HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Reference: Aspects of the national competition policy reform package

CANBERRA

Thursday, 5 December 1996

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Members:

Mr Hawker (Chair)

Mr Albanese	Mr McMullan
Mr Anthony	Mr Mutch
Mrs Bailey	Dr Nelson
Mr Causley	Mr Pyne
Mrs Gallus	Mr Willis
Mr Hockey	Mr Wilton
Mr Latham	

Matter referred to the Committee:

The aspects of the national competition policy reform package. The major issues the Committee has been requested to inquire into are:

(1) the appropriate means, including review processes, for applying the 'public interest' tests included in the Competition Principles Agreement:

These tests are a critical feature of this Agreement. They are described in Principle 1(3), which provides that:

without limiting the matters that may be taken into account, where this Agreement calls:

(a) for the benefits of a particular policy or course of action to be balanced against the costs of the policy or course of action; or

(b) for the merits or appropriateness of a particular policy or course of action to be determined; or

(c) for an assessment of the most effective means of achieving a policy objective;

the following matters shall, where relevant, be taken into account:

(d) government legislation and policies relating to ecologically sustainable development;

(e) social welfare and equity considerations, including community service obligations;

(f) government legislation and policies relating to matters such as occupational health and safety,

industrial relations and access and equity;

(g) economic and regional development, including employment and investment growth;

(h) the interests of consumers generally or of a class of consumers;

(i) the competitiveness of Australian businesses; and

(j) the efficient allocation of resources.

(2) the impact of competition policy reform on the efficient delivery of community service obligations including an assessment of:

(a) existing government policies relating to community service obligations and

(b) options for the delivery and funding of these services;

(3) the implications of competition policy reform for the efficient delivery of services by local government, including arrangements that have been developed between State Governments and local government authorities for the implementation of the Competition Principles Agreement.

WITNESSES

HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Aspects of the national competition policy reform package

CANBERRA

Thursday, 5 December 1996

Present

Mr Hawker (Chair)

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

The committee met at 10.16 a.m.

Mr Hawker took the chair.

CHAIR—I declare open this hearing of the House of Representatives Standing Committee on Financial Institutions and Public Administration and its inquiry into aspects of the national competition policy reform package. This is the second hearing of the committee and is held with the principal Commonwealth agencies responsible for competition work. Today we are taking evidence from the Australian Competition and Consumer Commission and we appreciate very much that Professor Fels is here today to present the views of the commission.

As the main competition regulator, the ACCC has a critical role in making the policy work. The committee is looking forward to getting into the detail of that role as well as hearing the ACCC's views on a range of concerns emerging from the committee's inquiry to date. The committee was fortunate enough to receive a private briefing from the ACCC a couple of weeks ago and we appreciated the open and constructive way in which both Mr Spier and Dr Tamblyn approached that task and look forward to a continuation of that approach today.

FELS, Professor Allan Herbert Miller, Chairman, Australian Competition and Consumer Commission, Chan Street, Belconnen, Australian Capital Territory 2616

SPIER, Mr Hank, General Manager, Australian Competition and Consumer Commission, Chan Street, Belconnen, Australian Capital Territory 2616

TAMBLYN, Dr John Cameron, Adviser, Australian Competition and Consumer Commission, Chan Street, Belconnen, Australian Capital Territory 2616

CHAIR—I welcome the representatives of the Australian Competition and Consumer Commission to today's public hearing. The evidence that you give at the public hearing today is considered to be part of the proceedings of parliament and, accordingly, I advise you that any attempt to mislead the committee is a very serious matter and could amount to a contempt of the parliament. The committee notes that the Australian Competition and Consumer Commission has not made a submission to the inquiry. Do you wish to make an opening statement before I invite members to proceed with questions?

Prof. Fels—Yes. I just wanted to say two things. The first one is just about our role in regard to competition policy. Essentially, we are a law enforcement agency. We are at the operational level with giving effect to various laws, most importantly the Trade Practices Act. So if there is some breach or potential breach of the act, then the commission has a role or if someone seeks authorisation we have a role.

Broadly speaking, the commission is not involved in broader issues than that. We are not, in general, concerned with trying to get the laws changed. There are a couple of exceptions to that but, as a broad proposition, most of the national competition policy thrust is concerned with the process of regulation review which is occurring both at the Commonwealth level and at the state and territory level over the next five years. As you know, all laws that have an effect on competition in any sector in any department at any level of government are being reviewed over that time.

We are not involved in that. We are not making submissions. If people come to us and want a bit of background information about the industry, that is fine. But I think that, in general, we stick to enforcing the law and giving guidance on how it might work in deregulated industries. I just mention that because sometimes some members of the public think that not only do we enforce the law but we also try to get all the laws changed that are the subject of review under the national and state regulation reviews. For example, we are not involved in, say, the sugar industry review or the wheat board review or things like.

The second thing I just wanted to mention in that context is what our role is. One of our roles is to apply the Trade Practices Act. Part IV of the Trade Practices Act prohibits anti-competitive conduct like price fixing agreements between competitors, various boycotts that are agreed between competitors, misuse of market power, exclusive dealing in resale price maintenance and anti-competitive mergers. It is possible for quite a number of them to get authorisation, so people often apply to us for authorisation and then if we make a decision on that, it can be—and often is—appealed to the Australian Competition Tribunal.

We also now have a new part to the Trade Practices Act and the access regime which is about access to essential facilities. We play a significant role in there along with many others. We also do the consumer

protection part of the Trade Practices Act. We also have inherited the Prices Surveillance Act administration. There has been a fair bit of cutting back on the role of the Prices Surveillance Act so there is not as much work being done there as there was in the past.

At this moment the government is also introducing telecommunications legislation which will transfer some of Austel's economic functions over to the commission from next July. We will kind of be the regulator of telecommunications. With respect to general areas, we are now spending a lot more time on reforms in regard to electricity and gas, that is, the energy sector, and the telecommunications sector, and to a degree the media. We are expecting to be doing rather more in the transport area and in that regard I have mentioned, of course, that 45D and 45E are now back in the act in full, once it is proclaimed, which I gather from the press will be early next year. We are also doing some work on the health sector which we had not previously had a huge amount to do with. That in brief are our main areas of interest at the moment.

CHAIR—Thank you very much for that. I guess one of the areas we would be very interested in is where you see a possible duplication between the work you are doing and what the NCC is doing. You mentioned electricity, for example, which the NCC would obviously see very much in its role, as well, looking at the question of competition in that area.

Prof. Fels—The demarcation is roughly as follows: the historic idea behind the NCC was that it would look at policy reform and we would just apply policy. That idea, which was in Hilmer, was actually slightly watered down by the Council of Australian Governments, in that the NCC can only look at matters that are actually referred to it by governments. I do not think electricity has actually been referred to it, from a point of view of trying to bring about reforms and so on. Nevertheless, there will be matters that get referred to the NCC and they would look at it from a reform point of view and no doubt they would talk to us and we could give them some help about our views on how the industry works. There may even be an element of duplication because we look at similar questions when we are enforcing the law to some of the reform questions.

There has been a similar issue with the Productivity Commission in the past. We are not sure, actually, that it is all that big a negative. There have not been that many complaints about overlap, for example. The second point, though, where the roles interplay with one another quite a lot is under the new access law because, as you know, the process of getting access to an essential facility is rather complex. You all know, of course, the classic example of the problem is Optus when they got started in Australia. In order to compete on long distance and international calls with Telstra, they had to have access to the Telstra wires into your home and so there had to be a law saying they could use their competitor's network and also someone had to figure out what price they paid for it. Now this class of problem is coming up all over the public utility area; energy, with electricity and gas, all over the communications sector, the transport sector, post and so on. A general law was passed about how you deal with this problem. That law gave a role to the NCC and it gave a role to the ACCC. What does happen is that although it is very early days in the history of applying this law, the people involved have a bit of a choice whether they go to the NCC for a declaration or to us for an undertaking—and to that degree there is a bit of overlap.

The broad distinction is that supposing someone is sitting on a so-called essential facility which might be electricity transmission wires, a big gas pipeline that is the only one from one point to another, part of the

underlying telecommunications network, the Australia Post core network, or a heap of other things, the owner of that facility faces the possibility that someone wants to use it. That person can apply to the NCC for approval to use it. They get what is called a declaration and then that declaration has to go off to the minister to approve—and there is also right of appeal to the Australian Competition Tribunal. It is a fairly complicated process. But that is what all the governments agreed was how it would run—and we had no particular problems with it.

The other thing—which is a lot simpler—is that the owner of the facility, instead of sitting back and waiting to see what happens, can come directly to us and offer up what is called an undertaking. They say, 'Sure we will open it up and these are our conditions.' Then we have to consider whether the conditions are acceptable. If they are—tick—and that settles that. If we do not like the conditions, then we will not register it and it is back to square one; and people may go off and seek a declaration. So in that area there is a little bit of overlap.

CHAIR—The other question is related to this. Are there gaps in the areas of responsibility as well as the overlaps? We have sort of talked about a number of overlaps but are there any gaps that you have identified?

Prof. Fels—In the whole scheme I think the present whole competition policy is actually quite comprehensive. If I had been asked about this several years ago I would have said there are a heap of gaps under our competition policy because our competition policy is just the Trade Practices Act. In the Hilmer report and the subsequent reforms it was recognised that competition policy is far broader than just applying the Trade Practices Act. I will give you some reasons.

The Trade Practices Act cannot override a law that restricts competition—and there are lots and lots of them. Also, there is no power to break up existing monopolies, no divestiture power under the Trade Practices Act. We do not particularly seek it either but there are areas of concern, for example, with regard to the public utilities where you may want to break them up, as has happened in Victoria. We have got no power there so there is a bit of a gap. But that is now being addressed. There is also this question of competitive neutrality, when the government runs a business competing with the private sector and it has some artificial advantage. We could not do anything much about that.

Hilmer said any serious attempt at the national competition policy has to cover those things as well. In the end, the Commonwealth, states and territories reached this agreement last year that they would review all those issues, every one of them, over the next five years. That is a really important commitment. They have to follow certain public, independent review processes and the Commonwealth has also offered a lot of money to the states and territories if they do the job properly.

CHAIR—Okay. One of the areas that, I guess, does concern the committee is that we have talked a lot about competition—implementation of the various competition policies. But there is this question of outcomes; the measurement of outcomes. How far does the ACCC go down this path and do you see this as an opportunity to further measure the outcomes? It seems that the NCC, for example, are not at this stage doing much on that.

Prof. Fels—I suppose all we would talk about in the first instance is outcomes under our law. This is a difficult area. It is undoubtedly the case that more should be done in this area. For example, when we intervene in a price fixing case or a merger, you have to ask, 'What happens three years later? Did we get it right?' and so on. We ourselves naturally do look at these matters because, three years later, people frequently come back to us and then we get the opportunity to review the situation, and so on and so forth. On an ad hoc basis, this happens a bit.

As far as having a formal evaluation process in place is concerned, we have always found this quite difficult—despite all the admonitions and the textbooks saying that you have to do this stuff—because, first of all, we are usually quite busy with current things. The commission has always been a bit under-resourced and so we are struggling to keep on top of our present work.

Also, you have to do a detailed evaluation of the market, and there may not be cooperation. For example, if I were to do a detailed evaluation of some merger of two or three years ago, people very often would not cooperate much. This whole subject came up about four or five years ago and there is also the question of whether we should evaluate our work.

It was arranged that the Bureau of Industry Economics would do a review of a lot of mergers we had been involved in. Unfortunately, over half the firms failed to cooperate. They did not wish to cooperate. The bureau then did a review of a number of cases and it reached a few conclusions. It was a useful study, actually. Do we have anything else on evaluation?

Mr Spier—The Productivity Commission will be doing some work across industries.

Prof. Fels—Yes, the Productivity Commission does some.

CHAIR—I think Mr Causley has probably got a case in point that he likes to quote. I will let him bring it up.

Mr CAUSLEY—You may have read it in some of the inquiries. The case I always put is the sugar industry, which I came from. The price of refined sugar on the Australian market six years ago was about $860 a tonne and the price this year is $470 a tonne. The price in the supermarket has not come down.

Prof. Fels—I see. I am not that sure of it.

Mr CAUSLEY—I suppose the question is: what sort of powers have you got? I am accusing the middle people, obviously. I am saying that they are putting it in their pocket.

Prof. Fels—Yes.

Mr CAUSLEY—Really, your whole raison d'etre is savings to the consumer.

Prof. Fels—Yes.

Mr CAUSLEY—What happens in this sort of case if, in fact, that is correct?

Prof. Fels—Incidentally, our impression was that the manufacturers of sweets did pass on some of the benefits, and it showed up in the CPI. But I do have it thrown at me a bit that it does not seem to come through in supermarkets. I am not quite sure what has happened there.

With regard to our powers, under the traditional Trade Practices Act, we have nothing. But under the Prices Surveillance Act we have the power to look into these questions. There are three levels of power in the Trade Practices Act: someone can be sort of controlled, or someone can be officially monitored, or we can just have a quiet look at something. Official monitoring is a fairly big deal. If we get complaints, we can have a look at a certain matter. In view of the fact that you have raised this, we could make some inquiries to see how it looks from our point of view or what the supermarkets' explanation is.

Mr CAUSLEY—It probably raises the question about whether in fact anyone is doing research as to the outcomes—doing estimates as to whether we follow this competition policy. Some of the policies, I suppose, are esoteric. There are some major changes that are taking place. Why would we be following this if in fact we cannot prove that there are benefits down the track?

I will raise again a rural subject. I think it was the competition council that was outspoken about single-desk selling—there might have been a comment about the Wheat Board and marketing boards in general—but when I asked a question about what they saw as the ideal method of marketing, no-one seemed to be able to tell me.

Prof. Fels—I suppose the whole idea of competition policy has actually been around for a couple of hundred years. There are general studies here and, more particularly, overseas about the effects of competition in a lot of industries. They show that, on the whole, competition has significant effects on prices, costs, efficiency, quality of service, diversity of choice for consumers and so on.

You might say—and this may either tremendously impress you or the opposite—that the whole body of economic study that has been done for 200 years tends to show that competition works in a slightly unpredictable manner and the timing sometimes takes 20 years with something that sometimes happens overnight. At a general level, I believe there is a lot of evidence that competition works fairly well.

Just taking the sugar matter into account, painful though it is to many, the commission's judgment on what would immediately happen to the competition element was right. We were pretty sure. The sugar people came to us with this joint venture on refining and the first question was: 'Was it anti-competitive?' We looked at it fairly carefully and we concluded that it was highly anti-competitive compared with the alternative.

There is no doubt, I am afraid, that our judgment on that was correct because, as you know, there was a huge price war after that. Maybe it was not passed on, although I am not so sure it was not passed on. Very often, the commission feels that it often gets its judgments right on competition. We certainly make our mistakes, but we feel we are working in an area which is broadly predictable in terms of the outcomes. The problem for the sugar people was that they could not prove an export case.

Mr CAUSLEY—Could I put it to you that, in fact, it could end up being anti-competitive? What is happening in the price war, that you rightly talk about, in the marketplace is that you have Tate and Lyle, who have taken over Bundaberg Sugar and CSR, trying to drive the others out of the market.

Prof. Fels—They have not done so yet.

Mr CAUSLEY—They are pretty close to it. Mackay Sugar has made $30 million, $40 million and $26 million losses in the three years.

Prof. Fels—It may be that there has to be some rationalisation in that industry. The question is whether the rationalisation occurs in a competitive manner that brings some benefit to the public or whether it occurs in some other manner so it is possible that the overall structure of the industry dictates that there be some rationalisation. Yes, I can see that, in that industry, basically there is a lot of overcapacity, so something has to happen. They came along with the most anti-competitive way of handling it, that everyone gets together and agrees on a few things, like prices. We thought that that was not really the way to resolve it.

CHAIR—One of the things that I think Mr Causley is coming to is that, if you are going to make competition policy really work, you have also got to have public support for what you are doing. It may be fine to say, 'Look, the textbooks tell us this is what is going to happen', but if you say, 'It may take 20 years', I suspect the public does not have that sort of patience.

Prof. Fels—No.

CHAIR—Particularly in cases like this one. What do you see as your role in actually educating people that they will get these benefits, rather than just saying, 'I can show you that the text book theory says yes'?

Prof. Fels—In fact, if I may say so, we actually tend to cop some criticism for too much education about competition policy. We think it is very important to get the competition story over to the whole public, and it is a rather complicated subject. Actually, I know a little bit about this because, when I was chairman of the Prices Surveillance Authority, I found that it was fairly easy to say to the public, 'We are controlling this price and you will get lower prices.' That is something that is easy to show and easy for people to understand.

But, as you probably all recognise, price control is often a very superficial or meaningless benefit, and competition has a more potent but more unpredictable effect. It is extremely unpopular with the producers. Every time you do something about any industry, there is a wall of resistance and public propaganda against the competition policy, which is very hard to deal with. We think the fact that there is a degree of publicity about it means that it tends to gain a bit of support. It is such a complicated subject that often those high profile price fixing cases and so on actually help to get the message out to the public and so they become a bit more aware of what it is about. It is a very difficult issue.

CHAIR—Yes, I could think of one high profile industry called oil or fuel, but I do not think we will

start on that one, because we will be here all day! Mr Pyne has a question.

Mr PYNE—Professor Fels, one of the roles of the ACCC is obviously promoting competitive pricing. Taking the area of intellectual property and using compact discs as an example, what sort of things can the ACCC do in terms of promoting competitive pricing, considering that the ban on parallel imports is not something which you directly control?

Prof. Fels—In fact, having seen some articles that you had done on this subject, I had it in the back of my mind when I said that we are rarely involved in advocating changes in the law that, actually, we have always advocated changes in this area. It is essentially up to the government to do it. I understand there are some processes of consultation going on at the present time from the government; and maybe there is an interdepartmental committee. We are not really involved in that stuff.

But the fact is that, in 1990, the Prices Surveillance Authority did an in-depth study of CD prices and found that they were consistently, throughout the 1980s, well above the CD prices in the rest of the world. The PSA concluded that the only way of fixing this up was by getting rid of the parallel import restrictions. Since that time, the CD industry has launched a massive assault on the report by every imaginable means, and that includes hiring consultants, lobbying members of parliament, running lots of PR campaigns and so on; but they have not knocked over the case at all, in my opinion. Not only do I say that but also, I believe, public opinion feels that.

Everyone who travels overseas knows the story that, if you go to record shops like Blockbuster, HMV, Virgin, Tower Records or whatever, in New York or Los Angeles, you can get a new CD for $13, $14 or $15, or maybe $11 or $12. When you correct for the taxes—we have done those studies and we are always happy to make them available—there is not a very big tax difference between the two countries. When you apply whatever the exchange rate is, there is about a $7 difference in price at the moment. Sometimes it comes down to $5 and sometimes it goes up to $8 or $9. That was the story throughout the 1980s and most of the 1990s. It is quite clear that, because the transport cost of CDs is negligible—it costs nothing to send a big lot of CDs across the ocean to Australia—if you removed the parallel import restrictions, there would be a significant price benefit.

In regard to one or two of the questions that the committee has been asking, this would bring a real direct benefit to consumers. As you know, and with regard to the question Mr Causley asked, we economists are all very happy about getting our micro-economic reforms, but maybe they do not get through to the consumers. There is a feeling, sometimes, on the part of the consumers: what benefit does this bring the consumer? A reform on CDs is a direct benefit to consumers, young and old.

Mr PYNE—Also to retailers. The issue at the moment is that what is happening is that quite a few people are buying their CDs through the Internet and as more and more people access the Internet the retailers will start missing out as well. That brings in a whole new raft of people that this would benefit.

Prof. Fels—That is quite important. There are some potential winners from these reforms. I have always been disappointed at the lack of support from the big retailers for the reforms, but the Internet may force them to review their position .

Mr HOCKEY—I want to make a comment on your last answer. I am a great protectionist in this area because when you talk about the fact that we could have cheaper CDs you do not take into account the fact that, for example, the record companies in Australia basically underwrite unprofitable tours by artists to Australia. Australia is not a particularly profitable place for various international artists to tour.

Prof. Fels—Like Michael Jackson, poor chap.

Mr HOCKEY—The Australian music industry is a loss making industry, basically, and the major international companies that send our artists overseas are also making a significant contribution in that area. So the CD prices are not just an investment in the CD, they are an investment in the Australian music industry generally.

Prof. Fels—Did you say Australian or the world?

Mr HOCKEY—Australian and the world.

Prof. Fels—A lot of it goes back to New York.

Mr HOCKEY—There is a significant investment in Australian artists as well. When you look at a CD, it seems to me that you look at just the price of the CD compared to the international market, and Australia's markets are a drop in the ocean compared to, for example, the American market.

Prof. Fels—There is a grain of truth in what you say but there are also some responses to that. First of all, it is a highly inefficient method of protecting the local industry because 90 per cent of the gain goes to the multinational record companies and just a small fraction goes to boosting Australian industry. It would be better to give them a small direct subsidy aimed at promising—

Mr HOCKEY—Who should give that subsidy?

Prof. Fels—The government.

Mr HOCKEY—So the government is expected to subsidise the Australian record industry as opposed to the consumers subsidising it.

Prof. Fels—If it could be done for one-tenth the price without all the money pouring back to New York and Tokyo, that would be better—if you want to subsidise them.

By the way, it is a very strange form of protection. I can understand tariff protection—that any import can be subject to a tax—but this one is a really strange form of protection because the record companies have an import monopoly. In other words, they can import as many CDs as they like. It is just that no one else can import them. So it is not like tariff protection where there is a tax and if someone wants the product they can have it with a tax. Under this, there is an absolute ban on imports by other people, but the record industries can pour as many imports into the country as they like.

Most of the music is actually foreign music. It is American music and so on. The falling price would have a stimulating effect on sales. Also, a lot of the Aussie battler performers make no money at all. They are treated very badly by the record companies. They always have—

Mr HOCKEY—They would not have a job if the record company—

CHAIR—We are right off the point.

Mr HOCKEY—That leads me to my original question. I find the definition of markets quite curious. For example, in banking it is arguable that we are part of a global market, that we are out competing for international funds and yet, quite correctly, you are very protective of regional banks. That applies also in the case of a whole range of other industries. I am curious as to what you define as a market and how you apply that.

Prof. Fels—For your general information, there is a standard method of determining what is a market in every OECD country. There is general agreement at the conceptional level what you mean by a market. However, the problem is applying it. That is quite challenging because you are never quite comfortable with the facts. The point is that if you are looking at something that reduces competition then it must be in a particular market. To take some theoretical example, suppose Coca-Cola merged with Pepsi. That would be anti-competitive in the colas market but in the wider drinks market, or share of the throat as they call it in that industry, then maybe it would not be so anti-competitive.

This question is often very crucial and the concept that is used is how substitutable are other products? If the price of cola went up 10 per cent as a result of this merger, and people still bought as nearly as much Coca-Cola as before, then you would say that is a separate market. If you believed they were going to shift in massive quantities to fruit juices and other things then you would say the market is wider. It is the amount which consumers will substitute. If they will not substitute then it is a separate market. If they will substitute other things then the market has to be broader to take account of that. That is on the demand side from a consumer point of view.

The other point we bring in is the supply side reaction. To take the Coca-Cola example, suppose they put up the price 10 per cent and someone immediately switched into making Coca-Cola or a close substitute then they would be in the market. Let us say it was a tea or coffee maker and they could almost instantly switch their production lines to making Coca-Cola, then they would be in the market. But if they had to set up a new factory and run a whole new business and it took them three or four years, they would not be in the market.

Mrs GALLUS—Professor Fels, you have been accused of too great a concentration on the Australian markets rather than globalisation, particularly in relation to takeovers and mergers. You may be preventing a takeover at the local level which at one stage would lessen competition but what that allows is the bigger international firms to come in and then wipe out the Australian ones, virtually. Would you like to answer that?

Prof. Fels—Yes, I am very happy to because we think this criticism is exaggerated. The fact is that,

certainly in my five years as chairman, not once have we opposed a merger where import competition is significant. We publish the outcome of all our merger matters in our annual reports. You will see in that annual report a list of every merger we look at. Not one have we opposed where there are inputs—such as BHP, Tubemakers, Amcor, APPM, and a whole lot of other Amcor. I could go through a huge long list. And BHP New Zealand too. I am not even boasting about these things. But the fact is, where there are inputs, certainly if imports are 10 per cent we have never opposed any merger. It is in that sector that the argument about, 'You need to be big to take part in work competition,' is most relevant. So the only issue that I believe is of any kind of genuine importance here is that there are a few sectors where there are no imports coming into Australia but they say we need to be big to get into Asian markets and all that.

Now the whole design of the Trade Practices Act since 1974—and it is an act which has been reviewed time and time again by governments and so on—has been to recognise that Australia is a small market and to build in an authorisation process to allow that type of argument to be considered. In America there is just a straight ban on anti-competitive mergers. In Australia you can get authorisation if there is a sufficient public benefit, if you can satisfy the commission, and there is a right of appeal to the tribunal often exercised.

The fact is that the track record is 46 authorisation cases: 26 have been successful, 20 have been unsuccessful because the case did not stand up. Sometimes the argument that 'We really need this merger to be able to go into Asia,' or something like that is just an excuse for an anti-competitive merger in the home market. So, of course, as times change you have to take account of greater globalisation. We have just issued some new guidelines on how we approach mergers which gives us slightly greater play to international-type arguments.

A final point I will just make on this, if I might, because it is a frequently raised question by business people, as you know, is that I myself do not view merger policy apologetically. I think it is extremely important actually to promote competitiveness and ultimately to help us compete internationally—in other words, all our exporters and import competitors benefit when we stop anti-competitive mergers that would lead to higher input prices for them.

Mrs GALLUS—I just want to clarify that. So hypothetically, if you have two companies here, A and B—and that is all, a restricted market for whatever reason—and A takes over B, you say that is certainly anti-competitive. But if in doing that you create, in your very words, a big enough force that that company then has the muscle to move into international markets, hypothetically what are you saying? How would you do that?

Prof. Fels—If it is established that it is anti-competitive, they seek authorisation. They come to us and they say—

Mrs GALLUS—In a way it is anti-competitive, isn't it?

Prof. Fels—Yes.

Mrs GALLUS—And you are going to have to say, okay, you are going to have to make a judgment.

Prof. Fels—Yes, that is right.

Mrs GALLUS—And what would be the overwhelming factor in you making that judgment whether to ignore the anti-competitive nature of this because it has other benefits?

Prof. Fels—It is a trade-off. Now sometimes it is really hard, sometimes it is easy. But we recently approved Davids QIW and Davids composite and all the other Davids ones—slightly controversial authorisation but, anyway, we gave it a tick in the end. Now that was not so hard from our point of view because the anti-competitive effect was small and the benefit was large. Now there are some other mergers which are the opposite: the anti-competitive effect is huge and the benefit quite small. But it is all the ones in the middle that are a real problem; that is, they are fairly anti-competitive but they have also got fairly significant benefits.

Mrs GALLUS—I do not want to take up the committee's time, but I will just push that a little bit further. Isn't that making you then the judge of a future action, and that you are being put in a position where you are the one who says, 'I can judge what the potential of this larger company is on the international market'? Surely it would be very difficult for the ACCC to be actually in that position to make that future judgment.

Prof. Fels—Yes, that is what makes life difficult. But there is a right of appeal to the tribunal. You have to remember that what actually happens in these cases is that the firm comes in with a stack of submissions, a room full of experts from here to the wall, telling us all these points, and they make a powerful case. The commission, typically, does not have a lot of resources on that site so the firm gets a really good run. If we took it into our head to just arbitrarily say no because we did not like them, they would go off to the tribunal and appeal and win. So we assess these things extremely seriously. We do not lightly knock back mergers. We only knock back about five per cent of the ones that come to us, and a lot of them get fixed up afterwards. On authorisations, as I said, 26 out of 46 have got through.

Mr Spier—Also it is a very public process; it is not us sitting in a room and making a judgment. Under the Trade Practices Act we have to seek public submissions from the competitors, the trade unionists, anyone who has a view about that merger and about the claims that there is public benefit. That is tested out in the marketplace.

Mr HOCKEY—Professor Fels, how do you rationalise your view on that with the Air New Zealand purchase of part of Ansett?

Prof. Fels—Just in general, the commission has been looking at that airline industry for about 20 years and wondering whether Air New Zealand would come in. You are worried about why we let it.

Mr HOCKEY—Well, Qantas owns a substantial interest in Air New Zealand.

Prof. Fels—That is correct.

Mr HOCKEY—And Air New Zealand has purchased 50 per cent of Ansett. That appears to me, as a

novice, as an anti-competitive act.

Prof. Fels—They got that 19 per cent under the dominance test years ago. I do not know whether they would get away with that today. But we inherited that situation, so when Air New Zealand came to us, of course we asked them all these questions about it, but in the end they cannot get rid of a 19 per cent Qantas shareholding. They cannot get rid of it. So we could not really say to Air New Zealand, 'You get rid of 20 per cent of a shareholder.'

Mr HOCKEY—You cannot order Qantas to divest itself?

Prof. Fels—No, we have not got a divestiture power.

Mr HOCKEY—Do you think you should?

Mr Spier—Also they were not a party to the acquisition. It was not Qantas making the acquisition. If Qantas had have come to us for an acquisition, we may have said, 'Well, we'll approve this on the basis that you get rid of that 19 per cent', but it was Air New Zealand and Ansett. Qantas was a separate shareholder.

Mr HOCKEY—On that logic, Qantas can buy 100 per cent of Air New Zealand.

Prof. Fels—No. If they moved now, we would—

Mr Spier—They are the acquirer then.

Mr HOCKEY—But it is in New Zealand though.

Mr Spier—So it does not matter.

Prof. Fels—But if it affected the Australian market—

Mr Spier—If it affected the Australian market, we can—

Prof. Fels—They would not dare. It is theoretical.

CHAIR—Can I just come back to a couple of things Mrs Gallus was bringing up. In the banking sector, for example, it is said that we are the second most over-banked country in the world. Often there is talk of the four majors being reduced maybe down to two or whatever, and I guess you would be fairly reluctant to see that happen, notwithstanding that there is another inquiry going on there. Do you see, in that sort of situation, by holding that against those sorts of mergers, that you may in fact be putting the consumer costs up because there is not the rationalisation of the number of banks or bank outlets in the country?

Mr WILTON—And to what extent also would you consider issues going to the question of the likelihood of massive redundancies in the banking sector and also cuts to regionalised banking services as being a component in the decision that you are about to make in regard to David's question?

Prof. Fels—Just going through that, it is best to treat this historically. The first really difficult bank merger question that we had was Westpac taking over Challenge in WA, and we had a very, very extensive look at that matter and, incidentally, we published a press release at that time which is still pretty valid as a statement of our views. In the end we did not object to that merger. We found at the time that it was best to think of the Western Australian market as separate from the rest of Australia in the sense that the ordinary consumer, looking around for substitutes, if he was looking for banking services he or she would not go to Metway if they were in WA, so it was best to think of it on the whole as a state market. Also, in practical terms, the ordinary consumer, faced with the need for an ordinary transaction, or a small business or perhaps a farmer going for a loan, could not go interstate. So we thought that it was best to ask what the effect would be on WA of this merger. Would it reduce competition? On balance, we thought it would not, but we started out from the view that it was best to look at banking state by state. At this stage, we were not ready to agree that banks faced unlimited competition in every dimension, from insurance and superannuation. They did in certain dimensions, such as on home loans from Aussie Home Loans, et cetera. We have never been too worried about the home lending side. We have been more worried about retail transactions involving small business and, maybe, farmers.

So we were swamped with submissions from both sides—for and against. Experts filled the room with arguments for and against. We were very conscious that the industry was changing very fast—it could look very different within a short time. We went out of our way to say that our approach to bank mergers was on a case-by-case basis at the time they occurred to take account of the latest change in circumstances and also to look at the particular transaction. Some bank takeovers look different from others and you want to see exactly what is involved in any particular one. We therefore said we would have a case-by-case approach and we would review circumstances at the time.

At the moment, the Treasurer has ruled out mergers between the big six: the big four banks and also AMP, NML and, maybe, CML. He has ruled that out, so that is an academic subject and we have not heard anything about regional bank mergers for quite a while. After the Wallis inquiry, if bank mergers are put to us in future, we will look at them again. However, we will see what Wallis has to say and also any changes Wallis recommends. So it is a case-by-case approach.

However, the last time we looked at the situation about a year and a quarter ago, we did sort of say—as many of you would know—that we were not keen at that time on a situation where in any one state there was no strong, regional bank left. In WA, for example, after Challenge went, there was still Bankwest which had 25 per cent market share, so that was a powerful, regional one. However, we would have been very unhappy if a major bank had taken that out and there was no regional bank left in WA.

If you look around the other states, the situation in each of them is fairly complicated. In South Australia, there is Bank SA, now run by Advance, and also the Bank of Adelaide. In Victoria, the big one is the Bank of Melbourne. In New South Wales, there are at least three significant regionals: St George, Advance and the former State Bank. In Queensland, there is Suncorp. So they are the sorts of ones we would look at. That is how we approach things.

Finally, you ask: what about all the efficiency gains from branch rationalisation, or about the unemployment effects? These, basically, are authorisation questions. We have never considered an

authorisation case but what would happen is that the proponents of the mergers would come in and say that there was a big efficiency gain from branch rationalisation. They would have to make a case to that effect and we would listen to it objectively and we would weigh it against any anti-competitive effect. It would be a very interesting question but I do not know which way we would line up. There is a bit of a discussion of this in the Wallis report, incidentally, and it seems the evidence on bank mergers and their efficiencies in the US leads one to think that sometimes they do not produce the obvious-looking efficiency benefits. The literature tends to be a little bit negative on this but the US is a different place; it is a different scenario to here.

In regard to unemployment, the other side of that question, I have to say to you that, given the tradition in the commission and on appeal, it is the tribunal that really decides these things. There has been a greater emphasis on the benefits of efficiency, even if there are some labour market negative effects.

CHAIR—What you are basically saying is that it is fairly subjective. Does that not add up to a cost? If people have that uncertainty in their minds, they are going to hesitate on going down an efficiency path, because they just do not know whether or not they are going to get this accepted. Is it not possible to have some guidelines?

Prof. Fels—In fact, we do have lengthy guidelines. It is fair enough for you to ask this question, because the Productivity Commission recently did a study on mergers. They said we should publish in full authorisation decisions. The only thing is that we already do that; we have been publishing them since 1974. The walls of lawyers' offices and consultants' offices are stacked high with our authorisation reports where we try to say what we do and the tribunal's reports are there also. We do our best to be public.

On mergers, we have detailed guidelines of about 90 pages that we publish and that in a way are fairly specific. As well, there are hundreds of reports on how we do it in practice. It is true that at the end of the day some judgment is required. However, I would say that it is more objective than you would think. I believe it is relatively objective, because the standard method of analysing competition is well known and all the conceptual side is fairly clear.

There have been a lot of cases and a lot of experience. The trouble is that the cases we get tend to be all the border line ones. Most people know the answers before they come to us, yes or no. The main ones we get are all the borderline ones and that is what you hear about. That is why there is so much controversy about mergers, because the ones where they are not sure, they come to us. We have been doing it for 20 years and we really do the same as Europe and North America with some variations. It is not as uncertain as you might think.

Mr WILTON—You will be familiar with this article from June of this year. In its last paragraph it poses the question:

. . . does the increasing reach of the commission create a climate for unwittingly suppressing rational business?

Prof. Fels—Yes.

Mr WILTON—That is a question which has obviously been put before and I am wondering whether you might answer it today.

Prof. Fels—Was that in the BRW?

Mr WILTON—The BRW, yes.

Prof. Fels—The Trade Practices Act is a powerful piece of legislation. It affects people's and businesses' basic property rights in a big way. We are just the police who are trying to administer the law. But we have got no power of our own to do anything or to do anything much. If we think something is anti-competitive, we have to go to court and prove it against an army of barristers, solicitors, consultants, experts and knowledgeable business people. They put up huge resistance. They get very strong encouragement from their advisers, especially their lawyers, to fight us in court on any decisions they think are wrong.

The other thing is that we do authorisations and I have already discussed what they are. Our decisions there can be appealed and often are to the tribunal. Therefore, there is nothing really that the commission can do to affect anyone's legal rights against their will. I think there are true and tried safeguards in the act against any misuse of power by the commission. Now some people say, 'Oh, that is not quite right, because people are not prepared to go to court with you.' That is true. However, I would just point out the following.

First of all, a lot of them go to court. We are in 43 cases at the moment. The lawyers are always telling them to go to court anyway. It has been my experience that, if they really think we are wrong, they will take us to court. The other thing is, the reason they do not go to court is that we win most cases. Our track record at the moment is: of the last 98 matters we have taken to court, we have won 93. The reason is that we do not lightly say 'no'. The commission is very careful before it knocks something back and it really has substantial reasons for doing so, as a rule. So that is why we tend to win most of the cases.

Dr NELSON—I have got two things. The first is in relation to competitive neutrality. It might seem like a trivial issue to you—and I am not talking about their bigger problems—but newsagents tell me that Australia Post sells stationery more cheaply than they can buy it wholesale. They believe that resources are being used to see that that happens. I do not know whether that is anything that you have looked at, but I might just leave you with that one.

The second matter involves the health area. Last year we had amendments to the Health Insurance Act which, I am sure you are aware, enabled the hospitals to contract with private health insurance companies, doctors to insurance companies and so on. My concern is that a number of the health insurance companies own hospitals and some of the hospital operators at the moment have advised me that—in fact, the Australian Private Hospitals Association has advised me that—some of the insurance companies are seeking to establish contractual arrangements only with certain hospitals; in some cases, hospitals which they will own.

It also concerns me that the smaller private hospitals are not able at the moment to negotiate as a group and that this is seen in some way to be anti-competitive. Similarly, the nature of medical services and the way they are delivered usually involves, for example, a surgeon, an anaesthetist and those who provide pre- and post-episodic care and are not able to negotiate with insurance companies as a group. I am interested in

any comments you have on those issues. Finally, the extension of the Trade Practices Act to professional people: just how far do you intend to take it? For example, doctors charging the same fees within a single practice: to what extent would you see that as collusion when, in fact, doctors would say it is simply commonsense?

Prof. Fels—I will go backwards over your questions.

Dr NELSON—And the health insurance funds are essentially oligopolies. There are generally just one or two that have predominant market share in any one state.

Prof. Fels—Yes. I will cover the last two points you raised. The situation faced by the medical profession is the same, of course, as other professions and everyone else covered by the Trade Practices Act. I think they are trying to get exemptions but they have not succeeded. The Trade Practices Act has always had a really strict law on two matters: one is a price fixing agreement between competitors and the other is a boycott when the competitors get together and agree to boycott something, like a group of doctors get together and say, 'We won't supply services to this hospital unless we get a fee increase,' or something like that.

Now that bit of the Trade Practices Act is different from the rest of the Trade Practices Act, in that generally the Trade Practices Act only stops something if it is going to have the effect of substantially lessening competition. As you would know, in some of the cases that you have in mind, it is a fact that some of those things you would not think of necessarily as anti-competitive. The fact is that all around the world, just about every country has an automatic ban on price fixing agreements between competitors without asking that wider question, 'What is the effect on competition?' There are good reasons for that policy which maybe I will not go into, but when you start thinking about oil companies or something, the reasons become clear.

In that situation, first of all, we may take action over these matters and secondly, I have to admit that private action is also possible. Even if we sit back someone might take some action about this behaviour and get an injunction in the court to stop it. In this situation there are two matters that I can mention. One is that the commission is considering this whole situation at the moment. It is relatively new and we are trying to come up with some way of indicating that where there are de minimis type problems that we will not take action on. It is not that easy to distinguish de minimis from important actions, but we are trying to come up with something sensible.

The second matter is that where we cannot do anything, they can apply for authorisation and then you are into those familiar trade-offs that we have talked about—competition versus efficiency and so on. I am expecting that there will probably be some authorisation applications where we will test these. Recently I visited the Federal Trade Commission in the US and they have got some detailed guidelines on how they deal with exactly the same problems. They may give some clues as to how we deal with these cases under authorisation.

It is early days. We are waiting to see how all of this unfolds. I know the medical profession is pretty nervous about the matter and we will probably just see how it goes. I will just deal with the other bits of the question on the health insurers owning hospitals and so on. As you know the Commission is fairly firm on

mergers between so-called horizontal competitors at the same level. If all the private health insurers got together we would get worried; if all the hospitals get together we would get worried. If on the other hand, there is a vertical link—someone upstream takes on someone downstream—we also look at vertical mergers. Sometimes we block them, but we have a more lenient approach. In principle we are interested if health insurers own hospitals. We are also concerned—we are interested/concerned—if they tell people that they have got to go to their hospitals, but it would need to be demonstrated to be anti-competitive on the whole, wouldn't it ?

CHAIR—Yes.

Prof. Fels—It would need to be demonstrated that it is anti-competitive. We are getting complaints about this and we have had a history of taking some actions on vertical relationships. We are raising an issue of interest to us. I will not comment on Australia Post.

Dr NELSON—Thank you.

Mr CAUSLEY—Mr Anthony had to go to the House to speak—he asked me to raise with the professor the effects of the competition policy on regional Australia. I suppose the classics are telecommunications, electricity, et cetera. Obviously, where you have a big market in the city and small lines of communication you can see the benefits, but if we had had this type of policy for a hundred years we would not have any reticulation of regional Australia.

Prof. Fels—Yes. In the history of the Trade Practices Commission—and all the evil things it has done and so on—we have not actually had a heap of problems so far on regional type issues.

CHAIR—No.

Prof. Fels—I mean we tend to see more the big end of town type problems but there are—

Mr CAUSLEY—With the power industry at the present time, obviously there are big things happening there. Aren't we heading down the track to where the consumer is going to pay, so those in the isolated areas are going to have to pay more because it is going to cost more to deliver the service?

Prof. Fels—First of all it goes back to the original point I made. With a lot of these reforms, in the end we are not involved in any of the general legislative changes. The members of parliament have the difficult task of debating all those issues, so we do not pick up that much of it.

Mr CAUSLEY—You would see CSOs coming into play and parliament would have to debate just one—

Prof. Fels—Yes. I have occasionally, in regulatory jobs, had the task to look at some of those issues—mainly when the Prices Surveillance Authority is looking at some public sector prices. We looked very carefully to see if there was some guidance on it. Say there was an act of parliament which says that everyone has to get telephones at the same price or letters at the same price, or some general sentiment like

that; that was the end of the thing. Nothing to do with us, we just let it apply. If there was some other cross-subsidy that the parliament or the government had said nothing about, then we would start to have a good look at it.

To take Australia Post, we had some inquiry years ago: what about having different rates for stamps? It turned out there was an official policy on that so we dropped it. Then all those registered publications things—we started to have a look at it. We said to the government, 'Have you have got a policy on it?' They said, 'No.' So we investigated it and we found out that, although popularly people think the benefit goes to little clubs—the musical theatrical organist societies—in fact the big beneficiaries were Messrs Packer, Murdoch and Fairfax. So it turned out that were we able to study it and separate and cut out their benefit and leave the other benefit for the small clubs.

CHAIR—But I think what Mr Causley is raising is a very serious matter because you could argue on the question of telephones and say, 'Government policy may be that telephones will be universal,' but that is very different from the level of service and the price of the service.

Prof. Fels—Yes.

CHAIR—It concerns me to say that we do not really look at that because inadvertently, or as a spin-off, this may be quite critical for people in regional areas.

Prof. Fels—As a spin-off, yes, it can happen as a side effect, yet an important effect. I do not mean to say that it is unimportant. Again, the act falls into two bits. If it is anti-competitive and that is the only issue, we just apply the act. If they seek an authorisation, they can present a regional argument. In our guidelines on it, we and the tribunal say that you can present a regional argument, although I would not want to pretend that has had a huge run in the history of the trade practices law.

There is one other point that I would make, that sometimes these reforms actually bring down prices for everyone but they just bring them down much more for people in cities than in rural areas. The people in rural areas are not always worse off, it is just that they do not gain as much as others do from some of the reforms. And then there are all these big gaps between rural and city prices which I am sure are a real source of ill-feeling amongst country people.

CHAIR—Yes, I think I touched on one earlier.

Mr Spier—As I think the chairman said earlier, we do not do these structural reforms. They are part of our environment and when we are administering the Trade Practices Act we obviously take those things into account. We may have some views, but a lot of that structural reform, be it in electricity, gas or telecommunications, is done by state and Commonwealth governments.

Dr Tamblyn—It will crop up in the pricing of essential facilities, like access to power grids, as well. I would also say there would be two questions: how do you price an existing facility? An example I could raise is that I am told that the line to Broken Hill has now got much less traffic on it with the decline of that town, but the investment is in place, and there is an argument which says that, as long as the operating cost

of the system can be covered by the pricing, you might not necessarily price to cover the full investment. But the question of new investments in regional Australia and what prices should be charged to justify those, and whether there should be a CSO introduced there, is a wider question.

I could also say, to take the power lines, there is sometimes a trade-off between whether you put in a new grid to link it with a power stations somewhere else or develop local gas-fired power stations. So there can be different investment choices that flow from the pricing. I do think it is the investment decision in infrastructure in remote areas that might be affected, and that finally will be a matter for governments. If CSR policy says there will be some adjustment, we will have to take account of that. But I just make the point that the existing infrastructure might mean lower prices for underutilised service in the short run.

Mr LATHAM—Just turning to another issue of major importance in the bush—petrol—on the assumption that the commission believes in the principles of competitive neutrality which are now written into the Trade Practices Act, why has Ampol Caltex had imposed upon it enforceable undertakings concerning access to product that do not apply to its major three competitors BP, Shell and Mobil?

Prof. Fels—We did not get a chance. We are sort of driven by events, if you like, and they came to us with a merger and so that activated us, but they wanted a merger, we thought it was highly anti-competitive and would put up petrol prices, both in the city and country areas. It is also a fact that it did have some big efficiency gains and it also was good for Australian ownership.

In the end, acting in accordance with the law, we said to them, 'Look, you are trying to change the structure of this industry in a highly radical fashion, not only putting up prices but also having staggering effects on large numbers of small businesses'—because they are going to hurt the independents quite badly—'so we are knocking it back. But if you can come up with changes that would offset the anti-competitive effect and the bad effect on small business, we will listen.'

So they came up with that and after six or eight weeks of negotiation, we accepted it. The other oil companies were not involved in the merger—they were standing by on the sidelines supporting it, but they were not actually involved in it—so we could not impose that on them.

Mr LATHAM—But is it the proper role of the regulator to approve a merger which would otherwise be anti-competitive by imposing upon the merged parties major market rules that do not apply to any of their major competitors?

Prof. Fels—Not necessarily, it depends on the circumstances, but if they agree to it and we think it is a good thing and, above all, if we think that would turn the merger from being anti-competitive to neutral, then that is our job under the law. I know the other oil companies did not like one bit what we did because it had a fairly powerful pro-competitive effect and they have been complaining bitterly about it. They did come and see us—the oil companies all knew exactly what was coming on.

Mr LATHAM—So you define notions of competitive neutrality according to outcomes rather than market rules?

Mr Spier—There is no such thing.

Prof. Fels—Competitive neutrality is not quite the term in this context. I am just saying competitive neutrality at the moment is used in another setting, like when the government is involved, but the underlying point you are making is an issue that on the whole we are trying to set a framework—we cannot control the pricing outcomes but we can have some impact on the structure of an industry.

Mr LATHAM—Competitive neutrality can apply between public and private sectors or within participants in a private sector market. Obviously, there is nothing more important than competitive neutrality rules for the effective administration of the act. On that question, why is it that horizontal arrangements by way of shared terminal product are available to the major oil companies in Australia but not shared retail access—that is where a branded service station does not have access to product that is distributed by other oil companies, other oil brands?

Prof. Fels—In each case they are industry practices and the question is, is there any law that overrides either of them? On the whole, with the first one—the horizontal, the joint terminal and the refinery exchanges and all that—the commission has thus far judged the situation to be that it would not, on balance, take action against them for being anti-competitive and therefore it is in the hands of the industry. In our report on petrol, as I think you probably know, we expressed a lot of doubts about how these things look when there is just four players left in the industry. We are at this moment out in the market place trying to evaluate the situation and to determine whether we think some action should be taken.

Regarding the retail bit, the commission has also been involved in this over the years and—

Mr Spier—In fact, the situation is quite the opposite to what it seems. Shell, back in the late 1970s, applied for authorisation to allow it to, what was called, solo trade, that is Shell lessees would be tied totally to Shell. That authorisation was unsuccessful. When it first went to the commission the commission said no. It went to the tribunal; the tribunal said no. The law is such that people should be free to seek fuel from other sources. The practicalities make it very hard because of who owns the tanks, who owns the pumps, et cetera. So the practicalities have not worked out that way. But legally, someone could have multi-brands on, say, the same site, if they had separate tanks and separate pumps.

Mr LATHAM—Do you believe the competitiveness of the industry would be enhanced if market entry was improved by providing a guarantee of terminal access to product for any new entrant to the retailing sphere?

Prof. Fels—I think so, yes.

Mr Spier—That was part of some of those arrangements in the Caltex-Ampol thing, and that was why we did that.

Mr LATHAM—No, I am talking about guarantees at law, rather than an outcome of an enforceable undertaking, that in the eyes of the commission give some short-term provision, rather than a long-term guarantee. The independents that you have been promoting are not able to engage in exclusive retailing as the

majors do.

Prof. Fels—The question is hard to not say yes to, but there are a couple of reasons why I stopped short of saying that it would be a great thing to embody it in law. I have a slightly conservative attitude to passing highly specific industry specific interventionist things like that in oil or anything else when the Trade Practices Act on the whole works fairly successfully as a general statute.

Mr LATHAM—Part IIIA?

Prof. Fels—That is a very good question. It cannot be ruled out as a possibility under Part IIIA. Obviously Part IIIA was written with public utilities in mind; whether it will get to refineries is a very interesting question.

I will just make one other point, which I suppose you will be more than familiar with. Guaranteed access to terminals alone will not do anything because it depends on the terms and conditions. Some of the proposals—and I am not suggesting anything you may have in mind with this—about guaranteed access to terminals involve anti-competitive elements, that is, that there would be a fixed price at terminals and no discounts or anything. We think that is highly anti-competitive. That is one reason we have not been quite as overwhelmingly positive on some of the terminal access proposals that have been floating around because they have been linked with this idea of no discounts.

Dr Tamblyn—Turning to part IIIA: the definition of service to which part IIIA applies does not apply to the use of a production process—that is in the act. There has been quite a bit of debate as to whether part IIIA could apply to gas processing facilities at the top of transmission pipelines, in the Cooper Basin or in Bass Strait. A similar sort of debate about whether the act, as it is currently worded, would extend to processing facilities, for instance, oil refinery facilities and their attendant facilities, would be there.

In the gas context, that was addressed by the Charlton committee and some views on that committee were suggesting that that should be put beyond doubt in some way by law. But there was enough ambiguity about the way part IIIA is currently worded, and what services are covered and what services are not, to think that gas processing facilities and petroleum processing facilities are likely to be outside part IIIA. But it is very much a borderline issue and there is a legal debate on that question.

CHAIR—Okay. Mr Mutch, you have a question.

Mr MUTCH—Earlier, you mentioned that something was good for Australian ownership. I was just wondering what weighting or consideration do you or can you give to maintaining Australian ownership, or at least participation, in an industry sector?

Prof. Fels—As you know, the Trade Practices Act is in two bits. If something is anti-competitive, end of story—we do not look at the ownership question either way. However, if they apply for authorisation and if the authorisation would enhance Australian ownership that is a plus. However, it has to be weighed up against other things. In the famous Wattyl case, we thought the plus from that was not big enough; we thought other things were more important.

Mr MUTCH—Do you think you need some more discretion then? There is a case that was a local issue for me where an Australian firm was wanting to buy another Australian firm but it was ruled to be anti-competitive. What happened was that it did not happen, it collapsed, and that left that industry open to external competition which was taking over.

Prof. Fels—They can apply for authorisation, but I would not want you to think that they have a terrific chance; it is a bit of a plus, sometimes it might be a big plus, but more often it has not swung the balance.

Mr MUTCH—Sorry, authorisation?

Prof. Fels—They can say—

Mr MUTCH—If you say it is anti-competitive—

Prof. Fels—They can then come and say to us—

Mr MUTCH—They can still overcome that?

Prof. Fels—They can apply for an authorisation and they can run the Australian ownership as an argument. But I would not want to fool you. We had such a case recently with Wattyl who wanted to take over Taubmans. We said no because we saw the Australian ownership as a plus, but not big enough to overcome the bad effect on paint prices, as we saw it.

On the question of Australian ownership, sometimes the act works the other way, like in the Ampol Caltex matter. It was known that Caltex was on the market and there was no question—BP, Shell and Mobil were not allowed to have it. But with Ampol there was a real chance. That created an opportunity for Australian ownership.

As a general proposition on Australian ownership, we think the points are: one, the high degree of foreign ownership is related to macro-economic matters—the long-term capital importing nature of Australia, which has always been a capital importer, is the way that we should run the country, and everyone agrees with that; second, any recent acceleration is due to our high foreign debt which almost inevitably increases foreign ownership; and third, if you are unhappy about foreign ownership then the correct policy step is to reactivate more rigorously the Foreign Investment Review Board—do it that way. We think the Trade Practices Act bit is right down the bottom of the list in terms of the policy steps to deal with that problem.

CHAIR—Okay. There are no more questions. We have had a fairly good innings. Can I thank you very much indeed for coming along to the committee today and answering the questions in a very frank manner. If we have anything further, do you mind us sending it to you in writing?

Prof. Fels—That's fine. We would be very happy to help at any time.

CHAIR—Thank you.

Resolved (on motion by Mr Wilton):

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 11.45 a.m.