HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Reference: Australian Competition and Consumer Commission annual report 1995-96

MELBOURNE

Monday, 21 April 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON FINANCIAL INSTITUTIONS AND PUBLIC ADMINISTRATION

Members:

Mr Hawker (Chair)

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

Matter referred to the Committee:

Australian Competition and Consumer Commission annual report 1995-96

(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

Australian Competition and Consumer Commission annual report 1995-96

MELBOURNE

Monday, 21 April 1997

Present

Mr Hawker (Chair)

Mr Anthony	Dr Nelson
Mr Causley	Dr Southcott
Mr Latham	Mr Willis

The committee met at 2.07 p.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 inquiry into the Australian Competition and Consumer Commission's annual report 1995-96. The hearing is being conducted under the provisions of standing order 28B, which states that annual reports of government departments and agencies stand referred to the relevant committee for any inquiry the committee wishes to make. Reports stand referred in accordance with a schedule tabled by the Speaker.

This committee has been undertaking this form of inquiry for a number of years now, although this is the first occasion for the ACCC. The committee's experience with annual report inquiries has been very positive, and this process improves accountability to the parliament and it provides a valuable opportunity for members to canvass a range of issues which they might not otherwise be able to through the normal practices of the House.

The committee resolved to examine the ACCC's annual report following concerns raised with a number of members about the processes and procedures used by the commission in relation to section 87B undertakings. While I anticipate that the hearing will focus primarily on mergers, if we have time the committee will also take the opportunity to canvass a number of other issues related to the administration and the operation of the commission and competition policy.

[2.09 p.m.]

FELS, Professor Allan Herbert Miller, Chairman, Australian Competition and Consumer Commission, Benjamin Offices, Cnr Chan Street and Benjamin Way, Belconnen, Australian Capital Territory 2617

SMITH, Ms Rhonda Lynette, Commissioner, Australian Competition and Consumer Commission, Benjamin Offices, Cnr Chan Street and Benjamin Way, Belconnen, Australian Capital Territory 2617

SPIER, Mr Hank, General Manager, Australian Competition and Consumer Commission, PO Box 19, Belconnen, Australian Capital Territory 2617

CHAIR—I welcome Professor Fels, Rhonda Smith and Hank Spier, representing the Australian Competition and Consumer Commission, to today's public hearing. I have to remind you that 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 parliament. Do you wish to make a brief opening statement before I invite members to proceed with questions?

Prof. Fels—Just perhaps briefly a couple of general points, if I may. Thank you for having us. We recognise that there is a fair educational task involved in talking about the Trade Practices Act. Because of its general reach these days, we also learn a lot from hearing what people have to say about us and what their perceptions of our work are.

As far as the commission is concerned, I guess the biggest change that is affecting us at present is that we are being drawn into playing a much bigger role in the newly deregulating areas, especially in the communications sector, especially telecommunications, and energy—that is, electricity and gas—and there may be some more work coming up on that transport sector as time passes. We are already doing a few new things there.

That is a bit of a change from the past. In the past, the commission was involved in applying a very valuable act of parliament but it tended to apply it to the traditional private sector and, oddly, to relatively more competitive parts of the economy. Whilst not having much to do with the areas where market power was greatest, there has been a gradual switch of priorities over to these new areas while we keep trying to do the job we used to do in the former areas.

The second point, which is related, is that some of the work that we used to have to do in the past is now being done for us by import competition and by the exposure of business to greater international competition anyway. So as the tariff barriers have come down we have had to be less concerned about trade exposed sectors. Just to give you one example, the commission has not once opposed—in the last five years at least—a merger where there are significant imports. We have a pretty long list—some of them are in the report that you have in front of you. I will just mention two cases out of hundreds. We did not oppose BHP/Tubemakers because there were enough imports, and we did not oppose Amcor/APPM, another major merger, because there were imports—and there have been quite a large number of others.

Instead, the competition issues come up in the non-traded goods and services sector. Of course, as business becomes more exposed to international competition it finds it very important that the act applies and ensures that the suppliers of inputs to them are competitive and efficient. Otherwise, they cannot compete in international markets. There was actually, as you would know, quite strong support from business for all the recent reforms which have managed to slightly change the emphasis of the national competition policy. Anyway, I could talk about that more later.

The commission itself has a number of tasks. In order to handle them, it has tried to get a sharper focus on what it is doing. So the first point of focus is that we are essentially just an enforcement body. We administer and enforce the law; we are not really an advocacy body. There are occasions when we do some advocacy, generally when we are invited to by the government. But, speaking broadly, we are not involved in recommendations to change the law.

For example, we are not involved in the national competition policy reviews. They are being done by state and federal governments. We have simply not been involved in all those reviews of sugar and wheat and so on and we were not looking to be involved in any of the reviews. I think there are 1,700 laws up for review over the next five years. At the moment, we have been involved in none. I do not rule out the possibility of becoming involved in three or four, but we have been involved in nothing so far. We are there to apply the law, and that gives our commission a focus for its work.

The unifying themes underlying our work are that we are about competition and what goes with it—the public benefit and, ultimately, the consumer benefit. Although we deal with quite a few industries, there is a general framework that we apply to competition and public benefit, which makes it a bit easier to be focused on our work.

Of the other matters, the Wallis report has recently come out, and we were generally pretty happy with that report. Maybe I could leave that in case you have particular questions on it. They would be my opening comments, Mr Chairman.

CHAIR—Thank you, Professor Fels. We certainly appreciate the time that you and your colleagues have taken to come along today. We might get on to one of the topical issues that probably covers a lot of what you were talking about. You talked about competition policy and how to benefit the consumers and so on. One of the areas that seems to be a continuing thorny issue, and which we have raised with you before, is the differential in petrol prices between the city and the country. I know there is some reference in your report. Do you feel there is some sort of a gap in the policy so that there just does not seem to be—what is perceived anyway amongst country consumers—a fair arrangement whereby the differential between what is a very competitive market in the city is not being translated into a very competitive market in the country?

Prof. Fels—This is a very difficult issue. Perhaps we could start by analysing the situation for a moment as to the causes of the differences. The following seem to be what causes the differences. In short, there is a transport cost; secondly, the cost of doing business in country areas is higher; and, thirdly, competition is far less in country areas. Perhaps I could just explain each of them.

There is a freight cost for getting petrol to country areas and that can explain some of the difference,

but not a great deal. The freight costs are explained and published by us and they are available in relation to each town in Australia. The second reason why petrol prices are high in country areas is the fact that the cost of doing business in country areas is higher. The service stations are smaller. They also derive much less revenue from selling food and other things, and the oil companies and distributors also probably incur some extra costs in country areas.

Does that explain the gaps? No, it does not explain the gaps. The other big factor is the fact that, in most capital cities, there is a fair bit of competition and in country areas there is far less. It is not just a question of a few retailers in country areas not competing as hard as they should. If you had really strong competition, somehow, between those few retailers in country towns, that might bring down prices a bit. But it is more fundamental than that. The whole system, from refinery right through to the country town, exhibits non-competitive characteristics which explain the differences.

In other words, the retailers may not compete, but the distributors do not face much competition either. In supplying country areas, the oil companies do not feel that they are supplying into a competitive market so they are under no pressure to cut prices. That is how you would start, by looking at country-city differences. Those differences become most pronounced when there is a price war in the city areas. For example, in Victoria at the moment you would find that there is a very large gap just as of today between—

CHAIR—Hamilton?

Prof. Fels—I am extremely conscious of this at the moment. At the moment the price in Melbourne for petrol is exceptionally low. I think I saw a price per litre of 68c today, if I remember rightly—that order of price—and so the gap with country areas would be very large. I should think it would be a gap of 10c, 12c or 14c. In Sydney, I am fairly sure the price is around 74c a litre as of today—around that kind of figure—because there is not a price war going on in Sydney. So the gap is smaller and it is probably less commented on by country people, even though they are probably no better off than Victorian country people. But the gap is not there. This price war has been going on in Melbourne for six or eight weeks, and it is a fairly strong price war. So there are a few facts to get this topic started.

CHAIR—I was using this as an illustration of whether you think there is some gap in the way competition policies are being administered generally in this country? It may be very effective in the city but it is not translating into offering the same benefits for people in the country.

Prof. Fels—Yes. I will start off with the Trade Practices Act and then get a bit more general. I am not trying to be defensive about it, but the Trade Practices Act is applied to price fixing, mergers, misuse of market power and so on in pretty much the same way in city and country areas . What has it done? It has contributed to there being more competition in various dimensions—probably more in city than country areas. But the underlying economic structure of the arrangements in country areas means we have not got the full benefits of competition there. I do not know whether there is a huge amount more that can be done directly under the Trade Practices Act to fix the problems. Certainly, although over the years there has been no lack of pressure nor of expressions of public concern about this to the commission—such that if it could have done more to fix it in country areas it would have—we are not sure that the problems lie there.

We have concerns about the arrangements between the oil companies—the horizontal arrangements and the borrow and loan refinery exchange and joint terminalling arrangements—which we think make it somewhat harder for independents to get access to petrol and to get into country areas and compete. That is one of our concerns. We are also supportive of the government's idea that there should be better access to terminals on the part of everyone, and we are talking about that with oil companies at the present time.

In country areas another problem—I do not want to blow it up by any means but it should be mentioned—is that there is sometimes an inconsistency between the desire of country people to get more competition and lower prices and the desire not to let new players into the market. The local councils come under pressure not to have new players there. That is not the whole story, but it is a point that is worth noting.

CHAIR—I hope that would be fairly minimal. I have seen a case locally where there were a small number of objections to just that but, nonetheless, the council allowed the new competitor in.

Prof. Fels—Yes. Our impression is that Woolworths is generally starting to get ticked for getting in, but there have been some areas where it has not been accepted. There seem to be a number of areas where they have failed first go, but they have good prospects on their second go.

CHAIR—I want to come back to a general point rather than the particular about competition policy and people in the country. Do you feel there is still something lacking there to get consumer benefits through to country regions?

Prof. Fels—As a general thing, firstly, I do believe competition policy brings general benefits. But the effects are strongest in city areas. Say you get price cutting on airlines or telecommunications or whatever. There tends to be a general lowering of costs and prices or general improvements in those areas with the stronger effects felt in city areas and some benefit going through to country people. But that may be less than that which goes through to city people. What can you do in a policy sense about this? That is the hard thing.

The structure of markets in country areas is such that you tend to get less competition in them. We are not quite sure what to do there. If a market has a structure that is uncompetitive, what are the answers? Import competition is not really relevant in most of these cases. Busting up monopolies is fine for big monopolies in a town where we have those powers, but in smaller country areas you are not going to bust up businesses and get competition. Merger policy is not really relevant in country areas to any great extent. The players are just smaller and the structure is less competitive. There are fewer opportunities to compete with smaller markets. Although I think country people benefit from competition policy, you tend to get a more vigorous competitive market, because of structural reasons, in city areas.

Mr ANTHONY—To follow that thought, Professor Fels, I do not know whether that holds totally true. Perhaps because of the tyranny of distance—and we are seeing rationalisation within banking, and perhaps communications might be the exception because we have satellites and cable—country people have a lot more archaic forms of telecommunications and are still at a major disadvantage. Even now with competitive tendering in more isolated communities—and I know it is not your charter—there is the social impact of those communities providing almost a self-imposed employment strata for isolated areas. As you

know, this is a real concern in a lot of those areas. For many of these areas the benefits are far less than the costs. I do not know how, in the long term, some of these more isolated communities will benefit from a national competition policy. It seems to be a bit of a trade-off. In higher population areas, where there can be flourishing competition, you see lower prices and benefits to consumers, but in those isolated communities you do not.

Mr CAUSLEY—There is centralisation of benefits in those areas.

Prof. Fels—My impression is more along the lines that there is a general benefit but that it is bigger in the city than in rural areas. I do not necessarily see rural areas as a loser on balance from competition policy but as simply deriving a bit less of the benefit. Competition amongst big business tends to bring down their prices or improve their quality of service across the board compared with otherwise, but they have to compete harder in city areas. I do not see them as kind of subsidising the competition in city areas through rural areas. For example, when there is competition there is usually pressure on cost and they have to reduce their costs across the board and then reflect it in the consumer offering. So that usually goes through to the consumer as a benefit.

I have not noticed in any figures over the years, even though I think the economy is more competitive than it used to be, any relative worsening of country conditions. I think I would say the economy is more competitive than it used to be. In a whole lot of ways with deregulation, with various sorts of tariff cuts and so on, I do not know that the gaps between the city and the country have got greater over time. I think they have always been there.

CHAIR—I wonder with that petrol case whether, in fact, the gap might be wider than it was.

Prof. Fels—In some ways, the problem with petrol is partly people's perceptions—that is, when city prices go down there is perceived to be a large gap. As I said, the Melbourne-Sydney case today gives you a bit of a feeling about that. I do not believe that the rural situation in terms of relativities has got worse over time. The rural price is basically the maximum price set under the Prices Surveillance Act plus what the retailers get as the added-on margin. The Prices Surveillance Authority price has been basically constant over time. It has not embodied an extra profit or anything; it has just been running on a formula, which is a Singapore price, which does go up and down a bit. But the oil companies make about the same profit as they always used to and the retailers have not been particularly adding on much. You might say that there has not been much improvement in this situation over time, and I would not strongly dispute that.

Mr LATHAM—In relation to the situation in country New South Wales with the entry of Woolworths to the market, is it the view of the commission that, given the existing access to terminal arrangements, the competition between existing retailers in country New South Wales and Woolworths is on fair and reasonable terms? The service stations who have the tied terminal arrangements are saying that they are getting wholesale product that is 6c, 7c, or 8c more expensive than that which is available to Woolworths. Naturally, their worst fear is that they go out the back door because of that unlevel playing field.

Prof. Fels—Woolworths is getting its supplies from imports, essentially, and so, of course, not getting them from oil companies and their terminals. My understanding of the sources to which Woolworths go is

that—I am not 100 per cent sure of this—they are not restricted in principle or anything to Woolworths. What I do know for sure is that with the Ampol-Caltex undertaking, there was kind of an open access regime as part of that undertaking. So, in principle, the terminals that supply Woolworths are willing to supply to anyone. But I think the service stations are tied to the oil companies and they do not go to that source. They do get support from the oil companies to a fair extent. I do not know exactly how much they are getting in country areas. In some areas, I think Woolworths' price cutting has been matched by price support from oil companies, as I understand it; I think that happened in Dubbo.

Mr LATHAM—But, in the view of the commission, is that fair competition; is that a desirable situation?

Prof. Fels—In our report on petrol we did express reservations about the closed nature of the arrangements between the oil companies at the horizontal level and the fact that they have these borrow and loan arrangements and everything which no-one can get into except the four oil companies. We did express some reservations about the exclusive links between oil companies and service stations.

We have a feeling that some of those problems would disappear if we could get a bit more competition between the oil companies themselves at horizontal level and that that would maybe flow on in more competitive supply to their own outlets. As you know, the Trade Practices Act framework for looking at exclusive dealing arrangements is that it prohibits exclusive dealing if, but only if, there is the effect of substantially lessening competition in a market.

This has been looked at a fair bit over the years. I think originally the commission had some concerns. Then in the 1980s it decided that it would tolerate the ties. Of late we have been getting more restless about them, because of the fact that there are only four big companies left and they start to look a little different. We have not, however, taken court action on this matter. But we made, I think, some comment in the report on the exclusive dealing, because we are not entirely happy with that situation.

Mr LATHAM—Has any progress been made with your recent round of negotiations with the major companies with concern to terminal access?

Prof. Fels—The companies have all indicated that there is access to their terminals. We are evaluating that reply. There is, in some sense, access to their terminals; but whether it is real is something that we have quite a few doubts about. They have all said, 'Yes, sure.' It is a bit like the Hotel Ritz being open to everyone. So we have some doubts and we are at present evaluating what seem to be the limitations. Ampol, for example, has said, 'There's open access to our terminals,' but this seems to apply to only three per cent of the people who might want to have access. So we do have a concern.

CHAIR—How do you define three per cent only?

Prof. Fels—They exclude all the franchisees.

Ms Smith—Anyone who actually has a contract for supply with anyone else or with Ampol is excluded from the arrangement. There are others. The retailers, for example, are also excluded.

Mr LATHAM—You do not see that as a very good standard of terminal access?

Prof. Fels—No, we are rather concerned about that limitation.

Mr LATHAM—Minister McGauran, I think, in the parliament said he thought the Ampol model was desirable.

Prof. Fels—The model is fine, but there seem to be some limitations on the extent to which this excellent model applies.

Mr LATHAM—Very diplomatic!

Dr NELSON—I will just take it in a slightly different direction. You mentioned the Wallis inquiry, and I think one of my colleagues will probably ask you about that. What I am particularly interested in is that you said that you thought by and large it was a good report. I am interested in your comments on the government's response to it, particularly in relation to the four major banks. The government made a decision, which has attracted considerable attention, about restricting provider numbers for medical graduates. Is that an issue that the commission has at this stage been looking at, or does it intend to?

The health minister, Dr Wooldridge, has been reported as saying that he will be inviting the ACCC to look at the specialist training colleges in the medical profession with regard to restrictions on entry and numbers. Has he had discussions with you about that invitation directly or has he corresponded with you about it? How will you be responding if that is the case?

Prof. Fels—I can deal with that quickly. We have not really been involved in that. It is this question, once again, that, where it is a general change in laws or regulations, we do not get involved. Where we get involved is where there is a breach of the Trade Practices Act, like a price fixing deal between competitors or they get together and boycott something or there is a merger. This provider number issue is more of a policy question and a law enforcement question, and we are not involved in that.

Dr NELSON—So you do not see it as a trade restriction issue?

Prof. Fels—Certainly, as a citizen, I see there may well be some impact on competition there. But there are no breaches of the Trade Practices Act, nor does that idea involve there being a law exempting people from the Trade Practices Act. We have not followed it very closely for that reason.

Mr Spier—That is a matter of policy for the government of the day.

Prof. Fels—On the specialist matters, there is no correspondence or any of that kind of thing between the health minister and us on this topic. Since the government has been in power there have been some informal discussions with the minister about that possibility. But, essentially, if we were to do a big study on that we would have to get a reference from the government.

Dr NELSON—So the minister has informally discussed it with you but, at this stage, there is not any

formal reference?

Prof. Fels—That is correct. I should mention another point to give you the complete answer. Hearking back to the point I was making about the difference between policy and enforcement of law, some of the arrangements in the colleges are clear policy questions for the government but some of them get close to being breaches of the Trade Practices Act.

We have done a couple of things. We have spoken to the college of specialists where all the heads of the colleges of specialists get together. We had a serious meeting with them 18 months or two years ago and we explained the nature of the Trade Practices Act. As well as that, we have been talking, in the profession, about the nature of the Trade Practices Act. It does have a bearing on the specialists. We have been pointing out that, if people are engaged in trade and commerce—if they are engaged in business—then they can be at risk, under the Trade Practices Act, from various practices. When specialists get together and agree that there will be some sort of restriction of entry into a form of specialisation, that is close to being a Trade Practices Act issue unless they happen to have a law that says it is okay for them to do that. To take a simpler case than specialists, if an established group of businesses form an association and there is some big benefit, commercially, from being in the association and some big disadvantage from not being in it, if they get together and agree to exclude people from the association, that is likely to be a breach of the Trade Practices Act.

It is a little more complicated with the specialist colleges and so on, as to the extent to which they are covered by the act. Let us just say that it is a fairly close thing, and we are having a fairly careful look at it at the moment. They are aware that we are highly interested in this issue. That is the other dimension too. Is there anything else on specialists?

Dr NELSON—The last thing I wanted to raise is that at page 105 of the report there are five chapters on cigarettes. I notice that in 1995 you opposed a couple of price increases from Rothmans of Pall Mall. I read in the financial press at the moment that we are going into a price war in the tobacco industry. The question is: in terms of consumer benefit, is price the only thing that you believe to be important? There is a very important consumer benefit in having higher prices for tobacco, which is one of the reasons why governments tax it as they do.

Prof. Fels—I do have a view on that. My own personal view about cigarette prices is that, if you want to take steps to discourage smoking by having high prices, the best way of doing that is by putting up taxes to the highest extent possible. If, on the other hand, say, you have a very permissive prices policy and just let them put their prices up at will, I am not very keen on that as a way of dealing with the health issue because to let them have higher prices generates high profits, which are usually spent on promoting the industry, including through advertising. So, to the extent that one has a serious concern about health and smoking—as I do—I would use high taxes, but I would not have a permissive attitude to letting companies put up prices.

I was on a public inquiry on this a few years ago. At the beginning of the inquiry, a couple of the anti-cigarette smoking lobbies such as ASH—I think that was the main lobby—started out opposing the price increase. We put these points to them, and I believe they have watered down their attitude—as has the Anti-

Cancer Council, if I remember rightly.

Dr NELSON—Thank you very much.

Dr SOUTHCOTT—What do you think of the argument put by some business groups and also the Industry Commission that you do need a certain level of market concentration to have the economy of scale to compete internationally? You have previously said that opposing some of these mergers should be no obstacle to that. How do you rebut that argument?

Prof. Fels—This is a frequently raised question. At the end of the day, there are some cases where that is true and the mergers should be allowed, and they are allowed. Sometimes it is used as an excuse to have a merger that is anti-competitive in Australia and harmful to consumers. So it requires each merger to be looked at on its merits. In that regard, I would make several points.

Firstly, the argument that you have raised is most relevant to sectors that are already involved in international competition. We have not opposed any mergers where there are imports for many years—at least five or six years. Not once in my time could you point to a merger where imports are more than 10 per cent of the market and we have opposed it. So, in the area where it is most relevant, we simply do not oppose mergers.

Secondly, with respect to areas where there is no import competition but there is still some argument that we need to be big to get into Asia or something, it needs to be remembered first that some of those mergers we do not find anti-competitive. We oppose only a small number of mergers each year. Of those, we sometimes reach a settlement of them. I am sure there are going to be some questions about undertakings later on.

Thirdly, even if we think it is anti-competitive and potentially harmful to consumers at home, they can apply for authorisation. Our law is different from the US law. The US prohibits anti-competitive mergers—end of story. Australia, in recognition of the fact that it is a small economy, allows mergers if there is a sufficient public benefit. Twenty-six out of 46 merger authorisation cases have been successful over the years. If we get it wrong, you can appeal to the Australian Competition Tribunal. With the ones we have knocked back, the case does not stand up, and that is the usual thing. People may come in and say that this is great for exports, but you find there is nothing to it.

So I believe the framework of the act is adequate. Naturally, there is an imbalance in the business comment on the commission. Whenever the commission ticks something, nothing is said, but on the occasions when we oppose something, everything is said. So there is a tendency in business to advance this argument. The most respectable sounding argument against merger policy is precisely the one you have mentioned, and we certainly take it seriously. It is one that everyone in town tends to have recourse to when they have got nothing else to say on this subject.

CHAIR—Professor Fels, I will just take you up on that. It is not only the business community. The Industry Commission, for example, argues that you look at too many mergers, resulting in excessive administrative costs and the discouragement of efficient mergers. They argue that you should lift the

concentration threshold. That is a body that I would have thought would be seen to be fairly independent. I was wondering exactly what your response to that is.

Prof. Fels—Yes, we have copies of an article—I will pass over two copies immediately and then the rest in a minute—responding to this. We have a critique of that article done by some of our staff, but I must address the main issues. What we have actually done is we have decided to give the Industry Commission a go in the following manner. We have decided that for the next year or so we will test the Industry Commission test. We will test ours, and then we will report publicly on how they work.

We do have a couple of concerns about the Industry Commission. The issue is, as you rightly identified, that this is not about whether we accept or reject mergers; it is about the number that we look at in a serious manner. Most mergers we do not look at, or we spend a minute and we say, 'We are not going to look at this.' So the cut-off point for looking was what is in issue. We have a rule that, if the top four firms have 75 per cent of the market, then we start to have a look or, if one firm has more than 40 per cent of the market, we start to have a look. They wanted to take it to 50 per cent, and I think the top three have 75 per cent or something like that.

The main point I would want to make there is that their thresholds are rather generous. We would not have looked at mergers between the big four banks on that basis. We would not have looked at mergers between the five oil companies; that is, we would not have looked at Ampol/Caltex. We certainly would not be looking at a little thing like the Bank of Melbourne and Westpac—any of that kind of thing. So we are concerned as to whether their threshold is not a bit high, a bit generous. After all, all we are talking about is having a look at mergers, and we think it is generally a fairly low cost process for looking at mergers.

The commission report is mixed. There is a number of things in it that were useful, particularly on the economic side. There were some difficulties about it. For example, there is a lengthy plea in there for the commission to publish its authorisation reports—a strong recommendation that we should be more transparent and open discussing public benefit in our authorisation reports. In fact, they have always been published. The walls of most lawyers and quite a few businesses in town are stacked high with our authorisation reports. There are some other misconceptions about the processes of the commission in there.

But when someone takes a look at you, you have to take it seriously. So we have adopted their recommendations on how you look at imports. We are giving a go to their market threshold. But we are worried. Supposing—we can talk about it now—the big four banks got together. Under their guidelines, we would not have looked at it. We would not have spent 10 seconds looking at it. That guideline makes us worried. I can understand the Industry Commission saying, 'We feel perfectly relaxed about the big four banks getting together or all the oil companies merging.' I can see that, but I cannot quite see the argument as to why a regulator should not spend a few minutes having a look at those mergers.

Dr SOUTHCOTT—Can you now report how the monitoring of those Industry Commission thresholds has gone?

Prof. Fels—It is a little early. Our 12 months is not up. We will be producing some cases as to how the whole thing looks after the 12-month period has expired.

Mr WILLIS—Professor Fels, you know that this committee is concerned about financial institutions particularly, so I want to take you to the Wallis report, which you said you were generally happy with. As you would be aware, there are a couple of elements in that which I would have thought you would be less than ecstatic about.

One is a criticism—a rather lengthy critique—of the way in which you go about defining the product market for the purposes of considering a takeover of a regional bank by a bank major. They particularly draw attention to your cluster approach and suggest that perhaps some narrowing of the definition that is used and perhaps a reconsideration of the whole thing is needed.

As to the geographic area, they suggest that at least some substantial parts of the banking industry are now rather more national than regional. They look at things like mortgage loans and credit cards, et cetera. Would you give us your reaction to that aspect of the Wallis inquiry? I admit it is early days and you might not have had time to think about it too much, but perhaps you could give us your off-the-cuff reaction.

Prof. Fels—We are fairly happy with that and have said so. You have accurately summarised what was said. I have just noticed that about half the press have said that it is a sweeping endorsement and the other half have said it is the opposite. The real situation is the following. We had one serious look at regional bank mergers in September 1995, when Westpac took over Challenge in WA. There were fairly major inquiries, and we had huge volumes of submissions and lines of experts on opposite sides on this.

At that time, we thought that we would take the traditional anti-trust view in the US—a view that was strongly urged on us by quite a few applicants—that you should think of banks not just as supplying a single product or a group of single products but a cluster of products—a customer relationship in which they give you a credit card, a housing loan, a cheque account, a savings account and the works. That was that kind of relevant unit of analysis.

We also said that if a customer in WA went to a bank and the price was too high they were not going to go to Metway to get alternatives. In other words, we thought it was a WA market. It was just those in WA that you would go to. The same for small business: they took a regional view of the market.

We also had it put to us that banks have gone, they are finished forever, there is no such thing as a bank, it is just a financial services market and, if banks do not look after you, you can go to insurance companies, credit unions, and everyone else. We did not accept that view. That was not some arbitrary decision; we made some fairly extensive inquiries.

At that time we said something very publicly, which is a little unusual for us. We said that that was the view we take—at this time. You would see, even in the original media statements, 'This is the view we take—at this time.' The reason we said that was that we were aware of the rapid structural change going on in the financial services sector. We wanted to leave open the possibility that we might have to revisit some of these issues. At that time the Aussie Loans saga had just started and it looked like it would have an important effect and we could see some other important things developing.

We have not really had cause to look seriously at regional bank mergers from then up till now. We

are now, with Westpac and the Bank of Melbourne. Wallis did some research using Roy Morgan, which is not a bad source to use although we are going to check up on all of that material. It used some material from Roy Morgan which suggested that things were a little different by the time Wallis looked at it. So Wallis said that this cluster approach that we had had probably broken down. I think Wallis says that we needed to alter the approach and possibly to abandon it. The alteration is because home loans really have become separate from the rest of it. There is not any customer loyalty left on home loans to any great extent—there is a bit but there has been such a change there.

Wallis said we should certainly change the cluster approach and possibly abandon it. We have no problem about it and we will make some announcement about it after we have looked at Westpac and the Bank of Melbourne. The fact that we use another approach instead of cluster would not have changed anything we said in September 1995. It is just that we would have looked at it product by product. Instead of clusters we would have gone through the home loan market, the credit card market, the transaction account market, small business and so on, and assessed competition in each of them and probably reached a similar conclusion. So this time we will be certainly having to look at things that way while we are making up our mind whether or not it is the right way.

Mr WILLIS—When you say 'that way', do you mean the product by product approach?

Prof. Fels—I do not mean to prejudge it. I just mean that there is a sufficient possibility that we will move away from cluster to so-called multi-product, one by one. Rather than predetermine it, we will do some inquiries based on that approach and we will do some based on the traditional approach and then we will reach some kind of decision.

Wallis comments on the geographic market and says, 'You are right; there is a regional market. But please note it is changing in that home loans are probably national, credit cards are national and the position of regional banks is not immutable.' So we took Wallis to be saying, 'You were not necessarily at all wrong when you looked at it but things are changing in some respects.' If I took Wallis into a court now, the present Wallis report, I believe, would have supported the intellectual basis of our decisions in September 1995 on regional banks because he is just saying things have been changing since then, and we have no doubt they have been changing.

Mr WILLIS—The Wallis report suggests that the division between banks and other deposit-taking institutions, like building societies and credit unions, should be rather narrow. It said that they should be brought into the payment system, be able to issue cheques in their own name and be subject to the same prudential regulator so that, in the public's eye, the difference between these bodies and banks will be narrowed. In those circumstances, do you think, looking at regional banking takeovers, one should look beyond those to these other institutions, or is it too early for that?

Prof. Fels—We will be having a look at that. We certainly recommended to Wallis that, as far as clearance payments systems and the like are concerned, if you get more people in there it will be good for competition. We have always said that, if those things are actually implemented by the government, they have to affect the state of competition and how we look at issues. As a result, it will affect our analysis. That is not to say that we are going to reach different conclusions on particular mergers or market definitions. It is

just to say that we would certainly have to look at them. On the whole, those things conceivably would tend to make one take a broader view of the state of competition. But how it would affect our view on individual transactions, we do not know.

Mr WILLIS—The other part of the Wallis inquiry which seems to relate directly to you concerns consumer protection. It basically says that you should lose jurisdiction in this area, which I would have thought you would be less than ecstatic about. What is your view about the proposal that the consumer protection area for the financial services industry be moved exclusively to the proposed Corporations and Financial Services Commission, which would have the Trade Practices Act or the competition laws as they currently are translated directly into its own act and, therefore, would be administering the same law but obviously with the new commission, not you, as the administrator?

Prof. Fels—Basically, we are not unhappy with what Wallis has come up with. But I should explain the position. The Wallis report basically says—this has been emphasised quite strongly by Mr Wallis, Professor Harper and Mr Carmichael, and possibly even Mr Beerworth, but I am not so sure—that the new agency, the CFSC, should have the consumer protection role. That is fine with us. We have never sought it and have never had that role, and I will explain why in a minute. They are saying that it should be able to apply part V of the Trade Practices Act, and we do not mind that.

The Wallis report—and I will come to a little bit of possible ambiguity in the report—says that we will retain all our powers to take action under the Trade Practices Act and that all that would happen is that there would be an operating agreement between us and the new agency about how the act is to be applied to avoid too much duplication and that kind of thing. If that is the Wallis report, we are happy with it. There are a couple of bits of wording in Wallis that can be read the other way. The summary—you know what summaries are—say more brusquely that the CFSC will have a kind of monopoly over exclusive—

Mr WILLIS—Exclusive responsibility?

Prof. Fels—Yes. We are concerned about that. If you turn to the detailed chapter in the Wallis report on this, you will see a couple of bits of texts that read very similarly to the summary. But I actually think that, if you go on and look through it in more detail, you will see that what they are saying is that we should lose nothing and have rights of action and so on but that we should have an operating agreement with the new agency. So we are happy with that and with that interpretation of the matter. Wallis and the other members certainly have said repeatedly that that is what they meant—the two agencies would be around.

Just being a little general about the whole story about what is happening here for a minute: the situation is that the Trade Practices Act has applied to the financial services sector and we have applied it pretty vigorously since 1974. All the Trade Practices Act does is to stop untruthful advertising and misleading or deceptive conduct, and there are a couple of other consumer protection provisions. But that is all. It stops deceptive and misleading conduct. It does not go any further than that.

There is, however, in the market a huge amount of activity that you would call consumer protection, but we have nothing to do with it. This is about disclosure requirements: when insurers are selling you

something, that they disclose properly. There are certain codes of conduct about how they behave: when you have a complaint, going to the Ombudsman, the banking or to the life insurance panel and so on. There is a lot of activity out there which we are not involved in at all.

We believe that all of that other activity is in something of a disorganised mess at the moment. That is what Wallis said; it needs to be sorted out, to be unified. He has proposed that there be a new body, the CFSC, which deals with all of that; and there is a lot of work to do there. We have never been in it and we have never wanted to be in that because we think we would be more effective in doing what we do at the present time. I also should have mentioned that there is licensing and accreditation and all that kind of thing as well, which we are not involved in. It would not be appropriate for our body to get involved in that. It would not be appropriate to add on, to double the size of our organisation, to deal with all of those complaints and all that stuff.

We are happy with the Wallis proposal that there be a CFSC. It is not quite what we recommended as the ideal answer, but there were weaknesses in what we proposed. Having done that, Wallis says that they should be able to enforce the act; they should be able to take action under part V of the Trade Practices Act for deceptive and misleading conduct. We have no objection to that; it unifies the treatment of the subject.We would be concerned—because we are an economy-wide body—if there were an exemption from the act such that we could never serve as a back-up. So that is what the issue is about: do we stay there as a back-up and have an operating agreement? Wallis says yes, and I believe this matter can be sorted out administratively.

Mr WILLIS—You are not concerned that this at least semi-industry body—and its corporations economy-wide and financial services specifically to the industry—might be subject to some kind of industry capture and administer the laws somewhat differently from the way that you would administer them in relation to the consumer area?

Prof. Fels—I am hopeful that that would not happen, that the right culture will be there. But I see some merit in having the commission and its administration of the Trade Practices Act available for this kind of situation. It is a fact that we already have overlap and operating agreements in a whole lot of areas. We have long had an operating agreement with Austel and we have some kind of agreement with the ASC about overlap. As you know, with all the state fair trade consumer agencies, there is also quite a lot of overlap there, and we have just got agreements. The agreements have worked okay; this overlap between us has not been a controversial subject.

Mr CAUSLEY—Professor, I want to get rather more mundane than Ralph's questioning. I want to go right back, I suppose, and challenge the principles involved in competition policy and an assumption you made in your preamble that it was all about giving benefits to the consumers. I gave you some analogies once before at a meeting about where I did not believe that was working. You were going to get back to me, I think. Maybe you remember that.

Prof. Fels—On the prices, yes.

Mr CAUSLEY—I gave analogies on the sugar industry, and I do not believe that the consumers are getting cheaper products. Can I say that we are making some big decisions here that are going to be very

hard to change, and it is early days in many areas in some of these changes. For instance, I already have constituents who are being asked to pay $35,000 for a connection for electricity. That can only get worse in isolated areas. So we start to ask: where are the benefits? I put to you that I think some of these benefits are being transferred from those less well off in our community to those who are more powerful in our community. You could work that through in the electricity area, where someone is a large user of electricity and has a big bargaining position, and obviously any of those suppliers of electricity bargain from a strong base. But someone who is a small user is from a very weak base. Therefore, obviously, the weak are going to support the strong.

The other thing I put to you on the merger basis is that really it is academic whether or not you approve of mergers because in the marketplace, if the company that is being taken over by another company is not competitive, it is going to go broke anyway. So whether or not you say so, they will be put out of the marketplace.

What worries me is that I think services which are being provided to customers in the community, whether it be banking services where we are being dragged down to the lowest common denominator—which is Aussie Home Loans, if you like, working out of the back of a truck literally—are being reduced down to that level, and large sections of the community will be disadvantaged. I wonder where the benefits to all the consumers are. We are probably just shifting the deckchairs on the *Titanic*.

Prof. Fels—I would have said that, in a world of monopolies I do not think anyone would be better off. Are you saying that stopping the concrete companies getting together for a price fixing agreement that cost millions to consumers and governments, the freight express companies getting together in a $2 billion business and having an agreement, Ampol having a price fixing agreement in Melbourne—

Mr CAUSLEY—That is not takeover; that is more or less a cartel situation.

Prof. Fels—Yes. How merger policy got started here in Australia was that some price fixing deals between competitors were stopped, and then they decided to merge and to achieve exactly the same result. Mergers just have this double aspect, that is, the ones we look at involve former competitors getting together and agreeing on something. And even on that contentious sugar matter—and you have this concern about what happened downstream—I do not think there is any doubt that the commission's judgment on the competition question was right.

Mr CAUSLEY—Don't ask the farmers that because they will tell you that you are wrong.

Prof. Fels—I have never heard a farmer argue that we got it wrong on the fact that those people getting together would keep prices up. That is what they are complaining about, as I understand, that it has been a bit of a hardship for the growers.

Mr CAUSLEY—No, the complaint now is that because of the cutthroat domestic price at the present time—

Prof. Fels—That is the competition.

Mr CAUSLEY—The people who are losing out are the farmers, and I am saying that the consumers are getting no benefit.

Prof. Fels—That is just a bit of farmer propaganda.

Mr CAUSLEY—Let us follow the analogy of the electricity industry. There are 23 providers, I understand, at the present time out there to compete in the electricity industry.

Prof. Fels—Yes.

Mr CAUSLEY—The theory is that they have to compete against one another for contracts to supply electricity and the most efficient ones will win out. If someone consistently misses out on contracts, what are you going to do about mergers—they are going to fail anyway?

Prof. Fels—I think the basic point is that the principles—we only apply the law—do have a very full statement and recognition of the public interest, the public benefit side, and most of the reviews that I have seen of rural matters so far going through the system have given very full weight to the public interest side. Australia's competition policy is different from the US. As I said, in the US, if it is anti-competitive, it is prohibited. In Australia, if it is anti-competitive then all you have to show is that there is a sufficient public benefit and then it is okay and that is fully written in. There are questions of judgment here that have to be made, but the reviews of sugar, wheat and those areas are being done by governments and they will be able to make public interest judgments.

Mr CAUSLEY—I suppose I am getting down to the fact that I do not believe that there is any analysis of how the policy is working. I do not think there has been any forward thinking to project exactly what the benefits are. We just assume these things because it is a theory.

Prof. Fels—There was the Industry Commission report on this topic. It is a fact that, in just about every area of policy in any walk of government I should think, it is difficult to know what the outcome would be. I imagine it is the same with the euthanasia debate and things like that, that you have some idea but you cannot specify an exact blueprint of what will happen in the future in most policy areas. You have to go on your knowledge in general of how things work. We have some general idea of how competition and other policies work, so we are always in that situation.

We encounter in the legal area where we deal with it some people who have a kind of mentality that you have to know every exact consequence in detail in advance before you make any policy decisions, but you are never in that kind of situation. You cannot have it all planned in advance or specify in advance exactly what will happen. To some extent, you rely on what the history has been where competition has been introduced into industries, and the questions are not that easy to answer. Isn't the framework adequate? That is, that there is a presumption for competition, but if there is a sufficient public benefit then the public benefit overrides.

CHAIR—I think we expressed interest in what you said when you came before the committee back in December and made similar comments to similar questions about evaluations of outcomes and the difficulties.

At that stage, I think you were concerned about the lack of resources to do any evaluation. Has anything changed?

Prof. Fels—There has been some amelioration of our resource position, but not in relation to evaluation. It is a fact—and I have to say it very openly to you—that in organisations like ours there is always immense pressure on the organisation to deal with here and now problems. We keep saying to ourselves, 'Yes, it is important to evaluate outcomes and so on but, typically, we do not devote sufficient resources to evaluating outcomes.' We have evaluated on mergers, we have evaluated the whole Santos-SA Gas Co matter, we have done some evaluation of Ampol/Caltex and with Wattyl/Taubmans we have done some reviews more on the process side.

I mentioned to you last time that in about 1990 the Bureau of Industry Economics did an evaluation of us on mergers and they published this study. The three things that really stood out were, first, that about half the firms did not cooperate—they did not want to say what happened after the merger; second, they concluded, looking back, that the anti-competitive effects of the particular mergers had been slightly overstated; and, third, the efficiency benefits had been greatly overstated also. That is the main systematic evaluation study that has been made.

CHAIR—We might just take a very short break.

Short adjournment

CHAIR—Mr Latham would like to open the batting on the section 87B undertakings.

Mr LATHAM—How does the commission view this particular power because it seems to me to be a mix of administrative resolution but also quasi judicial in that it is enforceable in the courts and, in particular, did the commission take any legal advice on this given the outcome of Brandy's case from the High Court where clearly judicial powers had been questioned in their constitutionality under the separation of powers?

Prof. Fels—We got advice on Brandy and we heard that it was okay on the things we asked about, which was about authorisations and so on.

Mr Spier—Section 87B predates the Brandy case. But at the time of Brandy we sought legal advice from the Attorney-General's Department on that very issue, and their view was that our power was quite different from the power of the Human Rights and Equal Opportunity Commission. We do not have the power to fine. We can only accept undertakings. They are a mutual exercise, and they can be enforced in the courts but they do not have the same penalty aspect that the human rights powers had.

Mr LATHAM—On that question of how the undertakings are arrived at, as you say, the ACCC does not impose them; they must be offered by the parties. I have always wondered how the parties know what to offer.

Prof. Fels—We have talks about it. I will begin with the pure theory, if you like. If it is a merger,

they come to us with a merger. Mostly undertakings are not regarding mergers, they are about other things, but we catch them doing something that we consider is a breach of the law.

We explain to them what the breach of the law is or what our concerns are about a merger. Sticking to the pure theory, they then can go away and think up ways in which they can overcome our concerns without the matter having to go to court. They come back to us and offer up something. We have a look at it and then if it is acceptable we then an agreement. I said I would begin with the pure theory.

In practice, of course, we give them some guidance on what would overcome our concerns, but they have to agree to it, and you get all sorts of situations, ranging from people who just are uninformed about the act understandably—so we give them a fair bit of guidance—to others who have a fair idea of what the rules of the game are and they may formulate their own undertaking.

Mr LATHAM—Your guidelines outlining the things you consider in the acceptance of undertakings include impact on third parties and the community at large. That strikes me as just a bit curious in that there is no third party consultation. How do you gauge the impact on third parties in the community if third parties in the community are not allowed to make submissions as part of the enforceable undertakings process?

Prof. Fels—Firstly, very often there is no significant third party issue around. Secondly, sometimes a third party has been to us and expressed concerns and we know what their concerns are and what to do about them, and we may go back and consult them or we may not. And sometimes, as in the oil one, people come to us.

To take the Ampol-Caltex one, which seems to have attracted all that attention, we were certainly approached by other people in the oil industry. I make no secret of the fact, for example, that one of the big complainants about this, Shell, certainly came and saw us in the middle of it and said, 'We don't like what you are doing and there is this reason and this reason and this reason why we are opposed to it.' We said that we certainly recognised that Shell was a part of the public interest and we would take their views into account. And we did, but we still came up with an answer that they did not like.

We had a fair idea of what everyone in the industry thought about the deals because, although they were sort of confidential and Ampol-Caltex wanted them to be very confidential, the word certainly got around the industry and we heard from them. But that has not stopped them complaining about this whole thing.

Mr LATHAM—In that case, if companies like Shell are coming to you, should that opportunity not be available as part of an open public consultation where submissions are invited and where you do not need to be someone like Shell that obviously knows most things that are happening in the industry? You might be just a small petrol retailer who has an interest in these matters and even though you are a small player you can make a submission just as much as the big players.

Prof. Fels—I think it is just worth noting that on oil we have an exceptionally good idea of what everyone wants because they are beating a path to the door every day. There have been inquiries going on in this area—you may say it has been with or without success—over 20 years. But I think I could do as good a

job as the service station or the APADA or any oil company or anyone else in saying what they want. We happen to be—if anything—overeducated in this. I admit that I have not spoken to the service station lobby for 24 hours—a most unusual period in my life. It is longer than that in fact—Friday was the last time I had a meeting with them. And I have not spoken to anyone from an oil company for five hours now, apart from bumping into someone socially a few minutes ago who happens to be at this inquiry. We are very well informed about the oil companies. The problem was that, as you know, to make an omelette you have to crack a few eggs along the way. The settlement of the Ampol/Caltex merger delivered significant consumer benefits, and some of the companies did not like it.

Mr LATHAM—Given your knowledge of the views of the various parties, how do you answer the substantial criticism in the Ampol/Caltex matter that one set of rules was established for one of the participants—albeit just three per cent market access to Ampol/Caltex terminals—but that same set of rules does not apply to the other major participants, particularly in divestiture and access to terminals? You may say there are consumer benefits, but is it your role to engineer or mould those consumer benefits or to apply competition regulations equally across the board so if it is good enough for Ampol/Caltex to have industry access to their terminals it should be good enough for the other parties?

Prof. Fels—There are two answers to that. First and foremost, we did everything we could for the public interest, but all that was in front of us was the Ampol/Caltex merger. So we got all the undertakings we could in that situation, and it brought some benefits to consumers. We have got our eyes on the consumers, not on APADA. Secondly, we considered the merger was anti-competitive and would put up prices. We then had a very awkward situation indeed, because it was promised that the merger would bring savings of $500-$600 million. But it had a significant consumer detriment because, although that is a large amount of money, 1c on petrol is about $400 million. So, if it had put up the price by 2c and saved $600 million in costs, I do not know whether we would have been better off.

We could have done a couple of things. We could have just dug in and said, 'This merger is not on, we're opposing it,' or we could have sat back and let it happen, and it would have been anti-competitive. So, to a significant extent, we followed the theory I mentioned to you earlier. That is, we told Ampol/Caltex, 'We are of the view that this is an anti-competitive merger and should not be allowed under section 50.' That decision became public. Admittedly, it leaked out from Ampol/Caltex, but anyway. They then contacted us and said, 'Is there anything we can do to overcome your concerns?' We said, 'We don't know, but we are happy to explain our concerns.' So we then had a long meeting with them and went through a whole list of our concerns, which were published and had been in a press release, but we explained them more fully. They said, 'All right, we will go away and see if we can come up with something that will address those concerns.' We gave them some help along the way, but that is what happened.

We believe that was the best outcome because the arrangements, looked at from the point of view of the public, preserve competition, have done some things of benefit in the longer term to rural areas and have, at the same time, allowed the benefits of the merger to occur. We reckon that was better than the alternatives, and it was done fairly quickly under the undertakings process.

Mr CAUSLEY—Can I go back to the public interest factor, which is related to this, and also to the question I put earlier. What would your attitude be if you saw in the marketplace a company that is obviously

taking losses to gain market share or drive a competitor out of the marketplace? In the short term it might be of benefit to the consumer, but in the long term it may not.

Prof. Fels—We would not necessarily be sympathetic to what that company is doing. That would be a problem under section 46 of the Trade Practices Act which, in shorthand, prohibits predatory pricing; in longhand, it prevents someone with substantial power in the market taking advantage of that to drive out a competitor. The act has a framework for dealing with that problem. It is a very difficult problem, as you can imagine. It is also awkward. Let us say you are convinced that your analysis is correct and it is not in the interests of consumers. The next very difficult problem is that you have to get a legal order telling someone to put up their prices—not very easy—and what the prices should be, and then to stick to them. The solutions in this area are difficult.

Also, as you can imagine, in litigation it is really complicated. There are costs arguments, because people will say we are not really pricing below cost and so on. The commission has been to court very few times under section 46 of the act. They have mainly been private sector cases where one competitor takes on another over it. I acknowledge that there are cases where this happens and where it is not good for consumers.

Mr ANTHONY—Just to revisit some of the comments you made before we broke—the monitoring service for assessing the success or otherwise of mergers or the stopping of mergers—and to go back to Mr Causley's comments regarding the sugar industry and the Trade Practices Act at the time, a merger was proposed between Tate and Lyle and Mackay Sugar that was unable to happen. With national competition policies, there is still the assumption that they will generally lead to the lowering of consumer prices. In the area of sugar, for instance, the major consumption is for confectionary or soft drinks. From 1991 until now, confectionary went up 52 per cent and the CPI about 30 per cent. For soft drinks it was about 35 per cent and the CPI was about the same. So there actually has not been a reduction in price. I know you are revisiting that issue. What is the process now? What happens when you have got to make decisions?

The other one, of course, on which the ACCC made a ruling was telecommunications—Australis and Foxtel. That was knocked back. Of course, it has seemingly gone to its rival now—Optus Vision. I was wondering about some of those areas where, from my reading, there is terrible inefficiency and overcapitalisation. For example, in the area of pay television, the ground rules were put in place in a way that was terribly inefficient. Pay television will no doubt become a less viable medium for communication in years to come because of certain decisions that have been made.

Prof. Fels—On sugar, I have not got any prepared comments on this question of the after-effects of the sugar price war. I have heard both claims, frankly, about the effect of the price war on sugar. I think perhaps I should at least look up what information I have on this, now that it has been raised a second time by Mr Causley and also your interest, which goes back further than just today, I note.

I heard that after the price war the CPI for sugar related products went down. I would like to check up on whether that is correct.I have been told that it did go down. The CPI element related to sugar prices. I suspect we will come up with a very inconclusive answer on this topic.

On the present process, the situation is that, for quite some time, various parts of the sugar refining industry have been talking to us about the matter and the losses incurred, particularly by the Mackay growers, have grown quite considerably. They have had a reasonably sympathetic hearing from us on the possibility of some kind of joint venture or some way of tackling the problem. The hearings are going on.

I might say that this predated the Prime Minister's own comments on the subject, just to show you that we were trying to deal with the issues. On the matters before us there have been some meetings. There is no definite proposal on the table.

Mr LATHAM—How can the government then tell you to consider a proposal that is not on the table?

Prof. Fels—They have not done that as yet. All that happened was that the Prime Minister expressed a bit of concern about it in parliament.

Mr LATHAM—It sounded like in today's sitting of parliament that he was telling you to get in there and reinvestigate this merger.

Prof. Fels—I remember that his answer to a question was to the effect that he thought the act was a bit inflexible in dealing with these situations. Then I heard that there was going to be some kind of suggestion that we pay attention to the possibility of a merger. At that time, we are talking about a joint venture.

Mr CAUSLEY—It depends on the two players. Initially they were interested. Whether they are interested now, I do not know. Initially they were interested in one refinery at Mackay, and I think you knocked them back. I do not know whether they are interested today.

Mr ANTHONY—I think they are also looking to see whether there could be a more liberal interpretation of the Trade Practices Act in that particular case.

Prof. Fels—Yes. Also the tariff may have changed things.

Mr CAUSLEY—The big criticism I have of it is that, if in fact the competition in the marketplace—which has been immense—had been passed on to the consumer, I have no complaint. What I am saying to you is that I do not believe it has been passed on to the consumer; I believe the multi-nationals have put it in their pockets.

Prof. Fels—All I can say is that I will have a bit more of a look into this matter. It is inherently difficult to conclude decisively on these things.

Mr CAUSLEY—It tends to blow competition policy away, though, doesn't it?

Prof. Fels—If it is true, but I am just politely wondering what your evidence is for this, apart from hearing it from a few growers.

CHAIR—Professor Fels, would you be able to respond to the committee on this?

Prof. Fels—I will do my best.

Mr Spier—We gave you some material last time, I think.

Mr CAUSLEY—No, I have not received any.

Prof. Fels—Mr Causley certainly asked for it.

Mr CAUSLEY—Yes, and I have not received any.

Mr Spier—I will go back and have a look.

Prof. Fels—We will do that. It is an important issue.

Mr ANTHONY—Certainly, all those figures I quoted you came from the confectionary lobby group's data, not from the growers.

Prof. Fels—Obviously, it was a longer time period than the merger. There is another difference at the moment and that is the tariff cut has some effect on this situation. It has already been mentioned to us by the parties that the impact on competition, of them getting together, may be a bit different.

Mr ANTHONY—And with the second part of that, regarding communication?

Mr CAUSLEY—It does come down to, I suppose, players within the industry as well trying to position themselves.

Prof. Fels—Yes.

Mr CAUSLEY—Again, I suppose, if that gives a benefit to the consumer, I have no complaint. But whether in fact it does is the big question.

Prof. Fels—Yes. I have to answer this question on pay TV and all that, then I will deal with Dr Southcott. We thought at that time that that merger of Australis and Foxtel would have taken Optus Vision out of the market and would have damaged not only competition in pay TV but, even more seriously, would have destroyed the possibility for a few years ahead of competition in local telephone calls. So that was our core concern with that merger.

If I may speak for a moment generally about the evidence that we had on this matter—a little bit of it was confidential—we got extensive evidence from the companies about how they saw this merger. We got that evidence from Australis, Foxtel, Telstra, News Ltd and Optus Vision. A lot of that information was dragged out of them unwillingly. They all agreed that, at that time, that merger would have a decisive effect in the marketplace in taking Optus out.

Optus was not in a terribly strong position at that time, because the cable roll-out was just starting up and its competitor, Telstra, had a roll-out. Also there was Australis, which had the satellite monopoly at that time, and it also had the MDS monopoly. The cable roll-out was going slowly, obviously; you cannot roll out cables that quickly. In this industry, as all the company documents showed, the first mover advantage is crucial. The first person that gets to it and sells it to you, you tend to stick with. So the whole idea of the merger was to get a huge head start for Foxtel over Optus.That gave them not only the consumers but also the programs, because the programs are sold to the people who have got the most viewers. The idea was that by the middle of 1997, they would have a very, very large market share indeed, and Optus would have nothing.

It would have been different had Optus had its own access to a satellite or MDS but because of the regulation Optus cannot get into a satellite until mid-1997. At the beginning of 1996, when this was on, had that merger gone ahead, Foxtel would have left Optus Vision so far behind that it would not have got into the game. That was the main method it was using not only to penetrate pay TV but also the telephone market. It is going to give you pay TV and there is a fair chance you would sign up on their local telephony.

Regarding what has happened since then, Australis has been kept afloat with support from OV but, as I recall it in broad terms, OV is not doing very much of the running of it; PBL has some influence on the running of it. There are several people involved in running Australis at the present time. Now we have a slightly new situation. We have deregulation from mid-1997. We said at the time to the companies that if this merger were before us in the middle of 1997, with Optus having access to satellite, we would feel a lot more relaxed about it.

The two main telco companies have told me that they are having talks at the moment to sort out the cable roll-out, the pay TV, the access to local telephony and quite a few other matters. Once they have managed to iron out these not totally small matters between themselves, they are going to have some amicable talks with News Ltd, PBL, Australis and anyone else who has some interest in this matter. Once they have reached that agreement, they will also try and make sure that it meets the Trade Practices Act's specifications. Talks are under way on that matter and they say that they have not made enough progress to talk to us in a serious way about these issues.

Overcapitalisation is an issue, and it is possible that the argument that will be presented to us is that, even though the deals have some anti-competitive features, there is a sufficient public benefit from dealing with the overcapitalisation that it should be authorised. Optus and Telstra obviously are under pressure to settle the matter quickly because of their both floating so they both say something will be coming to us before long. At the moment there is nothing.

Mr WILLIS—I was going to ask you about the criticisms made generally by industry, which have been somewhat supported by your predecessors, at least by the Trade Practices Commission and particularly by Professor Bob Baxt and also Bob McComas. Both have been relatively critical of the way in which the commission is being administered. Professor Baxt was quoted in *Business Review Weekly* last year as saying that the commission did not show as much imagination as it might; its definitions of markets were 'nearly always too narrow'; the commission was too consumer-oriented and, commensurately, anti-business. That of course gives more conviction to the business critics that the commission is not pro-business enough.

Mr McComas said in that article that the commission did not recognise changes in the structure of the economy, such as globalisation. He was quoted as saying:

What the ACCC will not accept is that Australia is full of oligopolies. Industries are highly concentrated because we've got small consumer markets and the markets aren't big enough to support a huge number of competitors.

Given that sort of criticism by your two predecessors, do you think that the way in which the competition laws are being administered has changed significantly from the time when your predecessors were in charge? If so, why has there been that change?

Prof. Fels—I do not know if you can help me, Mr Willis, as to whether these comments applied to the commission when these two gentlemen were the chairmen of it or not, or whether it is merely the case that, since they have been solicitors acting for some people that deal with us, they have had a change of view of the world, or whether it is a question of—

Mr CAUSLEY—Do you think money is an influence?

Prof. Fels—There has been one change of note since then. Well, there have been a couple of changes—one is that the merger law has changed and is slightly tighter, and the other is that the commission has had a few more results, which has stirred up the business community in various ways compared with their time—not necessarily due to that change in management, but probably the commission has had a few more results.

They were both chairmen in the 1980s, when there was perhaps a different attitude to these things. The fact is that there is a much more serious attitude taken by the community, by governments and by the courts to competition policy. While I understand and appreciate the fact that there are some concerns around, including concerns that have been voiced by members of this committee, about what I think is the question of extending the act into newer areas where it is a bit more controversial perhaps, I have not noticed any really serious opposition from the public to the fairly vigorous application of the act to mainstream issues like price fixing agreements and things of that sort. So, there has unquestionably been a change there in the last five years.

On the globalisation, the commission has actually put out new guidelines on mergers which try to recognise the impact of globalisation. On narrow market definitions, we have got solicitors coming in every day of the week arguing—usually the exact opposite from one day to the next, depending on who employs them—about the breadth of markets.

An expert colleague of mine in the United States was recently employed by a bank in a US merger. They were about to take over another firm and he was hired to demonstrate just how broad the market was and certainly could live with any mere bank mergers, given the competition from insurers, savings and loans and everyone else. But in the middle of this someone tried to take over that bank and he got an urgent message to throw out all the work he had been doing and get to work on showing that the bank market had to be extremely narrowly defined.

So sometimes you get people—not of course any former chairman of our commission whatsoever—who take different views of market definition depending upon the issues.

Mr CAUSLEY—How does section 46 apply to overseas companies? Is it the same?

Prof. Fels—Yes. Overseas companies operating in Australia are certainly caught under section 46.

Mr WILLIS—I just wanted to get this clear. Apart from the changes to the coverage of the act, which of course are quite substantial with some change in definition of mergers and so on, are you basically saying that you do not think there has been much change of substance in the way in which the act is administered?

Prof. Fels—It has probably been a bit more vigorously applied.

Mr Spier—It has been an issue of policy through the whole COAG process. Now the commission is in an unusual situation where it now administers state law as well as the previous Commonwealth act. The climate is changing. It has been more vigorous and there is more expected. But if you go back to the 1980s, mergers like Coles-Myer, Ansett to East-West and a very big mergers like that which under dominance were let through and the criticism then was that that was wrong. Mergers are always controversial; there is always criticism, no matter who is around.

Dr SOUTHCOTT—You mentioned in the report that there are 1,000 issues that you looked at related to trade practices and there are something like 34 section 87 cases and a number of cases that actually went to litigation. Is it the case, therefore, that you determine most of the anti-competitive conduct you look at not to be against the public interest?

Prof. Fels—Yes. Sometimes it is anti-competitive against the public interest but not against the Trade Practices Act. We get the full range. Firstly, the Trade Practices Commissioner got a significant number of telephone calls asking what time the shops closed because they thought we were about trade practices. Secondly, we get a lot of inquiries about what is the state of the law, and we can quickly answer over the phone.

Thirdly, we get complaints, some of which are just unjustified. Fourthly, we get some complaints but there is no evidence that we can do anything about. So the number of things that get serious become about 300 or 400 a year.

Mr Spier—On the competition side?

Prof. Fels—Yes.

Mr Spier—About 1,000.

Dr SOUTHCOTT—It says about 1,000.

Mr Spier—A lot of those go past the threshold. They look like there is something that may need to be investigated, but a lot fall by the wayside once you look a bit further because there is no evidence. Some you can tell right from day one there is no evidence and for others perhaps a bit more work needs to be done. Then there are others that are settled because the company says, 'I'll fix whatever is wrong,' or enter into 87B, which is short litigation. The ultimate is litigation, but the litigation is a minority. The public interest does not come into that equation.

Dr SOUTHCOTT—So of those 1,000—

Mr Spier—Is there a breach of the law or not? In some cases there is and in some cases there is not. In this type of area it is very hard to find evidence of anti-competitive conduct. Sometimes it is easy. For some of the complaints we get evidence is very hard. If someone says, 'Look, all the services stations in Sale have got the same price,' that is not evidence of unlawful conduct. You have to prove that there has been some meeting or some meeting of minds. You need a bit more evidence than that simple fact alone.

Mr ANTHONY—Just two quick points. I know it is not in your charter, but you talk about consumer interests. Do you ever have pressure in the national interest? That is more of a broader question.

Mr Spier—That is not our test. The third test is national interest. There are other tests in national interest. Ours is public interest.

Mr ANTHONY—It is to do with the cross-media ownership laws. I am sure we could be here for many hours if we delve into this too long. I am conscious of time and the government will be making a decision soon. I know you have made statements in the past and I just wondered whether you could just enlighten the committee on what the ACCC view is of cross-media ownership.

Prof. Fels—First of all, we are totally neutral about what the outcome should be, but we have been aware that the government has been interested in, as one of its options, having a suped-up version of the Trade Practices Act cover the situation. So we have made a few statements trying to explain what that option would entail.

You could stick with the present cross-media laws. They are a little rigid and technology insensitive. You could, therefore, answer that by refining them but retaining their character—changing the percentages and covering X not Y and so on. Another option is to move away from a slightly rigid set of rules and just have a public interest test. That could be done by us or it could be done by a specialist body. If that happened then media mergers would face two hurdles.

The first hurdle would be the normal Trade Practices Act under the normal competition test. If they got over that hurdle then, like bank mergers, they would have to get over a second hurdle—in this case a public interest test run by an independent agency. They are the options we see as being involved. I have done a paper on this subject. If you would like me to, I will send it to you.

CHAIR—Thank you for that. I thank everyone for coming here today.

Resolved (on motion by Mr Anthony):

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 4.09 p.m.