNE—Can you explain that?

Mr MUTCH—That is what I was told by a musician. Apparently, it is a practice where pirates can get hold of labels and produce them—

CHAIR—What is the difference between that and bootlegging?

Mr MUTCH—and then dump them in supermarkets. It is a practice where you can buy a very cheap $2 CD. They are not protecting the copyright.

Mr PYNE—I thought schlock was seventies disco.

Mr MUTCH—I am not sure, but it was a term something like that. But they are not protecting the legitimate copyright royalties and interests, and that is a concern that

needs to be addressed.

Prof. Fels—I do not think that Coles Myer would be in on that. We have got a fairly law-abiding retail sector. In general, what the industry is putting up on the piracy issue is just a scare story and a red herring. The proposal is to admit non-pirate CDs—issued validly in accordance with the copyright laws of the countries where they were first issued—into this country. It is not to let in pirates.

There is no reason to think that this change would cause a surge in piracy. Piracy is a fact of life, both in Australia and overseas, but this proposal is essentially irrelevant to it. If you wanted to argue that there could be a marginal increase in piracy because of the greater exposure of our retail outlets to different sources of imports and so on, then the answer to that is to step up the penalties and make it easier to prove piracy in court. That is exactly what the government is proposing to do, and what we recommended. That is the way: you deal with piracy directly rather than make everyone pay through the nose for CDs everywhere.

Mr PYNE—The United States runs a line throughout the world that they would like to establish a hegemony over the copyright law with respect to CDs, and they quote a number of agreements, such as the Berne agreement, as the basis of this argument. But there seems to be little evidence that, in fact, the United States does have any rights in this respect. Would you like to comment on that?

Prof. Fels—That is absolutely correct. The US, as you say, has been trying for years to get an international agreement on this, but they have failed. There is an outstanding book by an Australian authority, Professor Ricketson, on the whole history of copyright conventions, which documents at great length the unsuccessful efforts of the US to get an international agreement.

Moving on to recent history, at the recent Uruguay Round, the US tried quite hard for an agreement, and it was thrown out. The fact is that there is an international agreement on this: that there will be no international agreement on this. After all, it would be rather absurd for the WTO to have an agreement that there be import monopolies everywhere. That would not exactly be a free trade agreement. So there is no agreement, and there is no Berne or copyright agreement to this effect.

Mrs GALLUS—Professor Fels, I want to touch on three things. First of all, Mr Gardini raised a matter with you, and it was taken up by the Law Council of Australia. I might leave that one until last. Professor, I would just like to—

Prof. Fels—We have only just got it, and we know what he is on about.

Mrs GALLUS—But I would still like to ask you questions about it.

Prof. Fels—Yes.

Mrs GALLUS—I want to get your opinion of the way that Woolworths deal with wholesale sales tax in what the independent grocers call an anti-competitive way. I suspect you are aware of the situation where Woolworths act as a wholesaler so that, when they sell on to their own stores, they sell at a lower price, therefore incurring a lower wholesale sales tax that is made up by their own retail stores by adding the price in at that end. Overall, Woolworths escape a considerable percentage—even a small percentage of wholesale sales tax over their large volume is of considerable benefit to them—of wholesale sales tax, and the independent grocers find this anti-competitive. I am interested in whether you find this anti-competitive or a legitimate activity of vertical integration.

Prof. Fels—Yes. It is a significant issue. Obviously, since it is tax, in the end, we are not involved.

CHAIR—But it is making it very difficult for the independents.

Ms Smith—I have to say that it is a long time since I have looked at this. I was on top of the detail of all of this back in 1992. It is not distinctive to Woolworths, of course. The same would be true for Coles, Franklins or any of the other large—

Mrs GALLUS—Any large, vertically integrated organisation.

Ms Smith—Yes. You are right; there is a problem. But it is not a problem that has suddenly come to light. It is a problem that was certainly talked about back at the time of the Davids' attempt to acquire QIW in 1992. It is a tax issue. Yes, there are competition implications from it but, essentially, it is something that we cannot solve. It is something that the tax department can solve.

Mrs GALLUS—I would like to take you up on whether it is a tax issue. I suspect that it is incidental that it is a tax issue. They are deliberately manipulating their buying and selling price within their own vertical integration to pay lower tax. Yes, in one sense, it is a tax issue. But the tax is being paid, so I think it also becomes a competitive issue of whether that is a legitimate form of competition. Professor Fels, I would like to know whether or not you feel it is a legitimate form of competition.

Prof. Fels—Firstly, again we stick to applying the law. It is not an area where anything is happening—including the incidentals that you have mentioned—that is a breach of the law. Secondly, if you wanted to say that this was some general breach of the principles of national competition policy, we would not be involved in that. It is possible that the National Competition Council, preferably on notice, had the issue raised with them. Thirdly, when we look at mergers in that area, this point is made to us. On the other hand, with mergers, you have an all or nothing choice; it is a real yes or no. It has not been a decisive factor either in our hearings or in the court cases on retail and wholesale

mergers.

Analysing it in our terms, if there is an agreement between competitors to fix prices or reduce competition, that would be caught by the act. Thinking about it, it does not fall under that head. Similarly, under section 46—someone with substantial market power taking advantage of, have an effect—it does not fall under that heading either.

Mrs GALLUS—You are saying that you do not see it as anything that your organisation can deal with—

Prof. Fels—No.

Mrs GALLUS—despite the effect of what we are seeing here being uncompetitive conduct as the result of the size of a large firm compared with smaller firms.

Prof. Fels—If they squeeze small players in an anti-competitive fashion, that is a breach of the law, yes. If someone is big, efficient and low cost and drives out small players, that is not a breach of the Trade Practices Act.

Mrs GALLUS—But, when they are able to manipulate the tax that they have to pay, surely that becomes a way that those big companies are being totally uncompetitive with small companies.

Mr Spier—A small company could do exactly the same, if they are both a wholesaler and they supply their own. It does not have to be big.

Mrs GALLUS—Yes, you are right; you could set up as a wholesaler. But you would not be able to set up as a wholesaler because, to make yourself an efficient wholesaler, you have to buy big. A wholesaler does not get the price cuts—

Mr Spier—Right, relative to Woolworths, you mean?

Mrs GALLUS—if it is a small wholesaler, because it cannot buy big. So you have to be a big player to be in that sort of business.

Mr Spier—There are small wholesalers. Obviously, there is Woolworths which is huge, and there are others. I think there is sometimes a misconception about the Trade Practices Act; it does not prohibit all anti-competitive conduct. There are specific types of conduct that it prohibits. Perhaps it is question of the law needing to be looked at. That type of conduct is not picked up by these specific prohibitions.

Mrs GALLUS—You do not see it as being a problem. So you are happy that it is dealt with elsewhere, other than by your organisation.

Prof. Fels—It is true; you are reflecting a point that has been complained about fairly bitterly to us a lot by retailers. I would not want to discount the importance of the issue you are raising but, on the whole, they go off to government and raise it. On the whole, it is outside our province. Although you are right in saying that there are some practices arising from it, the problem seems to be the nature of the tax itself.

Mrs GALLUS—In December last year, I raised with you the preventing of mergers and the effect that that had on the competitiveness of Australian organisations internationally.

Prof. Fels—Yes.

Mrs GALLUS—At that time I think you said that you had had 46 applications before you, and 20 of those you had approved. Can you give us some indication of what has happened in the interim years?

Prof. Fels—Yes. I will go through the total statistics quickly for the year that you are looking at in that report. We had 140 mergers notified.

CHAIR—This is Page 29.

Prof. Fels—Yes. We got 140 mergers. There are a few figures around there, and we are happy to explain discrepancies. I do not know if you are interested in the discrepancies or not. But the short answer is that, last year, we got 140 mergers notified; we opposed seven and two of them got resolved by undertakings. So that is a five per cent rate of opposition. There were no authorisation applications last year.

I did say at that previous meeting that one, but only one, of the ways of addressing the concern you had was that people seek authorisation. We have figures about what you said—that, I think, 26 out of 46 applications have been successful over the years: 26 successful, 18 denied, and two withdrawn. But there has not been much action on authorisations this year. We intend to send to the committee fairly soon some more up-to-date and slightly deeper figures on merger numbers.

CHAIR—While we are on that point, in your report on page 28 you did say that you would explain to the committee how you would be making the section 87B undertakings more transparent. It says here in the report that you will do it, so we will give you the opportunity now.

Prof. Fels—I have some points on this, and I might ask Mr Spier in a minute to spell out a couple of these matters. The commission's general attitude is that undertakings should be as transparent as possible because we are a public body, answerable to you and many others. We try hard to make the undertakings public. Indeed, we have to make them public after the event, and they are all on the public register.

The only exception to that statement is that sometimes there are some details that, for commercial reasons, cannot be made public, especially at the time. That does not happen much, but occasionally it does. For example if, as the price of the merger, someone is going to sell off a couple of assets, the reserve price might not be stated, or something like that.

The more tricky issue is about the negotiation of undertakings before the transaction is dealt with by the commission. There we have a real dilemma in that most business people do not want the undertakings they offer to be public. We prefer them to be public, and we often insist that there be full consultation about them. But it is tricky.

We have had some mergers that would have fallen over. For example, Wesfarmers wanted to move on ICI. They came to us and said, 'All right, it's obvious that there are a couple of problems in this area, so we are promising you that we'll just do something'—and it looked perfectly okay from our point of view. So, they gave us an undertaking in writing before they made the bid. They said, 'However, this must not become public,' because otherwise the element that they needed of immediate action and perhaps surprise in the merger would be lost. So we agreed to that. As a result, they were able to move, although they did not succeed in the end.

But the point is that a lot of businesses want the undertakings to be made; they want them to be made confidentially before the event. For our part, we prefer to consult—and, as much as possible, we do. We think that with the undertakings there is probably a trend to greater transparency. We now tell people it has got to be in undertakings that they are to be public. We refer to them in media releases and in our annual reports. We normally ask them to waive any confidentiality conditions. There is a provision for a review. Also, since the report of this committee, we have been trying to step up the level of transparency and we engage in different levels of consultation depending on the situation. In some cases the context of the undertaking offered or the confidentiality constraints imposed will require different levels of transparency.

There is the case where the merger is not confidential and the undertaking is not confidential. That is easy; we do that in full. That was with the CSR-Mackay matter. The application was public, the undertakings were public and there was consultation. Sometimes the merger is not confidential but the undertaking is offered confidentially and the firms insist on it. Then we may have to go along with that. Sometimes everything is confidential. At other times it has this status that it generally becomes known, like with the petrol—it was generally known what was going on there.

What we have thought, following your own review, is that we will as a general rule carry out the most transparent process we can in each case, recognising that there will be some circumstances where confidentiality constraints will preclude consulting market participants, for example, Wesfarmers, ICI, or where identifying concerns that might be resolved through an undertaking can only be carried out through general market inquiries,

such as Westpac and the Bank of Melbourne. 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. They were the main points I wanted to make on this subject.

CHAIR—What about the case where you accept an undertaking after there has been a breach of the act?

Mr Spier—You would never do that with a merger.

CHAIR—No, but a section 87B undertaking.

Mr Spier—What the chairman has been talking about is basically section 87B with mergers. We also enter into many, many 87Bs in terms of misleading advertising, price fixing—you name it. This is where breaches have happened or where there have been alleged breaches. There we enter into many undertakings—probably a couple a week. They are all on the public register. They are where we say there has been a breach of the law. There it is the alternative to, say, litigation perhaps. It is a fairly quick way of resolving issues.

CHAIR—But then if a third party has been affected, where is the—

Mr Spier—They are seldom affected. It is normally where someone has been in breach of the law.

CHAIR—But if there was a case?

Mr Spier—In those cases we would probably consult because we are talking about a breach of the law and something that has happened. The sensitivity about mergers of course is that mergers have not happened. There is often a need from the parties' point of view to be confidential. Our general process would be extremely public, but the issue that has been raised with you, and the issue where there has been some concern, is on merger undertakings, not in the non-merger area. In the non-merger area it is more like someone has been engaged in misleading advertising: they are undertaking not to do it again; they are undertaking to compensate people; and third parties are seldom affected.

CHAIR—There are cases where some feel they have been aggrieved.

Mr Spier—We are not aware of any examples of the non-merger ones. They are all on the public register. They go on the public register as soon as they are done. Often there will be consultation with some other parties, but it is not all that often because it is not necessary. You are not doing an industry-wide effect; it is normally a one-to-one breach of the law.

CHAIR—But there can be an occasion where the third party has been affected because of that breach of the law. You get the undertaking.

Mr Spier—Yes, but that does not stop them taking their own action. We make sure that we do not compromise the third party rights.

CHAIR—Wouldn't it almost be inevitable?

Mr Spier—No, they still have their full rights of action because the undertaking does not exempt them from the law; it only gets us off their back. It does not exempt them from the law in any way. One of the arguments that we often have about undertakings is that parties are concerned about giving undertakings because they think they are then exposed to a third party action, to which we say, 'Bad luck,' because there is an admission almost on the record that they have breached the law. Third parties can perhaps then use that in other proceedings. It is very rare that there is a broad marketplace effect of a detrimental kind in undertakings that happen post a breach or an alleged breach.

CHAIR—If it did happen, where would they be?

Mr Spier—We would consult, but it would be very rare.

Mrs GALLUS—The concern that I expressed last time, and which we discussed, was that if we prevent some of these mergers we stop Australian companies getting big enough to compete overseas. Surely, this must continue to be a concern because what we see regularly happening is these big international companies eating up Australia's companies, but we do not see many Australian companies going overseas to eat up international companies because we do not have many that can get that big. We are in fact preventing some of those happening by these anti-competitive mergers. I realise the bind that you are in, but do you not consider this has some long-term problems, in that we are going to be less competitive internationally if we keep along those lines?

Prof. Fels—We think it is an issue and one of the things we have done since we last met you was issue some guidelines regarding our approach to this topic which are called *Exports and the Trade Practices Act* and we have a few—

Mr Spier—We will send a whole stack to the committee.

Prof. Fels—I might say that the origins of this were that there is the Prime Minister's supermarkets to Asia initiative. He set up a number of business committees and one of them we were on. After much discussion with the business people we decided to come up with this guide which was discussed with them fully. We got a lot of business input into it. They basically advanced some arguments, which have found their way in here, as to circumstances under which there is a good case for allowing mergers in these

situations.

I still remain of the view myself that the merger law is not blocking these sorts of mergers; rather, what is happening is that those sorts of mergers are generally handled satisfactorily under the act. Rather than criticise the merger law as such, people are tending to say we need these mergers for international reasons, when that is not really what they are about. They are about reducing competition in the home market quite often, but there are many legitimate cases going the other way; I admit that too.

Mrs GALLUS—Last time you said you basically made a judgment on individual cases, that you had the right to do this, and that you felt that if it was in the national interest you could permit the merger.

Prof. Fels—Yes. There are two steps of course in the process. The first step is: is the merger anti-competitive? At that stage we are sort of police and say that if it is we have to go to court and prove it. As I have mentioned, where there are imports we have never opposed. That is really an important area. In the other areas, where there are not imports, then often the merger is not anti-competitive. No problem. If it would be a problem, they can apply authorisation and then we judge it, but decisions there are appealable and often are appealed to a tribunal.

Mrs GALLUS—Don't we have the problem that if a company is going to get big enough, then it is going to go international down the line a bit, and we have actually prevented them ever reaching that critical mass at the earlier stage? I understand your problem; you have a brief to ask what is in the interests of the consumers and whether this is anti-competitive. But I am just trying to clarify that long-term implication where in 20 years we look back and say, 'We really did not help our own companies get to an international size.' We will be suffering for it because, in the meantime, the other international companies from the other countries will come in and eat up those very companies that we stopped merging.

Prof. Fels—Commissioner Smith is our mergers commissioner so I will hand that one over to her.

Ms Smith—First of all, it is a slightly novel suggestion to reverse the process. Usually we think of this in the context of developing exports. To think of it in terms of acquiring overseas companies is an interesting variation. We might think even more realistically in terms of the development of offshore activity, which for many of the areas that Australian companies are likely to be involved in might be a more realistic option.

It also probably addresses the fact that the limitations on exports do not arise from only scale, or their limitation from overseas activity does not arise from only scale. For example, one of the issues that was raised at the supermarkets to Asia launch was the difficulty that companies in Australia face when they attempt to get into export markets

because of the lack of a fully developed competition policy in some of those overseas markets. Consequently, they are facing what they regard as being unfair competition put together with the non-tariff barriers, which certainly are being looked at, but we have still got a long way to go in that area.

There is also the difficulty that a very significant proportion of Australian large companies are the subsidiaries of overseas parent companies. That is not something that is new; it has been in existence for a very long period of time. If you look at the food industry, for example, you will find that a very large number of the larger firms are controlled overseas. The tendency certainly in the past has been for those overseas parent companies to allocate markets. For example, despite the fact that there is a subsidiary in Australia, Australian companies might not be allocated the rights to market into Asia so the marketing is done by the European operation or someone else.

So there are a variety of problems as far as exporting or developing offshore activity is concerned that do not have a great deal to do with competition policy here. The other aspect worth considering is that, if you emphasise only size and if all you are interested in is scale, then when you look at what is going on in the US, you start to wonder where you will ever end up.

For example, the Federal Trade Commission held inquiries into what it called the global market place and high-tech industries. One of the very common themes that came up in that was American companies claiming that they were not big enough to compete internationally. If they are not big enough to compete internationally with the size of the domestic market they have got, then I think we have got a real problem. I think that points out the fact that only one aspect of competition and only one aspect of success for exports is the price at which we sell those products.

I was under the impression that, over the period since the mid-1980s, we had been trying to convey to companies that they had to move away from producing commodity exports towards value-added exports. As you do that, the emphasis is much more on the quality of the product and the service that you are providing and much less on the actual price. Which is not to say that price is irrelevant, but it becomes less important.

That is part of the story. One of the other stories Professor Fels has alluded to is that the empirical evidence really is quite uncertain and quite equivocal in terms of whether largeness really is that important. Some of the small food companies, for example, have done extremely well, but as niche players in the international marketplace. Porter, for example, argues that what is really important is to have a very vigorous competitive domestic environment. Companies in that sort of environment are the ones which will thrive and manage to compete internationally.

There is no doubt that there are benefits other than cost benefits that come from size. For example, one of the difficulties that we face in the meat industry is that we do

not have a large domestic market. The export markets want particular cuts of meat, particular qualities and particular grades. What happens to the rest of it? Some of it goes into the export market, but for the rest of it, some of these cuts that are not required, we have developed quite a thriving pet food industry which is exporting into Asia. There is definitely a difficulty there because the Americans have a large domestic market which can absorb these unwanted parts.

There is a problem in terms of distribution. If you are not large enough, how do you support a suitable distribution outlet? Then you get into principal agent problems in terms of how you operate in your overseas markets. I am not saying that there are no problems in terms of size, but I think they have to be put into perspective.

One other thing that is really important is that, as the economy becomes more globalised, we end up with different constraints operating on our domestic firms and, consequently, a lot of the mergers that might not have been allowed in the past will now be allowed. For example, if you have a company which is wanting to be involved in a merger, the merged company will be selling to the subsidiaries of international companies in Australia and will also be selling to the subsidiaries of those companies overseas. The company cannot price differentiate between the two because, obviously, the companies talk.

So the fact that there is an international market constrains what goes on in the domestic market. In that sort of environment we might be much less concerned when the companies come to us and say that they want to merge, even though it may mean that there are only a couple of participants in the relevant marketplace.

The final point I want to make is that one of the really important areas for competition policy now is the non-traded goods sector. We do not run into lots of problems where we have traded goods, where imports are a significant constraint; it is in the non-traded goods areas. These tend to be inputs into the products that Australian companies are wanting to export, whether they are in the form of electricity, gas or other forms. One of the things the commission is increasingly turning its attention to, aided by the changes in the act, is to protecting competition in these sorts of areas and ensuring that the people who are trying to develop exports get a fair deal in terms of the input costs.

Mrs GALLUS—Thank you, Ms Smith. That was a longer answer than I expected.

CHAIR—That was a very comprehensive answer.

Mrs GALLUS—A couple of things disturb me. One was your concentration on niche markets. It seemed to me that you were saying, ‘We are a small country. Let us look at niche markets.’ I do not like that. I think niche markets are an answer for a lot of our products, but I do not see that we should be restricting ourselves to look at ourselves as only niche market players.

You seemed amused by the idea that Australian companies should be growing big enough to take over companies internationally, whereas I would have thought that that was one way of increasing our exports into those countries and is an important part. Having said that, I really would not want to go further with this because I am quite anxious to get to this other thing that we raised—I am conscious that I have already taken up a lot of the committee's time here—unless you just want to reply quickly to that.

Ms Smith—I have a couple of quick responses. Certainly, I was not suggesting that all of our exports ought to be through niche markets. The other thing is: interpret what is meant by 'niche'. A niche for an international market might be extremely large by comparison with the domestic market. One per cent of the Japanese market, for example, would be awfully nice for any Australian industry.

The other thing to take account of is that, while I am slightly interested in the change of direction in that question, we do have many large companies that own other companies overseas. We have got banking companies that have ownership overseas and various other companies—Wattyl, for example.

Mrs GALLUS—I guess my original philosophical question was whether we were actually preventing, consciously or unconsciously, developing more of those. It is perhaps desirable that we keep that in mind.

Ms Smith—Sure.

Mrs GALLUS—If I can go to the letter from the Law Council, which you do have a copy of.

Prof. Fels—Yes.

Mrs GALLUS—It does raise some interesting points about what is happening. The Law Council writes about a number of serious concerns about the involvement of the Australian Competition and Consumer Commission in compliance work related to undertakings which have been given by companies under section 87B. It has made four points. The first is that the companies may feel intimidated in choosing the ACCC to conduct the compliance program—or if not intimidated, at least unduly influenced. The second point is that if the ACCC uncovers some second breach of the act, what is the attitude of the ACCC? Is it to cover it up because they are acting as agents of that company, or is it to ignore it or is it to not do so because they have responsibility as the ACCC. I see that places you in an extreme conflict of interest.

Prof. Fels—Yes.

Mrs GALLUS—The third point is whether the ACCC then can objectively assess the progress of that company and its own program when it has been the ACCC that has

actually enacted the compliance program. The fourth one is whether there is actually a statutory basis for the ACCC to carry on the business of carrying out their compliance programs.

Prof. Fels—Thank you. There are some gross errors in the letter by Mr Gardini.

Mrs GALLUS—This is actually the letter from the Law Council—

Mr Spier—There are also gross errors in that. Perhaps we can be a bit more constructive. Can I just perhaps answer that very last point that we do not have any legal power to engage in compliance programs: we would totally disagree. If that is the case, it is—

Mrs GALLUS—So, you think there is a statutory basis.

Mr Spier—For a law enforcement agency not to have a compliance function says that you take people to court only, and that is a most inefficient and very unfortunate way of looking at things. I think that is just a bit of self-serving stuff there. Having said that, this broad issue was raised by Mr Gardini with the Treasurer some time ago and also with the Law Council and of course now with this committee. Mr Gardini has not talked to us about it, but that is history.

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. What happened is that we started to get involved in the compliance programs—and still do in a very broad industry sense—with particular companies, whether they were linked to an 87B, which was unusual, or otherwise, because companies asked us. We were out in the marketplace; we were involved with companies that asked us to get involved in compliance functions where we had found they had breached the law, where they thought they had breached the law. We get approaches every day from companies saying, 'Can you please help us with our compliance' and we do.

We seldom did in terms of 87Bs but occasionally did—again, because they asked us, not because we said, 'You must take us as part of the package', because frankly we have got other things to do than be involved in compliance.

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, small firms—and Mr Gardini obviously is one of them—who provide such kind of advice to industry and can go into a company and do a compliance audit and get involved very closely with the compliance activities. 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. But we are also strongly of the view that the market now has developed and that market should develop more—like Mr Gardini, and there are others—so that that can develop and, hopefully through a bit of competition, there might be some keen price competition, but we have pulled out.

Mrs GALLUS—I accept that. You are saying you pulled out, which answers all of this.

Mr Spier—Yes.

Mrs GALLUS—But at the same time you are saying that you did not quite agree with them, but I think you have got to say then that they had made a few legitimate points; otherwise you would not have pulled out.

Mr Spier—Well, also, the timing was right. When we started all this, there were no others in the marketplace. This is a marketplace that we developed, in a way, by doing a lot of that compliance work, by putting a compliance into 87B undertakings, sort of mandatory compliance programs. So we developed a market and a point was reached where we stood back.

Mrs GALLUS—Thank you, Mr Chairman.

CHAIR—Okay, we might move back to Australis, because I am a bit conscious of the time. I will let Mr Hockey start the batting.

Mr HOCKEY—In an article in the *Australian* on 31 October this year, Bryan Frith wrote in that article entitled 'Bitter Australis battle looks like getting personal':

During the proceedings this week, Robert Alexander, 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.
The ACCC also supported the unsuccessful application of Optus to join the action.

Prof. Fels—Excuse me. That bit was wrong.

Mr HOCKEY—Sorry?

Prof. Fels—That—

Mr Spier—We were neutral on that.

Mr HOCKEY—Okay. The point of the question is: do you think it appropriate that as an independent authority the ACCC should accept legal resources, in effect

financial support from one of the parties that might be involved in an action that it is investigating?

Mr Spier—It is not the first time it has happened. In most areas or in most of our investigations there are always, I suppose, two sides: there is someone who is complaining and someone who is complained of. And in some of the big litigation areas we do get some assistance from lawyers who have worked for the parties who are complaining or who are on the other side of the dispute. It is not something that happens every day. But in many cases there is, as there was here, a very urgent need to get some quick help—help that knew the industry—because we could not get help elsewhere, because most other legal firms were already somehow involved in the matter for some other parties. So we were unable to do that and we took advice that what we were doing was not unlawful.

Mr HOCKEY—Do you accept that Gilbert and Tobin had a vested interest in the outcome of the case?

Mr Spier—I do not think you can attribute that to a legal firm.

Mr HOCKEY—So there is no conflicts of interests within legal firms about these things?

Mr Spier—I would not say there was no conflict of interest, but these are professional lawyers who knew the industry. Sure, they worked for Optus but we also had very clear—

Mr HOCKEY—They are Optus's lawyers, are they?

Mr Spier—Gilbert and Tobin act for Optus, yes. But they are not working for Optus in a strict sense.

Mr CAUSLEY—Who pays the bills though? Did Optus pay them or did you—for the work they did for you?

Mr Spier—Optus would have paid them.

Mr HOCKEY—Let me get this right. Optus are the main beneficiaries—

Mr Spier—No, we are.

Mr HOCKEY—Optus are the main beneficiaries of the Australis decision—or a significant beneficiary of the decision—made by the ACCC to get involved in the merger of Australis and Foxtel, and you were accepting legal resources from Gilbert and Tobin and from Optus, according to this article, and you do not see any potential conflict of interest for the ACCC?

Mr Spier—The Gilbert and Tobin lawyers were involved after the commission had made its decision. They had absolutely nothing to do with the commission's decision. It was once the matter was in court and we were given a very short timetable to get the matter in court and get the matter going. It was quite appropriate for the court to say that the matter was urgent or that the party says it is urgent. And we had very short timetables to do things. The Gilbert and Tobin lawyers were then seconded to the Australian Government Solicitor, who are our solicitors, to help in certain aspects of the matter, particularly in the preparation of affidavits by witnesses.

CHAIR—But did you not say that Optus were paying their fees?

Mr Spier—They were paid by AGS as lawyers—which we don't pay because we don't have a full client relationship. I am not sure what the arrangement was between them and Optus—but we paid AGS, which in turn paid for those lawyers.

Mr HOCKEY—Professor Fels, do you accept that the ACCC has an obligation to be not only independent but also perceived to be independent of commercial interests?

Prof. Fels—Of course.

Mr HOCKEY—You do not see this as a conflict?

Prof. Fels—I think you are talking about the Australian Government Solicitor, aren't you? I thought that was the answer.

Mr HOCKEY—No, I put to you the original article that made mention of the facts. Whether it is the Australian Government Solicitor, they were the solicitors for the ACCC, weren't they?

Prof. Fels—The Australian Government Solicitor; basically, we have to have them as our solicitor.

Mr HOCKEY—Whether you get into the pedantics of it or not, at the end of the day Optus were involved in contributing towards the legal action commenced by the ACCC.

Prof. Fels—I do not know a great deal about the arrangements between the Australian Government Solicitor and Optus, but we do know that there is a secondment to them of someone from there. The whole thing was of course discussed fully in court. You may realise that one of the arguments advanced by the defendants in this case about why Optus should not be a party to the case was the very fact, openly discussed in court, that solicitors from Gilbert and Tobin would be used by the Australian Government Solicitor. That was all had out. The other parties were told about it. There was a lot of discussion about it in the court on the point as to whether Optus should be a party.

It was strongly argued that this link they had with the Australian Government Solicitor was a reason Optus should not be a party. That was all had out in court. The judge expressed no reservations about the matter. The whole thing was had out quite publicly.

Mr HOCKEY—But, Profesor Fels, we are here asking questions about the operations of the ACCC. I am putting it to you that there is unquestionably an actual and perceived conflict of interest for the ACCC to engage and receive support from someone who was going to be the commercial beneficiary of the actions of the ACCC.

Prof. Fels—I repeat: it is the Australian Government Solicitor and the judge was fully aware of it.

Mr HOCKEY—They are the solicitors whom you instruct. The Australian Government Solicitors are your solicitors. You cannot pass that on to your solicitors.

Prof. Fels—The whole thing was told to the court. The whole thing was out there in public in the court. The judge was fully aware of it and all the barristers and so on. I do not believe the issue was raised during the hearing when it could have been. What was argued about was whether or not Optus should be a party to the case or not. But, going to the substance of this, this was a really important case and everyone wanted it done very quickly. Telstra and News Ltd tied up most legal firms. The kind of service—

Mr HOCKEY—You are saying there is not one legal firm that was available that did not have a conflict of interest?

Prof. Fels—That had expertise in telecommunications.

Mr HOCKEY—That did not have a conflict of interest?

Prof. Fels—Yes.

Mr HOCKEY—You are saying there is no firm in Australia that has telecommunications expertise that did not have a conflict of interest?

Prof. Fels—I think all the big ones are tied up with Telstra or News Ltd or Australis.

CHAIR—Maybe, rather than go around this too much, we could get a written brief on that.

Prof. Fels—Yes, we would be very happy—

Mr HOCKEY—Mr Chairman, this is an extraordinary situation—

CHAIR—If we get a written brief we can then ask the Australian Government Solicitor to come before the committee as well.

Mr HOCKEY—We can do that as well, but I am not satisfied I have got an answer out of Professor Fels about the clear perception that the ACCC is engaging the financial support of a major commercial beneficiary of its decisions, and that is a fact.

CHAIR—That has not been denied, has it?

Prof. Fels—We have not denied the AGS has this arrangement. It was all out there in court. The judge had no problems with it. This is not an unusual situation; these sorts of—

Mr HOCKEY—The Australian Government Solicitors are your solicitors.

Prof. Fels—Yes, but—

Mr HOCKEY—You were aware that your solicitors were engaged in that. Did you raise that with your solicitors?

Prof. Fels—I was not around when this happened. I think the Australian Government Solicitor would have advised that they needed specialised telecommunications help and it was all tied up by Telstra. Basically, everyone knows that Telstra is tied up—

Mr HOCKEY—You are saying you do not instruct your solicitor. Is that what you are saying?

Prof. Fels—No, I am not saying that.

Mr CAUSLEY—I do not think there is a problem about the expertise of the solicitors. I accept that argument. But the point I accept from Joe is that if Optus paid for someone like that—the expertise that was given to the government—then that does put a position where it is seen not to be above board.

Mr HOCKEY—It is not above board; it is not just seen to be above board.

Mrs GALLUS—Professor Fels, at the moment your answer to Joe seems to be, 'Well, nobody else has raised this; therefore it is illegitimate for Joe to raise it.' Joe's point is that it is, totally. Simply because it has not been raised by anybody else does not mean that it is any less legitimate for Joe to raise it here.

Prof. Fels—It has been raised by the *Australian* newspaper.

Mrs GALLUS—You were referring to—

Prof. Fels—But I was driving at a slightly different point: that this was all out there quite openly in court. The judge, to the best of my knowledge, did not raise it as a concern. The parties were informed of this arrangement and they did not consider it to be a matter to raise in court. I understand—I might have to check this detail—the Australian Government Solicitor wrote to them and advised them that this was an arrangement being entered into. To the best of my knowledge there was no suggestion that there was anything that was illegal about this behaviour. As I said, I would have been surprised if the judge had allowed a matter like that to occur if he had concerns about the legality.

This question about perception is also a matter that we can talk about because perceptions depend on what the law in practice of things is. If this is a practice that, when openly told to people, the judge is not going to comment on and the parties do not say it is illegal, then I think that also has to affect perceptions. It was an Australian Government Solicitor issue—

Mr HOCKEY—Professor Fels, I repeat my question: do you think it is appropriate that an independent statutory authority receives commercial support from a private operator which is going to be the main beneficiary of a decision of the independent statutory authority?

Prof. Fels—When you are in these commercial battles it is, of course, the case that the parties involved in the litigation will bring up issues and bring forward support of matter and material to you in these matters.

Mr HOCKEY—It is one thing to join an action; it is another thing to receive financial support from a beneficiary.

Prof. Fels—I also think you are making a mountain out of a molehill.

CHAIR—With respect, Professor Fels, I think Mr Hockey does deserve an answer.

Prof. Fels—Yes. First of all, I happened not to be around when this happened, but I have not perceived this to be a serious issue for the reasons I have mentioned, and that is that. I am quite happy to go away and think about this matter now that you are saying so much about it.

Mr Spier—We actually sought advice from the Australian Government Solicitor about this very issue. He was of the strong view that there was nothing that we were doing that was wrong.

Mr HOCKEY—That is not the point.

CHAIR—Professor Fels, I really think you should be able to give him an answer to that fairly straightforward question.

Prof. Fels—We got advice from the Australian Government Solicitor that this was perfectly okay.

Mr HOCKEY—That is not the point. I will repeat it for the fourth time: do you think it is appropriate that an independent statutory authority receives financial support from a private sector beneficiary of a decision of the independent statutory authority?

Mr Fels—No, not in general, and it does not happen in general.

Mr HOCKEY—But in this case it is okay?

Mr Fels—There were some factors here. The commission did the right thing. It got advice on whether this was the right thing to do and the advice was yes. It was fully open about the matter. The judge did not perceive it.

Mr HOCKEY—I put it to you that the credibility of the ACCC is shot on this issue—absolutely shot.

CHAIR—We will just keep to questions.

Mr HOCKEY—But it is the truth. There is a clear perception.

Mr Fels—We got advice that this was an acceptable practice.

CHAIR—Professor Fels, have there been other occasions when you have been in a similar situation?

Mr Spier—Yes, there have.

CHAIR—Could you name them?

Mr Spier—Can I come back to you on that?

CHAIR—Yes.

Mr Spier—I will get you the details.

CHAIR—Thank you.

Mr HOCKEY—Can you also provide a list of the current cases where the ACCC is receiving commercial support from someone who may be a beneficiary of the decision of the ACCC?

Mr Spier—There are none.

Mr HOCKEY—There are none? There are no situations at the moment?

Mr Spier—With the exception of Foxtel, no. But it has happened before.

Mr HOCKEY—Does that make it right?

Mr Spier—No, but in those cases we also sought legal advice on the same grounds.

Mr HOCKEY—But does that make it right for there to be a perception that an independent statutory authority was wrong?

Mr Fels—If it is within the law then it will not be perceived to be wrong. That is what I would have thought. The idea that this would have had in any way any influence on perceptions, I believe is wrong. If they had been involved in the actual decision to go to court, then that would have raised some other issues. But this was openly adopted by the commission after we went to court and after the pressure came on for a quick resolution.

Mr CAUSLEY—Was this a mediation afterwards?

Mr Spier—No, it was a court case.

Mr Fels—No.

Mr Spier—They are helping us getting statements.

Mr Fels—We made a decision to go to court. At a certain point the pressure came on to deal with this matter very quickly, and there were no telecommunications law firms available because, basically, they were all tied up.

Mr HOCKEY—Did you write to all the firms that had—

Mr Fels—No, the Australian Government Solicitor had this view.

Mr CAUSLEY—What about Foxtel? Were they happy about the fact that this was proceeding this way?

Mr Fels—They were told about it.

Mr Spier—It was totally disclosed.

Mr Fels—It was totally disclosed. It was in court and everything.

Mr Spier—The task of these solicitors was to work on affidavits from Optus. Other affidavits that we were obtaining, we were doing ourselves.

Mr HOCKEY—It just keeps coming back to my original question.

Mr Spier—The main evidence in any of these types of mergers will come from people with commercial interests—in any merger.

Mr HOCKEY—But those commercial interests could be beneficiaries of an ACCC decision.

Mr Spier—It is not just those people that you get statements from. You get statements from other people too. In anything we do, there are other commercial interests. There is a commercial interest that is in favour of what we do, and a commercial interest that does not like what we do.

Mr HOCKEY—Professor Fels, with the benefit of hindsight, do you think in future that the ACCC will be accepting commercial support from someone that could be the beneficiary of one of your decisions?

Mr Fels—Obviously we have to look at this matter very carefully in view of the concerns you have expressed. We will undertake to have a real hard look at this matter. What we are talking about in this case should not be blown out of proportion, because you are talking about a fairly small element in the general situation.

We did a full investigation that went for two or three months on our own. We had a lot of representations from everyone, but we did that all on our own. Then the AGS and our barristers ran the case. They are eminent counsel. Within that, I think the solicitor work was coming from the AGS on a significant scale but they needed the help on the telecommunications. That was a terribly important issue—

CHAIR—Professor Fels, you say it is a small matter. This is—

Prof. Fels—What I mean is quantitatively—

CHAIR—This company is in strife. The value of its shares has virtually collapsed.

Prof. Fels—Yes.

CHAIR—It has been suspended. Millions and millions of dollars have probably been lost.

Prof. Fels—Yes. When I said ‘small matter’, perhaps I could make myself clearer. What I meant was that in terms of the full amount of the litigation, the effort and hours of

work and so on that went into this, the Optus contribution, so far as I know—and I will have to check up on this payment aspect—is not a particularly large bit of the overall thing. It is not insignificant. But I do not mean that the issue is unimportant—

Mr HOCKEY—Will you provide us with the details on that?

Prof. Fels—Yes, we will find out from the AGS what the details are.

Mr HOCKEY—Do you pay the bills for the AGS?

Prof. Fels—The legal bills from this case? Yes, we expect to—

Mr HOCKEY—So AGS are clearly your solicitors?

Mr Spier—But they are also the AGS.

Mr HOCKEY—I understand that; I know what the AGS is.

Prof. Fels—Yes, and they provide—

Mr HOCKEY—They are your solicitors? You engage AGS?

Prof. Fels—Well we have to, basically.

Mr HOCKEY—And you pay their bills?

Prof. Fels—Correct.

Mr CAUSLEY—I am sitting here smiling because I was dragged before ICAC for much less than that, as a minister.

Prof. Fels—Well, we got legal advice on it.

CHAIR—Okay. Is there anything you want to pursue further on this?

Prof. Fels—We are offering to come back. It is true you have raised a serious issue. I have been trying to explain what has been happening, and so on. I will also take serious note of your obvious concerns about this.

Mr HOCKEY—I have another line of questions here, Mr Chairman. Do you believe that the ACCC decision in relation to the merger of Australis and Foxtel in any way affected the survival of Australis?

Prof. Fels—Yes, in the sense that Australis was expecting to be taken over by

Foxtel and when that did not happen that was a further blow to Australis. That was its exit strategy, if you like, from the market. So I accept that. Indeed, I have a statement about this whole thing, if you would like.

Mr HOCKEY—No I am happy to keep asking questions.

Prof. Fels—Okay.

Mr HOCKEY—Do you believe that if Australis and Foxtel had merged it would have been prejudicial to the interests of Optus?

Prof. Fels—As I have said many times, it would have been highly prejudicial to competition in pay TV and in local telephony. Optus happens to be the only other real competitor in this situation, so it would have been prejudicial to the interests of Optus. There is no secret about that fact. But we do not look at it that way. It is the impact on competition that is of concern to the commission.

Mr HOCKEY—So you accept that Optus was a beneficiary of your decision to step in in relation to the merger?

Prof. Fels—I have no doubt about the fact that they—yes, sure.

Mr HOCKEY—You do not believe that there is a problem associated with the fact that the ACCC received commercial support from Optus?

Prof. Fels—I am going to go away and think about this matter, in view of your concerns and so on. You have raised a serious question that needs to be addressed, and so on and so forth.

Mr HOCKEY—When can we receive a response to that?

Prof. Fels—We will come back to you with the information about the whole decision on this aspect of the matter and so on.

Mr HOCKEY—Can you give us an indication of the timing?

Prof. Fels—About two or three days, I suppose.

Mr Spier—As soon as practical.

Mr HOCKEY—In a matter of days?

Prof. Fels—Yes. You have to remember also incidentally that we have had senior counsel involved in this at all times—top QCs—and we need to talk to them, having

raised the issue.

Mr HOCKEY—It is irrelevant, because the ACCC is coming to this committee and we are asking you questions about the operations of sections of the ACCC.

Prof. Fels—Yes, and I say to you that, if the advice you get—and I believe we got advice on this matter—says that it is perfectly legitimate, then you do not jump to the conclusion that this is something that will be perceived to be wrong. Isn't it interesting that, when this was all had out before the judge, he did not make any comment to that effect?

CHAIR—The committee will be meeting again next Thursday. Is it possible to get that before that meeting?

Prof. Fels—Yes.

CHAIR—Can I just go on to this Australis question? You keep referring to the importance of the local telephony. In an article in the *Financial Review* last weekend it says in relation to the need for success in local telephony—and it was quoting you I think:

> We did an extremely detailed and thorough investigation and concluded that there would be an effect.

That is between pay TV and local telephony.

Prof. Fels—Yes.

CHAIR—I was wondering is it possible to see some of that detailed investigation?

Prof. Fels—The first thing I should tell you is that this case is in court at the present time. There are two issues in the case. One is about the merger. There is a very real prospect that the merger will be terminated today. With respect to the second issue, the so-called T&C agreement, the commission has made no decision whether to continue with that litigation, but I certainly do not rule out that possibility.

So we do have a complication first of all over this question of relationship, this inquiry and the case. The second thing is that we will try to say more about the nature of the investigation that we have done to let you know what kind of investigation was made. In short, we will do our utmost to cooperate with you. Could I make a further point about this? I wanted to give you some points about why the commission intervened in this matter. Could I give you those?

CHAIR—Yes, certainly, we will accept those. Thank you. That will be submission No. 5.

Prof. Fels—Essentially, we thought this was a very important case about local telephony as well as pay TV. The case in some parts of the media has been presented as a case about Australis Media and its fate. But in fact, the commission faced a very difficult issue, an unpleasant choice, between possible Australis Media failure and possible Optus failure. The commission concluded in short—and if I had more time I would go through this, but I will not try my luck on it and it is in writing—that Optus would withdraw from pay TV and, even more importantly, from local telephone competition.

That would have been a great disaster for jobs, investment and the prices we all pay for local telephone services. So I want to emphasise that there was this very difficult choice about the whole matter; it was not simply making some decision that somehow or other affected Australis Media badly, and that was it. It was a decision which was likely to lead to the withdrawal of Optus from local telephony and pay TV, and it would have been disastrous if that had happened. That was a very important factor in our decision.

I want to emphasise the importance of local telephone competition that is based on competition from people who actually have a network facility. It is true that the other elements of competition that were raised by Mr Hockey are also quite important, but we do think that where competition is based on people having access to a vertically integrated monopolist, then that is a solution that will be likely to have less competitive effects than if there is a facility based player—and they were proposing to withdraw from this market had the merger gone through. That really important point has not been terribly well understood publicly.

CHAIR—Given the time, I think probably we have had a fairly good innings. You acknowledged earlier that you are happy to take further questions in writing. There are some there that the committee had hoped to put to you.

Prof. Fels—Yes.

CHAIR—We appreciate that offer, and we will take you up on that. As I said, the committee may give serious consideration to having the Australian Government Solicitor before us as well to discuss this matter further. I would like to thank you very much for coming before the committee today.

Resolved (on motion by **Mr Hockey**, seconded by **Mr Causley**):

That this committee authorise publication, including the publication on the parliamentary database, of the proof transcript of the evidence given before it at the public hearing this day.

Committee adjourned at 1.22 p.m.