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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION

Reference: Review of the Australian Competition and Consumer Commission annual report 1999-2000

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HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION

Monday, 25 June 2001

Members: Mr Hawker *(Chair)*, Mr Albanese, Ms Burke, Ms Gambaro, Mrs Hull, Mr Latham, Ms Plibersek, Mr Pyne, Mr Somlyay and Dr Southcott

Members in attendance: Mr Albanese, Ms Gambaro, Mr Hawker, Mrs Hull, Mr Latham, Ms Plibersek and Mr Somlyay

Terms of reference for the inquiry:

Review of the Australian Competition and Consumer Commission annual report 1999-2000.

WITNESSES

Committee met at 10.11 a.m.

CHAIR—I declare open this public hearing of the House of Representatives Standing Committee on Economics, Finance and Public Administration. I welcome everyone here today, particularly representatives from the ACCC, members of the public and the media. This is the fourth occasion that the ACCC and Professor Fels have appeared before the committee to discuss competition policy and the operation of the ACCC. At our March hearing, we discussed a number of very important issues with the commission. The committee wishes to continue its examination of some of those issues today as well as some additional matters that have been brought to its attention in the intervening period. Matters which I expect we will address today include the commission's proposal that its powers for dealing with cases of collusion be increased, criticism of alleged arm twisting and bullying tactics by the ACCC, volatility of petrol prices, the Productivity Commission's review of the Prices Surveillance Act and what the ACCC is really doing to assist small business in dealing with competition. The basis on which the committee is undertaking its investigations of the ACCC is the commission's annual report for 1999-2000. House of Representatives standing order 324(b) states:

Annual reports of government departments and authorities and reports of the Auditor-General tabled in the House shall stand referred to the relevant committee for any inquiry the committee may wish to make.

ARBLASTER, Ms Margaret Peta, General Manager, Transport and Prices Oversight, ACCC

CASSIDY, Mr Brian David, Chief Executive Officer, ACCC

FARMER, Mr Richard Arthur Mailey, Director, Compliance - GST Division, ACCC

FELS, Professor Allan, Chairman, ACCC

LU, Ms Helen, General Manager, Corporate Management Branch, ACCC

PALISI, Ms Joanne, Director, Adjudication Branch, ACCC

PATTAS, Mr Chris, Senior Manager, Telecommunications, ACCC

PEARSON, Mr Mark John, General Manager, Mergers and Asset Sales, ACCC

SMITH, Mr David, Executive General Manager, Compliance Division, ACCC

CHAIR—Welcome. I remind you that the evidence you give at this public hearing is considered to be part of the proceedings of parliament, and any attempt to mislead the committee is a very serious matter and could amount to a contempt of parliament. Before we begin, I have a resolution to consider regarding the commission's responses to questions on notice following the March hearing.

Resolved (on motion by **Mr Latham**, seconded by **Ms Gambaro**):

That submission No. 3 from the ACCC be accepted as evidence and authorised for publication as part of the committee's inquiry review of the Australian Competition and Consumer Commission's annual report for 1999-2000.

CHAIR—Professor Fels, would you like to make an opening statement?

Prof. Fels—No. I will be happy to take questions and deal with each of those issues as you like.

CHAIR—I might start with the question of arm twisting or bullying that has been highlighted, in particular, in a paper by Professor Pengilley. Referring to the tactics employed by the commission, he makes constant reference to 'heavy penalties', the 'threat of adverse publicity' and 'lengthy pre-trial legal proceedings followed by a sudden settlement before the trial, leaving the subject with heavy legal bills'. Could you respond to these comments in terms of the way the ACCC is operating and whether you feel that they are fair comments about the way the ACCC handles some of these issues.

Prof. Fels—There is no real basis to these allegations by Professor Pengilley. A lot of them seem to stem from his almost single experience in a case a few years ago concerning the paint industry, where he represented Wattyl and we opposed their merger. The commission sticks to

the law and, if we do not, there are many sanctions available against it, including the administrative review.

At the present time, for example, Virgin is telling the whole world that it is going to challenge our decision on Impulse under administrative law for not giving them reasons. I might just mention that we published our reasons in full. We did more than that: we held a full conference open to the media, we were grilled on that and we gave our answers. We always make our reasons for our decisions very public. As to Virgin, I think it was the day before that decision that I recall we had a lengthy meeting with Mr Godfrey and other people from Virgin. We went through the whole case. Indeed, at the beginning of the process on day 1, as soon as the merger of Qantas and Impulse was announced, we called Virgin to see if they were interested in buying Impulse, but they were not.

Nevertheless, that is an example of the fact that there are many safeguards built into the act when the commission deals with business. The commission deals with the biggest most powerful businesses in Australia. They are heavily resourced with lawyers, consultants and executives. Typically, millions of dollars are involved in merger matters and they push extremely hard. When the commission upholds the public interest in the protection of competition, there is an army of lawyers, executives, consultants and merchant bankers—many of them being paid very high success fees—who take every step they can to attack the commission. One should not be surprised if there are occasional criticisms of the commission. If there are any specific allegations that Professor Pengilley has, we are happy to look at those specific allegations. I saw the article a few weeks ago. The only thing I particularly noticed was the bit about the paint case, but he was the—

CHAIR—No, it was a paper. One of the points that Professor Pengilley did make was a statement that was issued in June last year in an ACCC update, where it said:

The ACCC can impose severe penalties for businesses that fail to pass on tax savings for lower prices - up to $10 million per offence for corporations, and up to $500,000 per offence for individuals.

He went on to say:

... the ACCC is quite blatantly and wrongly claiming powers which it does not have.

It is pointing out that they would really have to be imposed by a court, not by the ACCC. I think the point that I am searching for is that, while I accept that when you talk of major corporations and the resources they have, smaller businesses often do not have access to those sorts of resources and would not be aware of some of the finer points. If they were to read publicity like that they would probably find it quite intimidatory.

Prof. Fels—I think I can say that during my own chairmanship of the ACCC and the TPC in the last 10 years we have made thousands of statements about the penalties available under the Trade Practices Act— I myself, other commissioners, members of staff, ministers, members of parliament and members of the opposition. I cannot recall any time in the last 10 years that anyone from the commission has ever said that we can fine people, with the one exception of the statement that Pengilley—who spends his life fault-finding with the ACCC—has managed to uncover. So I congratulate him on this discovery of his. It should not have been said. We do

doubt very much that anyone ever saw it, apart from Pengilley. I very much doubt that this particular publication actually reached a lot of people.

We have always tried to make it clear that the level of penalties, if any, in a case are up to the courts. That statement should not have been made by the commission that we had the power to impose a fine. We do not and we do not generally say it. I can think of no other cases where we have because people are very clear about where the power is. It is one of our basic defences against critics like Pengilley that, if we want fines, we have to go to court to get them. In addition, even if a firm does not oppose us, the court still has to be satisfied. No court in this country will impose a fine just because we go into court and the other side says that they will not oppose those fines. They look at the evidence and have to be satisfied before they will levy a fine.

Mr Cassidy—I could add just on that point that in our work, under the new tax system and our role in it, so far we have had 233 cases where, if we had wanted to, we could have marched off to court on the basis of there being price exploitation under section 75AU. With all but a couple of those we chose not to do that because they were small businesses involved. Quite often the mistake, in terms of charging GST when it should not have been charged, was inadvertent. We sought other remedies in terms of refunds and discounts on goods. In a sense, our administration of that particular provision to which he is referring has been anything but heavy-handed compared to a strict legalistic approach.

CHAIR—Could you just explain on what basis you would choose or not choose to proceed against a small business in this situation?

Mr Cassidy—In the great bulk of those cases it did seem to us that we were talking about mistake situations where the business genuinely did not understand and, therefore, they ended up charging GST on goods which they should not have charged GST on, increasing their prices by more than they should have. In a couple of cases where we took a different view it seemed to us that the conduct was rather more blatant. In other words, people knew or, it could be argued, reasonably should have known, that what they were doing was wrong. Nonetheless, they went ahead and did it.

CHAIR—But how do you actually decide this is blatant or this is genuine error? It is fairly arbitrary, isn't it?

Mr Cassidy—We have a set of what are quite public criteria that we use in deciding when we will go to court. They are issues like how blatant the conduct is; the extent of consumer detriment involved; the previous record of the parties involved in terms of previous breaches of the Trade Practices Act; whether it is a new area of the law, or whether it is the law applying to a new area of the economy. There are judgments involved in some of those sorts of things. Quite often decisions we make as to how blatant or otherwise the conduct is will be in part based on material evidence we have in our hands to indicate the state of knowledge of the parties about what they were doing and, therefore, how conscious or otherwise the potential breach of the act was.

Prof. Fels—I would just say another word briefly about fines across the board if you are interested. The main area where we seek fines is typically for collusive behaviour under section

45 on price fixing and so on. With regard to other parts of the competition provisions, we do not terribly often seek fines but more injunctions, like with mergers, for example. There was one exception on mergers, but that was a secret merger that was very similar in our view to a secret price fixing deal concerning Pioneer. We are seeking a penalty against Boral but they are seeking leave to appeal to the High Court on whether they are guilty in the first place. Most of the penalties that we seek under part 4 are with respect to big business. They are generally with respect to blatant breaches of the law—clear, deliberate behaviour in breach of the law. We put in our published guidelines for taking cases to court some other criteria—economic detriment and a number of others.

On part 5 on consumer protection, for a number of reasons there is less emphasis here on seeking fines and there is more emphasis on getting resolution for consumers. The reasons for that are partly that it is probably more important. Also, the structure of the act makes it very difficult to do otherwise because, broadly speaking, with part 5, if you are going for fines, the fines are quite low.

Mr Cassidy—The bill that has passed both houses will increase those, but you are still talking about a maximum of $1 million for a company.

Prof. Fels—Up to now they have been $200,000. Also, the case has to be run via the Director of Public Prosecutions, who typically has much higher priorities in life than these matters, like murder and all that kind of thing. I think I am right in saying that, if we decide to take criminal action, that takes precedence legally over anything else. If we want a solution for consumers we have to wait until the DPP has seen fit to conduct the case. Then after that, many years later, we can consider getting civil outcomes, but we do not get many penalties under that part of the act. In the regulatory area which, as you know, takes a fair bit of activity, broadly speaking we do not seek fines. It is more a case of making various decisions. I think Mr Cassidy has covered most of the points on the GST. The parliaments of Australia—federal, state and territory, Labor, and coalition—have passed extremely strong laws with provision for very high fines. The commission took that as a sign that all parliaments were very serious about wanting to seek compliance with this law. Even so, as Mr Cassidy has said, we have not gone to court seeking fines a great deal.

Mr LATHAM—Professor Fels, it is true that there is a mountain of business lobby groups and special interests that say that you are too tough in the application of competition law. I am probably at the other end of the scale in arguing that in a market economy you can never get enough competition. What is happening about the doctors? For six years you have had the power to clean out the college of surgeons and their collusive practices. What progress is being made? Why does it appear that the doctors are the last of the vested interest groups and sheltered workshops in this country to be exposed to competition?

Prof. Fels—I will have to take a minute or two in responding to that. I would just like to go through what has happened. Prior to 1995, when the competition reform act was passed, the commission had extremely limited jurisdiction over doctors, so in shorthand I say we did not have jurisdiction. When the act was extended to cover doctors, there was a year or two during which it applied to them but there were no penalties and other things. In any case, the appropriate thing was to engage in a process of major education, so we had many seminars

around Australia and we issued publications and guidance for the medical profession and everyone else in the health sector.

Towards the end of those first couple of years we stepped up things somewhat and we issued some warnings where we were getting complaints. From memory, there were several country towns where there were boycotts of hospitals by groups of doctors—they were reported in the press, from memory—and we issued warnings that, if this behaviour of refusing supply of medical services to country hospitals continued, we would take action. That was broadly in line with our standard approach to enforcement: that we give warnings.

Despite a number of these warnings, we did come across a significant case in Sydney, where anaesthetists had got together. A number of anaesthetists had a meeting at the Australian Society of Anaesthetists in Sydney, and they agreed to increase fees or to introduce a so-called at-call charge. They conveniently recorded in the minutes of the annual general meeting that they had an agreement on this. Also, we had evidence that they had contacted a number of hospitals and said that they would not be providing their services as anaesthetists unless they got this at-call charge.

So we took them to court over the matter. We were very keen to establish our jurisdiction so we went into court, and eventually the anaesthetists did not oppose the matter. We thought it was a pretty clear-cut breach of the law, incidentally, and the court upheld our view about jurisdiction and it issued the remedies we sought. We did not seek fines, incidentally—I wish Professor Pengilley would occasionally mention these things, by the way—but we did get an injunction and some other orders in relation to the anaesthetists. Incidentally, we have no views on the question of this at-call charge, which is that they are available to do an operation in a hospital. They wanted to charge $25 an hour; they did not have it up till then. They might be at home or somewhere but they are available to go into the hospital and do it. We have no views on the social justification of that, but it is against the law for people who are in business to have an agreement on a thing like that without having got authorisation for it under the Trade Practices Act.

Following that, we came across what we regard as a more serious case. This concerned the Australian Medical Association in Western Australia, and we have now got a case before the court. It is okay, I know, for me to just summarise what the case is about. It has not been decided by the court at this stage. In that case there were negotiations going on concerning the privatisation of a hospital in Western Australia, and during those we alleged that the Australian Medical Association's WA branch entered into an unlawful price fixing agreement and possibly a boycott; that is, they threatened to withdraw their services to the hospital, and they did so in collusion with Mayne Nickless. So we have taken that matter to court and we are seeking penalties. We will have to see what the court says.

On the other point about the specialists, there is quite a long story to tell there, I am afraid, but I will just run through it as quickly as I can. In 1996 roughly, we began investigating whether the restricted entry provisions for the colleges, the various specialties, were illegal—whether they were anticompetitive—because obviously they keep out people who are competitors. I can recall that quite early in 1996, I think it was, I went and spoke to the heads of all the colleges of specialisation in Australia and at a special meeting I explained the law. Then I went to another meeting and spoke to the Royal Australian College of Surgeons—all their top 20 or 30 people—and explained the law, and we did a number of other educational things. But

30 people—and explained the law, and we did a number of other educational things. But we decided to investigate whether the restrictions were anticompetitive.

That investigation took a long time—and I will grant you that—and there were two reasons for it. One was that it is not a completely straightforward matter as to whether the restrictions are anticompetitive or not, so we had to spend a fair bit of time on the legal side and on collecting the evidence. A number of the colleges were not that cooperative to begin with, but eventually we got the information. Also, the commission was a bit stretched in resource terms so it took us quite a while, but eventually we told the college—and we set out in some length in writing—the reasons why we considered that their entry arrangements were unlawful.

We particularly focused on the orthopaedics, I think I should say as I was generalising too much. We decided to pick the orthopaedics because there were more complaints about them than just about anyone. So we did an in depth investigation on them and we concluded their arrangements were unlawful—we did not really conclude the rest of them were necessarily unlawful—and we put them on notice that this state of affairs could not persist. We did not say more than that. I have forgotten what we said in the letter, but it was unlawful. We would have hinted that we could not allow unlawful things to go on forever without going to court. We would have also made clear at the same time that they could seek authorisation, and the whole flavour of our discussions with them throughout was 'you had better seek authorisation'. So they have now applied for authorisation, the application is in front of us and we are reviewing it for all the surgeons, not just the orthopaedics. So we have been fairly active.

Mr LATHAM—So the authorisation is for all surgeons, not just the orthopaedics.

Prof. Fels—For all surgeons, not all specialists.

Mr LATHAM—Have you investigated the other areas?

Prof. Fels—Not really, not in depth, not the other seven or so colleges.

Mr LATHAM—Do you plan to, to see if their activities are unlawful?

Prof. Fels—It automatically comes up through the authorisation process.

Mr LATHAM—When do you expect to have that completed?

Mr Cassidy—As to what we expect to happen with the seven surgical colleges, the orthopaedics and the six others that are applying for authorisation, we would expect that when we reach a position on that authorisation then that would also apply to the remaining 25 colleges, in the sense that what we decide we are able to authorise for the seven surgical colleges will set a benchmark for the remaining colleges.

As you would be aware, we received additional funding in this year's budget. Part of that funding is being used to set up what we loosely call a 'professions' team. The role of that team, firstly, will be to follow up the authorisation of the surgical colleges and to make sure that the entry rules of the other colleges are consistent with that authorisation. If not, those colleges will also need to seek authorisation or face the possibility of legal action. Beyond that, we will

extend our examination to other professions—particularly those who still have association rules of one form or another—to make sure those rules are not in breach or potentially in breach of the act.

Mr LATHAM—When do you hope to have the authorisation process for all surgeons finished?

Mr Cassidy—That should be within the next three or four months.

Ms Palisi—On 24 November 2000 they lodged, but they did not put their submission in with that. They put their supporting submission in on 30 March 2001.

Mr Cassidy—Our authorisation processes—which involve a process of public consultation, public comment and public hearing if any interested parties require it—normally take about three months or so from the time we get a full submission.

Mr LATHAM—Let me ask a question about airlines, which are in the news, of course. Earlier on you mentioned Virgin.

Mrs HULL—Can I just ask a question on the associated topic?

CHAIR—On doctors?

Mrs HULL—Yes.

CHAIR—Let us stick with doctors for the moment.

Mrs HULL—I am interested to listen to the history of the medical practitioners and specialists. Do you think that the history now reflects the current situation between the ACCC and the AMA? I raised the issue of medical specialists and professionals in my electorate the last time we met with respect to their not being able to come together to determine how they will deliver services into the hospital due to medical indemnity and the cost of their being able to perform those services.

It seems to me that there is a difficult history between the ACCC and medical practitioners, specialists and surgeons, but things have changed on the ground. I know you will go back to times when there may have been restriction of entry into these areas—and perhaps that is part of the reason why we currently do not have enough specialists to man our hospitals, et cetera— but generally there has to be some sort of resolution; otherwise, we do not have these specialist services in our hospitals. Tamworth is a typical example of this. How will we resolve this? You said last time, Professor Fels, that we could apply for an authorisation. On investigating that, I found that the cost is extremely high. It is not as though you just write in and apply for an authorisation and it will not cost you anything—you pay $7,000 first up. After looking through the anaesthetists one at $21,000 and determining that they still could not do it, it basically puts it outside the capacity of some of the specialists that I represent.

Prof. Fels—I am very happy to make a few points on that, and I am glad you have asked me for our side of it. First of all, there has been a widespread dissemination of the view by the Australian Medical Association that the Trade Practices Act prohibits their having agreements on rosters.

Mrs HULL—That is on GPs; I am talking about specialists.

Prof. Fels—Yes, but I would not mind just mentioning this because you mentioned services, but I will come to specialists in a minute. The commission have 100 times made it clear that we believe there is no such restriction. I did say to Mr Latham that the act applied only from 1995, but in fact it did apply in the ACT and a couple of other areas from 1974. We did take a couple of actions over very blatant behaviour back in the 1970s on price fixing but, since 1994, we have never gone against rosters. Despite this, the AMA has promulgated a wrong view—a misleading view—that the act prohibits doctors from getting together on rosters in country towns.

Turning to the issue of specialists, supposing that in a country town with three specialists it does not pay for all of them to continue to supply services with the rise in medical indemnity. They would like to have an agreement that two of them withdraw, leaving one to do it, but they feel this could be in breach of the act. It could possibly be a technical breach of the act. It could even be that we would take some action about it, although it would be just unbelievable—like I could visit the moon next week. In any case, to clear up the matter, we have been working on a process under which there could be a general authorisation for the whole set of specialists that are so affected. I do not know whether it would be on a state-wide or an Australia-wide basis but, if it was on a state-wide or an Australia-wide basis, the cost of the authorisation would not be very great, although I agree that the cost would be fairly high if three people in a country town sought it. We are working fairly hard on a process. Since the introduction of the Trade Practices Act in 1974, many difficult situations have arisen with all sorts of people—big business, small business, and so on. The commission always works to fix the problems. We are an operational body; we have to get results. Our approach is that we see no harm in what you are talking about; therefore our interest would be to make sure that the law does not get in the way of something sensible like that. We see it as an authorisation, and we are working on that approach.

Mr Cassidy—We are expecting that the Royal College of General Practitioners will approach us for authorisation fairly shortly. As a result of the work we have done on our guidelines—and I think we have now had close to 20 workshops around Australia with rural GPs on our proposed guidelines—we are basically down to two issues that doctors in rural towns are concerned might be a problem. One is that one that we have just been talking about; the other is what we call joint practice—where GPs who are separate legal entities get together into a single legal practice and agree on the fees they will charge, and so forth. That also could be a technical breach of the act, although probably one that we would be unlikely to pursue. To put it beyond doubt, we have suggested that it should be authorisation of that. We expect the Australian Division of General Practitioners to approach us for authorisation of that fairly shortly. The commission have been fairly open in indicating that we will probably be favourably inclined on both of those authorisation applications. The best that we can tell, after our quite extensive discussions around Australia with rural doctors, is that they are the only two live issues for doctors in the bush so far as the act is concerned.

Mrs HULL—What time frame are we looking at? This is critical for us.

Mr Cassidy—Unfortunately, with the authorisation process—and this has been going on for some little while now; as you know, this is something we talked about at some length when we last appeared—we cannot move until we get an application. It is not something we ourselves can expedite. We are waiting for these applications to come from the two general practitioners' bodies. As soon as they come, we will deal with them within the constraints of the act. We will deal with them as quickly as we possibly can, but we cannot move until we get the applications.

Ms GAMBARO—I want to again deal with the issue of mergers of general practitioners. There has been a very aggressive move in Queensland recently by, I think, a foundation in Macquarie, where they are acquiring independent medical practitioners' sites—you have roughly gone into this with Mrs Hull's questioning—but are also integrating services like diagnostic services and a whole lot of things that will ensure that they have some sort of vertical integration. If they are referring to pathology services or diagnostic services, for example, when does the ACCC step in to determine whether or not it is collusive behaviour? I know we will be talking about airline mergers and the Franklins case and about market power—are you looking at some sort of guide to how many medical practices you will allow these large corporates to take over? Do you see your role as doing that? I see this as an emerging problem, and it is already starting quite aggressively in my state.

Prof. Fels—With respect to mergers, whether vertical or horizontal—and the only other category is a so-called conglomerate, where they get together but they are not competitors—the commission has issued very detailed guidelines on how we approach any merger. They include some market share figures. By and large, if a merger occurs and it creates a market share that is smaller than that in the guidelines, then we have an announced policy of not acting against it—or hardly ever. In the case of the medical ones to which you have referred, where they are taking over independent medical practices, to my knowledge at this stage no acquirer has got close to the market shares where there is a concern under the act. Also, the issue of corporate acquirement of doctors' practices is not in itself an issue under the Trade Practices Act.

There have been some acquisitions in the health sector which we have opposed. I suspect that they are not the ones that you have in mind, and I understand your concerns. For example, when Mayne Nickless wanted to take over Hospital Care of Australia, we initially opposed it and we only agreed to it when they sold off quite a few hospitals. In the area of mergers in radiology and pathology, we have looked at all of them carefully because the market share numbers have been going up. I think we have opposed some, haven't we?

Mr Smith—Yes. Some cases are confidential—

Mr Pearson—We recently opposed one in South Australia.

Ms GAMBARO—That is in the specialist radiology area, is it?

Mr Pearson—Yes.

Mr Cassidy—When we look at these, we do it on an area basis. We get our hands on figures from health funds and so forth where we can see a pattern of behaviour in the way health

consumers use hospital specialists and so on. In other words, when we are talking about these market definitions, we are not talking about Australia wide.

Ms GAMBARO—I was going to ask you that next: how do you determine what a market share is? Do you base it individually?

Mr Cassidy—We look at the geographical area, and that will vary a bit according to what area of health care we are looking at. In a sense, the issue is that when you are looking at, say, GP type issues there are a range of alternatives—not only are there other GPs but also there are out-patients if there is a hospital in the area, and so forth. That is why, as the chairman said, we have not found any of these as yet to have reached the market share thresholds we look at.

With regard to the other issue you raised of the vertically integrated medical practices, we would start to look at those fairly closely if there was any suggestion of compulsion by, say, a doctor saying, 'You have to have a pathology test and, what's more, you must use this pathologist.' That could well either breach section 35 on anticompetitive agreements, arrangements or understandings or it could be exclusive dealing under section 47.

Ms GAMBARO—But if a doctor said, 'We recommend X'—

Mr Cassidy—If he says, 'We recommend X,' it is like a lot of recommendations: it is very hard to prove that it is mandatory. The argument from the doctor would be that the patient still has the option of saying, 'Hang on a moment: rather than go to him, I would like to go to someone else.' However, if the doctor says 'we recommend X' in the situation where there is an information imbalance between a doctor and a patient, the patient may be unlikely to say, 'Rather than who you recommend, I would rather go to so and so.' Nonetheless—and this goes back to the earlier question about the Pengilley article—as the chairman says, at the end of the day we have to be able to prove all of these things in a court of law. Once you get into a court of law, someone saying 'we recommend X' is very hard to establish as some sort of mandatory requirement.

Ms GAMBARO—So you take market share considerations area by area—you have covered that. I have just one other quick question on this. With regard to restrictions on the colleges—and there are usually a number of restrictions, from what I understand—I have had people speak to me about when they have graduated from the colleges and have gone to a particular area. I think Newcastle was one of the examples used, where the gynaecologists in the town tried to drive out a particular individual. Have you had many cases like that, where someone has moved into an area that is established and the established medical specialists in the area have taken exception to that and have done everything to ensure—for example, through innuendo—that the person is driven out? Have you had cases like that come before you?

Mr Cassidy—We have had occasion to look at some of those. There could be various reasons why a group of doctors may not let another doctor into their roster arrangements.

Ms GAMBARO—This was a female gynaecologist in an area where there were male gynaecologists.

Mr Cassidy—I will not reiterate the comments I made a couple of minutes ago, but the problem, again, is being able to establish a case before the court that these things have happened and have had anticompetitive either intent or consequence, depending on what section of the act we are working under. It is very hard, as I said, when we get these sorts of allegations to then put legal substance to the claims. We have looked at some, and we will continue to look at them as they are reported to us.

CHAIR—Professor Fels, I want to go back to the Pengilley thing. I think you were rather quick to dismiss it. In this paper he talks about the arm twisting and so on. I notice in the footnotes on the first page, Pengilley says:

The author had the final draft of this article reviewed by a number of Australian leading trade practices practitioners.

He went on to say:

None of the practitioners consulted saw any basic faults in the major propositions put in the article or in the general philosophy expressed in it.

I do not think you can just dismiss it as being Pengilley's views. I really think we should get a bit further into some of the points that have been raised.

Prof. Fels—Sure, we are happy to deal with them. But, of course, 'leading trade practices practitioners' are the lawyers that represent big business—that is what he means. I do not know which ones he showed it to, but I am sure that they would be very interested in it. If they want to come forward and see us, that option is available.

CHAIR—Maybe I can put it to you in another way, in more general terms. Obviously you understand the importance of trying to get this balance. How do you get the balance of, on the one hand, wishing to promote the work of the ACCC but, on the other hand, doing it in a way that is not going to undermine the basic market system?

Prof. Fels—The commission is very heavily involved in trying to get markets to work well. That is what we are all about. We are about getting free competitive markets working well. There is, however, one problem, and that is anti-competitive behaviour. That has gone on for hundreds of years. It is a natural temptation for businesses to form monopolies, to monopolise and to engage in collusion. These are often done secretly and they may be very harmful to the working of markets. Our job is to try to get markets working well. Inevitably, the commission is involved in conflict with the most powerful players in Australia. They are highly resourced, and they will fight very hard. For example, in the Wattyl case, which you have mentioned—

CHAIR—No, I did not mention it; you did.

Prof. Fels—I am sorry, Professor Pengilley mentioned it. In that case, for example, there was massive publicity, which clearly came from Wattyl and/or its representatives, attacking the commission quite unfairly during the court case. We were in something of a dilemma in that a lot of very incorrect and misleading information was being put out through the press in the middle of a court case. The commission obviously gave consideration to whether it would get into a big media fight to refute this misinformation or whether, because the case was under way

and before the tribunal, we should refrain. So we refrained from dealing with it. But, curiously, in the article by Pengilley—and I would not know whether he was responsible for all the misleading information that went into the press about this; I would not know who that came from—he does not mention that side of it in the Wattyl matter at all.

The position is that the Trade Practices Act, as I am sure the members of parliament here would know, has been a piece of legislation that has been considered many times in parliament. Battles have been fought out in parliament about how far it goes and, as all the members would know, there is typically extremely heavy lobbying from big business interests to water it down in every way and to put in major safeguards to protect their position. The result is, I believe, that the act—which fortunately enjoys bipartisan support—has embodied numerous safeguards to protect the position of business. What has changed a bit, perhaps, is that during the 1990s the commission was probably more active and vigorous in enforcing the act and that has stirred up some opposition, including from the trade practices law community.

From time to time you get criticism by Professor Pengilley and others, but I believe that at all times the commission has certainly sought to act within the law in carrying out a fairly difficult implementation task in the face of very strong opposition. I also think that it is rather important that regulators do their job and are not deterred from doing it by this kind of pressure. As a general point about regulation, it is important that, no matter how much resistance there is, we try to do the job that parliament has assigned to us or otherwise things will go wrong and people will turn around and say that the regulators are not doing their job. We try quite hard to strike the balance, but I have never known of any antitrust agency around the world which has been seen to be doing its job not to attract some criticism of this kind.

CHAIR—I think we all appreciate that point. Would the ACCC be able to give us a written response to this? That would be quite valuable.

Prof. Fels—Yes, we would be very happy to do that. It may be a little bit shorter than the article.

CHAIR—There are quite a few points in there, and I think it would be quite useful.

Mr ALBANESE—Running with the ball that you just bowled, what changes would you like to see made to the Trade Practices Act so that you could do your job properly?

Prof. Fels—Over the years, as various parliamentary and other inquiries have been held—at the moment, there are three inquiries by the Productivity Commission—we have mentioned a number of changes that we would like. Just before I get specific, it is perhaps worth noting that there have been a number of inquiries into merger and monopoly laws since at least 1986—Griffith and Cooney, and then Baird on unconscionable conduct. If you trolled through the full list of things, you would find quite a few recommendations in there for change. Let me try to give you some sense of the priorities. The commission believe that, in relation to hard core collusion by executives of big business, there should be criminal sanctions. The present position under section 45 of the Trade Practices Act is that, if there are breaches of the law, the most that we can do is to seek penalties—a maximum of $10 million per offence or half a million for an individual.

We believe that there is now a strong case for introducing jail sentences for defined acts of hardcore collusion—not for breaches of the whole of part 4 of the act, which covers many forms of behaviour of anticompetitive mergers, misuse of market power, and so on. The acts that we would see as being defined as fit for possible jail sentences would be price fixing agreements between competitors, bid rigging, probably market sharing and, quite likely, agreements between competitors to boycott. They would not apply to trade unions, and they would not apply to small business. We believe that there has always been a good case for this. It was considered quite seriously in 1974 when the Trade Practices Act was introduced, but there was huge pressure against it at that time by big business. Also, perhaps one justification for the decision was that, at that time, the meaning and nature of the act was somewhat uncertain and unclear whereas we have now had 27 years of cases and litigation where people understand what is what. So the idea that this would cause any uncertainty is much harder to justify. We believe there has always been a case for it. In the United States, Canada, Japan, Korea and some other countries, they have these sanctions and they regularly use them.

In the *Wall Street Journal* last week it was reported that Mr Gordon Brown, the UK Chancellor, said that there would be jail sentences in the UK. It was reported in the *Wall Street Journal*; I read it myself. I suspect there will be some more formal announcement about it, but I do know that it has been a hot subject of debate in the UK. It is also on the agenda for discussion in Europe. It has been freely talked about in the European Union as to whether they should bring in jail sentences. The arguments are really that hard-core secret collusion is comparable to other forms of white-collar crime for which there are jail sentences. It is not unlike fraud. It is typically secret. I might just mention on secrecy that that means that it is not always caught. That strengthens the case for having a powerful deterrent law. If we are only going to catch it some of the time, we want to have a pretty strong deterrent. It is fairly clear that this would have far more of a deterrent effect on business executives than fines. The calculus of a business approach to deliberate collusion is that they weigh up the gains to be made from collusion versus the probability—whatever it is; whether it is high or low—of being detected and the fines themselves. The fines may not even equal the value to the business of the collusion. So we believe that in this area jail sentences would have a more powerful deterrent effect than would civil penalties.

As I have said, we believe that for this type of behaviour, secret collusion, which is just price gouging—not only consumers but farmers, particularly in rural areas, and small business—there is a need for a more effective deterrent. In that regard I would just point out that we are concerned about the fact that there has been, to our mind, some increase in collusive behaviour in recent times. The history of matters is that for a whole set of reasons—during the 1980s certainly—business did not really get a message from anyone that collusion mattered a great deal. Then in the 1990s there was some stepping up. First of all, parliament itself sharply increased the maximum fines from a quarter of a million to $10 million.

Secondly, the commission itself became more active and more successful, and it secured fines of $15 million against TNT and Mayne Nickless and $21 million against the building companies. I think at that time there was a view, 'Well, maybe let's wait and see how these new fines work.' But we believe we are a bit past this point now, because not that long after the fines levied on TNT we caught McPhees, which is part of TNT, engaged in blatant price fixing. We went to court and got them fined. This was after that. In relation to the building case—as you would know, that was in Queensland with CSR, Pioneer and Boral—we have had this case

against their fire protection and fire sprinkler people in Queensland. I cannot remember whether that all predated those fines or not, but at any rate we have been to court on that recently. It was just blatant. They had at least 55 documented meetings at hotels, golf clubs and other places. Some 56 players were involved in these meetings. They agreed on rigging bids and also on a whole lot of other anti-competitive practices. These were against things like hospitals, against businesses, against consumers, but mainly against small businesses and government things like hospitals. It just went on and on. We have gone to court and we have now got penalties of $15 million or $16 million. I might say that, from the point of view of the public, an enormous number of public resources have had to be devoted to this. We have had a team working on this day and night for years. It is a very hard thing. There has, if you like, been some reward for the public but also there has been a considerable expenditure of public resources on this matter.

There are some other matters around at the present time. There is one case I want to mention but I do not wish to say anything more because it is part before the court; that is, the case concerning transformers where we have got one penalty of $7 million. There are some other parts of that case before the court at the present time. But it is a price fixing agreement and the $6 million is against a smaller player. At the international level there has been a disturbing increase in the amount of international cartel behaviour, and that would be agreed by just about every authority around the world; not just by antitrust authorities but by lawyers and so on. The vitamins case is a good example. In this case the major producers of vitamins, mainly for making and manufacturing food and for animal feed in particular—particularly animal feed—got together and for nine years they secretly rigged the whole of the world market. It was really just an accident that they got caught. Eventually, years later, we have collected a fine against them in Australia of $26 million. The behaviour did involve some Australian players. There are quite an number of other serious international cartel cases around. The US has got about 25 major grand jury investigations going on of international price fixing cartels. I think all the competition regulators around the world agree that there has been a big rise in it. The profits from collusion can be very big and outweigh fines, even when they are caught.

We think that in this situation we could sit back and, just like other matters that are around now, let it happen. Then in two or three years we will perhaps be grilled—perhaps by parliamentary committees or by others—for not having drawn attention to this problem, for not having suggested steps that need to be immediately taken. We believe that there is enough evidence and there is a strong enough case around to act now rather than let this price gouging go on for a few more years while we wait until we have the kind of evidence that would carry everyone, even the big business community, to support us.

Mr ALBANESE—Isn't what you are really saying that the problem is that in relation to the colluders the penalties at the moment are on companies; that there is no real penalty on the individuals and that you need to move to a system whereby there is some penalty on the individuals?

Prof. Fels—That is broadly true. The act does enable there to be fines on individuals.

Mr ALBANESE—Sure, but by and large it is the company that ends up paying them.

Prof. Fels—I am afraid so. And, even if there were a law against that, it is far from clear that it would be workable.

Mr ALBANESE—There is another thing that the act might need to fix; we have discussed this before in this committee and you raised it earlier on in the context of the Impulse takeover. The airlines are, in my view, a very clear case whereby, even if you argued that the market was responsible for the fact that they all have the same prices within a few hours of each other, the timetabling is very clearly a case of the market not operating properly. And you do not appear to be able to do anything about it.

Prof. Fels—I suppose that raises the other part of the act that is relevant. For many years there has been a debate about how far the parliament should go over section 46, the misuse of market power law. My own interpretation of it is that parliament has understandably been a little worried about how far section 46 is taken. The purpose of section 46 is to stop firms with a substantial degree of market power from taking advantage of it for the purposes of damaging their competitors in certain circumstances. The kinds of cases that come up are the refusal to supply someone where it would be anticompetitive, predatory behaviour such as undercutting someone by more than is warranted by someone's costs, like pricing well below cost, or using market power in one market as a lever to get market power in another. That is like the Microsoft case: they got some market power and then they tried to use it illegitimately to gain it in another area, according to the US courts.

The law has one considerable restriction in this area that says, 'If the firm with substantial market power does certain defined things, it is anticompetitive provided the commission can prove that that was the purpose of the behaviour.' So, it is not unknown for people, including members of parliament, to come to this commission and say, 'Look, here's some anticompetitive behaviour. Here's someone in big business taking action against a small business that is clearly anticompetitive and harmful to competition.' We have to say to them, 'Well, sorry, that is perfectly true, but we would have to be able to prove that they had the purpose of doing so before we could win a case.' Often, that is just not possible because businesses these days are pretty well educated on how to avoid there being evidence that they had that purpose. Mr Gates was a bit less cautious in some of his e-mails so he got caught out fairly badly. But, in most cases, lawyers like some of these ones that Mr Pengilley seems to have consulted often give a bit of advice to people about not saying things in writing that might come up in a case.

Our view is that an effect test should be added, so that if it 'had the purpose or effect', it would make it like section 45, price fixing. If you have a meeting of competitors and it has either the purpose or the effect of fixing price, it should be unlawful. We have been recommending that for quite a long time, but it has come up rather more in a number of areas lately. We are not suggesting that there were necessarily breaches—in fact, we are not suggesting that there is any evidence at this stage that that has occurred in recent high-profile matters—but we do think that, perhaps, the time has come for lifting the restriction that the parliament deliberately imposed on the law out of a degree of caution about it.

Ms PLIBERSEK—I have a number of questions, Professor Fels, and I know that other people have a lot of questions as well so could your keep these answers quite brief, because I do not want to impose on the goodwill of my colleagues. My first question relates to what the ACCC's view is on the Productivity Commission's draft recommendation to repeal the Prices Surveillance Act.

Prof. Fels—In short, we think the Prices Surveillance Act needs modernisation but not abolition.

Ms PLIBERSEK—You don't need to be quite that brief; is there anything in particular?

Prof. Fels—Broadly, it was devised in 1974 as the Prices Justification Act and in 1983, I think, it became the Prices Surveillance Act. That was part of the wages prices accord and it was aimed at oligopoly behaviour in a quite different climate and setting of opinion. In retrospect the astonishing thing is that, although it applied to oligopolies like oil companies, it did not apply to the area where everyone agrees there is a need for price regulation—that is, where there is pure monopoly. It did not really apply to Telecom or Australia Post—and I know the experts will tear me apart for that but it did not really apply to them—or to electricity or gas or water or ports, or other areas where there is pure monopoly.

CHAIR—They were government monopolies, though.

Prof. Fels—Yes, they are government monopolies and one of the reasons was that, in those days, the cabinet used to set these prices, whether federal or state. Now, with privatisation, corporatisation and commercialisation, all those enterprises are free of government control but they have a monopoly power and there needs to be some independent regulation of their prices. So we believe the act should be modernised to pick up that and to do less of what it used to do in the past.

Ms PLIBERSEK—The second question I have relates to small business. I have been speaking to a lot of small businesses while travelling around and their response to the GST and to your role in making sure that people were not unfairly putting up prices is that they in fact understated—I am talking about small businesses like local cafes and so on—the cost of the GST and put up their prices too little because they did not calculate for the price of implementation, for example. They may have included the GST impost on their goods but they did not include implementation costs and so on, so a lot of them are experiencing a lot of hardship for that reason. In retrospect do you think that you should have handled the situation differently so that small businesses were not as terrified of the ACCC? What measures can you take now to ensure that people are not understating the costs of the GST to their small businesses?

Prof. Fels—All of the parliaments of Australia—federal, state, territory, Labor dominated and coalition dominated—gave us a fairly challenging task in making sure that there was no price exploitation, and there was not a lot of time to do it. We published guidelines that make it very clear that business could get back the full costs of the new tax system and, in doing that, we believe that it was open to business on this—of course, there was the 10 per cent cap, I accept that. In retrospect it is also worth noting that just about all businesses had some cost savings from the new tax system. These were things like the offsetting reductions in the wholesale sales tax anyway and, secondly, the number of cost savings coming through, such as on petrol for business because of the way it was treated for tax purposes. There are a number of other cost savings that were offsets, and it is not unknown a number of small businesses played up implementation costs, which are an allowable cost subject to the 10 per cent rule, and not put so much emphasis on the cost savings that were coming through. I think the public was expecting the ACCC to make sure there was no price exploitation. Of course, we tried to strike

the right balance. We had a consultative group that included small business representatives as well as big business representatives. We met them repeatedly. So I hope we struck the right balance.

Mr Cassidy—We did try hard in the sense that we put out a lot of material that was particularly aimed at small business. On our web site we had all sorts of examples and so forth that they could go to. We also put out a CD-ROM, which we distributed quite freely. It had a balance sheet, which a lot of small businesses could use to put in the relevant figures and therefore know what they should be doing with their prices. So we were conscious before the event of the concern you raise, and we did quite a lot to try to explain to small business. Indeed, this was raised with us and we did write to some associations, making it quite clear that small businesses could quite legitimately claim the full cost of implementation of the new tax system.

Ms PLIBERSEK—Many of them would not have know at the initial stages what the cost impost would be, because it is only at the end of the quarter and the second quarter that they are actually paying much higher accountants' fees, and so on.

Mr Cassidy—As far as we are concerned, if a business wished to increase its prices and the reason why it wished to increase its prices was that it did not allow enough implementation costs initially, and it can reasonably establish that, there is no reason why they cannot subsequently adjust their prices.

Ms PLIBERSEK—One of the problems of reasonably establishing those cost increases is that a lot of small businesses are quite intimidated about getting a four-page letter from the ACCC explaining why their two-cent widgets have gone to four cents and being asked to justify that on the basis of the total cost increases for the whole of the business and all the bits and pieces that go into decisions like that. I think that is quite a difficult thing for many small businesses to cope with.

Mr Cassidy—We have done a fair bit to try to help small business in particular. On the other side of the ledger, since 1 July we have had more than 100,000 complaints about prices not doing what they should have done following the new tax system implementation. We also have to have an eye to people who are complaining and saying, 'Hey, the price of this or the price of that or the price of a widget has gone up by more than it should have.'

CHAIR—How many of those 100,000 have been justified? Just a rough percentage will do.

Ms PLIBERSEK—Would they automatically get a letter asking for an explanation?

Mr Cassidy—Some of them fall away fairly quickly in the sense that they turn out to be factually wrong when we look at the price involved. Some of them are in areas where we have had previous complaints. We know what the story is; therefore we can explain just why it is that those particular prices are moving the way they are. I would have to check these numbers, but we ended up writing to more than 4,000 companies. A number of the complaints would relate to a particular company—there might be 100 complaints that company X has done this, or done that. I think we wrote to more than 4,000 companies to ask them to explain why their prices had done what they were alleged to have done.

CHAIR—Of the alleged 4,000, how many were actually seen to have exploited the opportunity?

Mr Cassidy—It depends. Some of them were resolved by administrative actions—for example, where the price change had been in place for only a short period of time or minor things such as the price of a cappuccino in a coffee shop. We did those through the industry associations. Prices seemed to adjust accordingly, so we did not pursue those any further. We got a bit over 100 administrative undertakings, where we required them to give us something in writing to the effect that they would be adjusting their prices and offering refunds, and so forth.

CHAIR—So 100 out of 100,000?

Mr Cassidy—As I say, we got a lot of calls. In actual concrete actions, there were a lot of letters. We sent out different form letters. One form letter was purely a warning letter saying that we had had a complaint about their prices—that perhaps they needed to have a closer look at whether their price was right and that, if we continued to receive complaints we may need to take further action. As to the number of serious things we did, there were 100-odd administrative undertakings and there were about another 32 court enforceable undertakings. Under section 81B of the act, we got a formal undertaking from them which, if they had not done what they had agreed to do in the undertaking, we could go to court to get it enforced.

Mr SOMLYAY—On the same topic, when prices did not fall as much as we expected them to fall after the introduction of the GST—

Ms PLIBERSEK—Some of us expected them to fall, not all of us.

Mr SOMLYAY—Some of the people I spoke to explained that they had wide across-the-board increases in wholesale prices a month before the introduction of the tax—in electrical retail goods and sporting goods, and quite a few things associated with invoices. Their prices had risen by about 10 per cent or 15 per cent before the introduction of the GST, so that when they went on the market a month later, the savings in the wholesale sales tax was wiped out by the increase in wholesale prices. Have you evidence of that?

Prof. Fels—As you know—and I do not say this sarcastically—every possible theory has been put up about what has happened to prices in relation to the GST and preceding it. One of the allegations was that the prices went up before the GST in some abnormal fashion. We did look into that, and the numbers do not bear that out as a general statement. I cannot give you chapter and verse straight off, but we did look into that at the time. Also, all of the claims that were being made to that effect as the GST was coming on were not borne out by the behaviour of the Consumer Price Index in the period preceding the GST. We, ourselves—for better or worse—issued some warnings that we would be seeking to apply the law vigorously to that kind of behaviour, and that may have had some effect.

As a general phenomenon, we do not think there is evidence that there was significant anticipatory behaviour. We did very substantial surveys of prices. We certainly started them up in about the December before the June introduction. Some people said, ‘Oh, you didn’t start early enough; you should have started years ago,’ but there was not much evidence of it even in the six months before that in the Consumer Price Index. I realise that is not a very complete

answer to your question, but that was something. There were a number of retailers who just refused to accept any price rises from about April. They just said, 'We will not accept them.' They were the big fish, like Coles and Woolworths.

Ms PLIBERSEK—In relation to whether things are going up 10 per cent or less or more, it is my understanding that Westpac passed on to its customers the full 10 per cent GST on fees, and I was just wondering whether you had investigated that or had any intention of investigating it. Related to that, I think in the past you have said that you would need or you would like a direction from the federal government if you were to investigate bank fees and charges. Is that the case? Do you have any intention to investigate fees and charges?

Prof. Fels—Dealing with your second question first, if it is not GST, we have very limited powers to investigate prices unless there is a formal referral by the government. Assuming your question is about why we do not do a full-scale inquiry into bank fees from top to bottom, we would need a formal referral. On the first question with respect to Westpac, we did look at it. As you know, the broad effect of the GST on banks was that there was no GST on bank fees as such, but the GST did apply to the inputs that they purchased. So they did incur extra costs due to the GST, but not 10 per cent. Therefore, obviously, the law was that they could pass on these increases, which were of the order maybe of two or three per cent. We had a very careful look at everything the banks did. In the case of Westpac, there were, from memory, a couple of instances out of many fees where they went the 10 per cent. I have forgotten—

Mr Cassidy—In terms of the guidelines, we needed to treat bank products as related products, because there is a substitutability between a number of different bank products. Within a particular package of bank products, the banks increased their fees by an average, which was about the sort of average that we expected bank fees to go up. But they increased some by more than they did others, and there were some tens in amongst the increases. In terms of the law and our guidelines on how we were applying it, that was all right providing there was an offset with something else not increasing by as much as it could have.

Ms PLIBERSEK—Was the offset on the same account? Were they passing the 10 per cent on to the low fee customers and offsetting for the customers they wanted to keep, which are the high value customers? Do you recall that?

Mr Cassidy—It was between similar types of products. We did not, I suppose, spend a great deal of time trying to establish whether they were low income, high income or low value or high value. We were more interested in establishing was that the cluster of products that we were talking about were genuine substitutes. So that, in a sense, you were not starting to get an apples and pears type problem and that, within that cluster, the average increase was the sort of increase that we thought there should be. We satisfied ourselves on that issue, although, as I say, some banks increased individual bank products by 10 per cent.

Ms PLIBERSEK—I know that I am pushing my luck, and I know that my colleagues have questions, but I do have two very quick questions that relate specifically to my electorate. The first one is about the Woolworths and Franklins merger. We have a Woolworths in Waterloo that is closing down. They are saying that they are closing down because the ACCC have told them that there are too many Woolworths and Franklins in a small geographic area. That struck me as

an absolutely ridiculous excuse for closing down. I would like to know what you have told Woolworths about where stores should be located or how close or far apart they should be.

Mr Cassidy—I will kick off and then maybe Mark might want to kick in. We are requiring Woolworths to divest certain stores. Again, this goes to the merger and acquisition analysis we do which, as with the health area earlier, we do on an area basis. Indeed, the bill which has now gone through both houses actually provides unquestionable legal underpinning for that by referring to us being able to look at regions when we are looking at mergers and acquisitions. We do have a concern that where Woolworths is acquiring, say, a Franklins store within that geographic area that it gives Woolworths a disproportionately higher share of the retail sales within that area.

Ms PLIBERSEK—How do you measure the area? Is it geographic or are you talking about population areas?

Mr Cassidy—Let me finish my answer and I will then come back to that. We are certainly not saying that these stores have to close. Indeed, what is required of Woolworths is that, in the first instance, they do their best to find a buyer for the stores and they have three months in which to do that. We have had inquiries in relation to not only the Waterloo store but also one or two other stores where, for some reason, there is a perception or a belief that Woolworths have to close these stores. That is not right. What Woolworths has to do is divest the stores. They can no longer continue to own them but they are required, in the undertaking they have given us, to use their best endeavours to find a buyer for the stores.

Ms PLIBERSEK—What if they cannot?

Mr Cassidy—If they cannot, then the store may well close. On the other hand, if you think of those options confronting Woolworths, Woolworths are saying to us that they are not looking for particularly flash prices in order to sell the store to someone else because selling it, as far as Woolworths is concerned, is better than closing it. You asked a question about the way we do geographic things. Perhaps I can get—

Ms PLIBERSEK—The reason I raise it is because the stores in question are in Waterloo, Newtown and Marrickville, which geographically are not so far apart. It is a matter of maybe five kilometres and three kilometres. They each serve quite large populations—it is very high density living—and most people in those areas do not have cars. If the Waterloo store closes down, it will be a very serious problem for the people who live in the housing commission houses in that area and it will be a very serious problem for the Waterloo shopping centre if they lose the supermarket because people will have to get on a bus and go shopping somewhere else. You were talking earlier about your rules being basically to make sure that anti-competitive behaviours do not worsen the quality of life for people and so on. This is certainly not going to improve anyone's quality of life if the store is finally forced to close. It would seem like a very bureaucratic reason to close a store that serves a local community.

Mr Pearson—When we looked at the competition effects in those markets, we used a fairly well-known consultant and reports that were prepared by the company.

Ms PLIBERSEK—Which company?

Mr Pearson—Jeb Holland Dimasi. They are an expert in retail. We looked at each one of those stores. Each of the areas was broken down into a 1½ kilometre, two kilometre and out to a five kilometre circle. We looked at each store in that region: the size of the stores, the types of stores, whether they were independent, whether there was an existing Woolworths, whether there was an existing or proposed Coles. It is my belief that the stores that we asked to be divested will be divested. I have had discussions with a couple of independents who have said that they see those stores as very good—in their words—'mum and population' type operations and that they are in good locations. So we have no reason to believe at this stage that they will not be divested. Woolworths are required under the undertaking, as Mr Cassidy said, to make best endeavours. We are in a position, because of the legally enforceable undertakings, to assess those best endeavours. Woolworths are not in a position to just call us up and say, 'Look, we've done what we can. We can't sell them now; we want to close them.' We have to be able to audit, if you like, those best endeavours.

I discussed the Newtown store with a gentleman two days ago. He was quite interested in the Newtown store. I know there was some interest in the Leichhardt store as well. I have not discussed anything with anybody about the Waterloo store. Each one of those is a successful operation as it stands right now. They do not fit perfectly, I assume, with the size of Woolworths stores or with what their proposals are. In terms of the overall assessment of competition at both the macro and the microcompetition levels, it was the commission's view that divestment of those stores would be the best way to ensure competition in those areas.

Ms PLIBERSEK—Waterloo is not a particularly attractive area for businesses to move into. In fact, we have a huge problem with businesses moving out of the area. I hope that another company or some individuals will be interested in taking over this supermarket. If there is not someone to take over the running of this supermarket then it will have quite a damaging effect on local people rather than having any benefit at all. I want to know whether there is some flexibility there. Are you saying that if they do their best to find another buyer and they do not find another buyer then the store closes? That does not really seem to be an adequate response.

Mr Pearson—When we look at something like this we look at what we call a counterfactual to see what would happen if we did not agree to the proposal. One of the issues, of course, was the possibility of Franklins selling up altogether. If Franklins had gone out backwards then stores like Woolworths and Coles would have been in a prime position to take over those stores anyway and, in that position, we would have had no say whatsoever in whether they could divest or keep those stores open. From the commission's point of view we are at least in a position to try to ensure that some competition and service remain in that community. We get reports from both the JIDA process, which is the process under way for selling the stores, and from Woolworths—we have already received one and another one is due next week—on how they are going with each of those sales.

CHAIR—We might follow this up afterwards.

Ms PLIBERSEK—I would really like to. The alternative is that if the supermarket closes down then people will not go to other supermarkets but will shop at convenience stores. These people can barely walk and most of them do not have cars. They will not be exposed to greater competition; they will be exposed to much less competition.

What are you up to on Lord Howe Island? There was a review of the New South Wales Lord Howe Island Act 1953. State governments have to review each piece of legislation for competition.

Mr Cassidy—Those are regulation review requirements under national competition policy.

CHAIR—You can take it up with the NCC if you like.

Mr LATHAM—Back to the question of the airlines. There appears to be a period of change and rationalisation under way. What do you see as the future of the airline industry in terms of market structure? In particular, do you recommend these changes to section 46 as a way of assisting the competitiveness of the industry and evening out the lopsided nature of industry structure?

Prof. Fels—To forecast the structure is a fairly challenging question. We have at the moment the two big players and there is all this discussion going on at present about what the outcome there will be. We have Virgin in the market and, although I have been away, I believe it might be entering the Sydney-Melbourne market. That is the present structure, plus the fact that there are still a couple of regionals left.

The other issue that comes up is that very often it is difficult for the commission to act quickly. If we, for example, form the view that there is some predatory behaviour going on then we would have to collect evidence and win a case in court which can take a long time. There needs to be some look at how quickly action can be taken. The possibility of cease and desist orders or something like may need some consideration.

Mr LATHAM—Are you happy with the progress that the Reserve Bank has announced with regard to the introduction of a new payment system for credit cards, ATM and EFTPOS? We are likely to have a report before the parliament in about an hour's time that will possibly outline some concerns about the pace of action with regard to interchange fees for ATM and debit cards. Do you think they should be acting faster in that area, particularly given the impact on low income consumers? Many more low income families are affected by high interchange fees for ATM than they are for credit cards.

Prof. Fels—We ourselves have not set out to assess the speed of the Reserve Bank's action in the same way that the parliamentary committee has. We have not formed the view that they are moving too slowly.

Mr LATHAM—On the question of undertakings, in a column last Friday in the *Financial Review* you mention:

> ACCC decisions to authorise anti-competitive practices are accountable. They must be published and can be, and often are, appealed against to the quasi-judicial Australian Competition Tribunal.

Do you think that there is the same level of transparency with regard to undertakings and, in particular, the suggestion that behind the scenes there are a lot of trade-offs and negotiations that take place? Would it be useful to actually publish some record of the process that led to a certain set of undertakings?

Prof. Fels—Obviously you have anticipated my answer, which was that we do publish the undertakings. It is true that the undertakings process is less transparent. The people who are unhappy about being more public about undertakings are not us. As you know, the commission is happy to be public about everything but generally businesspeople do not like things being made very public. We could do more about the process. Typically, what happens is that there is a merger put up and after eight weeks, or before that, we tell the business that it is not on. They then think up an undertaking and we have a lot of meetings with them. Generally, we take records—

Mr Cassidy—When we are in the process of possibly accepting an undertaking on a merger, we will consult with the other interested parties, not necessarily on the full text of the undertaking but on the aspects of the undertaking that potentially have an impact on them.

Mr LATHAM—Also, in that *Financial Review* column, responding to Dr Hewson, you wrote:

In my 10 years as chairman, the ACCC has never opposed a merger where imports make up more than 10 per cent of the market and sometimes when they are fewer than that. Australian merger law is more flexible than that of most other countries.

Earlier today you have argued for Australia to stick closer to international best practice. Do you believe that we could strengthen our merger laws—10 per cent of the market is not necessarily that great an amount?

Prof. Fels—The 10 per cent, incidentally, is our judgment. The 10 per cent is not a rule, it is just a historic fact that we have never done it. I accept the implicit criticism that this could mean that if someone gets 90 per cent of the market the only protection is imports. So a fairly difficult assessment is required.

Mr LATHAM—Would you like to see a strengthening of the merger provisions in this country?

Prof. Fels—We would not like to see it weakened. The main thing we tend to hear about is for a fair bit of pressure for it to be weakened in various ways, but we would be opposed to a weakening. We do not have major proposals for a strengthening.

Mr LATHAM—On petrol, you have recently released a report. Also, the government, some time back, announced some measures regarding terminal gate access. In a former capacity I used to argue for the access regime to be applied to petrol terminals. Has there been much progress made on this? Is there much shopping around regarding wholesale petrol? If not, is this something that could assist in reducing petrol prices around the country?

Prof. Fels—The access provisions of the Trade Practices Act, as you undoubtedly know, more or less exclude oil refineries. The ACCC report on petrol in 1996 or so referred to some freeing up. Some of that was given effect to, although perhaps not as fully as we would have liked.

Mr LATHAM—What should have happened there?

Prof. Fels—I can say what happened: the access that the oil companies eventually gave was limited to fairly narrow categories. I think they were basically to people who did not already have a contract with an oil company, that were not lessees. As I recall, a very low percentage of service stations gained potential access as a result of that.

Mr Cassidy—That was an arrangement between the government and the oil companies. Part of the arrangement was that the sites act and the franchise act would be repealed. That has not happened yet. To be honest, we are not aware that that terminal gate pricing arrangement is still in operation, as far as most terminals are concerned. Certainly, as the chairman said, we have indicated previously that we think greater access to terminals for retailers of petrol would be a way of increasing competition in the industry.

Mr LATHAM—Do you think that should happen as quickly as possible, given the public importance of petrol prices?

Mrs HULL—It is the Senate.

Mr LATHAM—The Senate is not the problem; it is the government that is the problem.

Mrs HULL—No, it is not.

Mr LATHAM—Anyway, maybe the ACCC has got an answer.

Mr Cassidy—As we have said before, we think it is something which could help. We would not want necessarily to place too many eggs in that basket, in that we still believe the key to lower petrol prices is greater horizontal competition within the industry, and the key to that is the independents and imports.

Mr LATHAM—With respect to the 70 hotels that you are examining with regard to passing on the reduction in excise, are we going to get free beer? If so, is it Allan Fels's shout?

Mr Cassidy—No, you are not going to get free beer. We have been at some pains for the last several weeks to explain that to various journalists, but it would seem from what occurred over the weekend that they still have not heard. We have approached about 700 clubs and hotels, asking for explanations as to why their beer prices have not fallen by the extent that might have been expected. Of those, about 70 have come back to us and said, 'We haven't reduced our price,' and that is about it. So we have gone back to them and pointed out what the situation is under the act and the requirement for them to fully reflect the excise reduction. They are starting to come back to us but we gave them until the end of this week to do so. If it is the case that they have not reduced their price by as much as they should have, we will expect them to do that, and also we will need to make some arrangement with them as to what is to be done with the money they have earned, if you like, as a result of having their prices higher than they should be. That certainly will not result in free beer; whether it results in a discount on their prices, which is what we have done in some other cases, is something that the commission will need to think fairly hard about. Some of the external economies of alcohol consumption might lead the commission to think about some revenue other than discounted beer in that particular situation.

Mr LATHAM—Can I refer to one matter that is of concern to my electorate. In the outer suburbs it is not a question of supermarkets closing down; it is a question of supermarkets opening up. The introduction of Aldi is the best news for consumers in Werriwa in years. The $80 shop that I used to do at Woolworths can be done for $50 at Aldi. So I would encourage you to do everything you can to get more Aldis into the market and to make them available in the electorate of Sydney, so that people in Waterloo, Newtown and Marrickville can access these cheap products, and do it right across the country. In terms of the undertakings relating to Franklins, the forgotten factor has been the warehouse arrangements. What can be done to protect warehouse jobs in the break-up of Franklins, particularly the warehouse at Ingleburn in my electorate, which is a large employer?

Mr Pearson—The undertakings that we have received relate fundamentally to competition issues. The statements that have been made to us by Woolworths, Metcash and PicknPay in defence of employment is that they will work to the utmost to employ as many of those people as they can. We are not sure exactly what is going to happen with the Ingleburn warehouse at this stage. We did feel that if we could ensure that a sufficient number of stores went to independents and remained viable through this whole process, it would at least ensure employment at that level because it would protect the warehouse operations, particularly of Metcash. It would actually provide opportunities both with PicknPay and with FAL, if they wished to, to go out into their own integrated operations so that they would be in a position to establish their own warehousing, because they would have a sufficient critical mass.

Mr LATHAM—Is that likely to happen?

Mr Pearson—That is a commercial decision. It is a hard thing for me to answer. I have a personal view; I am not quite sure that that is what the committee wants to hear. I believe that both of those companies are well funded and well financed. FAL, for example, will be operating; they have a lease on part of the warehouse in Brisbane. They operate their own warehousing in Western Australia, so there is no reason to suppose that they would not or could not. PicknPay are also a very aggressive operator in South Africa and there is no reason to suppose that they would not look seriously at that operation as well.

CHAIR—I am conscious of the time. I know there are quite a few subjects that people still want to raise. I want to run through a couple of quick ones. Following the HIH situation, I think the ACCC suggested that if other insurance companies were to raise their premium rates, they would be closely examined. Where do you get the balance? One company has probably gone under for the reason that it was underpricing to the point that it was no longer commercial, and taking the market down with it, while other companies, for sound commercial reasons, would say, 'If we're going to continue in business we are going to have to get those rates up.' Isn't there a fear that the ACCC would run the risk of forcing another company either out of business or into a similar situation as HIH?

Prof. Fels—We have been asked by the minister to look into all of that. The general approach that you have to pricing is, first of all, that if the costs and the profits are reasonable, how can one object? We do not know what the specific meaning of that is in this context until we have looked at the numbers. If the costs and profits are not reasonable, businesses will go out of business.

CHAIR—Insurance is a slightly different type of business. It is fairly difficult to reasonably evaluate what are costs and profits.

Prof. Fels—That is true. Of course, the best safeguard always is to have a fair bit of competition. That is the best way of—

CHAIR—But aren't you trying to force the price down if you threaten these companies?

Prof. Fels—We are having a look at it. Say you wanted to force their price down. You would have to do a lot more. You would have to introduce some form of price control.

CHAIR—Isn't this the whole point? Coming back to this question of arm twisting, if insurance companies are going to get heaps of bad publicity on the basis of what they see as a prudent commercial decision, they are going to hesitate to do it. Doesn't this run the risk that over time it could have quite a detrimental effect on their viability?

Mr Cassidy—We have been asked by the government to look into why insurance premiums are rising, so we need to do that. It is not an optional thing for us. We looked into it following the implementation of the new tax system, where some insurance premiums were changing by amounts that were more than we expected. One of the answers we got back from the insurance companies then was that there was a need to, if you like, rebuild their books and, in particular, reference was made to the underwriting result for the year to June 1999, which for general insurance was a loss of $2.7 billion, which was followed by a loss of $1.5 billion the following year.

Part of the explanation for the increasing insurance premiums in the general insurance area was a need by insurance companies to try to prevent those sorts of underwriting losses from continuing to occur. We accepted that as a legitimate explanation as to why insurance premiums were rising and had risen in some cases by more than we expected following the introduction of the new tax system. We certainly have not jumped on insurance companies or told them that they cannot increase their premiums. We have had one inquiry and we have been asked have another one.

CHAIR—But you have made it clear publicly that there is big question mark over whether it is reasonable for them to increase as a result of having been in a market where one competitor—and it was the dominant competitor, or one that had a big influence—had forced the price below what was obviously a viable level.

Mr Cassidy—We have expressed that we would have a general concern if what was happening was that, with the exit of HIH, the remaining insurance companies, particularly in some areas where HIH was one of the very few insurance companies offering that particular type of cover, in a sense would take advantage of that and increase their premiums accordingly. That would be purely because they no longer have a competitor, if I can put it that way. That would cause us concern. As the chairman said, whether we could do anything about it or not is quite another thing. But what we have been asked to do is inquire into why insurance premiums are going up.

CHAIR—'Whether or not we could do anything about it is another thing.' What do you mean by that?

Mr Cassidy—I simply mean that under the Prices Surveillance Act we cannot act to restrain price increases unless the particular prices are declared by the government under the act. We do not have any standing power in relation to prices other than in relation to the new tax system.

CHAIR—Anyone reading the media would have been left with the impression that—and this comes back my earlier question—if insurance companies priced at what they believed was a reasonable price, whatever that is—and insurance, we know, goes up and down—they could well get a 'Please explain' and a fairly lengthy discussion following up.

Mr Cassidy—As I say, we, as the competition authority, were expressing our concern if a reduction in competition as a result of HIH led to insurance companies taking advantage of the reduction in competition. That is quite different from a proposition where an insurance company is saying, 'Our premiums need to increase for other reasons.'

CHAIR—Surely the reduction in competition will come because either they will just pull out or another one will go under like HIH.

Mr Cassidy—We have had this explanation from insurance companies once already about increasing their premiums in order to avoid underwriting losses and we have not raised any objection to that.

Prof. Fels—It is also a somewhat different position from the concern that has been expressed around the table about messages going out to small business. Insurance companies are big people; they are sophisticated; they know what is going on and they know how to read the messages in a sophisticated fashion.

CHAIR—I cannot accept that. One of the biggest insurance companies in Australia has just demonstrated that it could not.

Prof. Fels—That may be, but I cannot believe that an insurance company in Australia that faces the prospect of going out of business just because of some comment of ours about the fact that the government has asked us to look into some prices would keep prices at a level that would keep it out of business. HIH went out of business not because of any of that but because of bad management. The other failures that are being talked about have gone under because of bad management, not for other reasons.

CHAIR—I think you will find, from the royal commission or whatever, that one of the things was their aggressive pricing.

Prof. Fels—Yes. That may be.

CHAIR—You can call that bad management, but the flow-on to other insurance companies was that they had to meet the market, which may have been an unviable—

Prof. Fels—Let me say more generally that we have sat there for the last 20 years during situations when there have been price wars—and we clearly know a fair bit about price wars—and when they came to an end we have not taken action unless there has been collusion, and that applies right across the board. I hate to even advertise it, but I can think of many industries where price wars have come to an end and the consumer has suffered and we have said nothing. For example, take air fares when Compass disappeared. No-one was happy at the big jump after that, but the commission did not do anything to get in the way of them getting their prices back to levels which many people feel uncomfortable with. We have not had a record of saying after a price war, 'Well, you cannot go back to normal levels.' That is not the message we have been sending out to insurance or that we send out generally, otherwise we would not get price wars.

Mrs HULL—Could I just raise some questions? We need a day together, I am sure, because I have got pages and pages that I have yet to ask.

Ms GAMBARO—The Wagga Wagga hearing!

Mrs HULL—Yes, I could ask them at the Wagga hearing, perhaps. We talked about dairy deregulation last time you were here. It is quite significant, because it comes to the core of small business, and my interest in small business and the power of collective bargaining that is not available to small business, as I have alluded to before. You have a balance of power that is unequal, in that the producers cannot get together and the processors have significant concentration of power. The processors then fight each other to get contracts that ultimately impact on the producers, who have no power or say. The one question that I have there is that there has been a suggestion that there needs to be a process that considers the public benefit before major contracts can be finalised. Basically, you have got three major processors, and if they are all clambering across one another to get a contract and they are going lower and lower, obviously the producer gets the short end of the cherry.

Then you have got conflicting views as to the supermarket margins. Have they dropped? Have they grown? I have worked with the dairy farmers considerably in taking the price delivered in the supermarket. These people are not stupid; they have a fairly good understanding of margins and retail prices, et cetera. Then you break that down between the farmer and processor and you look at the retail price and deduct the first equation. There is absolutely money that seems to going nowhere. I know that you do not agree with that, because you have stated that you do not. At the end of the day, are you considering relooking at that equation with respect to where is there a differentiation between what you understand margins to be in supermarkets and what others understand margins to be?

The third thing is that the Trade Practices Act was written over 30 years ago. We now have demonstrated the whole different way that small businesses do business. We are not reflecting how we have been forced into competing. We now have more regulation on small business than we have ever had before, under deregulation. If we want competition, perhaps there is a need to change the Trade Practices Act to reflect what small businesses have to do now to succeed.

Mr Cassidy—There are couple of things I would like to pick up. Let me pick up the more straight factual ones. We are having another look at the results we got in our milk monitoring, because we have got a number of comments from people, particularly along the lines that what was said about retail margins over the six months period is not right. What we said was based

on asking the processors for the information and asking the retailers for the information and then matching the information we got from processors and retailers. Nonetheless, as I say, because a number of people put it to us that the answer we got was not right, we are having another look and, as was commented in the press last week by dairy industry participants, we have gone back to the processors and we are asking them for further information. So we are looking further into that margins issue.

In terms of bargaining power, the commission has indicated in the past that it is quite prepared to authorise collective bargaining, particularly by rural producers, and we have authorised such things in the past and we authorised a premium milk application which related to southern Queensland and we currently have an application before respect from the Australian Dairy Farmers' Federation, which is an Australia-wide application for milk producers to be able to get together and collectively bargain with milk processors. We are considering that authorisation application at the moment. Those are some of more straight factual things.

Mrs HULL—Aren't you saying that the problem is that they could build a bank of information which would amount to collusive bargaining and if the Australian Dairy Farmers Federation were to get full collective bargaining power they would have the capacity to build a bank of information?

Mr Cassidy—No, I do not think we are saying that. We are saying that if they can show that there are advantages for the public in their being able to collectively bargain, and those advantages can be things like reduced costs so far as the producers are concerned because that is a reduction in the costs in the system, then we are quite prepared to authorise collective bargaining—and we have done so in the past.

Mrs HULL—I think there needs to be collective bargaining at a local level area, otherwise small business is never going to provide—

Mr Cassidy—When I say that it is an Australia-wide application, the ADFF has put it in covering all dairy farmers in Australia, but there is not going to be Australia-wide collective bargaining because that is not the way it works. What they are after is an authorisation Australia wide to cover the producers in each particular area dealing with a milk processor being able to get together and collectively bargain with that individual milk processor.

Mrs HULL—What about the public benefit test before major contracts can be finalised?

Mr Cassidy—That is one that I do not know that we have previously thought about.

Prof. Fels—I think I understand the problem you are getting at but, to point out the difficulty, you would need to pass a law about that. Would you pass a law in this parliament saying that no-one can have a contract in Australia unless there has been prior evaluation of whether there is a public benefit from it? The real problem with a lot of these commercial matters is that, while the world is full of unfair practices and so on, you cannot legislate to cover all of them. To take an extreme case, say you enacted a law that says that no-one can have a contract unless it has first been evaluated for public benefit, it would be too much of an intrusion into commerce.

Mrs HULL—I would love to debate this, but the chairman wants to close—

CHAIR—I do not want to close. There are a few more issues that we would like to traverse. We have not got onto your favourite outlet much—the oil companies. Comments were made around Anzac Day—and I read an article in the *Herald Sun* some weeks ago saying that petrol prices had been put up on Anzac Day and therefore there was criticism but that, subsequently, when it was evaluated, this was found to be incorrect. Was that article correct?

Prof. Fels—We certainly said that it was un-Australian and so on. The price rises did occur before Anzac Day, if that is what you said was found to be incorrect.

CHAIR—No, the article said that subsequently, when it was properly assessed, it was found that Anzac Day prices had not gone up.

Prof. Fels—I know that Shell made some comment that we had made some comment that got them off the hook. What happened was that, as you know, petrol prices tend to rise on a Thursday or Friday. This time they put them up in some capital cities but not in others—they did not put them up in Melbourne, from memory, but they put them up in Sydney and Brisbane on the day before Anzac Day. We criticised them for doing so—and still do. We did not say that they were breaking the law. That was the point—we did not say at any stage that they were breaking the law. We just criticised them. I thought it was fair enough to criticise them.

I would also like to mention that there was a period during which, because of high levels of public concern about oil company pricing preceding holidays, Caltex introduced a practice of not putting prices up just before holidays. They made a big thing of it in a media release a couple of years ago. Once they did that, the rest of the industry fell in with it. They had given up that practice, for whatever reason—Dr Blackburn was in charge then and he made a statement to that effect in a media release. That was in Ampol days, and now Caltex has decided to drop that. They were interviewed on TV and they made it quite clear that they had given up that practice. We made some comments about that. But we did not suggest that there had been any breach of the law. And then Mr Duncan, the CEO of Shell, tried to make an issue about whether or not they had broken the law. I was asked whether they had broken the law and I said that I did not think they had broken the law. I think he was using that statement to say that they had been exonerated. However, we thought they were open to criticism for putting up prices before Anzac Day, whatever the legalities.

CHAIR—As a general comment, is the Australian refining industry competitive?

Prof. Fels—It is really a very edge of the cliff situation in petrol because the potential for cartel behaviour is quite high if you think about it. Firstly, it pays to cooperate on prices if the consumer demand is inelastic—if you can get prices up a lot without consumers being able to switch to other products. So it would not pay to run a cartel over, say, copper because, if you do it on copper, people then switch to other products. With petrol they do not switch so there is the potential for cartel behaviour. The other protection of consumers is if there are a lot of new entrants into an industry. It is not easy to just set up a refinery in Australia, so there is no new entry into the industry. On the one hand, it does not take very much for the industry to get prices up. On the other hand, if things go wrong for the industry then prices fall sharply. So you have a very delicate balance in that industry everywhere.

In answer to your question, with just four players in Australia, we have to watch the oil industry. There were once nine players and it is now down to four. Given that consumers cannot switch to other products when they put prices up, there is a strong temptation for the industry to cooperate on prices— not legally, but if they get prices up they will do very well. As I said, the other protection of consumers is that if four companies put up prices then maybe some new player will come in and compete, but who can set up a refinery? So there are really two hopes. One is imports and the other is that the independent people—the Liberties, Gulls and Matildas and so on—over the years have played a really important role in keeping price competition there. They have managed over the years to bargain for fairly good prices from refineries, often threatening to go to imports, and sometimes actually bringing them in. While they are there they have kept the industry in check in the city areas, but they have been much less successful in the country areas. We believe that the whole matter needs close scrutiny, and small changes in public policy can have significant effects on the state of competition there.

CHAIR—Sometimes the oil companies will complain that their return on investment in Australia is not very impressive. Is that a fair comment or not?

Prof. Fels—According to, I think, Ernst and Young reports that the Australian Institute of Petroleum commissions, their returns are low. It is worth noting, however, that—certainly in my experience—any industry that has been regulated for 60 years, like petrol, anywhere in the world, always turns in low rates of return. If you were a regulated industry, would you be encouraging your accountants to be reporting high profitability? When there has been price regulation of petrol for 60 years, I would not be surprised.

What I have noticed with the oil industry over the years is quite high rates of investment. They have tended systematically to have over-capacity in the industry, over-investment. They have over-invested in service stations, refineries, maybe distribution outlets and other things. So I am not clear that the oil companies have done so badly in Australia, but their accounting numbers certainly tend to indicate fairly low results. I think this year some of them may do fairly well, because the way the world market has been going has been fairly good for the oil companies. That is my impression.

Ms GAMBARO—Matilda, one of those independents you just spoke about, is in Queensland. At the moment there has been a very aggressive price war in Queensland between the major companies, and I believe they might be presenting a case to the ACCC in Queensland. If large petrol companies continue this aggressive price discounting—which is good for the consumers, no doubt—the independents tell me that they can no longer compete in the market. They do not get any rebates. It is vitally important that we have independents. I think they are applying under section 46, but it might be more a section 45 issue. I know that there is not much time for your answer, but what would have to be proven in that case?

Prof. Fels—So far as section 45 is concerned, we would have to have evidence of collusion, which means actual evidence of unlawful communication between them—phone calls, or something. As far as 46, misuse of market power in a predatory matter, is concerned, we would have to show that the oil companies are pricing below their own costs—

Ms GAMBARO—They are.

Prof. Fels—and then we would have to show that they had that purpose of eliminating someone like Matilda. To get to the practical end of your question: we would have to have a great deal of evidence, go to court and run a case that would take a few years. We do not have a cease and desist power, which would mean that we could say straightaway to the oil company, after proper investigation, 'You should stop doing this,' and then they could appeal it to the court, so the boot would then be on the other foot. In other words, if we were wrong they could show it to the court—that would be fine—but we would not have to wait five years for some kind of outcome before we could get an order, when Matilda would long ago have—

Ms GAMBARO—So it is a long, slow process, and the independents would have to build up a major case before they even approached the ACCC?

Prof. Fels—Yes.

Ms GAMBARO—I know that petrol is very political. With the Fuel Sales Grant Scheme that we implemented for outer metropolitan and rural areas, there is some evidence of prices going down. But have you had any evidence that the government's price support of 1c and 2c is harming those independents that we want to keep in that market? Have you had independents come and speak to you about that, or has it just not come up?

Prof. Fels—No.

Ms GAMBARO—One could argue, again quoting a Queensland example—

Mr Smith—I think there was perhaps a small indication in Queensland of certain areas where that might be around as an issue. I cannot provide a lot of detail on that, but I think it was raised in a few areas in Queensland.

Ms GAMBARO—As a result of what we are doing, we might be actually playing into the hands of the major oil companies by giving them a price subsidisation that then allows them to be much more competitive than independents. If so, we would again have the same sorts of problems.

Mr Cassidy—I would not absolutely swear to this, but my understanding was that the independents got it as well, provided they were in the designated areas.

Ms GAMBARO—We could go into this for ages, but—depending on the area—if the majors reduce the price in an area by the subsidy, it sets the price for a whole region. And that is what has been happening. So yes, some independents get it; some major oil companies get it and do not get it. It is not a question of that but of what the impact is overall in a region. I just thought I might raise it. I think I had better stop now, as the chairman wants to wind up.

CHAIR—We are going to lose a quorum very shortly. We have had a very useful morning, so I thank you all very much for coming here. There are a number of questions that we have not had time to ask. You would be happy to take them in writing, I am sure.

Prof. Fels—Yes.

Resolved (on motion by **Ms Gambaro**, seconded by **Mrs Hull**):

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

Committee adjourned at 12.35 p.m.