
# HOUSE OF REPRESENTATIVES

## STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

**Reference: Australian Competition and Consumer Commission Annual Report 1996-97**

**CANBERRA**

**Thursday, 4 December 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, 4 December 1997

Present

Mr Hawker (Chair)

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| Mr Albanese | Mr Hockey |
| Mr Anthony | Mr Martin |
| Mr Causley | Dr Southcott |
| Mrs Gallus | |

The committee met at 10.20 a.m.

Mr Hawker took the chair.

**ALEXANDER, Mr Robert Menzies, Acting Deputy Government Solicitor (Trade Practices), Office of Litigation, Australian Government Solicitor, Robert Garran Offices, Barton, Australian Capital Territory 2600**

**BOUCHER, Mr Dale Roger, Interim Chief Executive Officer, Australian Government Solicitor, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600**

**LEADER, Mr Barry Haynes, Deputy Government Solicitor, Office of Litigation, Australian Government Solicitor, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600**

**CHAIR**—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 Australia Competition and Consumer Commission has appeared before the committee to discuss issues arising from the ACCC's l996-97 annual report. The focus of the committee's hearing today is on the ACCC's use of lawyers in the Australis media case. At the committee's hearing with the ACCC on 20 November this year, the ACCC confirmed that some of its legal advice over the Australis-Foxtel merger was paid for by Optus, and admitted that a similar approach had been used in some other cases.

The basis of the committee's concern with this matter is the principle that, while the ACCC will inevitably stress that it takes sides in mergers that it believes are not in the public interest, the ACCC has an obligation to be not only independent but also perceived to be independent of commercial interests in its operations which impact substantially on commercial enterprises in almost every sector. One very public way in which the transparency is being achieved is through the commission's regular appearance before our committee.

Professor Fels and Mr Boucher, I stress to you both on this day—and Professor Fels we will get to in a minute—that we are expecting a very frank and open discussion on these important matters, which have had a substantial impact on one particular business and which go to the heart of how the ACCC is in fact conducting its activities.

I welcome the representatives of the Australian Government Solicitor to today's hearing. I would remind you that the evidence you give at this public hearing is considered to be part of the proceedings of parliament. 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.

Mr Boucher, would you like to make an opening statement?

**Mr Boucher**—I would like to make a statement to explain my own involvement,

to elaborate on some aspects of my letter, which I wrote recently to the committee, and to clarify one or two other things. My involvement in these matters was as follows. I was first informed and consulted on Saturday, 18 October about whether two Gilbert and Tobin lawyers could, in principle, be seconded to the AGS. Apart from indicating that if this was what the client wanted, as I understood was the case, it would be more likely to be a consultancy arrangement than a secondment, I indicated my broad agreement to this course.

I became involved again several days later on the issue of engaging Gilbert and Tobin. At that time I was particularly concerned to ensure that any such arrangement was lawful, that it was proper, that appropriate arrangements were made for the protection of confidential information, and that Gilbert and Tobin did not have a conflict of interest. I had already been informed that a satisfactory rate had been negotiated with Gilbert and Tobin lawyers and so, between the AGS and Gilbert and Tobin, that was not an issue at that time.

My colleagues informed me that the use of Gilbert and Tobin lawyers was essential to run the ACCC's case and we discussed whether it was lawful to engage them. Before finally agreeing to the engagement as I did, I satisfied myself that it was lawful. In this regard, finally I received advice from both Mr Leader and Mr Alexander that the engagement was lawful. Also, I was aware that Mallesons Stephen Jaques, the solicitors for Telstra, had conceded orally that there was no legal basis for objecting to the engagement. I am aware that Mallesons have subsequently confirmed, in writing, their view that there was no legal basis on which to challenge the engagement. For that reason, they did not seek to raise the matter before the Federal Court when invited by the AGS to do so.

I was also aware that Mr Alexander had given evidence in the Federal Court about the preparations for the ACCC's case, and that happened without any resulting criticism from the Federal Court judge, and that was about the time that it would take to run the case. That is as to the legality of the arrangement.

We discussed the issue of confidentiality on 31 October, and I was informed that a suitable confidentiality arrangement was being negotiated with Gilbert and Tobin.

As to the propriety of the arrangement, I again assure the committee that this decision was not taken lightly. I was conscious of the potential for concerns to be expressed in relation to the decision. Despite my view that the engagement was lawful, I would most definitely not have supported it if I had considered it to be improper. In fact, I considered and still consider the engagement to be proper. In reaching this view, I have taken account of the factors set out below. I am going to refer to some of those things that I put in my letter, and then I want to go on to some other things.

Firstly, as appears from the ACCC's submission, the engagement was necessary for

the proper conduct of the ACCC case. I was advised that if the engagement of Gilbert and Tobin solicitors did not proceed the ACCC would not be able to present a proper case in the very limited time available, because it would not have timely access to the specialist industry knowledge that was required for its preparation.

I was also concerned to ensure that steps were taken to protect confidentiality of any sensitive Telstra information which might be passed on to Gilbert and Tobin solicitors. These steps would include confidentiality undertakings signed by the solicitors, together with the solicitors working at AGS premises rather than Gilbert and Tobin's premises.

Next, the Gilbert and Tobin solicitors would be subject to severe sanctions if they breached the confidentiality of information which they received under the engagement. In addition to sanctions for breaching of undertakings they would be subject to sanctions as legal practitioners, sanctions for contempt of court, including possible imprisonment, and sanctions under the general law for breach of confidence.

I understand that it is common in trade practices cases, as indeed in other commercial cases, for information to be restricted to legal representatives of parties and there is a reliance on the legal representatives complying with confidentiality obligations. The consultancy arrangement between AGS and Gilbert and Tobin would, and in fact did, include a warranty by Gilbert and Tobin that no conflict with the interests of the Commonwealth existed or was likely to arise in performance of the consultancy services. I understand that the senior AGS lawyer working on the case, Mr Alexander, had no reason to doubt that warranty.

I was also aware that the AGS's ACCC solicitor had offered to consider any submissions which Telstra might wish to make in relation to disclosure of a particular piece of information, whether by way of the procedure to be adopted or otherwise. I understand that arrangements were in fact negotiated between AGS and Mallesons whereby seconded Gilbert and Tobin solicitors did not have access to some Telstra information.

As to their fees, I was aware of the possibility that Optus might be paying an amount to Gilbert and Tobin to supplement what was payable to Gilbert and Tobin under the consultancy agreement with the AGS. I was advised that junior counsel for the ACCC, Mr Simon White and Mr Leader, had each independently reached the view that that factor did not render the engagement of Gilbert and Tobin solicitors by the AGS unlawful. Senior counsel for the ACCC, Mr John Sackar QC, has recently expressed the same view. I do not know whether any supplementation occurred or, if so, to what extent.

I was also satisfied that that factor did not render the engagement improper. In particular, I was aware that it is common for the ACCC to receive assistance—for example, by way of provision of affidavits or witness statements—free of charge from

persons having an interest in proceedings by the ACCC. As I understand it, such assistance is generally crucial to the ACCC's ability to perform the enforcement functions which parliament has conferred on it. I then had no reason to believe, and I now have no reason to believe, that any supplementation by Optus of Gilbert and Tobin's fees—if it in fact occurred—had any influence whatever on the decisions made by the ACCC in the conduct of the proceedings.

I also wish to add that AGS, whenever it is handling litigation or any other matter for a client, always tries to apply the best human resources to the task. Often that will include engaging barristers who have particular or specialised subject matter knowledge. In engaging these barristers we are aware that sometimes in the past they may have been on opposing sides or that they may be in future. Sometimes we use other solicitors. In every case, we treat very seriously professional obligations, including those of confidentiality that we in the AGS have as solicitors. We believe that the other lawyers we use do likewise, and we have no reason to doubt that they do.

I also add that, since writing my letter, I have been informed that Gilbert and Tobin in fact modified its terms and conditions of service to Optus to provide, notwithstanding the duties to which solicitors owe their clients, that any confidential information obtained by Gilbert and Tobin lawyers on secondment to the ACCC would not have to be disclosed to Optus. In my opinion, that shows that Gilbert and Tobin did in fact take their obligations regarding confidentiality and conflict of interest very seriously, as I expected they would.

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

In summary, I accept that if the circumstances relating to the preparation of the ACCC's case had permitted, it would have been preferable to engage solicitors other than Gilbert and Tobin. However, for the reasons that I have outlined, I believe the engagement was lawful, it was necessary in the public interest, and it was properly undertaken. In my view, these three factors outweighed any concerns which might be raised about the engagement.

I note that I was absent from Australia on duty from 1 to 20 November 1997. Finally, if the committee would wish to have this assistance, it may be of benefit for it to hear from Mr Alexander about other factors relating to the preparation of the case.

**CHAIR**—Thank you, Mr Boucher. I think we might move to questions straightaway. In your earlier remarks, you said that in discussion before the court Mallesons said, 'There was no legal basis to object.' We obviously have to accept that. But was it not true that there were some objections on another basis—appearances?

**Mr Boucher**—We understood that they were not happy about it. Mr Alexander would probably need to give the precise details because I was not there.

**Mr Alexander**—Certainly, Telstra's solicitors wrote to us saying that Telstra did object strenuously to the engagement of Gilbert and Tobin solicitors.

**Mr Boucher**—Indeed, Mr Skehill of Mallesons also made that clear in writing to us.

**CHAIR**—Wouldn't you have thought that that concern—if you said it was not a legal objection—ought to have been given some very serious consideration?

**Mr Boucher**—Yes, and we did give it serious consideration—very serious consideration.

**CHAIR**—But chose to ignore it?

**Mr Boucher**—No. It was not a matter of ignoring it. It was a matter, in our view, of balancing competing factors.

**CHAIR**—And the competing factors were?

**Mr Boucher**—There were factors relating to the preparation of the case. There were factors about the propriety, about confidentiality, and the other factors that I have referred to. It was, at the end of the day, a judgment call as to what was the appropriate course to be taken.

**CHAIR**—You mentioned ensuring there was no conflict with the Commonwealth. But surely that is only part of the question?

**Mr Boucher**—We were engaging Gilbert and Tobin to assist the Commonwealth. We were concerned that they were able to carry out the engagement, and that would include conflict of interest that they may perceive. But as I have indicated, I believe we received the appropriate assurances from them.

**Mr CAUSLEY**—Mr Boucher, would you agree that one of the very pillars of our legal institution in Australia is that not only has justice got to be done, it has to be seen to be done?

**Mr Boucher**—Yes.

**Mr CAUSLEY**—Obviously, in this particular issue, it is not so much the legality of it; it is the perceptions of it, I suppose, especially in this particular area where the ACCC is a very high ranking government instrumentality, and decisions from the ACCC

could have very big bearings on the business community. Would you have thought it was a little bit strange to have a competitor paying the costs of one of the legal firms?

**Mr Boucher**—The ACCC—indeed, I believe from time to time other regulatory bodies, but let us confine it to the ACCC—does receive practical assistance—my colleagues in the ACCC itself would have to fill in the detail—from time to time from parties in commerce. That might include witness statements, information, expert evidence and so on. Our concern was to pursue the interests of our clients and to do so lawfully, with propriety and so that confidentiality and so on were protected.We were acutely conscious of the fact that there were perception issues, but we had a duty to pursue the interests of our client.

**Mr CAUSLEY**—In your decisions are you saying that you came to this decision because there were no other competent legal people able to defend that case?

**Mr Boucher**—Mr Alexander would have to help me here but the advice to me was that we needed to engage these particular people, and I was not in a position to gainsay that advice.

**Mrs GALLUS**—I have two questions. There is a statement here; can you tell me whether you totally agree with it:

The AGS was of the strong view, and the ACCC reluctantly accepted, that the size, nature and urgency of the proceedings were such that the assistance of the two Gilbert and Tobin solicitors . . . were necessary to the ACCC's case.

Would you agree with that statement—that you were of the strong view and the ACCC reluctantly accepted?

**Mr Boucher**—I can speak for the AGS and I will need to ask Mr Alexander to talk to you about what happened in respect of the ACCC. I was simply not present at those discussions with them. But we were of the view—if you like, the strong view—that we needed to engage these lawyers. Mr Alexander was present—

**Mrs GALLUS**—What was the reluctance of ACCC then?

**Mr Alexander**—The ACCC was reluctant to engage solicitors who had a connection with Optus. I formed the view that it was essential to preparing this case in the time we had, which was a matter of days, to get assistance from solicitors with telecommunications expertise and a knowledge of the way Optus conducts its business.

**Mrs GALLUS**—Why did ACCC say to you they were reluctant?

**Mr Alexander**—You need to ask them, but they expressed to me the connection

between the Gilbert and Tobin solicitors and Optus.

**Mrs GALLUS**—Because they saw a conflict of interest? I assume they just did not say 'We are reluctant' and did not amplify that to you. They presumably sat down with you and gave you a whole list of reasons why they were reluctant.

**Mr Alexander**—No, there was not time for a whole list of reasons. They expressed their reluctance and—

**Mrs GALLUS**—They just said, 'We're unhappy with this but go ahead'?

**Mr Alexander**—No, it was a bit more than that. They said, 'Go ahead, as long as there is a strict break between the Gilbert and Tobin solicitors and their current work for Optus.' I said I proposed to have them join the AGS litigation team, to move out of their offices at Gilbert and Tobin and move into offices in AGS.

**Mr ANTHONY**—Were you aware at the time that they would be reimbursed—that the fees would be topped up by Optus?

**Mr Alexander**—Yes, I was aware that there would be a topping-up arrangement.

**CHAIR**—Could you give us some idea of how much?

**Mr Alexander**—I do not know. The basis on which I understood it was: I said we would engage them at the AGS rates for solicitors of their experience, and they indicated to me that the AGS rates were lower than their current salaries. So the inference was that the topping up would be in regard to the difference between their AGS salary rates which we were paying them and their current salary rates.

**Mrs GALLUS**—This did not concern you at this stage at all? You did not feel that there was something that made you uncomfortable about an arrangement where they were being topped up by somebody who had a very strong vested interest in this case? It did not appear to you that this was something that, even if it was legal, in the view of anyone outside would be somewhat questionable?

**Mr Alexander**—That was a concern, but my primary concern was to get this case up in the very short time that I had. I had a very short time to get it up.

**Mrs GALLUS**—Very quickly, can I ask my second question on that about the Telstra objections or do you want to get yours in first?

**CHAIR**—I will complete the finance thing. Can you give us some idea of the sort of figures? You say that the government rate is lower. Is it 10 per cent, 20 per cent or 30 per cent lower?

**Mr Boucher**—I understand that we were paying rates equivalent to the salary rate for a senior executive service band 1 officer. One of my colleagues might tell me what that is.

**CHAIR**—Could you help the committee with the figures? Some of us do not have a legal background and do not know what sorts of figures they are.

**Mr Boucher**—Yes, I am trying to get you that precise figure.

**CHAIR**—While we are waiting, Mrs Gallus might ask her next question.

**Mrs GALLUS**—You referred to Mallesons and Telstra and said that they actually objected strenuously—I do not want to distract you while you are trying to find figures.

**CHAIR**—Let us do the figures first.

**Mr Boucher**—One of the people was paid a daily fee equivalent to the daily salary, allowances and costs payable to an SES band 1 AGS officer at the top of the range, which came out at $379 and some cents per day. The other one was to be paid $291 per day. Those figures equate to $73,500 per annum for the second one and about $81,000 per annum for the first one.

**CHAIR**—When you engage solicitors in a situation like this, wouldn't it be normal that the market rate would be considerably higher?

**Mr Boucher**—We try to get the best deal that we can.

**CHAIR**—Would there not be occasions when you would have to pay more?

**Mr Boucher**—Yes, there would.

**CHAIR**—Why wouldn't you have paid more here, knowing there was a possibility of this top up going on?

**Mr Alexander**—I put it to Gilbert and Tobin on the basis that we would pay the equivalent salary rates for solicitors of their experience and they accepted that proposal.

**Mr Boucher**—That we would use.

**Mrs GALLUS**—Did you not just say that it was unusual, that you would expect to pay more normally and that your normal procedure would have been to pay more because the market rates for top people in this area are higher?

**Mr Boucher**—In regard to engaging solicitors as opposed to counsel, we engage

counsel all the time. We sometimes engage solicitors so, to some extent, it is unfamiliar territory. I was not personally involved in the negotiation of the rate.

**CHAIR**—It just seems unusual that you would say that you are prepared to pay more in the market when you have to but that, in this situation, you could actually command a lower fee. You must have been aware that there was some compensation there for the Gilbert and Tobin work, whether it be an extra payment from somewhere else or the anticipation of some additional work. What was it?

**Mr Alexander**—I was aware that their salaries would be topped up.

**CHAIR**—You were aware?

**Mr Alexander**—Yes.

**CHAIR**—You must have had some idea of the amount.

**Mr Alexander**—No, I was not aware of the amount or of what their salaries were.

**CHAIR**—Wouldn't you have wanted to find out? If, for argument's sake, the amount was double what you were paying, wouldn't that make you concerned?

**Mrs GALLUS**—Triple.

**Mr Alexander**—I did have concern but, as I say, my principal concern was getting the case up. I thought all of Telstra's objections could be addressed.

**Mr ALBANESE**—Wouldn't you have thought that Optus was consulted about what the top up would be, that someone consulted them, be they the solicitors or—

**Mr Boucher**—We were making an arrangement with Gilbert and Tobin. We wanted there to be a separation from their ordinary obligations to Optus. As between Gilbert and Tobin and Optus, that was a matter for them, in my view.

**Mr ALBANESE**—You are saying that is not a conflict of interest?

**Mr Boucher**—I was not the one who was involved.

**Mr ALBANESE**—There must have been discussions. If they agreed to cop the $370 per day or whatever the figure was, effectively, on the basis of getting a top up, there must have been discussions between Optus and somebody in the process—them or you, whether you were involved or not?

**Mr Alexander**—There was no discussion between me and Optus. My discussions

were with the people at Gilbert and Tobin.

**Mr ALBANESE**—But do you agree that Gilbert and Tobin must have had discussions with Optus?

**Mr Alexander**—Yes, I agree with that.

**Mr ALBANESE**—And don't you see that is an extraordinary conflict?

**Mrs GALLUS**—And did you not go into this—

**CHAIR**—I am sorry, can we just get an answer to Mr Albanese's question.

**Mr Alexander**—No, I did not see it as a conflict at all. The interests of the commission and Optus were in the same direction, and I retained complete control of the way the case was run.

**Mr ALBANESE**—But you are an independent body, not a privatised body to represent corporations.

**Mr Boucher**—But we were the solicitors on the record, Mr Albanese, and it was our responsibility to run the case and to engage the people that we needed to run it.

**CHAIR**—To come back to this, can you give us some indication? You must have a pretty good idea what the top-up amount would have been?

**Mr Alexander**—Well, it was not discussed at the time.

**CHAIR**—But why wouldn't you at least have familiarised yourself with it?

**Mr Alexander**—I had to put a case together in a matter of days. I knew there was a difference and that arrangements would be made to make up that difference.

**CHAIR**—But surely, Mr Alexander, let us take a simple case—well, it is a simple case for me, anyway. Supposing you were paying three hundred and something a day and the top up was significantly more, where would the first loyalty be? Wouldn't that concern you?

**Mr Alexander**—I was satisfied that these solicitors had their total loyalty to our case. They were part of our team, and I saw nothing which indicated that they had any loyalty other than to the case that we were putting together.

**Mrs GALLUS**—Mr Alexander, I want to take that one step back and just look at the nitty-gritty of how you negotiated this. From what you said before, it seemed to me

that, from the very beginning, from the moment that you engaged the Gilbert and Tobin solicitors, you knew there was going to be a top up because you knew they would not accept what the AGS was prepared to pay. So at what stage was the arrangement made? It does not seem to me that you said, 'Okay, we will engage you at this rate,' because you knew it would not be accepted. It seems to be that it was almost a pre-discussion that 'We will make an offer to engage you at the normal rate. You will not be able to accept it because it is not enough and you will come in and offer more.'

**Mr Alexander**—No, I simply offered them engagement at our AGS salary rates.

**Mrs GALLUS**—But I think you indicated before that you knew that would not be high enough and would not be acceptable.

**Mr Alexander**—Yes.

**Mrs GALLUS**—So it was, in a way, a false offer. You knew that, for them to accept, there would have to be a top up from somewhere else.

**Mr Alexander**—Yes; oh, yes.

**Mrs GALLUS**—So you made that offer knowing that Optus would come in and make that to supplement the—

**Mr Alexander**—Oh, no.

**Mrs GALLUS**—Well, you must have. This is exactly what you are saying. You knew they would not accept the offer you made; therefore, you must have known that Optus would be prepared to supplement those salaries.

**Mr Alexander**—I did not say that I knew they would not accept the offer that I made.

**Mrs GALLUS**—I had understood that is what you had indicated.

**Mr Alexander**—Certainly not.

**Mrs GALLUS**—I think you indicated that $379 per day is considerably less than what you would expect these people to work for and that you understood that would not be an acceptable level of remuneration for them.

**Mr Alexander**—I expected that certainly one of the solicitors would have a salary higher than the salary that I was offering. As to the other—

**Mrs GALLUS**—Okay, and how did you think that would be accounted for? Did

you think he was actually going to drop his fees for that occasion or did you think at that stage, when you made the offer, that it would be supplemented?

**Mr Alexander**—He told me at the time that the salaries would be topped up.

**CHAIR**—Can I just ask you, Mr Alexander or Mr Boucher, does this happen often when you engage solicitors?

**Mr Alexander**—This topping-up arrangement?

**CHAIR**—Yes.

**Mr Alexander**—It does not happen often, no. I cannot recall any other example.

**CHAIR**—This is the only time you can recall it happening?

**Mr Alexander**—Yes, I cannot recall a topping up—

**Mr ANTHONY**—So this has not happened before?

**Mr Alexander**—I could not say that it has not happened before.

**Mr Boucher**—Solicitors have been used on occasions in ACCC cases, as I understand it.

**Mr Alexander**—Yes, very much so.

**Mr Boucher**—And Mr Alexander would have to inform the committee of the sorts of bases on which they have been used. Sometimes, as I understand it—but I stand to be corrected—there will be assistance provided for which there is no fee paid by the AGS.

**Mr Alexander**—That is correct.

**Mr Boucher**—That might even come from a competitor of a company.

**CHAIR**—So there are occasions when the AGS would accept the services of a solicitor paid for fully by someone else?

**Mr Boucher**—That is not quite what I was saying. What I was wanting to say was that there will be occasions where we are working on a potential case for the ACCC and evidence has to be gathered. We might approach, as I understand it, people in an industry or particular companies and it may be that assistance is provided by those companies.

**CHAIR**—You are talking about evidence. We are talking about preparation of the

case itself.

**Mr Boucher**—That is preparation of the case.

**Mrs GALLUS**—It is not really. It is totally different. You are engaging a firm which is also working for another company which is going to be paid by that company. That is totally different from getting somebody who has evidence to provide to you.

**Mr Boucher**—I had not seen it as different, Mrs Gallus.

**Mr ANTHONY**—I will follow up on that, Mr Boucher. You said at point 11:

I was also satisfied this fact did not render the engagement improper. In particular, I was aware that it is common for the ACCC to receive assistance by way of provision of affidavits or witness statements free of charge from persons having an interest in proceedings for ACCC.

I understand that but, as Mrs Gallus was saying, this is totally different.

**Mr Boucher**—With respect, I do not agree that it is totally different.

**Mr ANTHONY**—It is preparing a case as opposed to receiving an affidavit.

**Mr Boucher**—In preparing the cases, we do have to receive affidavits. We have to get witness statements. We have to do—

**Mr Alexander**—The difference here is certainly that the Gilbert and Tobin solicitors were part of the AGS litigation team. We brought them into our team. In the other examples, they are employees of their own firms of solicitors and provide the product of their work—for example, affidavits to us—for use in our proceedings.

**Mr ANTHONY**—You mentioned, Mr Alexander, that it was because of the urgency of the case that you had to find some experienced solicitors and barristers and that is why you engaged Gilbert and Tobin. Did you approach any other firm?

**Mr Alexander—**No.

**Mr ANTHONY**—I would imagine that there are other experts in this field, not just Gilbert and Tobin.

**Mr Alexander**—With respect, there might be some. The major obvious firms which might provide such assistance were already acting in these proceedings for the other parties.

**Mr ANTHONY**—You just mentioned that you did not approach other firms

because they were acting in this particular case. Is that correct?

**Mr Alexander**—Yes.

**Mr ANTHONY**—Even though Optus was a beneficiary of this case?

**Mr Alexander**—Yes.

**Mr ANTHONY**—Is there not a conflict of interest there, an inconsistency?

**Mr Alexander**—Gilbert and Tobin were not acting for Optus in this.

**Mr ANTHONY**—No, that is correct.

**Mr Alexander**—There was an application to intervene by Optus, but it was unsuccessful.

**Mr Boucher**—So at relevant times, as I understood, they were not acting in these proceedings.

**Mrs GALLUS**—I have a second question which I foreshadowed half an hour ago. You said that Mallesons, on behalf on Telstra, objected strenuously?

**Mr Alexander**—Yes.

**Mrs GALLUS**—We have agreed that they pulled out. They said, 'Okay, we don't have legal grounds.' But you said they objected strenuously. What were the grounds on which they objected strenuously? They did not just state, 'We object strenuously.' What were the exact grounds they objected strenuously on?

**Mr Alexander**—They objected principally on the basis that Telstra confidential information may well find its way to Optus via the Gilbert and Tobin solicitors and, secondly, that Optus would have an influence in the strategic running of this case, and decisions as to the way the case was presented would be influenced by Optus.

**Mrs GALLUS**—You felt that these two objections were not to be taken seriously?

**Mr Alexander**—We felt they were to be taken very seriously, as they were, and that this could be addressed and overcome.

**Mrs GALLUS**—These were the only two objections that Mallesons have offered?

**Mr Alexander**—Mallesons said there was a perception of inappropriate conduct.

**Mr Boucher**—They were concerned that it was inconsistent with the model litigant policy in their view. We did not agree with it.

**Mrs GALLUS**—That is fairly well what the committee is saying today, is it not?

**Mr Boucher**—I am not sure, Mrs Gallus, but with respect to Mallesons we did not agree with that. We formed the view that if this was lawful, if it was proper, if it could be done, if the confidentiality arrangements could be established, if we had a client whose interests had to be pursued, then it was entirely consistent with the model litigant policy.

**CHAIR**—But, Mr Boucher, surely the question that the committee has been pursuing all this way is not the legal action so much as the perception.

**Mr Boucher**—I appreciate that.

**Mrs GALLUS**—It is the perception of inappropriate conduct, which is exactly one of Mallesons' objections.

**Mr Boucher**—I appreciate that, Mr Chairman. That is something that we considered very seriously, and we made a judgment call about it and formed the view that the arrangement could and should proceed.

**CHAIR**—Mr Albanese, you have got a question.

**Mr ALBANESE**—When Professor Fels appeared before this committee on 28 November one of the justifications that he gave for the decision to injunct the merger was a belief in a pull-through effect, which is, effectively, that pay TV subscribers on cable can be pulled through to also get telephone services. Are you aware that Optus's lawyers, Gilbert and Tobin, have said privately to interested parties that the pull-through concept does not stand up, and that there is considerable evidence from overseas, including from Donaldson Lufkin and Genret in New York and informed sources in London, that it is simply not the case but that the reverse might actually be the case?

**Mr Alexander**—Certainly not. No-one from Gilbert and Tobin expressed that view to me.

**Mr ALBANESE**—So, effectively, they supported the pull-through concept?

**Mr Alexander**—Most certainly.

**Mr ALBANESE**—That would be consistent with the support that they have from their parent company, Cable and Wireless, in the UK?

**Mr Alexander**—I suppose it is consistent, yes.

**Mr ALBANESE**—You support that?

**Mr Alexander**—Yes.

**Mr ALBANESE**—So again you have, I would have thought, an advocacy at least on a public basis of an argument based upon the company's connections with Optus.

**Mr Alexander**—That is certainly true, but we got an affidavit from the telecommunications regulator in the UK to that very point, saying that there was a very strong pull-through effect. We put before the court that affidavit from the UK regulator, who was prepared to come out to Australia to give the evidence.

**Mr ALBANESE**—What evidence did you have or what analysis did you do about the Australian situation, though, to justify your defence of that? Was it based solely on the UK advice?

**Mr Alexander**—No. There was, in the commission's view, a lot of evidence based upon Telstra's behaviour, substantially over building the Optus cable, to defend their telephony in the market and to stop the pull-through effect on the Optus cable taking customers away from Telstra.

**CHAIR**—Do you want to pursue this with Professor Fels?

**Mr ALBANESE**—Yes.

**CHAIR**—Okay. Mr Hockey.

**Mr HOCKEY**—I have a number of questions, Mr Chairman. I apologise, I might have missed something a little earlier. I just want to start at the beginning. As I understand it, the ACCC approaches you and says, 'We would like to engage you to be our lawyers.' Or do they have to engage AGS to do their legal work?

**Mr Boucher**—Practically speaking, at the moment they have got a choice. They know that but in fact they use us a great deal. We have people who are co-located with them—Mr Alexander heads that area—and so it is natural for them to consult with Mr Alexander and the other officers. But they also use other firms.

**Mr HOCKEY**—They do not have to use the AGS to be their lawyers?

**Mr Boucher**—This is a matter of debate. I might say that they are obliged, according to the letter of cabinet decisions of the former government that perhaps have been endorsed for the time being by this government, to use us. But in fact for some time, probably at least two years if not three, the ACCC has been asserting that it may wish to use other solicitors and we have been respecting that, in that we will do our best to

facilitate it.

**Mr HOCKEY**—When did they approach AGS about getting involved in this case?

**Mr Boucher**—I would have to ask Mr Alexander or one of my other colleagues.

**Mr Alexander**—The AGS, and I in particular, had been advising the commission in the lead-up to the case, at which time meetings were held with all the parties and I—

**Mr HOCKEY**—Which parties?

**Mr Alexander**—Telstra, Foxtel, Optus. I attended a number of those meetings.

**Mr HOCKEY**—When were you specifically engaged?

**Mr Alexander**—The engagement was not separate from the engagement to advise in relation to whether there was a case or not at the time we were having those meetings.

**Mr Boucher**—If I could elaborate: this particular group of people which Mr Alexander heads do no other work for any other client.

**Mr HOCKEY**—So you are, in effect, retained by the ACCC. Is that how you characterise the relationship?

**Mr Boucher**—There are retainer arrangements and there are also fee arrangements that we have with them.

**Mr HOCKEY**—And you charge them per hour?

**Mr Alexander**—Yes. That is subject to our retainer arrangement. If the hours go above the retainer, then you do not get paid for the extra hours.

**Mr HOCKEY**—And they pay you? There is actually a transfer of money from the ACCC to AGS?

**Mr Boucher**—There is a real transfer.

**Mr HOCKEY**—As this case developed, did you have a view about whether it would be a case relating to the future of telecommunications, particularly telephony and pay TV, or did you, when you engaged Gilbert and Tobin, consider that it was a commercial case involving basically a merger between two pay TV companies?

**Mr Alexander**—No, I regarded it as a case involving competition—the hindering and preventing of competition—in both pay TV and telephony markets in Australia.

**Mr HOCKEY**—Given that it was a competition case and a merger case, and seemed to be a form of commercial litigation, why did you deem it necessary to have a telecommunications specialist involved? I am curious about why Gilbert and Tobin seemed to be the only firm available with expertise in mergers-commercial litigation.

**Mr Alexander**—We had to put on a case to show the current state of pay TV and telephony markets in Australia, and how competition takes place in those markets, and Optus has a very major part to play in those markets. Optus was the only pay TV operator which was not a respondent to the proceedings. Optus is the only facilities based telephony competitor, and the character of competition which is able to be provided by a facilities based competitor is very important. I knew that Gilbert and Tobin acted for Optus and we would need to put on evidence from Optus witnesses as to those matters. Therefore, I approached their solicitors, Gilbert and Tobin.

**Mr HOCKEY**—When you engage a solicitor, is it your practice not to be aware of the commercial details of anyone else that might be paying them for your work?

**Mr Alexander**—Not paying for our work?

**Mr HOCKEY**—Yes.

**Mr Alexander**—Who was paying for our work?

**Mr HOCKEY**—Let me put it a different way. On how many other previous occasions, and can you provide details of those occasions, has the AGS engaged solicitors and those solicitors' fees have been partly paid for by an outside party?

**CHAIR**—I think you answered that earlier.

**Mr HOCKEY**—I am sorry, I was outside.

**Mr Boucher**—We do not necessarily have access to all the information, Mr Hockey. We would engage, as we sometimes do in the trade practices field, other solicitors. Sometimes in other litigation or matters we engage generally people on the face of the—

**Mr HOCKEY**—So you are saying that the AGS is unaware if the solicitors that you engage are paid for by outside interests?

**Mr Boucher**—Subject to the evidence or the comments we have made this morning about this particular case, my answer would be generally yes, we are unaware.

**Mr HOCKEY**—Do you think that is a proper way to engage lawyers? Mr Boucher, you are an experienced man. Are you aware of any other commercial

arrangement where someone would engage lawyers and those lawyers' fees would be partly paid by another party and you would not be advised of it?

**Mr Boucher**—No, I do not; but the engaging of solicitors—as compared to, say, engaging barristers—where it is a set of arrangements with which I am sure you are familiar—

**Mr HOCKEY**—I am.

**Mr Boucher**—It is fairly transparent, in the case of barristers. In the case of solicitors, it happens sometimes, and we have given evidence this morning about what happened in this case.

**Mr HOCKEY**—I am asking you this: are there any other cases that you can advise this committee about, where you have engaged lawyers and their fees have been paid by a third party?

**Mr Boucher**—I do not know of any others.

**Mr HOCKEY**—So, in this situation, did it not concern you that you were engaging lawyers who were then going to be paid for by the commercial beneficiary of the litigation?

**Mr Alexander**—It concerned us, as I said before.

**Mr HOCKEY**—And you did not feel that there was anything untoward in having someone else paying the legal fees?

**Mr Alexander**—I was concerned, but those concerns were outweighed by the other concerns that I had at the time.

**Mr HOCKEY**—Did you ever approach anyone for independent advice on the matter of whether it was appropriate for you to receive legal support and advice from someone who had their fees paid by a third party as well?

**Mr Alexander**—I approached my colleagues in the department, but no-one outside the department—other than, sorry, our Queen's Counsel and our junior counsel, who are part of our team.

**Mr HOCKEY**—You are saying that this situation is the sole case where AGS has engaged lawyers to perform legal work and their fees have been partly paid for by an outside party? This is the only case, the sole case that you are aware of?

**Mr Alexander**—It is the only case that I am aware of.

**Mr Boucher**—It is the only case I am aware of, too, Mr Hockey. But we did give very serious consideration to those points. It was not as if they were taken lightly. In particular, in considering it, as Mr Leader did, he advised me of the legality of it; and, indeed, as we discussed the propriety of it, we made a judgment call.

**Mr HOCKEY**—I am sorry, Mr Chairman, but this is an important series of questions.

**CHAIR**—That is all right.

**Mr HOCKEY**—And you did not think to ask Gilbert and Tobin what commercial arrangement they had with Optus to cover some of the legal fees?

**Mr Boucher**—I myself was not precisely making the arrangements with Gilbert and Tobin. I am not sure whether my colleagues—

**Mr Alexander**—I was told that Optus would 'top up' the Gilbert and Tobin lawyers' salaries.

**Mr HOCKEY**—You did not think to ask by what amount and under what circumstances?

**Mr Boucher**—I do not speak for Gilbert and Tobin, so I will put it on that basis; but I do understand that, if asked, they would be prepared to inform the committee—whether through us or some other means—of the arrangements.

**Mr HOCKEY**—Mr Boucher, they are your solicitors. You engaged them as your solicitors.

**Mr Boucher**—Yes, but we engaged them on the basis we have given evidence about this morning, and we made the judgment calls that I have talked about.

**CHAIR**—Can I just come back to this point again? You told the committee that you engaged them at the Government Solicitor rate of $379 a day.

**Mr Boucher**—The salary rate. We are not talking about our fee rate.

**CHAIR**—Salary rate. Can I put it to you that, if you were to get a senior lawyer from any of the big firms, wouldn't you normally be paying them more like that amount per hour—$300 an hour or more?

**Mr Boucher**—Approaching that, or in the $200 range. We ourselves charge per hour.

**CHAIR**—So, when I said it could be twice, in fact it could be at least three times as much—

**Mrs GALLUS**—Actually, 10 times that amount, for a 10-hour day.

**CHAIR**—For a 10-hour day, yes.

**Mr Boucher**—In relation to engaging counsel—and I am pretty sure this flows through to solicitors—we set daily limits, and so we would not go beyond certain limits.

**CHAIR**—No, but the point is that, if there was a top-up payment there to get back to the rate at which that solicitor probably would have been charged to Optus, in fact they would have been getting several times as much from Optus as they would have been from the AGS.

**Mr Boucher**—I do not disagree with that.

**CHAIR**—In fact, you engaged someone at that rate, and yet they were being topped up by a vitally interested party by several times that amount.

**Mr Boucher**—We knew of the possibility, or the fact: I am not sure—

**Mr Alexander**—I knew that the salaries were being topped up, but I did not know by how much.

**Mr Boucher**—We knew that Optus was interested. We considered particularly the interest of Optus—

**CHAIR**—Surely, if it is such an imbalance between the amount you are paying and the excess amount being significantly more, doesn't this raise questions or make alarm bells go off in your mind, so that you say, 'Hang on a minute'?

**Mr Alexander**—We had no knowledge of the extent of the top up.

**Mrs GALLUS**—Mr Alexander, can I say to you that that sounds highly unlikely? This is the area that you work in all the time. It took me three seconds to find out what a top solicitor charges. You must know this; you are in the area, and so you must have known that they would have been receiving in the vicinity of $300 per hour, whereas your salary package was $379 per day.

**Mr Alexander**—I was aware of the AGS salary rates and I thought that the Gilbert and Tobin salaries were higher, but not 10 times higher—nothing of that magnitude.

**Mrs GALLUS**—Let me make it clear: I have not talked to Gilbert and Tobin; that

was just the general information I received about what a senior solicitor would receive for working on a case like this.

**Mr Alexander**—I would be astonished if their salaries were anything like 10 times—

**Mrs GALLUS**—$300 per hour, I was told.

**Mr Boucher**—There is a difference between the hourly rate and how you extrapolate that and get to a salary—

**Mrs GALLUS**—All right; but we are arguing at the edges. What we are talking about is a considerable area of difference—a multiplication.

**Mr Alexander**—At the time, I did not think there was a considerable difference.

**Mrs GALLUS**—We are not talking about $10, are we? We are talking about thousands of dollars per day.

**Mr Alexander**—No, not to my knowledge.

**CHAIR**—Mr Alexander, surely, knowing you were coming here today, you would have found this out.

**Mr Boucher**—We have an awareness, Mr Chairman, of the rates that solicitors charge. I can give information to the committee myself now—or we could, if you wish us to do so—about what charge-out rates are. We were talking about an arrangement we made with Gilbert and Tobin based on salary.

**Mr ALBANESE**—Why wouldn't you have asked them, knowing you were coming today?

**Mr Boucher**—It was an arrangement between them and Optus.

**Mr ALBANESE**—But you are the ones who are engaging them.

**Mr Boucher**—Yes. We can find out.

**Mr ALBANESE**—And you do not care how much they are being paid? You did not bother to ask? It is an extraordinary situation.

**Mr Boucher**—Mr Chairman, I did not say, 'I do not care.'

**Mr ALBANESE**—You did not bother to ask, though.

**Mr Boucher**—We did not in fact ask. I understand, as I indicated to the chairman before, that they have indicated to us that they are prepared to provide the information.

**Mr HOCKEY**—Mr Boucher, how many hours did Gilbert and Tobin spend, engaged by AGS, on this case?

**Mr Boucher**—Mr Alexander can help me here.

**Mr Alexander**—I do not know the hours, but they worked from approximately 3 November to 24 November, give or take a day or so.

**Mr HOCKEY**—So you are saying that you do not have any exact records of how many hours?

**Mr Alexander**—We certainly have the records, but I do not have them with me. They completed diaries every day of the hours that they worked.

**Mr HOCKEY**—And you have the records?

**Mr Alexander**—I have not got them personally; they go to our accounting area.

**Mr HOCKEY**—Can you provide them to this committee by the close of business today?

**Mr Boucher**—We can try. We will certainly make our very best endeavours to get that for you.

**Mr HOCKEY**—To get the details of how many hours they spent on the case, by the close of business of today?

**Mr Boucher**—Yes.

**Mr CAUSLEY**—Can I go back to the business of the shortness of time? It seems that the reason given for engaging their solicitors was that they had very little time to prepare the case, and that—

**Mr Alexander**—That is correct.

**Mr CAUSLEY**—Therefore, because there was very little time to prepare the case, it was imperative that you got these people because they had the expertise, et cetera. Last time, when the ACCC were before us, we asked whether there was any precedent for this, and they said that, yes, they did on several occasions get payment by people who were involved in cases where they could be seen to be on the same side as the ACCC. One of the cases is quoted in a letter that the ACCC sent to us on 1 December 1991—the Santos-

Sagasco merger case—where the same argument is put forward again about shortness of time. How often does this occur? How fair is it that, just because you are short of time, you accept payment from an outside player that has an interest in the case?

**Mr Alexander**—I do not think the commission put forward the Santos example as being quite the same. I suppose it is, in the sense that the section 50 merger cases—of which Santos was one and this Foxtel-Australis was one—are cases in which the respondents have a very keen interest in rushing the matter on before the regulator is ready with its case. These are special types of cases where you have a very short time in which to prepare your case, and that did happen in Santos and it happened in this case as well.

**Mr CAUSLEY**—Is this because the injunction has been taken out? Is that why the time is so short?

**Mr Alexander**—It is an application for an injunction to prevent the merger taking place. The parties are wanting to consummate the merger and the only way to stop that occurring is to seek and obtain an injunction from the court to prevent that happening.

**Mr CAUSLEY**—So you cannot get the proceedings stood over? It is just imperative that you have it heard—is that the problem?

**Mr Alexander**—The parties always say that it is commercially imperative for them to be able to continue with their merger unless there is some lawful reason why they cannot and they invariably insist upon the hearing as to the legality of the merger taking place within a very short time frame.

**Mr CAUSLEY**—They might insist, but surely it is up to the court, is it not?

**Mr Alexander**—Indeed, and the courts usually try to have an interim injunction hearing take place within a very short time frame.

**CHAIR**—In the interests of time, I have one final question. At what stage did you inform the ACCC that Gilbert and Tobin were in fact having a supplemented payment from Optus?

**Mr Alexander**—It was either the day before, the day after or on the day that the people moved into the AGS offices.

**CHAIR**—So it was at the beginning, in other words?

**Mr Alexander**—It was at the beginning. One started on 30 November. I think it was a Thursday or a Friday—

**CHAIR**—It was October.

**Mr Alexander**—In October. And the other started on 3 November.

**CHAIR**—Your dates were different, I think—earlier. I think you said that they started early October—3 November, sorry. So you had actually engaged them before you informed the ACCC?

**Mr Alexander**—Yes, I had made the arrangements.

**CHAIR**—And ACCC had no objection?

**Mr Alexander**—There was no objection. They expressed concern about it and were unhappy with the arrangement.

**CHAIR**—So you had Telstra unhappy and the ACCC unhappy. We are wondering what was going on when you cannot tell us how much they were topped up. It is of some concern, is it not?

**Mr Alexander**—I think Mr Boucher will be able to get the details.

**Mr Boucher**—As I have indicated, Mr Chairman, we will try to get you that detail.

**Mr HOCKEY**—Do you have a view that there is a perception of a conflict of interest with the ACCC, your client?

**Mr Boucher**—A conflict of interest between them and—

**Mr HOCKEY**—Between them receiving financial support for the legal advice provided by the major commercial beneficiary of their litigation?

**Mr Alexander**—There may be a perception. The fact of the matter was there was no conflict.

**Mr HOCKEY**—So in your view, there was no conflict of interest? I just want to get this right for all the punters out there. In your view, there is no conflict of interest between Optus being the major commercial beneficiary of the ACCC's actions and Optus paying a significant amount of the legal fees of the government in this case?

**Mr Alexander**—I am saying that the fact of the matter was that the engagement of these two Gilbert and Tobin solicitors did not conflict with any interest against the ACCC.

**Mr HOCKEY**—I have one more question. A little earlier you advised us that

there were no previous cases that you were aware of where anyone was providing outside financial support for the litigation involving the government. Mr Spier, General Manager of the ACCC, advised this committee on Thursday, 20 November 1997 that there were no cases at the moment, and I repeated his answer in my question to him, thus:

Mr HOCKEY—There are no situations at the moment, Mr Spier, with the exception of Foxtel?

Mr Spier—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.

The advice was clearly that this was not the first time that an apparent conflict of interest has occurred. Are you advising this committee today that there has been no situation where this has occurred in the past and that you are unaware of any situation where legal advice has been sought from you in relation to this matter involving the ACCC?

**Mr Alexander**—As I said, I am not aware of any top-up arrangement previously—any arrangement where the salaries of the solicitors engaged as part of the AGS litigation team were topped up by somebody else.

**Mr Boucher**—We have also spoken, Mr Hockey, about how there is assistance provided, as I was saying to Mrs Gallus before, to the ACCC in the preparation of cases. That may occur without any fee whatsoever being—

**Mr HOCKEY**—Do you think that is proper, Mr Boucher?

**Mr Boucher**—Yes, I do; because various regulatory bodies—whoever they be: police, Commonwealth or state—will from time to time receive assistance from members of the community, members of corporations, for the purposes of their investigations. If a policeman goes to speak to someone, generally speaking, I do not believe that they provide a fee for getting a witness statement. But that is a form of assistance.

**Mr HOCKEY**—Mr Boucher, you are a lawyer—or, sorry, you are the head of the AGS.

**Mr Boucher**—Yes; I am a lawyer as well.

**Mr HOCKEY**—Okay, you are a lawyer as well. Do you never ask yourself what the motives of someone may be in providing free or significantly discounted financial and legal assistance to the government in a case such as this?

**Mr Boucher**—The motives of people and the evidence and the case that is put are

matters for the court to weigh. But, yes, in preparing a case, we do take account—if it is a witness statement—of the weight, as well as other factors. Of course we do.

**Mr HOCKEY**—If someone comes and gives you money or gives you some benefit—which is in effect what Optus have done here—

**Mr Boucher**—They gave us no money.

**Mr HOCKEY**—No money; okay, I am happy to accept that. They paid a significant proportion of your solicitors' legal costs. Yet you do not ask yourself what their motivation is?

**Mr Boucher**—We know that they have got a commercial motivation.

**Mr HOCKEY**—That does not disturb you?

**Mr Boucher**—Commercial motivations of parties are endemic in the trade practices field, I would have thought.

**Mr Alexander**—We went through their affidavits and satisfied ourselves that they were correct, and we knew that they would be subject to rigorous cross-examination by Telstra and Australis and News, so that there would be no doubt that the truth would come out.

**Mr HOCKEY**—So you do not have any problem with the fact that Professor Fels had said that the affidavits were in fact powerful evidence in support of his decision to block the merger, and that those affidavits were provided by Optus? Is that right?

**CHAIR**—Which affidavits are we talking about here?

**Mr HOCKEY**—They are one and the same affidavits, I understand, are they not?

**Mr Alexander**—We put forward, in the end, 31 affidavits.

**Mr HOCKEY**—Yes.

**Mr Alexander**—There would be a proportion, about half, from Optus and half from others.

**Mr HOCKEY**—Were those ones provided by Optus crucial in the case?

**Mr Alexander**—Yes, they were.

**Mr HOCKEY**—You had no concern that Optus's solicitors were providing these

affidavits and that Optus was paying the legal fees for the solicitation of these affidavits?

**Mr Boucher**—There are various questions there, Mr Hockey. Mr Alexander has the particular expertise in this field; but, as I understand it, affidavits from competitors will often be found in trade practices cases. I do not know if that is right, but I would have thought—

**Mr Alexander**—It certainly is the case. As I said before, I was concerned that we put the procedures in place to overcome the objections which had been put to us.

**Mr HOCKEY**—Mr Boucher, with the benefit of hindsight, would you do this again?

**Mr Boucher**—Hindsight is a wonderful thing. We would most probably have engaged these people. We would no doubt have given much more consideration to the fee arrangement. It may have been quite possible to persuade our client not only was it necessary but that they had to pay what may have been quite high fees to get the assistance. However, our judgment was that taking account of the legality, the propriety, the conflict of interest, all the factors that we had to weigh up, that this was essential. So the answer to your question is that, with hindsight, we would have perhaps done some things differently but I believe that we would have probably proceeded.

**CHAIR**—So what you are saying is that you could have charged the ACCC considerably more and picked up a much larger proportion, if not the whole proportion, of Gilbert and Tobin's fees?

**Mr Boucher**—Or negotiated a higher fee, yes.

**CHAIR**—And that would be normal practice?

**Mr Boucher**—We are talking about abnormal territory—

**CHAIR**—But there would be no problem, the ACCC would expect that you would charge whatever needs to be charged?

**Mr Boucher**—I do not criticise them for this, but they are a tough client that has a budget. They are very tough on budget. But, if we had to put it to them that there was a higher fee to be paid, I am quite sure they would at least listen to us.

**CHAIR**—Are you implying that you would have been somewhat reluctant to go to the ACCC, saying, 'Look, if we are going to get these solicitors on an exclusive basis rather than on a shared cost basis—

**Mr Boucher**—No. We have dialogues with all of our clients, including the ACCC,

about the cost of external lawyers and most often, almost daily I would imagine around the AGS practice, as indeed would happen in other law firms, we talk about counsels' fees.

**CHAIR**—But you said that you alerted the ACCC to the fact that Gilbert and Tobin's fees were being supplemented early in the piece and that ACCC raised some concerns. In the light of those concerns, would it not have been prudent or sensible to say, 'We can renegotiate it so that there is not an interested party paying probably significantly more than you are for the use of these solicitors?

**Mr Alexander**—I suppose we could have tried to renegotiate. We had an agreement. The ACCC had reluctantly agreed to it. We had put in place protections—

**CHAIR**—Were they reluctant to agree to the fee or to the choice of solicitors?

**Mr Alexander**—To the arrangement of engaging Gilbert and Tobin. They were reluctant from the outset—

**CHAIR**—Were they reluctant because of the Optus arrangement or for other reasons?

**Mr Alexander**—They were reluctant for the reason that Gilbert and Tobin had a connection with Optus. They were the solicitors who normally acted for Optus.

**Mr HOCKEY**—Did you advise the ACCC that Optus was paying part of the fees of Gilbert and Tobin?

**Mr Alexander**—I did, but after the initial discussions. It was the day after, or on the day that the Gilbert and Tobin people actually moved into the AGS offices and moved out of their own offices.

**Mr HOCKEY**—Did they raise any additional concerns with you at time?

**Mr Alexander**—I think they did. They expressed concern about that, yes.

**Mr HOCKEY**—Did you quote for the work when you started the litigation?

**Mr Boucher**—No, because for Mr Alexander in particular, and for other lawyers who are doing this work, there is a standing arrangement.

**Mr HOCKEY**—So you did not give—

**Mr Boucher**—As I said before, these people are dedicated to ACCC work only and we have an annualised fee arrangement for most of the team. Some of them charge an

hourly rate.

**Mr HOCKEY**—So you did not give the ACCC a broad spectrum of how much Gilbert and Tobin's legal fees may be in this case when you brought them in?

**Mr Alexander**—I told the ACCC that it would be billed at the AGS normal hourly rates.

**Mr HOCKEY**—So you did not advise the ACCC that Optus was going to pay for some of the legal fees of Gilbert and Tobin?

**Mr Alexander**—As I said before, I advised them of that on about 3 November.

**Mr HOCKEY**—And did they ask you how much that would be?

**Mr Alexander**—No, not that I recall.

**Mr HOCKEY**—Not at all?

**Mr Alexander**—How much the difference would be? No.

**Mr HOCKEY**—Did you not think to advise them how much the difference would be?

**Mr Alexander**—I did not know the difference.

**CHAIR**—But you would have been aware of the order.

**Mr HOCKEY**—Did Gilbert and Tobin quote for this legal work?

**Mr Alexander**—No. We reached agreement that they would do the work at the AGS salary rates.

**Mr HOCKEY**—If on a worse case scenario we are talking about $30,000 to $40,000, given the significance and the importance of this case, do you honestly believe that you would do that again?

**Mr Boucher**—Mr Hockey, I think I indicated to you that, broadly engaging lawyers to assist with the case, the answer would be yes. As to the precise fee arrangements, we most probably would have said, 'This is going to cost,' whatever the amount, based either on hourly rates or a daily fee or a global figure for the assignment. We most probably would proceed that way. At the time, with the need for the people to get on with the case, they made a call about their engagement. I accept responsibility for the call that my colleagues made. That is what we did.

**Mr HOCKEY**—I just want the AGS to reaffirm that, in their view, there was no other legal firm that could have done the work.

**Mr Alexander**—There was no other way we could have put that case together within the days we had to put it together other than to engage the Gilbert and Tobin solicitors.

**Mr HOCKEY**—Did you even think about delaying the proceedings? Did you seek to have the proceedings delayed?

**Mr Alexander**—We put submissions to the judge for a hearing next year. But we got a very short shrift from the judge on that score.

**Mr Boucher**—Mr Chairman, it is obviously a matter for the committee and I stand ready to accept your call. I did offer before, if it was of assistance for the committee, for Mr Alexander to outline the nature of the case that had to be prepared. I think that goes to the essentiality of using these particular lawyers. Mr Alexander might have to help me here. I do not know whether we have necessarily brought that out yet for the committee this morning.

**CHAIR**—I think we understand that it is a highly technical field and there are a limited number of people who you can call on, particularly at fairly short notice, to handle that. I think the committee accepts that point. In the interest of time, I do not really want to go into a detailed discussion on that, unless the committee would like something.

**Mr CAUSLEY**—It is not a matter of whether you needed to draw the expertise from where you did. It is the payment.

**Mrs GALLUS**—Mr Alexander, you said that on 3 November you told the ACCC that Gilbert and Tobin would be supplementing the income—

**Mr Boucher**—By Optus.

**Mrs GALLUS**—Optus would be supplementing the Gilbert and Tobin lawyers' income on 3 November.

**Mr Boucher**—I think that is the case.

**Mrs GALLUS**—Mr Boucher, in your letter to the committee you said:

I was aware of the possibility that Optus might be paying an amount to Gilbert and Tobin.

Isn't it true that you were not aware of the possibility? If Mr Alexander had even told the ACCC that this was happening, it was not just a possibility; you knew it was happening.

**Mr Boucher**—No, I did not, Mrs Gallus. I wrote this letter from my state of knowledge. I signed it and I stand by what I wrote.

**Mrs GALLUS**—Can I just get this clear, Mr Boucher? Did you not know?

**Mr Boucher**—I did not know precisely.

**Mrs GALLUS**—As head of the AGS, did you not know that the fees that were being paid to the solicitors were being supplemented by Optus, even though Mr Alexander did?

**Mr Boucher**—I knew of the possibility.

**Mrs GALLUS**—The ACCC knew.

**Mr Boucher**—On 31 October, which was the time up to recently that I was engaged in this, I knew of the possibility that there might be a top-up.

**Mrs GALLUS**—So although the ACCC—

**CHAIR**—But this letter is dated 1 December.

**Mr Boucher**—Yes.

**Mrs GALLUS**—Although the ACCC knew from Mr Alexander that there was a top-up from Optus, you, as head of the AGS did not.

**Mr Boucher**—The fact of a top-up?

**Mrs GALLUS**—Yes.

**Mr Boucher**—I was overseas from 1 November.

**Mrs GALLUS**—Again, this letter, as the chair just pointed out, was dated 1 December. You are not saying 'at the time'. You say:

I was aware of the possibility that Optus . . .

Do you mean 'at the time'? Page 2 says:

I was aware of the possibility that Optus might be paying an amount to Gilbert & Tobin . . .

**Mr Boucher**—I was intending to refer to the period from 31 October in paragraph 10.

**Mrs GALLUS**—So you meant to say that at 31 October you thought there might be a possibility. At what date did you know that this was a fact?

**Mr Boucher**—When I got back from overseas and was briefed by my colleagues.

**Mrs GALLUS**—What date was that?

**Mr Boucher**—Of the fact of a top-up?

**Mrs GALLUS**—Yes.

**Mr Boucher**—Earlier this week.

**CHAIR**—Mr Boucher, you go on to say in this letter:

I do not know whether any supplementation in fact occurred or, if so, to what extent.

**Mrs GALLUS**—That was on 1 December.

**Mr Boucher**—Mr Chairman, can I just make one thing clear. When I made some remarks this morning, I think I said—forgive me if I did not make this absolutely clear—that I wanted to say some things additional to those that I had put in my letter. I signed this on the 1st—that is, early this week. I wanted to then correct that as of today to let the committee know my current state of knowledge.

**Mrs GALLUS**—In your letter of 1 December you say clearly:

I do not know—

there is no date; presumably it was as of 1 December—

whether any supplementation in fact occurred or, if so, to what extent.

**Mr Boucher**—That was as of the lst. That is when I signed this letter. That is why I made a further statement this morning.

**Mrs GALLUS**—So on 1 December you did not know, even though the ACCC, who are your clients, did know?

**Mr Boucher**—That is correct. I personally did not know.

**Mrs GALLUS**—When did you come back from overseas, Mr Boucher?

**Mr Boucher**—I got back on Thursday, 20 November.

**CHAIR**—I guess we are a bit confused as to why you would not have run this past your colleagues to just check it.

**Mr Boucher**—I am not wanting to mislead the committee in any way.

**Mrs GALLUS**—When you say, 'I do not know', it does imply that the AGS did not know. You did not say you personally did not know whether any supplementation in fact occurred or, if so, to what extent. You say, 'I do not know.' Isn't that misleading when the AGS, and certainly Mr Alexander, was well aware that it had occurred and so did the ACCC?

**Mr Boucher**—I have absolutely no wish to mislead the committee. I am doing my best.

**Mr Alexander**—We are talking about different things. I am talking about the arrangements entered into for top-up. I think what Mr Boucher is talking about is whether the payment has already been made.

**Mr Boucher**—That is what I was intending to say.

**CHAIR**—Isn't that splitting hairs a bit?

**Mrs GALLUS**—What are we talking about here, guys? There is an agreement for Optus to pay these people and you are splitting hairs about whether at this stage, whatever today is, they have actually paid them or not.

**Mr Boucher**—The words were 'supplementation in fact occurred'.

**Mrs GALLUS**—The arrangement was that supplementation was going to occur. We are not going to suggest at this stage that Optus pulled out and did not pay that supplementation.

**Mr Boucher**—I do not know whether as of today, they have paid or they have not paid.

**Mrs GALLUS**—Isn't that totally irrelevant? The point was that the agreement was that Optus was going to top up. Whether something supplementary has happened or it has not is irrelevant to the point.

**CHAIR**—You were aware when you engaged them that they were going to get supplemented fees from Optus.

**Mr Alexander**—Their salaries would be topped up.

**CHAIR**—So that is the key point, isn't it?

**Mr Alexander**—Yes, that is the key point.

**Mrs GALLUS**—Just to sum up though, you knew all along, Mr Alexander, that there was going to be a top-up. Mr Boucher, you were not informed until you returned to the country on 20 November.

**Mr Boucher**—Sometime after that.

**CHAIR**—It must have been a lot later because you wrote the letter still unaware.

**Mrs GALLUS**—You did not put this letter past Mr Alexander?

**Mr Boucher**—No. I think Mr Alexander saw this, but I do not know for sure. What I intended to say in the fourth line at the top of page 3—the first incomplete paragraph—was whether the payment was in fact made. That is what I was intending to convey. I do not know whether that is expressed properly, but that is what I was intending to say.

**CHAIR**—But you go on later in paragraph 11 and repeat yourself. You say, 'If it in fact occurred.'

**Mr Boucher**—That is what I am saying.

**CHAIR**—Mr Alexander, you saw this letter?

**Mr Alexander**—Yes, I saw a draft of it.

**Mrs GALLUS**—You do not feel it gave a wrong impression?

**CHAIR**—I think the point is made.

**Mr Leader**—It certainly was not intended to. It was intended to refer to whether it had, in fact, occurred. It was not intended to refer to what the arrangement might be.

**CHAIR**—Thank you very much. We certainly appreciate your frank discussion.

[11.42 a.m.]

**ASHER, Mr Allan, Deputy Chairman, Australian Competition and Consumer Commission, 476 Northbourne Avenue, Canberra, Australian Capital Territory 2600**

**FELS, Professor Allan, Chairman, Australian Competition and Consumer Commission, 476 Northbourne Avenue, Canberra, Australian Capital Territory 2600**

**CHAIR**—Welcome. I remind you that the evidence you give at this public hearing is considered to be part of the proceedings of the parliament. 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. Did you wish to make an opening statement?

**Prof. Fels**—Yes. You have heard the AGS this morning. We were aware that it was their view that the arrangements regarding Gilbert and Tobin, solicitors, were lawful, proper, necessary, in the public interest and involved no conflict. Our own decisions in this whole matter were driven by public interest concerns and by a desire also to follow proper legal processes. Our process decisions were, of course, taken with the benefit of AGS legal advice.

On the key decisions—in fact, the really important decision that the commission made—was to oppose the merger and at that time there was no thought of a secondment arrangement. That was not in anyone's mind. We made that important decision prior to any of these issues about secondments and so on coming up.

The engagement arrangements, and the fact that Gilbert and Tobin would be seconded, were done in a very open, transparent manner. It was disclosed in advance to the parties and to the court, and it was openly discussed in court. Mr Alexander, I believe, was cross-examined in court for a couple of hours about a number of matters, including that. To the extent that there were objections, we understood that various specific measures were being taken to address those matters.

It would seem that the idea of a secondment to the AGS for the conduct of an ACCC case does not, in itself, seem to be objectionable; it seems to be okay in principle. Regarding the Gilbert and Tobin secondment, the commission's advice from AGS was that it was lawful, proper, appropriate, necessary and in the public interest. Also, so far as there were possible conflicts, we were advised that there were safeguards in place to address those particular issues.

With respect to the topping-up arrangement, I am unaware of any precedents where there has been a topping-up arrangement. The AGS entered into the topping-up arrangement and it was made, completed, given effect to, before we knew that there was a topping-up arrangement. After the arrangement had been entered into, the matter became known to a couple of our staff. I heard, and I think our Deputy Chairman, about the whole

question of the topping up much later. I think it was around the time of your own diligent investigations into this matter; maybe slightly before.

On the salaries question, we paid the AGS a rate. I do not know the exact number but, in order to advance a discussion, it was about $250 an hour. I have been unable to check up on whether it might have been 2,100 or 2,500, but it was about $250 per hour in relation to the engagement of those services.

**CHAIR**—So is that per solicitor or for the total advice?

**Prof. Fels**—No, that was per solicitor.

**Mr ANTHONY**—Per hour?

**Prof. Fels**—Per hour, yes.

**Mr HOCKEY**—I am sorry; that is in conflict with what AGS advised that they—

**Prof. Fels**—We had an arrangement to pay AGS about $250 an hour.

**Mr HOCKEY**—And they were paying Gilbert and Tobin $370 a day.

**Prof. Fels**—Yes, we did not know about that until—

**Mr HOCKEY**—Can I get 'broad laughter in the room' on the *Hansard* record.

**CHAIR**—Keep going.

**Prof. Fels**—I thought I would just mention that the payment to them was about $250 an hour for those people. That was what the staff thought, and then the topping up became known.

**Mr ALBANESE**—You will get a Christmas card!

**Prof. Fels**—I just mention that point because it has not become apparent until the last day or so that there is that aspect to it. We thought the payment arrangements were to pay something like commercial rates. We thought that the payment was of the order of $250 an hour. I do not know exactly what the staff thought about the topping-up arrangement, but I would think they thought it was not a very large amount of money.

**CHAIR**—So you are really saying that, despite the close working relationship with AGS, they keep a lot of things from you?

**Prof. Fels**—We did not know about that one until now. We understood that there

would be a billing to the commissioner of staff of that rate.

**Mrs GALLUS**—You actually were paying commercial rates where they were paying bargain basement rates to Gilbert and Tobin which were then being topped up to commercial rates?

**Prof. Fels**—I believe that was the case.

**Mrs GALLUS**—It is nice if you can get it.

**Mr CAUSLEY**—You did not know at the time that there was a top-up from Optus?

**Prof. Fels**—Just to go through our decisions: first of all, there was the decision to second them and, as has been mentioned this morning, we somewhat reluctantly accepted their advice that this was the only possible course of action to take. I am getting to your point a little slowly. There seemed to be no alternative with the case coming up just a short time off. The topping-up arrangement was entered into, and after the arrangement had been made, we were informed that it had been made. The staff were told that it had been made. We did not—

**Mrs GALLUS**—That was on 3 November?

**Prof. Fels**—It was on 3 November that it was made known to staff.

**Dr SOUTHCOTT**—When were you first aware that Optus would be topping up the legal fees?

**Prof. Fels**—To the best of my knowledge—thanks to Mr Hockey's very good questions, I have one slight qualification to that point.

**Mr HOCKEY**—I am occupying Mr McMullan's seat today.

**CHAIR**—And he is desperate to have a question, too.

**Prof. Fels**—I have one point to make, since I am before the committee. It is possible it got a mention in a newspaper article a few days before that, but it did not really register with me if it did talk about topping up. The article was probably about secondment. So we knew about the secondment early enough.

**Mrs GALLUS**—But the staff of the ACCC knew?

**Prof. Fels**—Yes.

**Mrs GALLUS**—But you personally, as head of the ACCC, did not?

**Prof. Fels**—No.

**Mr HOCKEY**—Professor Fels, I want to clarify the position: you were paying AGS $250 an hour specifically for those Gilbert and Tobin lawyers and you were paying AGS a separate fee for their work on this case.

**Prof. Fels**—First of all, it was about $250.

**Mr HOCKEY**—Yes, about $250 per hour.

**Prof. Fels**—Yes, there was a separate stream of payments. They were payments in respect of their own work and their own solicitors. The billing arrangement included extras for the Gilbert and Tobin secondment, and the billing arrangement was of the order of $250 per hour.

**CHAIR**—Since Mr Boucher and Mr Alexander are still here, I wonder whether they want to respond to this apparent difference in the charge-out rate, which seems to be a remarkable difference.

**Mrs GALLUS**—Do we want Mr Boucher and Mr Alexander to come back to the table?

**CHAIR**—Yes, please.

[11.55 a.m.]

**ALEXANDER, Mr Robert Menzies, Acting Deputy Government Solicitor (Trade Practices), Office of Litigation, Australian Government Solicitor, Robert Garran Offices, Barton, Australian Capital Territory 2600**

**BOUCHER, Mr Dale Roger, Interim Chief Executive Officer, Australian Government Solicitor, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600**

**OWBRIDGE, Mr Robert Glenn, Senior Government Solicitor, Australian Government Solicitor, Robert Garran Offices, National Circuit, Barton, Australian Capital Territory 2600**

**ASHER, Mr Allan, Deputy Chairman, Australian Competition and Consumer Commission, 476 Northbourne Avenue, Canberra, Australian Capital Territory 2600**

**FELS, Professor Allan, Chairman, Australian Competition and Consumer Commission, 476 Northbourne Avenue, Canberra, Australian Capital Territory 2600**

**CHAIR**—I would remind you of the earlier warning about this being a committee of the parliament, et cetera. Would you like to respond to this question?

**Mrs GALLUS**—Mr Boucher, what we have heard here is that the ACCC was paying you commercial rates of $250 an hour for the solicitors. Earlier on today you told this committee that you had no idea at all what the commercial rates were for these sorts of solicitors and what the top-up rate was. There seems to be a total conflict here.

**Mr Boucher**—There is a misunderstanding, at least. I have on my right Mr Glenn Owbridge who is involved in the detail of these matters; he works at the sub-office. As I think I said before, but I did not give a precise figure, we have an annual retainer arrangement for Mr Alexander. That covers all work. I understand—but I stand to be corrected—that, in relation to this work, even if there had been a time reconciliation against an hourly rate, the ACCC at the end of the day pays no more than the annual retainer for our work.

We have some of our other lawyers, but not all of them, who do work for the ACCC also on annual retainer fees. In relation to the Gilbert and Tobin lawyers, we gave evidence this morning about the rate at which we negotiated with them. If the committee wishes to hear it, as I anticipate it would, it would need to hear from Mr Owbridge about the precise charging arrangements between us and the ACCC for the Gilbert and Tobin lawyers.

**CHAIR**—Before you answer that, Mr Owbridge, I have to remind you that the

evidence you give at this public hearing is considered to be part of the proceedings of parliament and any attempt to mislead this committee is a very serious matter and could amount to a contempt.

**Mr Owbridge**—I understand that the rate that these people were charged at was the billable hourly rate and I understand it was $240 in the case of Mr Glass—and Mr Alexander may be able to correct me—but $200 in the case of his associates.

**Mr Alexander**—I think the figures are $250 an hour for Mr Glass and $210 an hour for Mr Wheeler, who was the other solicitor. Those rates are the AGS rates. They are the rates that throughout the Commonwealth, as Mr Boucher will be able to tell you, are paid.

**Mrs GALLUS**—Mr Alexander, I am a little confused—being a simple politician here—about what is being said. We heard earlier that you were paying $379 per day for the Gilbert and Tobin solicitors.

**Mr Boucher**—That is what we paid them—

**Mrs GALLUS**—That was what you paid them.

**Mr Boucher**—It is based on SES salary rates, and I took it down—

**Mrs GALLUS**—But that was what you were paying them—

**Mr Alexander**—For a year.

**Mr Boucher**—That is for a year, and we took it down to—

**Mrs GALLUS**—At $379 per day?

**Mr Alexander**—Down to per day.

**Mrs GALLUS**—So that is what the AGS was paying the solicitors. At the same time, we have just heard from Professor Fels that he understood that the ACCC was paying $250 an hour for those same solicitors. That is what ACCC understood they were paying for it. Then we understand that because you were only paying the $379 a day, that was being topped up by Optus to an amount which would be closer to the $250 per hour that the ACCC was paying, and maybe more.

**Mr Alexander**—Not to the $250; it was topped up to their normal salaries.

**Mrs GALLUS**—I said ‘about’ that.

**CHAIR**—Mr Alexander, you say 'not to'—what was the top up to?

**Mr Boucher**—We are finding that information for the committee, as I have undertaken. Steps are in hand to get that.

**Mr HOCKEY**—Just to clarify it: you charged the ACCC $250 an hour for the Gilbert and Tobin lawyers and then you paid the Gilbert and Tobin lawyers $379 a day?

**Mr Boucher**—That is as I understand the arrangement.

**Mr HOCKEY**—Given the fact that the ACCC pays you additional sums for your advice to the ACCC—

**Mr Boucher**—They paid for the work of Mr Alexander and others.

**Mr HOCKEY**—So where did the rest of the money go?

**Mr Boucher**—We have to operate as a business.

**Mr HOCKEY**—Operating as a business, it is certainly not unusual in my experience to work 10 hours a day and charge out 10 hours a day. That is $2,500 a day that the ACCC is paying you for Mr Glass. Are you paying Mr Glass's firm $379?

**Mr Boucher**—Is that correct?

**Mr Owbridge**—That is correct broadly. From listening to what you were talking about this morning, I think there are a number of misunderstandings. The first is the difference between a salary rate and a charge-out rate. The salary rate is what the solicitor receives from the firm for doing the work.

My charge-out rate is $240 an hour. My salary rate is identical to that that was paid to Mr Glass. The charge-out rate firstly is less than all of the hours a day. It is all of the billable hours a day.

**Mr HOCKEY**—Yes, I understand what billable hours are. I have done many of them myself.

**Mr Owbridge**—Secondly, in our case, it incorporates all expenses of operating the business. Whilst I do not have all of the numbers, it very closely equates to what it costs us to operate the business in terms of providing accommodation, support staff, secretarial, photocopying, phones, et cetera.

**Mr HOCKEY**—Are you saying it costs the AGS nearly eight times more to employ a solicitor through the AGS than it does if the ACCC went directly to that

solicitor?

**Mr Owbridge**—No, because if they have gone directly to that solicitor, almost certainly they would have been engaged at the commercial rate.

**Mr HOCKEY**—On my very crude sums, if they are engaged 10 hours a day, you are paying them $379 for that day. You are receiving $2,500 and your costs of employing a Gilbert and Tobin solicitor would be $2,121 per day. Don't you find that extraordinary?

**Mr Boucher**—No.

**CHAIR**—There is your answer. I think that has clarified that point. Thank you for that.

**Mr Boucher**—Mr Chairman, would you like us to stay here?

**CHAIR**—I think you have answered the question, thank you.

**Mr ALBANESE**—I have some questions to Professor Fels re the substance. First of all, I am sure we will come back to the legal fees questions. When the general manager of your colleague, Hank Spier, appeared before the Senate estimates committee on 14 November, he took on notice 80 questions put by members of that committee relating to the action by the ACCC to injunct the merger between Australis and Foxtel. Do you know if answers to those questions been provided to the committee yet?

**Prof. Fels**—I do not think they have been answered. There are 80 questions. It is fairly obvious where some of them came from. We actually are fairly happy to be able to respond and set out the answers in full because it gives us an excellent opportunity to try to explain what the case is about.

**Mr ALBANESE**—Have you got a time frame of when that is likely to be?

**Prof. Fels**—Mr Spier, for very substantial reasons is not here. It will be the end of next week.

**Mr ALBANESE**—The end of next week?

**Prof. Fels**—Yes.

**Mr ALBANESE**—Could that be provided to this committee as well?

**Prof. Fels**—Yes.

**Mr ALBANESE**—The Senate is a long way away sometimes. Going to the fax

relating to your decision to block the merger, one of the facts put by Optus to the ACCC was that the merger would lead to its demise because the company was experiencing a subscriber cancellation rate of 80 per cent. Did you just accept that rather extraordinary claim or did you test it yourself? Was there any evidence produced to suggest that that was the case?

**Prof. Fels**—I think all the claims were tested in considerable depth by the staff. The case did not hang just on an 80 per cent cancellation rate.

**Mr ALBANESE**—Wouldn't an 80 per cent cancellation rate suggest there is more wrong with Optus's business practices than whether there is simply a merger between Australis and Foxtel?

**Prof. Fels**—Optus has had problems; there is no denying that fact. But the very clear advice from our QCs was that the impact of the merger would be to substantially lessen competition in pay TV and the telephony market. Taking account of all the circumstances, including the Optus position, it would have made the state of competition a great deal worse.

**Mr ALBANESE**—When you were here before the committee a couple of weeks ago, you said:

. . . the commission faced a very difficult issue, an unpleasant choice, between possible Australis Media failure and possible Optus failure.

While it was pretty obvious that Australis would go to the wall if the merger was blocked, did you honestly believe that Optus was at risk of liquidation if the merger went ahead?

**Prof. Fels**—Not liquidation, and we have never quite said that, but what we believed was that there was a serious—

**Mr ALBANESE**—But you did say 'possible Optus failure'.

**Prof. Fels**—Yes. Just to slightly elaborate on that and generally try to make it clear, we believed there was a very serious risk, to quote your words, that Optus would withdraw from local telephony and from pay television. We did not believe Optus would withdraw as a player from the activities of long-distance, international and mobile calls and some other areas, but on that core area of local telephony competition by means of having a facilities based approach to competition, we certainly believed there was a very serious risk.

**Mr ALBANESE**—You are basing some of that on the question I asked before, which you would have heard me ask Mr Boucher, relating to the pull-through concept.

**Prof. Fels**—Yes.

**Mr ALBANESE**—Was it based upon that?

**Prof. Fels**—That was quite a central consideration. There were several considerations in the case, of course. The commission considered that the merger was anti-competitive in pay TV itself. It considered that because of the pull-through effect it was also anti-competitive in regard to local telephony.

**Mr ALBANESE**—Are you aware that there is substantial evidence to suggest that the pull-through effect does not exist?

**Prof. Fels**—There is even more substantial evidence to suggest that it does and the commission, of course, has spent a huge amount of time investigating that. We are very concerned with the public interest in this matter and the protection of the Australian public from the possible loss of competition in local telephony from a facilities based competitor.

**Mr Asher**—That was an issue that we debated quite vigorously at the commission level—the relative weights of those arguments. We were persuaded in the end—affidavits all spell this out—from the best expertise that we could get in Australia, including, as a consultant to the commission, Neil Tuckwell, who had been the head of Austel overseeing the introduction of competition into telecommunications, and also from the highest levels of the most comparable telecommunications regulator, OFTEL, in the UK. So while, of course, there are competing arguments, the commission formed the view, on its assessment of those competing arguments, that the risk to competition in Australia in both the local telephony market and the pay TV market required that we take action to prevent that risk.

**Mr ALBANESE**—At the last committee meeting, when my colleague the member for North Sydney was questioning about legal assistance, you began by saying at one stage that it was a small matter—I think you actually said he was making a mountain out of a molehill. You then went on to say that it was a serious question and that you would go away and think about it.

**Prof. Fels**—Yes.

**Mr ALBANESE**—Given that you have had some time to think about it, and given that you have been present when you have heard some quite extraordinary evidence before this committee this morning, do you now agree with the view of this committee—I think, across the board—that this is a very serious matter and that these are extraordinary circumstances and that there is an absolutely clear case of a conflict of interest in the engagement of solicitors who had a clear interest due to their connections with Optus?

**Prof. Fels**—There were some matters I did not understand when this came up the last time and I was a little cautious about saying certain things until I knew a bit more. It

is obviously a much bigger issue than I thought at that time and, indeed, than I thought even a few days ago.

**Mr ALBANESE**—Even two hours ago, I would have thought.

**Prof. Fels**—I do accept that there is a serious perception problem about these arrangements, and the commission proposes to instruct the AGS not to enter into topping-up arrangements in future. Because of the inescapable fact that, in trade practices cases, there is a degree of interaction between private sector parties and the commission in the preparation of a case—for example, on matters like helping with affidavits, and so on—it would also propose that there should be some guidelines drawn up. We would be proposing, in the light of all this, to draw up guidelines, to subject them to public discussion, and to submit them to this committee.

**CHAIR**—I am sure the committee will be most gratified to hear that and we probably feel that we have helped the public cause.

**Prof. Fels**—Yes, I think you have.

**Mrs GALLUS**—Can I put this to you, Professor Fels. You have just told us that the horse has bolted and it has happened. You said that you are now going to instruct the AGS not to do this in future. At the time it did not occur to you that there was something wrong, but now we have closed the door and said, 'We have locked the stable doors.' But the horse is out there.

**Prof. Fels**—Despite what I have said, I do not think any ill-effects arose from anything that happened. The commission's important decision was to oppose the merger and that decision was made well ahead of any of this. The case has not happened. There is a perception issue and it should be addressed. It was bigger than I thought it was. The commission itself now says that it will take some steps, and I will go over our decision making. The first step was to oppose the merger and there was no issue there because this issue you are interested in was not around. The second step was that in my absence it was agreed—and it was urged upon us by AGS—that there was no alternative but to engage Gilbert and Tobin. The commission had some reluctance to accept that—

**Mrs GALLUS**—With regard to your absence, it concerns me a little bit that all this agreement went on, and that on 3 November the ACCC was told there would be a top up—although you did not have any idea of the nature of the top up. Yet you, as head of the ACCC, did not consider it an important enough issue—presumably your office is in contact with you when you are overseas and you are not incommunicado—

**Prof. Fels**—Yes.

**Mrs GALLUS**—It was not considered an important enough issue by the ACCC to

inform you, as head of the ACCC, that the AGS was accepting a top up from Optus on this case?

**Prof. Fels**—Could I just distinguish a bit between the cases and different decisions? The Gilbert and Tobin secondment decision was made in my absence, and I did not hear about it. There were a lot of decisions being made at that time. I did hear about a number of them, but I did not hear about that particular one. I understand that it was reluctantly accepted by the commission on the basis of advice from AGS that there was no alternative.

When I got back I was also somewhat concerned about it, and I was advised that the arrangements were proper, legal, in the public interest, necessary and so on. Nevertheless, I did instruct the staff to enter into some kind of phasing out arrangement of this. It was not something that could just be dropped overnight, because the case was about to begin and the work had already started and there were not the people there who were into telephony law. So there was an instruction to phase it out and to start to build up someone from our own staff to work on this matter.

Turning then to the topping-up matter, as I said, this was not made known to us until around about the time of the inquiry. I do not quite know why it was not, but it may have been perceived that the commission was paying quite high rates. Also, the deal had been entered into and given effect to, and as far as I know, there is some kind of contractual arrangement.

**Mrs GALLUS**—But in retrospect, do you think your staff and those responsible should have contacted you overseas and informed you that there was this arrangement that Optus would be topping up the Gilbert and Tobin lawyers? Do you think this is something that you should have been told, as immediately as the rest of the ACCC knew?

**Prof. Fels**—I think, in retrospect, it would have been better if I had been told.

**Mrs GALLUS**—So having established that it would have been better had you been told, perhaps you would have taken a different course at that stage had you known. Let us get back to the actual payment. How do you feel knowing that you are paying commercial rates and the AGS was only paying $379 a day and then that was being re-topped up again to commercial rates by Optus?

**Prof. Fels**—I feel that they should have paid the rate we were paying then without mark-up.

**CHAIR**—Has this occurred before in other situations when you have had AGS provide—

**Prof. Fels**—I do not see that there has been any topping up.

**CHAIR**—No, but the charge-out rate has been significantly different from the payment rate.

**Prof. Fels**—Not that I am aware of.

**Mr Asher**—I cannot think of any analogous situation. The commission quite frequently engages other solicitors, but we do that without the intervention of AGS. The unique feature of this case is that the case had been filed on 14 October. I think this was a vital part of what Mr Alexander would have put to you, had he spoken. The case was filed on 14 October and on the first directions date, we had put to the court that we would be ready for a hearing in February or March 1998.

The court directed that, far from the case going ahead then, we were to be ready for a hearing in November this year. The 20 or so weeks that we expected to elapse from filing to arguing the case was compressed. The directions were that we had to have all that information into the court, served on other parties, within about two or three weeks.

That led to what I would have to call a real crisis of capacity to do that. As I said, in a unique situation, the commission agreed to the AGS, who were representing us, seconding staff from another firm. That just does not happen. This is unique. Normally if we had made the decision that we needed those specialist skills from another firm, we would have gone to them in the first place, as we have done in a number of matters going on now.

**Mrs GALLUS**—To follow up something that was raised in the paper after our last session with you, it was said that the ACCC is forced to go out and get help from commercial interests because the government does not pay them enough to run their ACCC. But is it not true, from what we have learned today, that you did have the funds because you were paying the commercial rates and it was just a decision of the AGS that it would seek a top up from Optus onto rates that were less than commercial rates?

**Mr Asher**—To comment on that, it is certainly not my understanding of any intention that the commission intended to put to this committee. I am responsible for enforcement work at the commission. We have never been of the view that we do not have enough money, so we have to go to commercial parties. It is more that, inherently, trade practices litigation involves competing interests of parties—in this case, it is Foxtel partners and Optus—and that the evidence that the court is going to want to hear, or in fact demand to hear, is not what we think is good or bad: it is going to demand that we put in evidence about exactly what market participants do. So that is why we would always go to competitors, suppliers and customers and put in their statements.

**Mrs GALLUS**—It was not actually my question, Mr Asher. It was just really about how you felt about the fact that you were paying commercial rates and yet AGS was seeking a top up because it was not paying commercial rates.

**Prof. Fels**—One of the somewhat unfortunate things about this is that it sharpens the perception of the conflict. The gap between what AGS was paying and what Gilbert and Tobin may have been getting as a top up may have been a significant amount of money, whereas the amount of money that we were paying was not that far—

**Mrs GALLUS**—Off commercial rates.

**Prof. Fels**—Yes.

**CHAIR**—On that point, this question does come about resources and so on. In your submission, you talk about the difficulty in undertaking complex litigation, time frames, funding and so on. There was an article in the *Weekend Australian* a couple of weeks ago, talking about a judge actually hearing a case and noting sympathetically that he had read that 'the ACCC staff is being cut under them day to day'.

**Prof. Fels**—The general position is, firstly, there have been general cutbacks in spending by the government which have been applied to the commission. There have not been any special discriminatory cutbacks or picking on the commission. Indeed, the commission has actually received additional resourcing from the government for a number of new roles. So we are not complaining at all about government funding of the commission or criticising it. However, it is a fact that there is a chronic problem for the ACCC in regard to the engagement of legal services. In regard to barristers, there is a limit on how much they can be paid. A number of well-known barristers have refused to work for us because of the rates that we pay. On very important cases, you often cannot get the barrister that you want.

With regard to seconding from private sector firms or directly engaging them in competition with the AGS, there is a general problem in that our budget is set on the assumption that we would be paying AGS rates. So to think about using a private sector firm, one is very cautious, indeed, to do that because of the rate discrepancy. There are occasions on which there would be a benefit to the enforcement of the Trade Practices Act in the public interest, if the ACCC had a bit more freedom, or had more allowance in the budget, to cover these sorts of—

**CHAIR**—When you say AGS rates, do you mean the $379 per day or the $250 an hour?

**Prof. Fels**—No, their charge-out rates to us.

**CHAIR**—Mr Hockey is desperate to ask a question before he goes somewhere else.

**Mr HOCKEY**—From all the evidence you have heard this morning, Professor Fels, do you now accept that there would be a justifiable, clear perception of conflict of

interest involving the ACCC in this matter?

**Prof. Fels**—There can be no perception that any decision making by the commission was in any way affected by this arrangement. What I think is a fair perception is that the topping-up arrangement was less than desirable and it would have been better to—

**Mr HOCKEY**—Would you agree to do that again?

**Prof. Fels**—I don't think I would agree to do that again, no. Indeed, as I said, we now propose to instruct AGS on this matter. I do not think we would do it again, no.

**Mr HOCKEY**—Given that, out of this case, a number of people raised issues relating to perceptions of conflict of interest, particularly involving Optus, I would like to flag that the chairman has a number of questions that will be put to you on behalf of a number of interested parties, including Taxi Company, UCOM and a few other people who have raised issues arising out of this matter with us about the ACCC's—

**Prof. Fels**—Taxi Company?

**Mr HOCKEY**—Yes—about the ACCC's perceived conflict of interest in relation to Optus. I would be very grateful if you would come back to us with full and complete answers as soon as possible.

**CHAIR**—You have flagged that. I certainly have it here in front of me to do that.

**Mr HOCKEY**—And UCOM as well.

**Dr SOUTHCOTT**—Professor Fels, how often would you contract the services of a private sector law firm in a case?

**Prof. Fels**—Very little, but it does happen.

**Dr SOUTHCOTT**—When you actually contract the services of a private sector law firm, do you look for a firm which does not have some connection with one of the participants in the action?

**Prof. Fels**—That would be the preference, yes.

**Dr SOUTHCOTT**—In the case of Gilbert and Tobin, were there any other private sector firms who had the expertise but did not have a connection with a participant in the action?

**Prof. Fels**—I understand in the AGS evidence—

**Mr Asher**—I can answer that, too. I have got a background working in the telecommunications industry. In my view, the leading firms with expertise are Mallesons Stephen Jaques; Norten Smith; Allen, Allen and Hemsley; and Gilbert and Tobin. There might be one or two other firms with some knowledge, but in terms of the complexities of a competition based case, I would have thought they were the only firms that one would consider—remembering the time constraints that I was talking about—to get the instant expertise that could be put to work. As it happens, all of those other firms were working for other parties. There was one other I have not mentioned, Minter Ellison; they have had some experience in this area but they, too, work for one of the parties. It is well known that Telstra also have retainer arrangements with a large number of lawyers and counsel. So the choices are very few.

**Dr SOUTHCOTT**—Given that, it seems to me that there are two issues arising out of this: one is the selection of Gilbert and Tobin and the other is the more serious issue, which is the top up by Optus.When you contract out work for private law firms do you always pay commercial rates?

**Mr Asher**—Sure.

**Prof. Fels**—Yes.

**Dr SOUTHCOTT**—So can you categorically say that the situation we had in this case, whereby the agreement from the law firm was that Gilbert and Tobin would second the lawyers to the AGS providing that their salary was topped up by Optus, has not happened in any other cases in which the ACCC has directly contracted?

**Mr Asher**—More importantly, we can say it did not happen in this case, to our knowledge.

**CHAIR**—Mr Spier said at the hearing last time that in fact there were other cases and he was going to get back to us, and I was going to pursue that in a minute.

**Prof. Fels**—I think we will have to give you a definitive response in writing, but my clear understanding is that there has been no topping-up type arrangement of this sort in any other case. I think he was referring to the fact that there has been this stream of assistance that comes in for cases taking various forms. He was aware of a couple of cases, at least, where there has been some involvement by lawyers not attached to AGS permanently in cases. We have given you a couple in our reply but there has been no topping up.

**Mr Asher**—I could think of several others that I could add to the submission, including one from very recently when we took an action against Tip Top or George Weston. The solicitors for George Weston, even though we were taking action against them, prepared the affidavits that were filed in court. It is a very common process.

**Dr SOUTHCOTT**—Given that the ACCC first heard on 3 November about the arrangements that there would be, and given that it was in the *Australian* on 31 October that concerns had been raised that Optus would be providing resources in this case, are you not concerned that alarm bells did not go off at any time and that it was only when you came to the committee on 20 November that you became aware of this?

**Prof. Fels**—The topping-up bit, yes. The general decision about having a secondment arrangement was considered by the commission. What was considered before then, I knew about in early November. But the topping-up bit had come forward—and, also, I think the extent of it was perhaps not so clear until very recently to anyone at the ACCC.

**Dr SOUTHCOTT**—Let us go back to one of your earlier comments. You said that, in effect, the arrangements did not change the stance of the ACCC with regard to opposing the merger. Do you feel that it is important in conflict of interest issues to not just avoid conflicts of interest but to avoid the perception of conflicts of interest?

**Prof. Fels**—Yes, I agree with that.

**Mr Asher**—Could I also point out that that arrangement did not commence until November, which was almost a month after the commission made its decision and three weeks after the case had commenced. All of the framework of the case was clearly under the direct direction of the AGS and the commission. While I think what you say is correct, one needs to recognise that we were simply at that stage of the case where we needed to get another 30 affidavits filed within two weeks. Their job was specifically to speak to people in their field of expertise and to develop these industry statements. It had nothing to do with tactics or the direction of the case but was more to do with identifying information and getting it in an admissible form. I do not want to minimise your comment but I think it is important to see it in that context.

**Dr SOUTHCOTT**—Okay.

**Mr CAUSLEY**—I just want to follow on a bit in this area of the integrity of the commission, and it probably follows on from a question I asked Mr Boucher earlier. Professor Fels, would you agree that the ACCC is a very powerful organisation in this area?

**Prof. Fels**—It is painted as that but it is dealing with the most powerful companies in the land. It is the Trade Practices Act which is powerful and that has been enacted by parliament. The commission is the agency which has some roles under the act in applying that. The decisions obviously have effects and are significant.

**Mr CAUSLEY**—Obviously the decisions that the commission makes in many ways can have very big effects on the investments of the public in these areas?

**Prof. Fels**—Yes, indeed. The one that we made in this case, I think, will prove to be profoundly beneficial to Australia.

**Mr CAUSLEY**—I am glad you said that! I think you make the point in the letter that you wrote back to us that it is not unusual for the commission to come down on the side of one of the protagonists. I accept that. I understand where that is coming from. But, because of the fact that you are perceived as judge, jury and executioner in many of these areas—

**Prof. Fels**—That is really a wrong perception, but maybe some—

**Mr CAUSLEY**—I think you are seen in that way. Isn't it very important for the commission to be seen to be not in any way taking sides in any of this, even if it is only advice and not top ups? It is seen that you might be taking sides in some of these disputes. Isn't it very important to see that the commission is not perceived in that way?

**Prof. Fels**—The commission is concerned with the promotion of the public interest in competition. When it decides something there, that will affect interests differentially. Some people will paint it as the commission taking the side of one interest versus another and there is some correctness in that. Our perception is that we are taking the side of the public. We are on the side of the public on those things.

We, generally speaking, are extremely careful about processes. There have been very few process type issues of the sort that have come up before this committee. The commission does things very publicly and transparently and is involved in numerous cases. It has an important job and its record on process issues is very good, in my opinion.

This particular issue has come up and I accept that there have been some problems about it. But the commission is extremely dedicated to applying the law properly and with proper processes. We take legal advice. In this instance, I want to point out, we turned to the AGS for advice on all these issues. At all times, the AGS was emphatically of the view that the arrangements were legal, proper, necessary, in the public interest and did not involve conflict. That is where we took our advice from.

We knew this had gone to the head of the AGS. We also knew that it would be an input in any of their decisions on the perception issue. That is part of the conflict of interest question. We gave weight to their views on the perception matter, plus the fact that the whole thing had been had out in court in front of the judge. The QCs saw no problems with any of the arrangements.

**Mr CAUSLEY**—But it still comes back to the point I think I made earlier. I think you agree that you are in a unique situation where you have to be seen to be absolutely immaculate.

**Prof. Fels**—Absolutely, yes.

**Mr Asher**—I could by way of illustration point to how this works in practice. In this very industry, in the last couple of years we have sued Telstra and Optus a couple of times—mainly in consumer protection issues. On the occasions where we have sued Optus, it has been because of misleading conduct and most of our evidence has been given to us by Telstra. In kind, with the cases we have taken against Telstra, information has been provided by Optus.

That does not mean that we glibly take everything they give us. We have then to take that before somebody who is far less open to persuasion than the public—to a Federal Court judge who will be very critical about the evidence we put forward. I wonder if you can see that, with so much of the work that we do, while it might appear that it is the special pleading of an individual, there are just occasions where there is a complete coincidence between their narrow interest and the broad public interest. I can tell you though that the number of times we reject information put to us are far greater than the number of times we accept it. That will not be visible. We impose extremely tough tests on evidence because we know that we have to persuade a judge.

**Mr CAUSLEY**—How do you test? Do you have in-house people who test these?

**Mr Asher**—Absolutely, to the extent that we can. In deception cases, we will take that statement. We will often appoint our own experts. We will form our own views in price fixing matters and resale price maintenance matters. But here in a complex competition issue the facilities based competition in telecommunications is brand new. There are economics. There are complexities that we really are not on top of. I do not think that is to the discredit of the commission. It is just that it is happening now.

What tests did we apply there? We contacted the head of OFTEL, the regulator in the UK who has been looking at similar issues. We had affidavits from our own specialist consultant, Neil Tuckwell. We used those as a way of assessing whether those submissions coming from Optus really seemed to meet the mark. I think that one of the members, Mr Albanese, spoke of the contention in the literature. We are aware of that. We have got all of those things, and we have had debates internally. But in the end, we felt that the most consistent theory, and the most damaging to the processes of competition, would be if we were to stand back and allow that acquisition to go ahead.

**CHAIR**—Mr Asher, just on that point, as it becomes more evident that there are technical problems with this local call that Optus are trying to set up through its pay TV cables, Optus's share of pay TV is dropping, I think. In terms of the number of subscribers for the local calls, it is fairly low. How long can you be confident of what you have really just said—that this pull-through effect, which is what Mr Albanese was really talking about, is going to stand up to scrutiny? There appear to be some very serious questions about it.

**Mr Asher**—I do not believe that the commission seeks to protect the interests of Optus, as such, but rather the processes of competition in local telephony. Will it succeed in that area? We certainly have no way of predicting that. What we could predict though with a high degree of certainty was that if Optus continued to be challenged and diverted with its resources, and denied the ability to put the investment in to compete head-to-head with Telstra in local telephony, consumers around Australia would be denied the contestability that is the goal of government policy.

**CHAIR**—But you are basing this more on the sales of pay TV—the customers—and yet as I understand it, there is an enormous churn in these customers.

**Mr Asher**—Yes, indeed.

**CHAIR**—That would indicate that the link between the two is a bit tenuous.

**Mr Asher**—But that is actually at the heart of one of the arguments. There are many of these things unfortunately that are in confidential affidavits. But I think that it would be fair to make this point: part of the reason for that high rate of churn is the absence of a nexus between the telephony and the pay TV contract. If those two can be brought together, then the churn rates, it is alleged, will radically fall, drop the capture costs for new customers, and bring about the recovery of the sunk cost in the technology.

**CHAIR**—But you are basing it on the fact that there is churn. But the technology is still deficient—I suppose that is the word. It has not been developed—

**Prof. Fels**—No.

**Mr Asher**—It is clear that Optus have had difficulties in implementing that. I could not comment though on whether the technology is deficient, or whether they have—

**CHAIR**—Perhaps 'deficient' is not the word, but there are sufficient difficulties there that—

**Mr Asher**—Yes.

**CHAIR**—the link is pretty tenuous at this stage. You have made a fairly bold assumption.

**Prof. Fels**—I think that there is a particular reason for the churn which is probably well known to many citizens. At the moment some people are wanting a free cable connection, and they do not have a particular commitment to pay TV. They want the local call and the interactivity later on. So that is one of the reasons for the churn that goes on. It is an important reason for the churn, but I do not know that it is central to the arguments in this case.

I might just say—and I do not wish to distract from what you are asking about—that you have been very concerned, as we have been, that the commission applies the law properly and straightforwardly. The legal issue is not simply something that turns on whether the technology is working like that. It was a factor.

The straightforward situation is that the merger, on a number of grounds, appeared to breach the law. We had very strong and unequivocal advice from senior counsel on that point. As a legal matter on the question of the application of the act in parliament, the situation was relatively clear.

Getting back to the working of the Optus technology, in general terms the evidence is that they had starting-up problems. They are now marketing between 1,000 and 2,000 local calls a week but you probably do not hear much about it because there is no national advertising of it. The advertising is done purely locally—they knock on your door, I believe. It has started up and they consider that they have a commercially viable service. They would not be offering a local telephony service to people if it were of an unacceptable quality. There are said to be possible loading problems as the number of customers builds up in future, but I believe that problem is one that would come up in the future and would probably be addressed by spending money.

There are two slightly contradictory criticisms on this matter. One is that the technology does not work so how can your decision have any effect in a situation where the technology is not working. The answer seems to be that it is not true to say it is not working. The other criticism is the opposite—that they were going to invest the money, anyway, so what are you worrying about? They have already spent quite a lot of money on this cable, it works, they are going to spend the money anyway, and we should not be worried about that.

There is a fair bit of tension—probably contradiction—between those two lines of approach. You will find these are two quite different sorts of criticisms. The commission has a view on the matter, which is that there was a very real threat to investment; we did not reach that conclusion lightly. We believed that particularly the Australian directors of Optus had decided there would be no more investment in local telephony and we considered that that would have had a disastrous effect on competition in local telephony.

That was a very, very important factor in this situation. But we looked at the problem as a legal matter. We kept asking how that would stack up under the Trade Practices Act. We consider that the withdrawal of Optus from local telephony would have had disastrous consequences for the Australian public and we thought it was appropriate for the matter to be tested in court. Speaking in general terms, I understand the issue of the inability of the technology was not raised by the opponents of the merger.

**CHAIR**—Mr Spier was going to get back to us on the question of direct legal input from commercial parties for other cases that you have handled in the past and I do

not think we have got that yet.

**Prof. Fels**—I was under the impression there was a letter.

**CHAIR**—You gave examples but I do not know whether you gave a list of all the cases.

**Prof. Fels**—No, we probably have not.

**Mr Asher**—I am responsible for the letter that came back to you. When it comes to direct legal input, I just wanted to raise this point: there are so many elements in the spectrum of input that one could determine. We listed the TNT-Mayne Nickless case in 1989 where we had temporarily a solicitor for the complainant working with us. That is pretty direct, but what about the recent case we took against George Weston where we were prosecuting them and their solicitors prepared the affidavits that we filed in court? Is that something of the class—

**CHAIR**—No, I think we are talking about something along similar lines to the questions that we had with the AGS.

**Mr Asher**—That is very easy: there are none that are remotely similar to this topping up. There are just none that I can discover in ten years.

**CHAIR**—I would like to thank everyone who has appeared before the committee today, both from the ACCC and the AGS.

**Mr Asher**—Did you have some complaints you wanted us to investigate?

**CHAIR**—Yes, we have had presented to the committee some concerns from Taxi 131 008 Pty Ltd. Could we give it to you and ask that you respond to it detail.

**Mr Asher**—Certainly.

**CHAIR**—Resolved (on motion by Dr Southcott):

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

**Committee adjourned at 12.50 p.m.**