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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

Thursday, 23 August 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: Ms Burke, Ms Gambaro, Mr Hawker, Mrs Hull, Mr Latham and Ms Plibersek

Terms of reference for the inquiry:

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

Committee met at 10.18 a.m.

PENGILLEY, Professor Warren, Faculty of Law, University of Newcastle

CHAIR—I would like to welcome you here, Professor Pengilley. Thank you, first of all, for the paper that you wrote some time ago, which the committee viewed with some interest, and also for coming along today. Maybe you would like to start by saying a few words about what has happened since you have written that paper.

Prof. Pengilley—I think we should clear the air a little in view of what I see as some of the evidence given. I am not here to attack Professor Fels or the ACCC, necessarily. What I am here to do is to cite some aspects of competition policy which I think could be improved. I am not here to gut competition policy. I believe in it. If you are cynical enough you can even believe the old Chinese proverb that every soldier has an insurable interest in the survival of his enemy, and I have an insurable interest in the survival of the ACCC. I think there are problems in some areas. I believe that competition policy, or any other policy, will not survive unless it has community acceptance. I am a little concerned that it is wavering off that community acceptance, and I think that is sad. My point, I guess, in writing the article was to try to specify where I thought maybe it was wavering off that acceptance. It is not only the ACCC, of course, but also the whole concept of regulation and the powers given by parliament.

I think there are a few areas to look at. One is the multifunction, if I can put it that way, of the ACCC. It is educator, policymaker, prosecutor, advocate, adjudicator, executioner and arbitrator. A good deal of Australian industry feels that it cannot do all those functions. For example, Telstra featured prominently in the article—I should say in the cash for comments disclosure that I do not act and, as far as I know, Deacons does not act for Telstra. They have had no input into this, and I have no Telstra shares.

Look at where the commission is setting a rate of return. The question is that it has to balance the rate of return versus the consumer interest. The rate of return was much lower than Telstra said it had performed or could perform with its assets. I see that the commission has criticised some of my comments, but I do not think substantively. Telstra would believe—and there is a lot to be said in the old adage that justice must not only be done but must appear to be done—that it could not get a fair shake out of the ACCC, because the ACCC has a consumer interest and it is going to balance it that way.

I certainly feel that in mergers the commission has a policy line. It has issued a guideline, and guidelines do not fit very well with things that come to the peripheries of those guidelines and tend to challenge them. You tend to believe that maybe the commission has more belief in upholding its guidelines than it has in evaluating your specific case. I mentioned the Wattyl case, which I have an interest in and acted, but I feel the commission was upholding its guidelines more than anything else. The issue is: can the commission do this? Should it do this? Indeed, managerially, can it to this? A lot of people feel that there are a few loose cannons flying around there at the moment. So that is one area.

Another area is the general view of the commission and government policy. There are some areas where the commission has strayed from what I would call its truly independent role. For example, I cite country of origin guidelines, which are simply wrong yet are government policy.

They do not take into account the various ways the government did not achieve its policy. But the commission is out there with its guideline and its lack of credibility. That is not good for people who feel that the commission is not obeying the same injunctions as they ask everyone else to obey. It is not telling the story as it is; it is telling the story as it thinks the government wants it. So that is another area.

Another area is that of arm twisting, which I have mentioned. I do not blame the commission, in a sense, for this—these are powers given to it by parliament. What I am saying is that perhaps parliament should not have given it the powers. Again, I see that there is criticism of my comments by the ACCC, but the facts are that, if you are running Telstra and there is a $10 million flag fall, going up $1 million a day, and the commission is not getting its case before court very speedily, you really do not have much right for a real appeal. Indeed, it is interesting to see that the Productivity Commission—at least in its draft reports—has recommended that part XIB be repealed largely for that reason. It has also said that it thought the commission may have got its rate of return wrong, so there are areas here for argument. I do not think the commission is totally correct.

The Trade Practices Act is good in patches, like the curate's egg. It seems to me that the competition and consumer protection provisions are good. It seems to me that the problem is in trying to enforce or put in regulatory functions which do not really fit a competition authority. In the early days of the commission it was suggested to us when I was on the commission that we should have regulatory functions and we turned them down. We said, 'No, get a prices surveillance authority. There is philosophical conflict between competition law and regulatory law.' Maybe we were less ambitious in those days, I don't know. So I guess that is my feeling.

If I could sum it up this way I would say I wrote an article once—I can't remember the exact title, but it was something like 'Why is the ACCC like the North Sea?' It might not be readily apparent, but the answer is quite simple. The answer is this: when the Russian submarine fleet doesn't know what to do with its spent nuclear waste, it simply chucks it into the North Sea. I have a terrible feeling that government is at the moment saying that, when we have a policy problem of price exploitation, Telstra regulation, or a policy problem of access adjudication, or enforcement, we simply chuck it into the Trade Practices Act and to the ACCC. I think that is where it has gone wrong in policy and I think that is where the commission is possibly suffering this credibility.

CHAIR—That is fairly wide ranging. In regard to the question of a regulator being able to argue a rate of return where you have a semi-monopoly situation, do you have examples of where that has been successfully implemented over a number of years?

Prof. Pengilley—No, and I do not claim to be a great regulatory specialist, but there is a philosophical principle. Where the same argument is not seen to have the same impact is at, say, state level, where we have all these regulatory guys. It seems to me that with the state regulators you can say, 'Look, they have got it all wrong' but nonetheless you could believe you had got a fair shake. They have no other agenda. They do not have a consumer protection agenda. I suppose it is not the fact of regulation so much. I suppose in these games you obviously have to have someone who is going to adjudicate on these issues. That is not my worry. My worry is someone who has other charters and is also adjudicating on these issues. There I think you cannot get justice at least seen to be done. I know there are a good number of people out there

who do believe that justice is simply not done or is not seen to be done. 'How can we get a fair shake from these guys when their primary concern is with somebody else?'

CHAIR—Yes, but there is a reason why I am asking this question. It is very easy to argue that in the short term a rate of return can be identified as whatever is seen to be reasonable in market terms without ever really considering the long-term implications. I take the example of electricity. If you put a competitive price on electricity, a generator can supply that over a reasonable number of years, probably quite successfully. But the question then is: how do you assess what re-investment money should be available to either replace or expand the power generation?

Prof. Pengilley—I think there are all sorts of rate of return formulae, and I do not claim, as I say, to be a price regulator expert. But one of the problems with, say, the access regime is simply that there is nothing in there. So you make an investment now and you have no real idea of what is going to happen in the future when someone wants access. All these entities should have a rate of return in them. Telstra, when privatised, should have had a rate of return formula so that people could invest knowing it. Again, the Productivity Commission has suggested there be a formula in the access regime, and I think that is a wise thing. I do not here purport to say what that formula should be, but I do think the Productivity Commission's formula is probably not a bad one. It takes into account the very things you are talking about.

CHAIR—You are talking about the access one, the lack of long-term certainty. But in the case of privatising Telstra, as you put it, no-one can guarantee a rate of return. You cannot say to someone, 'You take shares in Telstra; you know you are going to get X cents in the dollar return.'

Prof. Pengilley—No. But I would have thought that when Telstra was privatised there should have been a formula for calculating the rate of return or a maximum rate of return. I suppose it is a bit of history now, more than anything else. But it does seem to me a bit rough to buy into shares and then X years down the track be told that your rate of return is pegged to something. I mean: what is more fundamental to your investment than the rate of return? In theory, all these privatised entities should have a rate of return formula built into them at the time the privatisation action is taken. It might be a bit late now, but I think at least a general formula in the access regime would work.

CHAIR—Is that to price the share or is that to set the price of the products that are being delivered?

Prof. Pengilley—I am not quite sure of the difference, because one interacts with the other.

CHAIR—When you privatise, you pitch the price at what the market would perceive it to be.

Prof. Pengilley—I see what you mean. One of the arguments might be that the privatisation was done on the basis that the actual rate of return was not known or probably would not be or could not be known, so people bought on the basis of their own views of it. Then there was a general statement that it was going to be regulated, but this formula came in which was probably different from what most people expected. What I am saying is not necessarily 'the formula'; what I am saying is the principle of who should set the formula and whether there

should be a formula. I think the state regulators do not have the same problem of perception, of objectivity, as the ACCC does.

Ms BURKE—You said that at the time the commission was formed you did not see it as having the authority to have price surveillance authority built into it. Do you now see the ACCC as treading on the PSA's role more and more, and that is a bad thing?

Prof. Pengilley—It certainly is doing that. That is at least partially because there are more entities no longer run by the government. The commission makes that point and I accept that. But the commission is also trying to increase its powers in other areas. For example, it says the prices surveillance power is inadequate and—this is their submission to the Productivity Commission, which was rejected at least in its draft report—they should have the power to fix prices and to impose conditions on price increases. That worries me a little bit, for a competition authority. The whole area of regulation being grafted into competition worries me. The whole area of regulation being grafted into consumer protection worries me. It does not worry the commission. I am not surprised, because they see this, I suppose, as Allan Fels might see it as part of his logical progression, which was from a prices surveillance background. But I do not see it that way and I think a lot of people think it is a mixed issue and a mixed agenda.

Ms BURKE—So do you agree with the Productivity Commission's finding that the PSA should be fundamentally wound back and there should only be a light touch to that sort of thing?

Prof. Pengilley—Yes. I agree with that. I think everyone agreed with that apart from the ACCC. For example, it said, 'We have the power to set access prices but it would be good if we also had the power to set final product prices.' According to the ACCC, the Prices Surveillance Act was not adequate for its purposes. The reason it was not adequate was that it was a reporting statute only. What it wants is an authority which can also set the prices.

CHAIR—Constitutionally, how can you do that?

Prof. Pengilley—I think constitutionally you might have some problems, but that is a second question.

CHAIR—But that is the fundamental point.

Prof. Pengilley—I think the view would be taken, as seems to be taken with anything the Commonwealth wants to do now, that it can do it under the corporations power. Whether in fact that occurs or whether the court will uphold that I do not know, but it is the view which people seem to take.

Ms BURKE—But isn't there also public concern about pricing? The big one we get in this committee is bank fees and charges. Nobody seems to monitor, control, regulate and ensure that they are not obscene. There is hue and outcry from the public. Isn't there a bit of public perception versus some sort of good policy conduct somewhere?

Prof. Pengilley—Yes. I suppose with the banks it is an issue where you are on the border. If you were to ask me in terms of public policy, I would have thought, for example, the whole

ACCC's powers in relation to price exploitation were misguided, the reason being that it was very heavy-handed. It involved the commission setting what it thought was the right thing and running round Australia and prying into everyone's books. Surely if you believe in competition policy it must work in commercially traded goods and services. So I would say that is wrong.

If it was anything, it should have had some sort of impact only in relation to entities which had some substantial degree of market power and such like. Can I just illustrate a point. Everyone says—or the commission says—the commission was doing a great job. I was rung up at various times by various people around Newcastle, and the one I will never forget is the little sandwich shop maker who said, 'I don't know all about these computers and things, and I haven't got $10 million if the commission fines me, so I will just have to go out of business.' It didn't matter how I tried to assure that person. She went out of business. She wasn't prepared to take it. That was retirement—a sandwich shop! So it has its other side as well.

In relation to bank charges, I can see there is a consumer problem there. I can see there is a political problem there. There is an answer, presumably, in the Reserve Bank Act, as I understand it, although I have not studied it. Maybe that is an area where there might be some scope for regulation, the same as there is scope for regulation in electricity or what have you. It is just hard to know whether that is right or wrong. It is a question of whether we believe the bank or the ACCC, I suppose. I can see the huge political problem, for obvious reasons. You have to make a political decision. Competition does not work everything out.

CHAIR—Can I make a point about these regulatory and competition roles. I take it your view would be that the two should be completely separate?

Prof. Pengilley—I think so. I think it is philosophically a hybrid breed to be encouraging people to compete on price and then at the same time having a role setting price. There may be areas where there is justification for regulation of price, but I do not think that should be done by anybody who has another agenda of any kind—consumer protection, competition or what have you—because I think the old adage of perception of the law can be underplayed. Perception is damned important in this game. I think people do not believe that they are getting a fair shake.

CHAIR—What examples could you point to where this has been done successfully, either in earlier days here in Australia or in other countries?

Prof. Pengilley—You mean separation of regulator?

CHAIR—Yes.

Prof. Pengilley—Under the access regime you can have either the federal access regime with the ACCC as the ultimate arbitrator or you can have state regimes which meet certain regulatory requirements laid down in the competitions principle agreement. The state regulatory regimes—for example, Tom Parry and IPART of New South Wales—do not seem to me to be coming under anything like the same degree of criticism. I do not think Tom Parry is more likely to be right than anybody else in this game, because there are always problems of the right price, but I think people at least see him as an independent pricing regulator. 'Independent pricing tribunal'

is part of his title. The commission can say as long as it likes that it is independent, but I do not think it appears that way.

CHAIR—The states are really only regulating formal state instrumentalities, aren't they?

Prof. Pengilley—Yes, basically.

CHAIR—What about in terms of other areas of regulation?

Prof. Pengilley—If you have other areas of regulation, it is probably not very hard to actually specify those industries where regulation is required. There is only a handful of them. My own view is that there should be independent regulation of those industries. They should be specified. There probably should be an act of parliament in each case, which would probably be a lot easier than the present system. There are not all that many industries. We have this view that there should be a single regulatory regime. I think it simply does not seem to have worked. Look at how the system was meant to work for all industries: for the first regulatory industry you get which is difficult, which is telecommunications and Telstra, you have new additions to the Trade Practices Act in a number of sections which defy mathematical calculation. In other words, it is not going to work for all industries. It is much better to nominate the industries and have a separate regulatory authority for those industries. I am not objecting to the regulatory factor; I am objecting to the mixed function factor and the appearance factor. This is only a small part of what I put in the article, but it is obviously the part which is of concern to you.

CHAIR—I guess one of the areas that always feels a bit nervous with the ACCC is small business. They sometimes feel that they get lumped in with big business. Clearly they are generally not going to be in the position to exercise any market power. Do you see that there is a problem there?

Prof. Pengilley—It seems to me that there is a major issue here. I am not quite sure that the Trade Practices Act can have what you might call a specific small business orientation, in the sense that it is an implementation of small business policy. It is very hard to do that. Where you can have some balancing of the scales is clearly when you want competition to work better. When you want competition to work better, that is something you can put in the Trade Practices Act. Undoubtedly, one of the things that people feel—as I see it, anyway—is that they do not have the same countervailing power in small business because in trade practices terms they are all treated as individual entities. We should have countervailing power principles in the Trade Practices Act for exactly the same reason that we have unions: individual entities are weak and therefore they have to be able to get together somehow to bargain with a strong guy. That is better competition, in my view. At the moment the act is fairly deficient on that. I am not quite sure that I have an immediate answer. I see, from the evidence that Professor Fels gave here on 25 June, that they are trying to work out something nationwide with the medicos. Good luck to them; I do not know how it is working. In my view, something along this line is desirable. It may ultimately come to just an ad hoc decision, as it did in the old days with recommended price agreements: 'If you have a trade association of less than 50 members, then …'. It may be something like that; I do not know. But I think it is a problem in small business in that area.

Ms GAMBARO—I am sorry I was late. I had to speak in the House. There are two areas I want to speak to you about and get some comment from you on. The first is the corporatisation

of general practice at the moment by groups such as Foundation, where they are vertically integrated. I think I may have spoken to Allan Fels at our last hearing about it. I think he was keeping a close eye on it. But since then there have been many more of these medical centres taking over, particularly in the area that I represent. When do you determine that there is an abuse of market power with these corporations and how can that be looked at more closely?

Also, with the recent debate at the moment with bulkbilling, a number of general practitioners are deciding that because of their operating costs and costs of running a practice have gone up they will no longer bulkbill. A number of them are—I will not say setting prices—agreeing on a price that they might want to charge. I believe they are precluded from speaking to other independent general practitioners because that would be seen as a price setting type arrangement. Do you see a greater role for the ACCC at the moment, particularly in this medical area? I know that they have stepped in when there have been particular takeovers of hospitals. But this is a new and emerging area. I would just like your thoughts.

Prof. Pengilley—On the second issue—at the moment, anyway—if medical practitioners agreed between themselves not to bulkbill, that would be illegal. So if you are asking whether the ACCC has to have greater intervention, I suppose it is just a question of whether they can catch them. So there is no change in the law necessary there at the moment. On the first area, I realise this is an obvious problem. It is an obvious problem, of course, in the whole of commerce. We talk about globalisation. We are getting this down at the local level, which is what you are talking about. There are two things in history which I think about. The first is a report in 1939 in New South Wales on the expansion of chain stores. The recommendation of that report was that no chain store should be able to open in any area unless they went to a magistrate to get permission to so do it. That was greeted with great acclaim at that stage. That was never implemented. I think if that had been implemented—it is hardly applicable to now—it would not have allowed for much flow of commerce and development.

The second thing, as I recall, is that the commission, when I was on it, gave economic advice in relation to two particularly local merger matters. The first was that someone wanted to take over a bakery in Smithton in Tasmania. Smithton has 3,000 souls and the commission said, no, this was substantially anti-competitive. We were largely ridiculed for that, and I believe quite justifiably, but I suppose it was looking after a local area. It turned out to be very sad because the guy wanted to sell his bakery because he had to fund a cancer operation and there were various other problems with it. Another one was in Traralgon in a liquor store. Again, the commission objected to a merger for a local entity and, again, I think we were quite mad. So if you get into local issues, you can get some strange results as well as some good results.

Ms GAMBARO—I appreciate that.

Prof. Pengilley—I think the facts of life are that with medical technology it is going to happen that way. For myself, I don't see that as being terribly bad, but I am not a medico and I am not a politician either, so obviously you get different impact from what I do. The demise of, let us say, small business in the form of the corner store is not competition policy or anything; it is the advent of the motor car. I think in some ways the medical game is a bit the same. The demise is not because of anything other than perhaps the increase in technology and the demand for that technology. At least that is my guess. But I think you could see it in all sorts of ways. So I do not have an answer, but I do not think competition policy very often can be a substitute for

other issues. If the Commonwealth wants to say, 'Thou shalt not merge', then that is fine as a regulatory policy, but I don't think it is part of competition policy.

Ms GAMBARO—Thanks for that.

Mr LATHAM—Sorry for being late, Professor. Thank you for your submissions to the committee. I have looked through them and I suppose the one thing that lingers with me is a feeling of: what would you do to change the ACCC for the better? I know you have a list of comments and sometimes complaints about them, but what are the tangible things that can be done to improve the commission's performance?

Prof. Pengilley—As I said in my introductory comments before you came, I am not trying to bag Professor Fels. I get on quite well with him and even if I did not it would not be relevant to the argument. But that is not the point. I believe the competition policy should work and should be seen to work. It should be fair and impartial. So the major thing I would do, frankly, is to break it up. I think the role of the initial Trade Practices Commission was fine. It was there as the enforcer, basically, and I think that is fine. However, I think when you get into regulatory areas and price setting—I am not sure if you were here or not but I will just repeat it—some people feel, and Telstra is an example, that the commission has a consumer agenda and ask, 'So how are we going to get a fair shake in measuring investment?' And perception, I believe, is a very important part of the whole game. I think the perception of an independent regulator is terribly important, and I do not think the commission has got that perception. I also do not believe that anybody has a mortgage on knowledge. One of the things I have always thought that we believe is bad in private monopoly is that there is one decision maker. While we suffer—or we like to suffer, perhaps—diversity of decision making, it might not be as efficient but it is a little bit of a safety net for the absence of perfect knowledge; someone will do something different and that might be the real answer.

CHAIR—Mr Latham has a great statement on that, about monopolies commissions, I think.

Prof. Pengilley—It concerns me that if the commission has a particular approach to one thing then it has that approach for all Australian industry. I think it is probably not a bad idea to have other people with other approaches. I believe that the best things that can be done are: for the independent regulator to be independent, for the commission to be one of enforcement, and for the two to be broken up. As I was saying earlier, when I was on the commission, in 1977, I think, the Fraser government said that the logical thing to do was to have the Trade Practices Commission, as it then was, enforce the Prices Surveillance Act. We said no to that because we did not believe that it was philosophically compatible. It is even less philosophically compatible for the commission, with the vast number of regulatory functions it has now. And it is even more important now that there be some division of these functions. In fact we have had an aggregation: Austel, the independent regulator of telecommunications, was merged with the ACCC. That was the beginning of what I think is a very bad trend.

Mr LATHAM—So you would go back to separate trade practices and prices surveillance authorities?

Prof. Pengilley—Yes.

Mr LATHAM—In your comments about medical practitioners you cite the example of an anaesthetist charging $300 per hour rather than a $25 per hour fee for being on call. Hasn't Professor Fels tried to make the point that the problem with anaesthetists is supply, that there is a lack of trained people in these positions? If you look at the bulk billing rates of various medical professions, anaesthetists are at 25 per cent—way below any others. So the vast majority of their profession are charging above the standard fee in any case, and the shortage in hospitals is extreme. So don't we need to lift the supply and that will help bring down the price?

Prof. Pengilley—I am not a medico and I do not know about medical politics, but it seems to me that the answer is as you said. I would have thought supply and demand rules would run with medicos as with anybody else. I have heard an alternative view—I do not know from where and I do not know how much authority it has—that if you create more doctors you create more demand and therefore, presumably, the government bill goes up. I cannot follow that, but there is this theory that is around.

The medical specialist colleges are—to my way of thinking, as a non-medico—very, very iffy in relation to how they admit, how many they admit and this sort of thing. I would be all for the ACCC doing something about it. Under the present law it is probably a bit hard to do something about it but, yes, I think it should. If you were in America, for example, it would be a requirement—as I understand the American law, though do not hold me to it—that they have clear and objective criteria of admission, for example, and if you meet those criteria you get admitted. It is not a question of what the market is. I think there should be a requirement to do that.

The issue is whether you change the law to require it or whether you would get the ACCC to thump on the table—and they may be thumping for a long time before they can get a result. I do not know. But, yes, fundamentally, I agree with you.

Mr LATHAM—Thank you.

CHAIR—In your opening remarks, Professor Pengilley, you wondered whether the ACCC could managerially handle merger policy and so on. Have I got you right?

Prof. Pengilley—I wonder overall about the managerial problem. But anyway, keep going.

CHAIR—I just wondered if you could expand on what you meant by that.

Prof. Pengilley—Merger policy is one of these things that seem to have become holy writ. Professor Fels says that those who criticise his view of merger, and the current law about substantially lessening competition, are from the big business end of town and it is all self-interest. I have no self-interest in it. I just think that the better policy is the one that previously applied. The reason I say that is, firstly, that we should look at how it was changed. In the decade since it has been changed, there is a view that this is a non-controversial test. When it was changed, however, the Griffiths committee said there was no need for change; the two previous chairmen of the Trade Practices Commission, as it then was, said there was no need for change; the Cooney committee itself said something along the lines of, 'We can't find any reason for change, but the Trade Practices Commission wants it, so we'll give it to them.' What has happened is that it has brought more mergers into the net. My view is that there are not

many mergers that are in the position where they substantially lessen competition, unless also there are questions of control or dominance. For the few that are in that position, then perhaps the greater certainty of the dominance test outweighs the odd one which might escape.

Unfortunately, in my view anyway, we are getting even worse in mergers: the recent amendments concerned a substantial market 'in a regional area'. That might be politically attractive, but I cannot see any of those cases ever running foul of the Trade Practices Act, simply because, when we are looking at a regional area, we are looking at products that are substitutable. Don't tell me that most regional areas in Australia cannot take products from other places, because they will. We are really looking at mergers in Australia which I believe are dominance issues.

The problem is that substantial listing of the competition test is vague. It is going to pull in a lot of mergers which do not need to be pulled in, and currently that is the case. With the regional markets, it is going to be even worse in my view. And the commission itself spends its whole life saying how few mergers it wants to attack, yet it wants this lower threshold test. That seems to me to be a little bit inconsistent in terms of policy. Nonetheless, that is what they say.

Ms BURKE—Do you think they need to look at the argument that, by restricting some mergers, we have literally forced companies out of business? There was the pay TV company—the name of which has gone straight out of my head—that, because it could not merge with someone, went out of business.

Prof. Pengilley—That can always happen.

Ms BURKE—It was Austar.

Prof. Pengilley—I do not claim to be an expert in that area but, yes, it can happen. Of course it can happen. I find that competition policy is a long-term policy. I think we are all better off with it. We are better off because the capacity of government to regulate everything is certainly limited. We are better off because we get better goods and services but, when people talk about win-win competition policy, they are having themselves on. There are a lot of losers in competition policy. The political issue is the losers. Why? Because they show up first, they are easier to identify and they are normally in a local area. You have a huge political problem and an economic problem. When a factory closes, you have problems, yet probably, in competition terms, that might be what should happen. When the prices reduce X years later, that factory may have gone out of business because it was inefficient and someone else is producing that stuff, but probably people will not even recognise the benefits that come from competition, because losers are easier to identify. Your problem politically, as I see it, is to keep a competition policy and appease—if that is the right way of putting it—the losers. That is not all that easy.

Mrs HULL—How do you think it can be addressed in issues like competition policy? Currently, the rice industry is single desk and heavily regulated, because it is an industry that is purely global. Eighty-five per cent of its product is exported and it trades in a world of subsidised countries, when subsidisation does not happen here in Australia. So the dismantling of the single desk investing powers basically dismantles any competition power or inequality or efficiency power that the rice industry has in that corrupt market internationally. How do you get around this, looking at the fact that this company embraces globalisation and is part of the

global world more than probably any other company within Australia, and yet it needs regulation to enable it to compete globally?

Prof. Pengilley—Much the same question was asked before you came in. The question was in relation to small business. I would look at your industry in this regard as small business. It is very important that industries that are small in the bargaining game get some countervailing power. I am not of the pure ilk—I would probably find myself at odds here with Professor Fels—but I see nothing wrong with giving an industry such as you are mentioning, and there are others—sugar, wheat and God knows what else—the countervailing power of which you are speaking, because that is the only way they are going to get a decent price.

Mrs HULL—That is it.

Prof. Pengilley—The argument, however, is not whether they should have the power necessarily but whether their charter is too imperious, if I can put it that way. Do they allow for an individual to do something different, for example? I have heard stories—and I have only heard stories; I have heard them the same way that most people hear them, which is on the television—about wheat farmers, for example, who want to do a certain quality of wheat but they cannot do it because of that. So in my view it is not question of saying, 'No, there should not be regulation of those industries.' It is a question of what the regulation should be. I think we do have the tendency to say, 'If we are going to regulate, we must give these guys the absolute power to screw everyone to death,' whereas I think there is room there. However, I am on your side; I agree with you.

Mr LATHAM—Why should agriculture have a special set of arrangements? For example, there is a global industry for cars but Australian car manufacturers do not have a single desk for the overseas sale of their cars. In any case, with rice, for decades taxpayers subsidised cheap water for the rice industry, and the environmental cost of having a rice industry in the world's driest continent is enormous. As taxpayers, we are having to fund the environmental clean-up because of land degradation and the like. I think consumers and taxpayers in an area like mine—which is an outer suburban electorate—lose on both fronts: we pay the taxes and subsidise these industries, then they get the single desk for higher prices and we pay those as consumers. We do not get any of the benefits. People working in a factory in my electorate do not get any special concessions from anyone, so why does agriculture always get these special arrangements?

Prof. Pengilley—I am not saying that it should be only agriculture that gets the special arrangements. I am saying that, if you are a weak bargaining entity individually, you can amalgamate as a group into a union in order to bargain—but do not get me onto industrial policy! In the same way I suppose I would say that in world markets this entity is a weak bargaining entity. If I am wrong in the decision, there may be other things to look at. It is a question of countervailing power. Countervailing power is a matter of what you are bargaining against. You are bargaining against export sanctions, cartels in other countries that are subsidised, and you may have to get a bit of leverage there. In relation to motor cars, I do not know, but it seems to me that every year something seems to happen to Mitsubishi—they seem to get some sort of support from someone.

Mrs HULL—Absolutely.

Prof. Pengilley—I am not quite sure that they do not get it in another way. I do not want to get into a sectional interest fight. My principle is that countervailing power has to be recognised somewhere and, be that the trade unions bargaining against the boss or be that the rice farmers bargaining against the US cartels, it is there in principle in the same way.

CHAIR—On the question of arm twisting, you quoted in your first paper the fact that Gerry Harvey felt that there was a fear of victimisation—and I guess he is not seen as being a small player—and you said that it was a question of whether a parliament should have given that power, how would you balance, on the one hand, the expectation that—

Prof. Pengilley—It is always very hard to know where these imperious powers come from. The regulator will say, 'We are only the humble servant of parliament carrying out the powers,' as Sir Humphrey Appleby would say. On the other hand, probably they got the powers in the beginning by lobbying the minister to get them, so you cannot lay down the blame. If, for example, you have a situation where you can issue a notice—I am talking about Telstra—then that notice is, prima facie, enforceable so that you have reverse onus of proof. On the day of the issue of that notice there is a $10 million flag fall, and it goes up $1 million a day, so it is not too hard to enforce your views on people. It seems to me that that is societally wrong. I do not how you feel about it, but I think that is not the way we should do things.

CHAIR—How should we do it? What counterbalance should we have?

Prof. Pengilley—Our problem is that we are trying to get Telstra to comply with the regulator's will. Is the regulator's will correct and can it be impartially tested? It can be impartially tested, but it is a pretty theoretical test when you are running at $1 million a day getting it into court. As the Productivity Commission has prima facie found in its provisional report, the regulator was not right. In my view, it is not necessarily efficient regulation to be able to arm twist. The answer, of course, is to have procedures to get the things evaluated speedily. The alternative answer is to have an enforcer who is not the regulator. That way they get arm twisted.

CHAIR—Have you got examples from other parts of the world where this has been effectively put in place?

Prof. Pengilley—No, because I do not claim to have that capacity for worldwide study. There are other areas of arm twisting which happen, and I do not know how you correct this as a matter of legislation. A lot of the press releases of the ACCC, I believe, have a certain arm twisting capacity, and there is the belief of the ACCC that it does not want to talk to people. I see its criticism there of the comments made. The other day there was a wonderful case, ACCC v. Lux Pty Ltd, which is in the 2001 Federal Court of Australia.

The ACCC, having told everybody that mediation was such a good thing and having enforced so many mediations in codes of conduct—that is fine—got to the Federal Court and someone said, 'We want to talk to the commission. They won't talk to us. Will you please order mediation?' The ACCC opposed that order. It was, in fact, granted. But the reason for opposing it was that the respondents had not admitted liability. The ACCC was not prepared to enter into mediation other than on the basis that they had contravened the act. That was very thing they wanted to talk about. So you have got some arm twisting there. Sometimes the arm twisting is

where the commission just has not been right in some of its publicity. I mentioned the country of origin guidelines, for example. Price exploitation is another one. I do not know how you fix this. Maybe it is just a function of size and maybe they have become—

CHAIR—How do you fix it?

Prof. Pengilley—That is right. It is probably a question of maybe a ministerial direction, or some suchlike. There is a direction in relation to model litigants for the Commonwealth. It seems in this case that the commission just did not think it was bound by that. Indeed, the direction was cited by the court as a reason for directing mediation.

Mrs HULL—I would like to ask about medical practitioners, as opposed to GPs—you have made some statements about medical practitioners. GPs basically have the right to look at how they offer their services, et cetera, but medical specialists are another area. They cannot operate nor can they combine as a group to determine how they will deliver services into their local public hospital, so to speak. Without going through the authorisation process of having an authority, say, for anaesthesia, or an authority for obstets, do you have and thoughts and concerns—you have not gone into it in depth—as to how that might be overcome? In New South Wales currently, you have a problem with the state government indicating that because of Trade Practices Act guidelines they are unable to go into a room and discuss an issue with—

Prof. Pengilley—The roster, the example.

Mrs HULL—Not only just a roster, but the actual provision of services into the public hospital system. The director of health is saying, 'I'm sorry guys. I'd really like to come into the room and discuss this with you cooperatively and in a combined group. However, the ACCC guidelines prevent us from doing so. Isn't that a pity?' So everyone is at a stalemate. Do you have a position or thought on how that might be prevented or how that might be resolved?

Prof. Pengilley—I think I answered part of the question, at least, when you were absent.

Mrs HULL—I am sorry. I apologise.

Prof. Pengilley—I think the issue is one which the ACCC sees differently from the practitioners in the field. The practitioners in the field, however, if they consult their lawyers, will probably get the advice, 'We cannot guarantee that you are okay.' When the case was taken against the anaesthetists, the medicos generally took that to be, 'We can't have an agreement for a hospital roster.' Since that date, the Chairman of the ACCC has said, 'No, that is not right.' But yet he has got to convince the medicos and he has got to convince their lawyers that it is not right—and their lawyers, frankly, cannot give them that assurance. It is again, I guess, a question of countervailing power, to some degree.

I also see, from the evidence given here on 25 June, that Professor Fels is doing something in relation to medicos on some sort of nationwide basis of an authorisation. If he can do that administratively, that is fine; that might solve the problem. But at the moment, yes, you have got a problem. It is partly as a result of the anaesthetists' case and how people interpret it. Unless we get the capacity for individuals to bargain in this way when they are smaller units, then you are not going to get a solution, I do not think.

Mrs HULL—I am not sure if Anna has raised this with you or not, with respect to insurance companies and dealing with individual groups—say, repairing groups, mechanical groups. From the outset I would indicate that I have a smash repair operation in the family business.

Prof. Pengilley—From the outset, I might say that I do not know much about insurance groups!

Mrs HULL—Okay, terrific. We are looking at the size of companies like NRMA, RACV, et cetera, and how they impact on the capacity of competition with smaller repairers. Their directive, as an insurer, is quite substantial; their power as the mass vehicle insurer is very substantial. They can dictate the terms of how a car may be repaired mechanically or after being in a motor vehicle accident. It just seems that competition has a different flavour when you have a lot of people out there looking to do repairs and to provide small business with employment factors, and then you have a major company which can dictate the terms as to how that will be provided and for how much. The price setting, so to speak, is a matter of, 'You get that much money to do that, and if you don't like it, well, you don't do our work.' That appears to me to be the way it is. Do you have any thoughts on major businesses or conglomerates being able to dictate to small business?

Prof. Pengilley—I guess that one of the problems is that competition does not discourage but in fact encourages people like the NRMA to be innovative in whatever they are doing. All I say is that maybe there should be some provision for other people who are smaller in the game to get together to have the capacity to fight back, if you like, to put it that way. But the difficulty with that is that it involves some fairly fine evaluations. You can imagine that, if you had a general sanction for someone who was a bit smaller in the market, you would have widespread price fixing—and that is what you do not want. So I am not quite sure where the line is drawn. It is a matter of some thought.

The Trade Practices Commission did issue some guidelines previously on buying groups and this sort of thing which seemed to me to have a fair bit going for them. But I suppose in the ultimate the ACCC will say, 'We want the power to control,' and that means authorisation. I do not think that is a very good path, myself. It is expensive, it is slow, and probably when issued will be issued only for a limited time, so you cannot make final decisions on it.

I think the principle is there; I am just not quite sure how it works out. As it worked out in prior legislation in 1977, where people were talking about trade associated recommended price agreements having a different approach to other price fixing agreements, the simple pragmatic view was taken, 'Okay, if there are 50 guys in a trade association, that is the test.' It is a very inadequate test, but it might pragmatically work. Maybe we might get some test like that—I do not know. I can see the problem; I am not sure I can see the solution.

Ms BURKE—This is more like price fixing and pricing policy insofar as just about everybody is insured with NRMA or RACV, particularly in these parts, and they can literally dictate who you go to and what price that person charges. It is like the traditional large bread deliveries to supermarkets versus the independents and the pricing. We have just been incredibly frustrated. We feel the ACCC actually has the power to investigate this situation which we would say is anti-competitive because it is locking out a whole lot of individuals who are in the market from providing work: you as the insurance holder are not actually given a

choice. They say, 'These are our accredited people,' and what they are saying is: 'They are the guys who have signed the agreement with us about charging and actual level of service.' You as the consumer do not get a choice. You are going to go to these places even though you might not actually like the level of service that they are going to give to your car. We have just been on the other end where the ACCC has more or less said to us, 'Oh, well, we are not looking at it.'

Prof. Pengilley—I suppose the argument by NRMA and others is: 'We provide the policy; we pay the bill.' But I understand your problem. I think the ACCC certainly has power to investigate it. What it is going to find out I do not know.

CHAIR—On the question of regulatory error, on the one hand there is the claim that when it surfaced it was only in a few cases. Yet in your second paper you say that these should not be dismissed as one-off. You say:

… it is my view they should be seen as examples of practices far more widely engaged in.

But of course regulators have the advantage that they do not reveal all the cases. Can you expand on that?

Prof. Pengilley—It was not intended to be—and I do not think it was—talking about regulatory error as such. It was a response to a comment by Professor Fels, in evidence related primarily to the Wattyl merger, that there I was concerned only with one case and that case was not representative of the actuality. My response was that of course I only have knowledge about what I have been involved in. What I am saying is that we should not accept the principle that just because I cite but one case it is therefore an aberration or something different. My view is that you cite one case and it is more than likely to be part of a wider application. But of course I cannot audit the whole ACCC files. It is very easy for the ACCC to dismiss these things as one-off, whereas my view would be they should answer them as being 'one-on'. That is what I meant in that context.

CHAIR—Thank you very much for taking the time and trouble to come here and also for your papers. I understand you are happy for this transcript to be released.

Prof. Pengilley—Yes.

Resolved (on motion 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 11.24 a.m.