
COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

# HOUSE OF REPRESENTATIVES

## STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION

**Reference: Australian Competition and Consumer Commission annual report 2003**

FRIDAY, 5 MARCH 2004

MELBOURNE

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

**INTERNET**

The Proof and Official Hansard transcripts of Senate committee hearings, some House of Representatives committee hearings and some joint committee hearings are available on the Internet. Some House of Representatives committees and some joint committees make available only Official Hansard transcripts.

The Internet address is: **http://www.aph.gov.au/hansard**

To search the parliamentary database, go to:
**http://parlinfoweb.aph.gov.au**

**HOUSE OF REPRESENTATIVES**

**STANDING COMMITTEE ON ECONOMICS, FINANCE AND PUBLIC ADMINISTRATION**

**Friday, 5 March 2004**

**Members:** Mr Hawker *(Chair)*, Ms Burke *(Deputy Chair)*, Mr Albanese, Mr Cox, Ms Gambaro, Mr Griffin, Mr Peter King, Mr Nairn, Mr Somlyay and Dr Southcott

**Members in attendance:** Ms Burke, Ms Gambaro, Mr Griffin and Mr Hawker

**Terms of reference for the inquiry:**

To inquire into and report on:

The Australian Competition and Consumer Commission annual report 2003.

## WITNESSES

**Committee met at 9.42 a.m.**

**CASSIDY, Mr Brian David, Chief Executive Officer, Australian Competition and Consumer Commission**

**DIMASI, Mr Joe, Executive General Manager, Regulatory Affairs, Australian Competition and Consumer Commission**

**GRIMWADE, Mr Timothy Paul, General Manager, Adjudication Branch, Australian Competition and Consumer Commission**

**LU, Ms Helen, General Manager, Corporate Management Branch, Australian Competition and Consumer Commission**

**PEARSON, Mr Mark John, General Manager, Mergers and Asset Sales, Australian Competition and Consumer Commission**

**SAMUEL, Mr Graeme Julian, Chairman, Australian Competition and Consumer Commission**

**SMITH, Mr David, Executive General Manager, Australian Competition and Consumer Commission**

**CHAIR**—I declare open the public hearing of the House of Representatives Standing Committee on Economics, Finance and Public Administration into the 2003 annual report of the ACCC and in doing so welcome the Chairman of the Australian Competition and Consumer Commission, Mr Graeme Samuel, his colleagues, members of the public and the media to what I hope will be a highly informative morning. Today's public hearing is significant for a number of reasons. First and foremost, this is the first time that the new Chairman of the ACCC, Graeme Samuel, has appeared publicly before the committee. We intend to have inquiries of this nature with the ACCC and the other regulators on an ongoing basis, similar to our regular hearings with the Reserve Bank. Today we are to examine a range of matters relevant to competition law and consumer protection in Australia. Doing so will not only help to ensure that the commission is accountable to parliament but also, we hope, help public understanding of some of the roles, responsibilities and policies of the ACCC.

Moving on to the formalities, I advise all participants that, although the committee does not require you to give evidence under oath, the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Mr Samuel, would you like to make an opening statement before we proceed to questions?

**Mr Samuel**—Thank you. I will try to be brief. I will cover a number of matters that relate not so much to our last annual report but to taking us forward in the context of there being a new chair and deputy chair of the commission—they have been in place, certainly in my case, since 1 July—and to give you a feel for some of the issues we are dealing with and some of the procedures and practices we are adopting in dealing with the responsibilities that we have under

the Trade Practices Act. We will have an opportunity later to discuss issues perhaps around the annual report or the comments I will make.

Mr Chairman, in your opening comments you indicated that the value of these meetings is to enhance the transparency and accountability of regulators such as the ACCC. That is one of the reasons I very much welcome the opportunity to be here, because accountability and transparency are very important parts of the processes under which we operate. It is for that reason that I will very quickly cover the ACCC's relationship with the media and its role when dealing with them, which has been the subject of some discussion in previous hearings.

The ACCC covers so much that affects consumers and businesses on a daily basis that it must maintain a very high profile; it always has and it will continue to do so. It is part of the transparency of our activities. It is essential in order for us to become and remain accountable not only to parliament but also to the Australian public, because that is where our responsibilities ultimately lie: to look after the interests of the Australian consumer and the Australian public. It is also essential in order for consumers to understand their rights under the Trade Practices Act and for businesses to understand their responsibilities.

The media is not the beginning and the end of that process, though. The process of transparency and accountability is a high priority for the ACCC in its communications with the public, not only through the media but also through our web site and publications. Just in the last year 800,000 copies of various publications were distributed relating to a whole range of our activities. Those publications are all part of our providing transparency as well as information and education to businesses and consumers about their rights and responsibilities.

We will unquestionably work with the media to bring about behavioural change in industries where we can do so consistent with other principles that we apply in our dealings with the media. You will be aware that recently we applied a media and enforcement campaign to bring about changes in behaviour in the real estate industry. We did so with the very deliberate intent of dealing with some quite evident scams and frauds being perpetrated on consumers in the real estate industry. These scams and frauds ranged from auction processes, misleading and deceptive advertising, underquoting and overquoting in terms of auctions, and dummy bidding. Some of the more high-profile alleged scams that were occurring involved property investment seminars, property promotion schemes and two-tier marketing.

In the latter case we have instituted two court cases: one in Queensland relating to the sale of property in that state, and another very recently in Victoria relating to Mr Henry Kaye and the National Investment Institute. I think it is fair to say that a combination of our activities and those taken by the other regulator, the Australian Securities and Investments Commission, brought to a rapid halt certain activities not only of Mr Kaye and the National Investment Institute but also of other property investment promoters. An almost immediate cessation of advertising occurred in the daily papers and in many cases seminars were cancelled. When his company went into official management or voluntary administration, I think Mr Kaye himself admitted that the publicity caused by the regulators surrounding some of these activities brought about a significant decline in attendance at those seminars, which caused financial difficulties to arise, which ultimately led to the liquidation of the National Investment Institute.

We will use that process to bring about behavioural change in other areas as well, and there will be other campaigns. We have already started in relation to Internet scams and others, which I hope will be announced within the next two or three days. We will be focusing on some serious difficulties of a widespread nature that are impacting upon consumers and causing them significant damage.

We have in place some principles for dealing with the media and I think you would regard them as being absolutely proper in terms of the integrity of our processes. We will not be involved by rumour, innuendo, improper allegation or background briefing in damaging the reputations of businesses—that is, damaging them improperly. They will damage their own reputations by bad behaviour. But we will not be involved in any form of behaviour that will improperly damage reputations, nor will we be involved in processes that might breach the confidentiality that is so necessary and important to the effectiveness of the way we operate. For example, where commercial transactions are before us, particularly in the area of mergers, or where transactions might be before us in the area of complaints that might lead to potential prosecution, we are very strict with internal processes to maintain confidentiality, until it is appropriate that the public should become aware of what is occurring. Then, of course, the public becomes aware of it by the appropriate process of media release and the like.

We are driven by outcomes; we are not driven by perception. I say that only because, as we are all aware, when you have a high profile in the media, sometimes perceptions and the perception driver can become very compelling. We are very strict in applying the principle that the driver of what we do must lead to the right outcome. If that leads to a difficulty with perception, then we will deal with the perception as the second priority; but we should not be driven by perception as setting our priorities.

Let me move now to compliance and enforcement. We have what could be called a compliance circle or compliance pyramid, and it does not matter what the structure's description is. It is a process that starts with a foundation of information and education designed to bring about compliance strategies and compliance culture within organisations. If we can get organisations and businesses to comply with the act, that is infinitely better than allowing breaches of the act to occur often through ignorance—and very often not through ignorance but through improper intent on the part of businesses themselves. If we can bring about compliance through information, education and compliance cultures and strategies, it will save the harm done to consumers that is very difficult to rectify after the event, even with the best enforcement procedures you can take. So a lot of our work is focused on bringing about compliance cultures and compliance strategies and informing businesses about how to comply with the act.

The next part of the pyramid—the next step of it, if you like—is dealing with the enforcement process. The sharp point of that is litigation. Litigation will be used without any question where we know or detect that we have a problem that can only be resolved through the litigious process. Sometimes it will be used in terrorem—that is, to bring about a settlement on the part of parties where they agree to a negotiated settlement. But it should be emphasised that no negotiated settlement is ever done in secret; it is always made public. That is a non-negotiable element of any negotiated settlement—that any settlement is done in public. The reason we do negotiated settlements is that often you can achieve more by negotiating a settlement, particularly in the context of restitution for consumer harm, than you could otherwise achieve through the courts. If we have to go through the courts, we will do so. But if we have to spend

one or two years—or sometimes five or 10 years—in the courts to bring about an outcome that might otherwise be achieved in exactly the same matter through negotiating 87B undertakings and the like, we will do just that.

To give you an idea of the statistics, I will quote from the last annual report. We received 53,500 complaints and inquiries last year: 26,500 of those were resolved during the initial contact through our info centre; 634 were escalated to the investigation stage and 262 were escalated to serious investigation; and we commenced 39 court cases. You can therefore imagine that a vast number of these issues were resolved by reaching some form of negotiated settlement, which was a very satisfactory outcome for the consumer and the Australian public. You will find us reluctant to settle matters of complaint where there has been a serious breach of the act and where there is clearly a non-compliance culture or non-compliance attitude on the part of the alleged offender. Often the only way to deal with that is to actually run it through the courts and get a court order. That will tend to temper the process of reaching a negotiated settlement.

One of our principles is stop the consumer harm and the business behaviour as quickly as possible. Speed has become, if you like, the signpost on the door of every member of our enforcement division. Speed is essential. I mention that for a reason, and I often quote this example. We got a very successful court outcome in the case of Danoz Direct, which was selling alleged electronic muscle-stimulant units, after about 18 months to two years. It was very successful and we put out a great media release. The problem was that 94,000 units had been sold and $15½ million had been ripped off consumers through what the court ultimately found to be misleading and deceptive conduct, and it is very difficult indeed under the current law and current processes to get restitution for consumers in connection with that matter. So, if we can act speedily to stop these issues occurring, we will do so.

Just by way of another example, with the Henry Kaye case, from the beginning of the investigation to the institution of court proceedings and an effective stopping of the alleged misleading advertising at the time I think took about 3½ weeks. In another matter involving an alleged Internet scam in Queensland, I think the time between the receipt of the complaint and the obtaining of interim injunctions was about four or five days. That is now very much part of the process that we are involved in.

With business, the message is loud and clear. If you do not want to comply with the act, you will get the sharp point of our litigation. If you want to comply with the act, work with us to bring about compliance cultures and compliance strategies, and we will be happy to work with you to do that. If you have a problem, come and tell us about it and we will be receptive to a solution to the problem being found very quickly. Do not think that because you have a problem, have found you have breached the act or have had a complaint lodged you are necessarily going to be at the sharp point of a two- or three-year litigation. If we can bring about a solution for consumers very quickly, we will do so.

We say—and this has been publicised—that if, as part of our compliance process, we detect within an organisation a systemic problem, a process problem or a personnel issue, we have no hesitation in advising senior management about it and leaving it to them to fix up. If they fix it up, then clearly that is part of the information and education program. If they do not fix it, then that is clear evidence of a non-compliance culture—and ultimately the only way to deal with that, where a complaint can be shown, is to litigate.

We are putting a lot of effort into cartels. We currently have 31 suspected cartels under investigation. They range from very small local price-fixing arrangements that involve small retailers perhaps in a local town to large international cartels. They involve price fixing, market sharing and collusive tendering—collusive tendering particularly for government contracts. It has become a significant part of our investigative work at the moment. It is substantially assisted by the leniency policy that we announced last year. That leniency policy provides a path of leniency for the first whistleblower to walk in the door and say, 'I'm involved in a cartel and prepared to give you information that will lead to a prosecution.' Then we provide a well defined leniency path. Justice Wilcox of the Federal Court last year said:

If [the ACCC's approach to leniency] leads to a perception amongst colluders that it may be wise to engage in a race to the ACCC's confessional, that may not be a bad thing.

That probably sums it up very well.

We have been loud and clear in our support for the Dawson committee's recommendations and, I believe, the government's view that there should be the institution of criminal penalties—that is, jail—for those who are involved in cartels. They are a cancer on the economy. By their very nature, they are a silent extortion of consumers' funds. The cost-benefit analysis at the moment is: millions of dollars to be earned from the cartel as against millions of dollars that you might have to pay in a fine. That cost-benefit analysis is changed when on that latter side there are several years in jail, even when it is risk weighted very significantly indeed. So we are strong advocates of criminal penalties. Jim Griffin, an executive from the US Attorney-General's Department, said:

... so long as you are only talking about money, the company can at the end of the day take care of me—when you talk about taking away my liberty, there is nothing that the company can do for me.

That is a very telling statement.

In this area of cartels particularly but also dealing with Internet scams and Internet enforcement, we are starting to beef up our work in the area of international cooperation. You will be aware that we have a treaty with the United States, which is quite extensive; but we have memoranda of understanding or agreements with other nations around the world. Those memoranda are useful but they are not as useful as I think we would like them to be, particularly as we are dealing now with the global environment in relation to things like international cartels and Internet activity. So one of our priorities at the moment is to start focusing on international cooperation and building up the level of cooperation between jurisdictions around the world to assist in the enforcement process.

I want to make a comment about mergers. It has been well publicised that we are very concerned about certain proposals recommended by Dawson in relation to formalising the merger process that we currently have. At a seminar held last year involving most, if not all, of the leading practitioners—both economic and legal—in the merger arena, the practitioners spent nearly an hour and a half lauding the informal iterative merger process that we currently engage in. They said that they thought for 98 per cent of the cases, which are those that we ultimately approve, the informal merger process worked very well indeed and they hoped it would

continue. What they wanted, though, were some disciplines imposed on the ACCC in respect of the two per cent of cases that we reject.

You may interpret that whichever way you want. I interpret it as: we want not formality but accountability on the part of the ACCC. Some might also interpret it as: in respect of the two per cent of cases that we reject—because we consider that they are a substantial lessening of competition—they want to try and put more pressure on the ACCC potentially to move those cases across to the approval side. That is not to impute motives of any sort, but I suggest to you that that may be part of the process that has been put forward in terms of both Dawson and some of the practitioners in this area.

Based on advice given to me both internally and externally, it is my view that, if the formal process recommended by Dawson is instituted, it is highly likely that our informal iterative process will diminish significantly and may potentially cease altogether. That has been the experience in New Zealand. There is no jurisdiction in the world that has two merger processes, one formal and another informal, running side by side. The informal process that currently operates in Australia has been praised throughout the world and in particular in the OECD.

For practitioners who want accountability on the part of the ACCC as to its conduct of the informal process, I invite them to read the recent judgment of Mr Justice French in AGL v. Loy Yang Power. Mr Justice French said there that the ACCC had taken a course of action; that it had left the party, the applicant, that was seeking to engage in a merger—that is, AGL seeking to purchase a 35 per cent interest in the Loy Yang generation plant—with the sword of Damocles hanging over it and the transaction. Justice French felt in those circumstances that it was appropriate to grant a declaration that section 50 would not be breached if AGL proceeded with the transaction. That is the accountability process that has always been available to practitioners and to businesses under the Trade Practices Act; it will always be available. In our view, with that process of accountability being available through the Federal Court—and it was obtained in a matter of something like six to eight weeks, which was a very speedy process and actually cost the ACCC rather than the applicant in terms of legal costs—I suggest that to proceed down the Dawson formal voluntary clearance process will not bode well for the future conduct of merger hearings and merger matters in this country.

The matter I will conclude on is probably at the moment the most significant issue that we are dealing with in policy terms, and that is the issue of big business and small business. The small business issue has been the subject of the Senate Economics References Committee report which was handed down earlier this week. I think that we now have an acceptance amongst all levels of business and policy makers, as evidenced in the Senate economics committee report, that the ACCC's mandate is to promote vigorous lawful competition amongst all businesses, whether they are big, small or medium; that our mandate is not to protect any individual business or any sector of the economy from competition, no matter how big or small that sector or that business might be. Our focus is and must be on the interests of consumers and the community at large. It should not be diverted to protect certain sectors of the economy or certain businesses from healthy competition. Protecting businesses from fair, vigorous and lawful competition for whatever reason brings with it a corresponding cost to the Australian public, Australian consumers and the Australian economy.

That is now, I think, well understood and well accepted by all sections of business and, in particular, by small business. Small business is afforded many protections under the act. The first and fundamental one is under part IV of the act—that is, if we can bring about fair, vigorous and lawful competition then all sections of business benefit from that, particularly those that are innovative and creative and can adapt to changing times. Section 46 has a limited protection. The ACCC put its submissions to the Senate economics committee and I am pleased to note that the Senate Economics References Committee has in large part accepted the recommendations of the ACCC in respect of a modificational redrafting of section 46 of the act.

The provisions of part IVA provide protection for small business from unconscionable conduct in the vertical relationship—that is, the vertical supply relationship or the relationship involving dominant parties in a negotiating situation dealing with less dominant or inferior bargaining parties in a relationship. That section appears to be working well at the moment, according to court interpretations that we have received to date. We have made some recommendations in relation to the amendment to that, which, again, I am pleased to say that the Senate Economics References Committee have adopted. Small business also has the protection of mandatory codes of conduct under the franchise code and under processes of voluntary codes, which are going through some discussions in the ACCC at the moment and which may lead to the endorsement by the ACCC of voluntary codes of conduct involving small and big business relationships.

Collective negotiations are another area of protection for small business. Again, the Dawson committee and, most recently, the Senate Economics References Committee have adopted processes to facilitate collective negotiations on the part of small business and we welcome those. The ACCC engages in a significant information and education campaign to provide advice to small business as to their rights and responsibilities under the act.

There is a major issue that we will need to examine as part of our process in the foreseeable future, and that is the vertical supply chain relationship. It is where you have large customers dealing with very small suppliers or very large suppliers dealing with small customers. It occurs through the retail grocery trade, the oil industry and the clothing trade—I could keep on going. It is where you have that significant imbalance between supplier and customer, whether it be the large customer or the large supplier, and where there may be some issues that we need to address so far as we can under the current law and without impinging upon that fundamental economic objective of part IV of the act, which is to ensure that we have a vigorous, competitive economy that is efficient and operates to the benefit of the Australian consumer.

Finally, in this context, let me refer you to our petrol grocery report—that is, the so-called shopper docket report that we released a couple of weeks ago. In very short summary form—it is a complex report and does involve a significant examination of the issues relating to small business and big business so far as they relate to the retail petroleum and grocery sectors—in our view, at present and for the foreseeable feature, we see a very competitive marketplace in both retail petroleum and retail groceries in this country. While you have a competitive marketplace, the consumer benefits. There are changes occurring in both sectors. Significant changes have occurred in the retail petroleum sector which are totally unrelated to date and, we think, in the future to shopper docket schemes. They are, rather, the changes that are occurring through the changing nature of retail petroleum. Years ago, we used to see something like 20,000 petroleum sites in this country with four to six pumps each, often situated on every corner of a local intersection with relatively low volume. They had a small cubby house that would take your

money and sell you some distilled water and some oil. That has changed—it has changed in favour of 8,000 sites compared to 20,000 back in the 1970s. There are 8,000 sites on major highways with 20 to 30 pumps, often associated with car washes, 10,000 square foot convenience stores, fast food outlets and a whole range of convenience factors for consumers. It is the changing nature of business in the retail petroleum area.

We think that, combined with the new standards for petroleum that came into force on 1 January this year, which have now effectively taken out of the system the source of cheap imported fuel that used to be available—particularly from South-East Asia, which was often the source for some of the independent chains, enabling them to lead discounting in this country—those are the factors that will affect competition in the retail petroleum sector, not the shopper docket arrangements.

The other important thing to note is that in all the past analysis that we have done, including a report that we issued about two years ago, in the retail petroleum sector we have found that the leaders of price discounting are not the small independent players but the independent chains. The small independent players that have been concerned about some of the evolution that has been occurring in this area are generally the price followers rather than the price leaders in the discount moves and discount cycles that occur in retail petroleum. One area we are focusing on in retail petroleum at the moment is not the process of horizontal competition but the vertical relationships between the major oil companies and some of their franchisees. Well publicised complaints have been lodged with us that there may be evidence of unconscionable conduct occurring. We are focusing on that area and investigating those issues in conjunction with the people who are lodging the complaints and the major oil companies.

Creeping acquisitions is the other area that is often referred to in the context of retail groceries. We have pointed out in our report that the process of creeping acquisitions plays a very small part in the increasing market share of the major supermarket chains in this country. In one case it is less than five per cent of their annual growth. In the other case the growth as a result of creeping acquisitions is so small as to be hardly measurable in percentage terms. Growth in market share is primarily occurring through organic growth, not through creeping acquisitions.

While we will constantly keep an eye on the creeping acquisitions of the major supermarket chains, we are also conscious of the statistics that I have just referred you to as well as of the fact that there are not only the two major chains but one or two other significant operators in the retail grocery market who are proving to be very competitive players. I speak of Metcash on the eastern seaboard and the Foodland group in Western Australia. Their market share is increasing and they are at least maintaining, if not increasing, their profit margins. In our view, that ensures that, at least for the foreseeable future, there will be a very competitive grocery sector in this country.

With the shopper docket schemes we are seeing innovation right across the board in providing significant benefits to consumers, not only from the two major supermarket chains but from the others I have mentioned—like Metcash—and a number of other independents. They have before us over 100 notifications at the moment, and there are some who have not notified us at this point in time, of innovative schemes for providing discounted petrol and/or rebates for grocery prices and grocery bills at their respective outlets. That is all very good for consumers.

**CHAIR**—Thank you very much, Mr Samuel, for a very comprehensive introduction. You have certainly covered a wealth of areas in which the ACCC has responsibilities. You were talking about the use of the media. As you rightly pointed out, the committee has had concerns in the past about the way the ACCC has worked with the media, and you said that you would like to bring about behavioural change by use of media. Would you like to outline the principles that you use when you are going down that path?

**Mr Samuel**—The best example would be what we did in the real estate industry. In the real estate industry we did not name, either by background briefing innuendo or media release, any particular offender. What we said was that we were concerned about some actions that were taking place in the real estate industry, particularly with the relatively hot property market we have seen in recent times. We started by issuing a media release that said that we had a project task force focusing on this area. It listed the issues in two paragraphs—dummy bidding, under and over quoting, property investment scams, two-tier marketing and other misleading and deceptive behaviour in relation to property.

We got an interesting reaction from one or two of the real estate institutes. They focused on the dummy bidding and said that we did not understand how the real estate market and auctions worked and that for years undisclosed vendor bidding had been part of the process of conducting auctions. I responded very quickly on radio to say that in our view undisclosed vendors had no more intention of buying a property than did the tree or the gnome in the garden and that, if the vendor or the vendor's brothers, sisters, nephews, nieces, aunts, uncles, children or anyone else associated with them were engaged in or had knowledge of their agents being engaged in vendor bidding, frankly we would prosecute all of them. It was quite interesting. But a couple of the real estate institutes that had railed against our approach very quickly issued new codes of conduct that said that undisclosed vendor bidding was no longer appropriate and should be taken out of the system.

What that has done—in one case in a matter of less than a week—is bring about a change in at least the codes of conduct of behaviour which otherwise might have taken several months through prosecutions and/or legislation. I think in this state alone we started the discussion about vendor bidding perhaps earlier last year, and only recently the legislation has come into force—in February. Our view was that this could be stopped very quickly by simply saying, 'The ACCC will prosecute.' And agents have become aware of that. That is not to say that dummy bidding and vendor bidding have been obliterated, but it is to say that agents are now very wary. There is at least a changed awareness of what is occurring and an awareness that the ACCC is there ready to take the complaints, to investigate the issues and to prosecute in the event of a breach of the act.

We have one case going at the moment in respect of underquoting. That case looks like it will head to court to be litigated in full. That is a case that has been well publicised. The estate agency firm concerned has simply had no more publicity from that case than the brief issue of a media release on our part that says, 'This case has been instituted and here is what the statement of claim says.' Any journalist can pick that up from reading the court file. That is where we stop. We offer no more comments after that.

**CHAIR**—I am talking about principles. You have given a very good example of the practice, but what principles do you have when you start to use media to make behavioural change?

**Mr Samuel**—The principles are these: being very public about the issues; being public about the behaviour that is in our view in breach of the act; and being public about how the behaviour ought to be changed, but not being specific about individual firms or organisations or individuals themselves that we consider would be in breach of the act. That will be the subject of investigation. By the way, what talking about the behaviour that is in breach of the act tends to do is that the complaints suddenly come out and they are received through the info centre, then from that process we proceed to investigation of prosecution. But we are very wary about dealing with people's reputations improperly, particularly at the investigation stage, because often investigations will lead to a revelation of facts that show that the alleged offender actually has not offended against anything at all—it is an improper complaint.

**CHAIR**—That is the point I really want to come to: the damage you could do to reputation. You say you do not actually name them. Still, by implication people in that business would probably know who is being referred to. What are the safeguards for the individuals until you are progressing the case or whatever?

**Mr Samuel**—I would be surprised if people within the industry knew those matters that we were investigating, because our investigations will involve the party that is the subject of the complaint, the complainant and other witnesses that may be relevant to provide evidence to us. So I would be very surprised. Certainly I would be surprised if from the ACCC information was being disseminated that permitted other parties to know. We are very cautious about that. We will not make—either by innuendo or by improper allegation—any comments at the investigation stage about what we are doing. Sometimes inquiries are received by us from the media as to whether we are conducting investigations, and we will not comment. They want to know whether we are investigating certain parties. Again, we will not comment.

**Mr Cassidy**—Another example is that we have indicated that we are currently looking fairly closely at the Internet and at particular claims which are too good to be true. As part of that we have looked at over 3,000 Internet sites. In a sense we have signalled a behaviour that we are in the process of looking at, but again it would be very difficult for anyone to say that we are targeting X or Y in terms of individuals. They may say, 'Look, this particular site is probably going to be in trouble,' but that is not us impugning the particular individual. That is someone making their own judgment about whether, in terms of the generic behaviour that we have indicated, a particular individual or in this case Internet site may be offending in relation to that behaviour. So we are fairly careful when we make these generic announcements to do so in a way that someone cannot immediately say, 'Hey, that is targeted at this particular trade or this particular individual.'

**Ms BURKE**—On the other end of the scale, isn't there a problem with wanting to actually signal particularly to consumers that you may be coming up with an action against someone? By the time your complaint about the Danoz thing got to the end of the court process, X number of people had already bought the machines that had been advertised incorrectly. I am getting a lot of complaints from Henry Kaye creditors at the moment who are saying, 'Everybody knew; nobody told us.' There has to be a bit of a two-way street somewhere in this, doesn't there?

**Mr Cassidy**—There is something in that. There is an argument people make, which has some respectability to it, that we should perhaps be indicating what our investigations are simply as a way of forewarning people that a particular trader's practice may be contrary to the act, but then

you have to balance against that the possible reputational damage in announcing an investigation which we may find at the end of the day does not indicate a breach of the act or, to put it another way, where we cannot accumulate sufficient evidence to substantiate a breach of the act.

**Mr Smith**—In a practical sense also you cannot control complainants. People may come to us with a complaint. We may be investigating, and they may know we are investigating. But they themselves may raise issues with the press or others about the investigation. So, while we are being very careful, matters can become public not through us but through other sources.

**Ms GAMBARO**—We were talking about real estate before and the action against a particular vendor in Queensland. There is a fine line between a case becoming public and industry knowledge. Other real estate agents were fully aware of this particular real estate firm engaging in some of those underbidding type situations. Are you investigating that particular real estate agent also enforcing advertising on, say, elderly residents—forcing them to take enormously expensive advertising contracts—or are you only looking at the underbidding side of things? That is one of the things that is being engaged in as well.

**Mr Samuel**—Again I do not think it is appropriate to comment on investigations that we are currently undertaking.

**Ms GAMBARO**—I can understand that. I guess what I am trying to say, and I think it has been raised here, is that there is an area where it is public knowledge within the industry and then when you come in and investigate. It is quite a grey area where it can seep out into the marketplace.

**Mr Samuel**—I think all we can do is try and protect reputations at least until we reach the stage where we are sufficiently satisfied that there is proof of misbehaviour that we then have to proceed to the enforcement process—that is the litigation. The important thing at our end is to ensure that we take it through the investigation stage very quickly. You cannot run it through for a year or two years and let the damage be done for that period of time and then say, 'We've suddenly got ourselves satisfied and we can start court action.' That therefore goes back to the comments I made about speed being of the essence.

But we also have to be cautious, because obtaining evidence is not easy sometimes where the providers of evidence are reluctant. We have our processes, including the use of section 155 notices and 155 hearings. But in the event it is not only not much value but in fact would be inappropriate to be commencing court proceedings where we are not reasonably satisfied that we actually have a case that is appropriate to be prosecuted. That does not do the process any good. You will not get too many counsel actually signing off on a statement of claim in those circumstances either.

**Mr Cassidy**—As at last Friday, we had 195 serious investigations in train. Relatively few of our investigations become known during the investigation phase.

**CHAIR**—How can you deal with Internet scams when most of them seem to be located overseas?

**Mr Samuel**—It is very difficult. The jurisdiction of the ACCC is limited to parties that are incorporated in Australia, resident in Australia or carrying on business in Australia. The first two of these criteria are fairly easy to satisfy, if they exist, but where the party concerned is resident outside Australia, as they often are, our view—subject to being tested in the courts—would currently be that if, through the Internet, business transactions are being entered into with Australian residents, that is conduct of business in Australia. That is the legal position. Of course, the practical position is that you can get all the injunctions and court orders in the world, but it is very difficult to enforce them when you are dealing with parties outside the jurisdiction of Australian courts.

That is where the international cooperation arrangements become fundamental, because we have to go to our co-regulators and seek assistance to bring about enforcement in overseas jurisdictions. As I have indicated, we have a treaty with the United States which I think greatly facilitates that process. We are looking at a much closer cooperation arrangement with New Zealand. I think that the Australian and New Zealand finance ministers—that is, Treasurer Costello and Finance Minister Cullen—recently announced that they were intending to set up a working party to examine a much closer cooperation agreement, particularly in the area of competition policy, law and regulation between New Zealand and Australia. Beyond that, we are limited to some fairly loose memoranda of understanding which are very well meaning but of limited use in terms of practical impact.

**CHAIR**—Do you feel that there should be more emphasis on trying to warn people through public warnings and better public information?

**Mr Samuel**—I think that all of us would wish we could inform and educate the Australian public about these scams and the merits of ignoring them. But, as we all know, there is always a section of the public that will ignore warnings; there are always going to be those that will make their bank accounts available to the Nigerian money scam.

**CHAIR**—I have never got any money from it yet!

**Mr Samuel**—That is all right—so long as you had no money in the account to be taken in the first place. We are all aware of the scams and you never cease to be amazed that people actually fall for those tricks. Some scams prey upon people who can be caught out of sheer desperation—for example, promises of cures for major diseases such as cancer. Without wanting to prejudge them, they really prey on those who are in desperate need—and they are very difficult to deal with. Certainly there could be more education—as much as the resources can accommodate it—but ultimately people have to have some duty of care towards themselves.

**CHAIR**—I had a case where someone was fleeced, and I got the local newspaper to do a very sympathetic story to illustrate to other people that they should beware. Have you have the opportunity to use some of those examples to warn people?

**Mr Samuel**—Yes, we do. Let us take a case that has now been proven. There are 94,000 consumers who have purchased abdominal muscle stimulant units. I hope that no-one around the table has bought one. It is quite obvious that Mr Griffin either bought one and it did not work, or has not bought one!

**Mr GRIFFIN**—That is true. My wife bought one and it did not work either!

**Mr Samuel**—I hope all of us around the table would say, 'How could anyone have been silly enough to buy these things?' But 94,000 people bought them. That was $15,500,000 down the tube. To put a bit of levity into the proceedings, I will never forget Jerry Seinfeld, when he was out here in Australia, saying that he used to watch these shows in the middle of the night that talked about knives that would cut up shoes and later cut up tomatoes. He said, 'Why would anyone want to cut up a tomato after they had cut up a shoe?' He went on to say that he rang up to buy a set of these knives one night and the person at the other end of the phone said, 'Are you stupid? Why would you want to buy these?' You can only advise consumers so much, and we do.

**CHAIR**—Do you have any funding available for that education, or do you think you should have some funding available?

**Mr Samuel**—I would never reject funding. We do have funding and we apply it, but it is limited. There are so many demands on our resources. Perhaps two of the best educative tools are enforcement and compliance. Our annual report reveals that, in terms of the enforcement processes that we undertake at the moment, the legal process is becoming so expensive that we are finding that our funding is significantly short to cover the enforcement side of our activities. I think the most heartening aspect of our operation is probably the information centre, where, as I said, we have had 53,500 complaints and inquiries. In total the info centre receives something in the order of 80,000 phone calls each year. The people there are very well trained—they know how to handle issues and to provide advice. Where it is not a matter that concerns the ACCC, they will actually refer people to an appropriate authority, be it the state office of fair trading, consumer affairs bureaus, those who deal with debt collection or whatever might be the case. That, in many senses, is one of the best ways we can help consumers.

**Ms BURKE**—We have noticed a lack of regulation in Australia—and it is something that we can actually fix—in respect of property advisers, an example being the Henry Kaye instance. We have raised this now on several occasions with the Governor of the Reserve Bank, who has indicated on transcript quite publicly that he believes there needs to be greater regulation within that area. Do you think that should fall completely or partially within the gamut of the ACCC's responsibilities? If not, should it be ASIC's, the RBA's, or another organisation's responsibility? We now have a classic case of consumers who have been fairly well ripped off, and they cannot be the only ones out there. There are other property people advertising and doing these things. Why can't we enforce regulation in an area that is very publicly hurting Australian consumers?

**Mr Samuel**—It was part of our responsibilities until March last year, when, as a result of the Wallace inquiry, financial services were carved out of our consumer protection jurisdiction. That is a policy matter for government and parliament to deal with, and they dealt with it last year. What I can say is that the ACCC is very much focused on dealing with broad consumer complaints and issues. It is a consumer protection organisation in a substantial way. The competition side of the ACCC is focused on consumer welfare, and we have a significant consumer protection side. Our enforcement processes, our compliance processes and our information and education processes are all focused on consumer protection. If there is an organisation that clearly has the experience and the focus to deal with these areas, it is the ACCC. As I said, last year parliament dealt with who they would assign the responsibility to.

**Mr GRIFFIN**—That picks up another issue, which is that parliament makes those decisions, but there is also the question of the whether we are seeing effective regulation then occurring. There has been a range of cases since the credit powers have gone across to ASIC in which I think there has been genuine confusion about who is actually responsible for the issue. As you might know from my occasional press releases, occasionally the confusion comes from me, but quite often those press releases are based on advice sought from either regulator about who is responsible. Would you comment on that question of the interface?

**Mr Samuel**—There is some confusion. The confusion between the two regulators is probably more at the margin than at the core, but there is some confusion, particularly transitory confusion resulting from the changes that were instituted last year—and you and I have had some discussions about the confusion that has arisen in that area. Let me say, however, that the confusion will best be resolved, insofar as it occurs between regulators, by cooperation between regulators. I am attending a meeting next week with senior management and the commissioners of the Australian Securities and Investments Commission, particularly the new chairman, to start dealing at a very high level with some of these issues.

There will always be two issues that policy makers and regulators will have to deal with. The first is: which organisation is best suited to deal with consumer matters? That is, which organisation is best geared to and has a culture that is focused on consumer matters? Without referring to ASIC or any other organisation, I would simply say that our organisation has for years had on a focus on a culture that deals with compliance, education and enforcement with respect to consumer matters. The other area is those areas of margin that I have talked about, where neither regulator is terribly sure which regulator has the role. Either we resolve that between ourselves by referring or the matter has to be resolved by the courts. The latter course is a very unfortunate course of action, if it ever occurs.

**Mr GRIFFIN**—I agree with that, but I flag with you that I think there is a real issue about the interface between ASIC and ACCC and who is responsible for what. The future of this area is certainly something that I intend to take up at other committees, and it is something that I think also affects the timeliness of action, as well as the question of who the consumers go to in the first place. I will not go into it now in any greater detail than that, other than to say that I would be interested if you have any statistics on the question of referrals to ASIC and the nature of the interface between you, because I think it is an issue.

**Mr Cassidy**—We certainly understand what you are saying. We have a situation at the moment in the property area where the way the property investment seminars are advertised is probably our jurisdiction and what is said in the seminars is probably ASIC's jurisdiction. Unconscionable conduct in consumer financial transactions is exclusively ASIC's jurisdiction and unconscionable conduct in business financial transactions is a shared jurisdiction. Clearly, it is an area that is ripe for confusion, particularly on behalf of consumers.

**CHAIR**—What are you actually doing to get better liaison between the two regulators?

**Mr Cassidy**—There are regular meetings and discussions at the working level between ASIC and officers of the ACCC. Indeed, we have had joint exercises, for example in relation to the issue of surcharging for using credit cards, which was an ASIC jurisdiction. We put out a joint publication and undertook a joint education campaign because we realised that, even with the

best education in the world, we would still have people contacting us. So, as I said, we had a joint exercise between us, and we had specific arrangements set up so that we could refer complaints that we received over to ASIC through dedicated arrangements that ASIC had set up. At the working level, we do have frequent contact and liaison with ASIC to try to minimise, if you like, the confusion and difficulties insofar as individual consumers are concerned. As the chairman indicated, next week we are having discussions at more senior levels, to both review those sorts of arrangements and see what else we might do to help manage what is a challenging area for us.

**Mr GRIFFIN**—It does relate directly to that culture issue. There is a culture at the ACCC about what you do and there is a culture, to an extent, at ASIC, which is now picking up an enforcement power, if you like, which I think over the last couple of years it has had some difficulty with. I think it is really important that that is focused on.

**CHAIR**—We might move on. You were talking about the petrol market, saying that you believed it is a very competitive market. That raises a couple questions. Firstly, is this competition being felt on a similar level in country areas as it is in high-volume areas? Secondly, as competition may be driving out other players, are we going to reach a point where, other players having gone, it may be lessening?

**Mr Samuel**—Let me deal with rural Australia first, because there are a series of issues associated with it that have little to do with shopper dockets and the state of the petroleum industry but are somewhat endemic in relation to rural and regional areas. Competition requires at least two players to be competing against each other. Two or more players require enough consumers to warrant two or more players being available to participate in the market. They are the very basic notions that we have to deal with. In many rural areas there is not a sufficient concentration of population to warrant two pharmacies, two supermarkets, two petrol stations or two of anything—that is just the nature of the size of some towns that we deal with.

All of us here would be aware of the changing demographics that are occurring in rural Australia. Some towns are growing smaller as the next generation are tending to move towards larger rural cities and towards the coast. So there will be less competition in rural locations that have insufficient populations to warrant the number of participants that will bring about an effective competitive marketplace—whether it be in the petroleum or groceries market, or for pharmacies, post offices, banks or whatever. That has little—in fact, almost nothing—to do with the nature of the industries themselves; it is to do with the size of the towns and the size of the population to provide consumer demand.

In terms of the marketplace for retail petrol, on the basis of our investigations and information that we have developed from both the Australian market and from overseas markets—and, in particular, the United Kingdom, which has had these shopper dockets schemes in place for 10 years—there is no reason to suggest that these schemes will lead to any significant lessening of competition in the marketplace. We have concluded that there are some factors that are going to reduce some of the competitive elements that have been there in the past. I mentioned that the MTB fuel standards that came into effect on 1 January have removed the source of cheap imported fuel. That cheap imported fuel was often the prime source of discounted fuel for some of the independent chains that led some of the discount cycles that we have seen. Those independent chains no longer have that available. It may become available over a period of time

as some of the South-East Asian refineries start to develop higher environmental standards in terms of refined petroleum.

At the present time, it is fair to say that imported fuel is now a very small part of our total use of petroleum in this country—other than fuel that comes from Singapore, which is refined by refineries owned by the parent companies of the major Australian refiners; they are very much the same group. Thus, the refined fuel in Australia is primarily only available from the major refiner marketers in this country. And they still have a very competitive environment.

We talk of the potential ascendancy of Coles and Woolworths with their respective relationships with Shell and Caltex. But if we take the Woolworths-Caltex example, only about a quarter of their total sites will be tied up as part of the Woolworths-Caltex joint venture. About 70 to 75 per cent of remaining sites are still held under the Caltex brand and have nothing to do with the joint venture at all. The same thing occurs with Shell and Coles. I think something like less than one-third of the Shell sites around the country are tied up in the Coles joint venture. The rest are independents and Shell-run sites that have nothing to do with that joint venture.

BP and Mobil, in their own ways—in both a small and a more significant sense—have established and are in the process of establishing shopper docket schemes with independent grocery outlets not associated with Coles and Woolworths. And then we are seeing reverse shopper docket schemes, involving Metcash providing a rebate on grocery prices if you simply produce a petrol voucher from any petrol outlet—it does not matter where it is, so it is disconnected from any of the major petrol retailers.

All the prospects are that we will continue to see vigorous competition in the petroleum market, but subject to the limitation I described—that is, the lack of availability of cheap imported fuel, which was the source for the independent chains. Also, we will see some evolution in petrol retailing, where we have indicated that we think there are likely to be fewer of the smaller independent outlets, in favour of a move towards a consolidation of petrol retailing into those larger outlets on major highways that I described before.

**Mr Cassidy**—One of the pleasing aspects, in a sense, of the shopper docket exercise is that, while we received notifications of exclusive dealing involved from both Woolworths and Coles, we also received about another 100 notifications of much smaller schemes. A lot of those were in country towns where the local grocery retailer has entered into some sort of arrangement with the local service stations—a shopper docket type arrangement. So there are a lot of those sorts of arrangements being entered into in country towns, which we find encouraging in the sense that it is not just a big-city phenomenon; it is something that is also happening out in rural Australia. It is encouraging as a competitive response—an indication, if you like, that a competitive market is working. It is also encouraging because it means that grocery and petrol consumers in rural Australia are able to take advantage of the shopper docket type arrangements.

**Ms GAMBARO**—On the fuel pricing again: I note that you have had about 2,005 inquiries on fuel pricing. Do they relate to the variations in prices in predominantly regional areas? How does that work?

**Mr Cassidy**—It is a mixture. Some of the inquiries we get relate to why the price is X in this town and Y in that town on a particular day. Some of the inquiries we receive relate to why, as a

general proposition, prices in Australia have moved in a particular direction when, say, international prices seem to be moving in a different direction. We are still actively monitoring petrol prices, both in each of the capital cities and also in 110 country towns, regional centres, around Australia. We do that on a daily basis, so we are still quite actively monitoring petrol prices. When we get those sorts of inquiries, we do our best to see what our database tells us and to try to explain to the individual just what seems to be happening there.

**Ms GAMBARO**—That is the consumer. In terms of independent petrol station owners as well, do you have more complaints from independents—particularly in cases where the Shell stations, for example, are selling below the cost price of a particular independent chain—in certain states, or is it pretty much spread across the board? Is it more state specific, depending on the concentration of independents, or do you find that you have the same sort of complaints from independent chains about below-cost pricing, which they say is predatory pricing?

**Mr Cassidy**—I do not think we could say from our data that it is evident more in one state than another. I would have to say it has been a source of complaint over a number of years; it is not something which has just come along with the Woolworths and Coles involvement in petrol retailing. There has been a longstanding issue where, say, an independently owned site, maybe branded by one of the major names, purchases petrol at a particular price and then the terminal gate price moves for quite legitimate reasons such as international prices, exchange rate movements or whatever it might be so that the independent owner finds that someone down the road, who has probably got his delivery of petrol yesterday rather than a week or two ago, is selling at a much lower price than the independent is.

That is something we have had a number of complaints about over the years. We have looked into a number of them where there have been allegations of predatory behaviour. We have had complaints where a particular independent, or branded independent, site has been targeted by company owned sites around it. We looked into a number of those complaints and, in a sense, we have undertaken our own confidential monitoring intensively in that particular area over a period of time. Typically we find that pricing behaviour is a response to what an independent—in the true sense—is doing in the area, and is not predatory. When we get those sort of complaints, particularly where an allegation of predatory behaviour is involved, we will always look at it fairly carefully, because we are conscious of the vulnerability of independent petrol station owners.

**Ms GAMBARO**—But there has not been an increase in reports of those types of predatory behaviour since the Shell and Coles mergers and some of the others?

**Mr Cassidy**—Not in predatory pricing. We have looked at quite a number of them and we have found that there are quite significant price differentials between Coles and Woolworths sites and similar branded sites not very far away from them. But each time we have looked at one of these, and we have looked at quite a number of them, we have found that the differential closes fairly quickly—within a day or two.

**Mr Samuel**—It is not necessarily led by the linked site. Sometimes the price movements will be in favour of the unlinked site, in terms of price discounting, and that may lead the discounting process.

**Mr Cassidy**—Indeed, our monitoring so far is telling us that we are not getting a consistent pattern. If you compare the Coles and Woolworths sites with, respectively, Shell and Caltex unlinked sites, you find that there is not a consistent pattern in terms of one being consistently higher than the other; it is mixed.

**Mr Samuel**—We are also not getting a consistent pattern that would show, for example, the Coles-Shell sites leading the downward cycle as opposed to the unlinked sites; sometimes it will move the other way around.

**Ms GAMBARO**—It is a very difficult area to prove. People come to me about independents and predatory pricing. There are all these other factors in the equation is well.

**Mr Cassidy**—Not just recently, but over a period of time, we have had several complaints of predatory behaviour in particular areas, where a service station claims that they have been targeted. We have a way of doing it, which I will not go into detail about. We look fairly closely at the allegation and at the particular geographic area over a period of time. As yet, as I say, we have not found evidence of predatory behaviour.

**CHAIR**—We might move on to Telstra and broadband. You have certainly been very much involved with that—

**Mr GRIFFIN**—In case you were not expecting it.

**CHAIR**—with the accusations against Telstra of undercutting their wholesale customers. There has been some response but some dissatisfaction with the response. Would you like to open up with some comments on that?

**Mr Samuel**—Perhaps the shortest way of doing it would be to refer you to a speech that I gave yesterday to the Australian Telecommunications Users Group, ATUG, which set out in detail what occurred. On Sunday, 17 February we received advice from Telstra that it was about to announce substantial reductions in its retail pricing for broadband. We were caught quite by surprise, and yesterday I expressed significant irritation, as I have already expressed direct to Telstra, over the fact that they did not consult us beforehand or give notice of their intentions. On the Monday we received a volume of complaints from Telstra's wholesale customers saying that the retail prices were below the wholesale prices being charged by Telstra to its customers and therefore what was evidenced—according to the complaints—was a vertical price squeeze.

We conducted investigations over the ensuing five or six working day period and, as soon as we had sufficient information and evidence, we issued to Telstra what is called an advisory notice. An advisory notice does not have any legal power, but it was publicised and it advised Telstra that they should cease to engage in certain conduct—that is, the conduct that related to the pricing of their retail below the wholesale prices—or rather provided advice to them that they should reduce their wholesale prices to a level that would enable their wholesale customers, and thus their retail competitors, if you like, to compete with Telstra and to provide a competitive marketplace. Telstra responded the next day, upon receipt of that advisory notice, with advice that they would bring about certain reductions in their wholesale prices which would apply as from the day after.

I should put this in context. Ten days after 17 February we issue the advisory notice, the next day Telstra respond by saying that they will reduce their wholesale prices to enable competition to continue as far as their wholesale customers are concerned and that those wholesale price reductions will occur the next day—that is the Friday, the day that Telstra proposed to commence their retail broadband offerings. You can see that that is not a very satisfactory situation, to put it mildly. First of all, there is no consultation with the ACCC. Secondly, at least 10 days transpires before they even give us any advice that they will consider reducing their wholesale pricing. The third element is that they give advice to their wholesale customers, the day before the commencement of Telstra's retail pricing strategy, that they are going to reduce their wholesale prices to those wholesale customers—and then there are some questions about the extent of the reductions and whether they have been significant enough to maintain an environment of competition that will enable the wholesale customers to compete with Telstra's retail offering.

We indicated on the day that we received advice from Telstra about its wholesale pricing that we thought it was a start but that that was not the end of the investigation. The investigation has continued, and I do not think it would be appropriate for us to pre-empt what we might or might not do. I simply indicated yesterday that if we were satisfied—had reason to believe—that Telstra had not yet ceased anticompetitive conduct and was still engaging in anticompetitive conduct, we would then consider taking a number of actions which include the potential of issuing a competition notice and/or commencing court proceedings against Telstra for injunctions. The issuing of a competition notice simply requires us to have reason to believe that Telstra is engaging in anticompetitive conduct. It has to be preceded by what we call a consultation notice—that is, giving advice to Telstra that we propose to issue a competition notice. That in itself is a sign that we have already formed a reason to believe that they are engaging in anticompetitive conduct.

I cannot give you any indication of our position at this stage—it would not be appropriate to do so—but suffice it to say that we are engaging in extensive discussions with Telstra over its wholesale pricing plans that are currently available to its wholesale customers. We are receiving a significant amount of information as a result of the proper process of inquiries that we have undertaken with Telstra's wholesale customers, and we are receiving some information from Telstra itself. If we form a reason to believe that it is engaging in anticompetitive conduct then we will pursue one of the two courses that I described to you—that is, a competition notice and/or court proceedings. If we issue a competition notice, that has the prospect of giving rise to up to a $10 million fine for Telstra, plus ongoing fines of $1 million per day, backdated in respect of ongoing conduct.

**CHAIR**—Aren't you dealing here with a serial offender?

**Mr Samuel**—I am conscious of those sitting behind us with notebooks in their hands. This is a serious issue. As I commented yesterday, the issue of regulation of telecommunications is important in terms of the movement to a more competitive marketplace. It is not assisted by the market structures that we currently have in position in this country which ensure that one incumbent dominant player has control over the copper wire network. That, in the context of broadband, impacts upon ADSL, which is the increasingly significant part of the broadband offering. It also has control of the major coaxial cable, which is the other element of broadband availability in this country other than wireless, which is still at its incipiency stage. So we are

dealing with the ultimate oxymoron, which is regulated competition. The incumbent not only has the ability but, frankly, the incentive to game the regulator as much as the incumbent wants to do it, and we have to be ever vigilant to ensuring that the gaming has little impact.

**CHAIR**—You have raised a pretty fundamental point there. Has the ACCC thought of doing a discussion paper on that problem?

**Mr Samuel**—We have done many, including the emerging market structures report, which was delivered to government last June.

**CHAIR**—But I mean as a solution to it.

**Mr Samuel**—Yesterday I endorsed it publicly in its totality.

**CHAIR**—Do you talk about a solution to it, though?

**Mr Samuel**—We have talked about solutions as well, but solutions are a matter of government policy. Ultimately—and I said this in yesterday's ATUG speech—the solution to competition is to provide an environment where no incumbent has a monopoly capacity, because monopoly capacity then requires regulation to deal with competition. Monopoly capacity comes when you own the infrastructure that, if you like, controls the pipe and provides the bottleneck that gives the monopoly capacity—and that is the situation that exists here. That has been the subject of many reports and views expressed by both the ACCC and in my former role with the national competition council.

**CHAIR**—Perhaps I could dwell on one specific aspect. What can you do to get better competition for people in rural and regional areas? To give you some quick figures, with satellite, if we take cents per kilobyte, for one way it is about 86c for a country user; with a two-way satellite it is 47c; ISDN is about 46c, whereas what is happening in ADSL is that it is 23c for 256 kilobytes, which is faster than all except for two-way satellite. If you get the faster ADSL it is 18c, and then cable or the really fast ADSL is somewhere between 4c and 8c. What can you do to get a more competitive market there for people in the country? There is a hell of a difference there.

**Mr Samuel**—I am going to be repeating myself and repeating the comments I made yesterday. When you have a market structure that has a bottleneck because of the ownership of the infrastructure then you have a problem, and that is the market structure we have at the moment. We do not have a structure that is conducive to the proper efficient operation of competition or of normal market forces. You can only deal with that in one of two ways. One is to change the market structure and, as I say, we have opined on that on many occasions in the past, as I have done in terms of my role with the National Competition Council; or alternatively you provide for regulation. But regulation is a slow, difficult means of bringing about competition and the incumbent has the ability and the incentive to game the process, and does.

**CHAIR**—With the recommendations that came out of the Besley inquiry on pricing arrangements for ISDN, have you been able to take any action on that in regard to the fact that the ISDN services have been discriminatory and unduly favour Telstra over other providers?

**Mr Dimasi**—I do not think the recommendations were aimed at us. There were recommendations for some government policies. If there is any question of discriminatory pricing, that is something we look at. There are differences in pricing and costs of delivery in different parts of the market. To the extent that those prices reflect costs, you can get some of those genuine differences. There have been proposals to tender out some of the delivery of services, which companies other than Telstra have also been able to apply for, and there are some issues with the way that is done that we have certainly raised with Besley and with the government.

**CHAIR**—Have there been any outcomes?

**Mr Dimasi**—Not that I am aware of at this stage.

**CHAIR**—Any time frame?

**Mr Dimasi**—That is not for us; it is not something that we are doing.

**Ms BURKE**—I want to change tack completely. This is something you are probably expecting. The ACCC suffered a couple of heavy losses on section 46 in the High Court last year on Boral and Rural Press. I also note that the commission dropped its section 46 case against Qantas in November. Where do we stand now on section 46? Is the commission still prepared to run cases on section 46 based on a court's current interpretation?

**Mr Samuel**—You are probably already aware of the response, because I am sure you have read the evidence that we gave before the Senate Economics Reference committee and you have seen the—

**Ms BURKE**—Hopefully, we are a lot nicer than Conroy is!

**Mr Samuel**—You have probably also seen the report of the same committee. We still have a number of section 46 cases continuing but we have ceased—is it four?

**Mr Cassidy**—At the time of Boral we had 15 serious section 46 investigations under way. Boral led us to drop four of those. Since then we have dropped another six for reasons unrelated to the court cases—that is not unusual; the evidence was not there—but we have taken on another three. So at the moment we have eight serious investigations under way, and we still have Safeway in court. I think there is another one.

**Mr Smith**—There is one in Queensland.

**Mr Cassidy**—So we have two in court and eight investigations still on foot. As we have said several times in several fora, we are finding section 46 as it is currently drafted a challenging section to work with, and the costs of cases to us, particularly if we lose, can be double digit million dollar figures.

**Ms BURKE**—The Senate Economics References Committee, in its report tabled this week into the Trade Practices Act, agreed unanimously on some of the reforms you advocated but not on others, and the Dawson review that said there needed to be no change to section 46. In your

media release on Tuesday you expressed particular disappointment that there was no unanimous agreement on reforming the 'taking advantage' element of the section. Why is that element so important in your view? Does the High Court's interpretation of this element hinder the operation of the section, in your opinion?

**Mr Cassidy**—There are three key elements in the way section 46 is structured, if you like: first, whether a firm has market power; second, whether the firm has made use of that market power; and, third, whether it was for a purpose that is proscribed in that section. The unanimous recommendations of the committee deal with the issue of market power and the issue of purpose, but unfortunately there was disagreement on the issue of take advantage. We thought that was clarified in the so-called Melways case in the High Court, which was a private action but one that we sought leave to intervene in. We thought there that the court quite clearly said that 'take advantage' means 'to use'—it is no higher than that.

But then in the Rural Press case, which subsequently went to the High Court, the High Court, while acknowledging what it had said in the Melways case, seemed to apply a different test—the 'could' test, which asks, 'Could the firm have done this in a competitive market?' If it could have, then it has not been using its market power. That test seems to us to be a rather higher hurdle than the question of whether they were using their market power. We are still worried that the court has left the interpretation of 'take advantage' unclear. I do not think there is any disagreement between the majority and the minority of the Senate committee as to how it ought to be interpreted. The disagreement is over whether or not there needs to be clarification of that. We are disappointed that the committee was not able to agree on that point.

**Ms BURKE**—Comments in the *Australian Financial Review* on Wednesday, 3 February said that the report 'cites no evidence for the proposition that the status quo harms consumers'. Does the commission believe that an ineffective section 46 is harming consumers and small business? What impact does a weak section 46 have on the economy overall?

**Mr Samuel**—Any anticompetitive conduct harms consumers. Section 46 deals with misuse of market power, which is ultimately anticompetitive conduct. I would have to say that any part of part 4 of the act—which deals with the competition provisions—that proves to be ineffective is having a detrimental impact on consumers.

**Ms BURKE**—I suppose the question is whether we need to define precisely what we mean in section 46. Certainly small business people are coming to me seeking clarification, particularly around notions of predatory pricing. They want to know what it is, how to interpret it, how the ACCC interprets it and how the courts interpret it. Should we have greater transparency in respect of those issues or are we going to spend an awful lot of money going back to the courts to have these issues continually reinterpreted? As Mr Cassidy just pointed out, two courts interpreted the same section in different ways. I am sure if I go through the myriad cases you have done—and you have probably done this—I would find that the courts have interpreted the same section in respect of the same actions differently. Do we need to now define that section more precisely?

**Mr Samuel**—I think the submission that the ACCC put before the Senate Economics References Committee said that the section did not need to change in terms of its fundamental purpose and intention as set out by parliament in 1986-87, when it was last amended. The High

Court has provided a great deal of transparency and some clarification as to what it means. The problem is that the High Court has held that the section does not mean what parliament intended it to mean. Therefore, our recommendation in our submission to the committee was that the section needed to be redrafted. It was not that the intention of parliament that was agreed to in 1986-87—and which, frankly, had never been objected to since by any section of business—should be changed. All sections of business adopted the intention of parliament in 1986-87.

Two years ago, in the Boral case, the High Court ultimately said that the parliament's drafting of the section had not achieved its objective. All that we recommended was that the section needed to be redrafted and clarified in order that the intention adopted by parliament, and accepted by all sections of business in the ensuing 15-year period, was set out. Those sections of business that now put forward the proposition that the section does not need changing are being somewhat disingenuous relative to their silence over the last 15 or 16 years in accepting that the intentions of parliament in 1986-87 were correct.

**Mr Cassidy**—It is perhaps a telling point—and it is mentioned in the Senate committee report—that, in the history of the section, the commission has never won a section 46 case that has gone to a full hearing. The Safeways case is still in play, where we have, if you like, half won. Out of eight section 46 allegations, the full bench of the Federal Court found in our favour in four cases. Now both we and Safeways are seeking leave to appeal to the High Court. Putting that one aside, the commission, since its inception back in 1974, has never won a section 46 case that has gone to a full hearing.

**Mr Samuel**—Which suggests that the section may not be as effective as it should be. From the Dawson report as well, if you read the chapter on section 46 in Dawson you will find that the substantial focus of Dawson was on the effects test and that the Dawson committee did not give a lot of attention to some of the issues that the ACCC raised in its submission to the Senate Economics References Committee. The only reason I mention that is that Dawson is often quoted as having said that the section does not need any change at all. That may well be, if you like, the conclusion that one can draw from that section, but I have to say to you I think that that may primarily be the result of Dawson having focused on the effects test and saying, 'We reject the effects test,' as indeed it had been rejected in the previous inquiries. The committee rejected that and was suggesting therefore that the section should not be changed. I suspect that that is unfair. It would be interesting to know the reaction of the Dawson committee if they were presented with, for example, the submission that the ACCC put before the Senate Economics References Committee and/or the references committee report.

**Mr Cassidy**—And the court decisions. At that time they only had the Boral decision, whereas there have been a number of subsequent decisions by courts.

**Ms BURKE**—Your press release on Tuesday after the Senate select committee report came down said:

> The ACCC notes that the committee has unanimously supported the collective bargaining notification scheme that the ACCC originally proposed to the Dawson committee. The ACCC believes, however, that this scheme needs to retain the $3 million threshold so as to be limited to small businesses collectively bargaining.

The dissenting report from the government senators says that the $3 million should go and be lifted to $10 million.

**Mr Cassidy**—There are two figures of $3 million. In relation to unconscionable conduct, we said in our submission, 'Look, we don't think you need the $3 million threshold.' The basic reasoning there was that it is in the nature of unconscionable conduct that you have a firm in a superior position and a firm in an inferior bargaining position, So we said the $3 million type thresholds are basically irrelevant because that is a necessary part of the unconscionable conduct construct. The majority of the committee said, 'Okay, we will do away with the $3 million.' The minority committee report said, 'Keep the threshold but increase it from $3 million to $10 million.'

Separately there is the collective bargaining proposal which we originally put to the Dawson committee where we suggested also having a $3 million threshold so as to make collective bargaining something which small businesses could use but it would only be available to small business. I have to say that, the way what is a unanimous recommendation in the Senate committee report currently stands, there would be nothing to prevent the four major oil companies approaching us and saying, 'We want to collectively bargain with whoever because there is no size constraint proposed for the collective bargaining arrangements.' That is something that worries us because it seems to us that it is something that should be available to small business, however you wish to define that, and there is nothing magic about our $3 million.

**Mr Samuel**—But the intention was that the collective negotiation facilitation process should apply to small business; it was not intended that it should apply to major oil companies.

**Mr Cassidy**—That is right. So, without wishing to lock in on the $3 million, because, as I say, there is nothing magic about that, we think there should be something there to say that collective negotiation is something which is available to small business rather than being available at large.

**Mr Samuel**—Collective negotiation is available to any size business but, rather than putting small businesses through the process of going for authorisation, collective negotiation facilitation should be available to small business. I think it was just misunderstanding of the threshold.

**Mr Cassidy**—Yes, I think the two $3 million figures got mixed.

**Mr GRIFFIN**—I am conscious of the time. I have a series of questions which relate to funding and litigation crossover, so I might try and fire a few of them at you and see if you can deal with them in one hit. First I have a general question on your overall budgetary position. Where are you headed to this year? Are you on track on budget in an overall sense? Putting litigation to one side for a moment, do you identify any other particular areas where you have got a funding problem? That is the first question.

The second question is: Brian, you have been quoted in the *Sydney Morning Herald* in November regarding your litigation situation—the issues of its funding and the implications for government. Graeme, I have not got the article and I cannot recall the particular case, but the point you were recently quoted as making was that, if government wanted the ACCC to pick up

on issues like this, they would needed to be funded on a one-off basis to do so. That relates to the whole question of litigation cost and the funding for it—what do you do with it?

I am trying to knock these questions over in one hit, because we are not talking about petrol or Telstra. But following on from that, if you guys had a win, where does the money go? Does that have implications for what you do?

**Mr Cassidy**—Last year we had an operating deficit of $10.2 million. This year, when the additional estimates were first prepared, we indicated that we were expecting to have an operating deficit of $6.2 million. Since that time—and this goes back a little while—the estimate of our operating deficit for this financial year has gone to over $8 million. That primarily reflects the cost to us of the AGL case, which cost us $2½ million. We are again looking at an operating deficit this financial year. We are in the process of talking to government about our financial position at the moment. That is happening in context of the budget, so I would prefer not to comment on exactly where that is at.

It is primarily a litigation issue. There were pluses and minuses in last financial year's operating deficit of $10.2 million, but it included an overrun on our litigation expenses of $9 million. So our litigation expenses were the major contributor. Similarly, in our estimates for this financial year there is an operation deficit of over $8 million. We are a looking at an overrun on our litigation expenses this financial year of about the same order of magnitude—about $8 million or so. So we do see our funding issue at the moment as being basically an issue of the litigation costs that we are incurring.

As we have said previously, if we are unable to have an increase in our funding then we may need to look at what we call our 'discretionary areas of activity'. There are some areas of activity that we have, such as mergers and authorisations, where we have no choice; if someone comes through the door with an application, we have to deal with it. In some cases the act actually specifies how we deal with it. So, if we find ourselves with a continuing funding issue, we will need to look at what we loosely call our 'discretionary areas of activity'. Enforcement is one of those activities, because it is always the case that with any possible enforcement action, there is a choice for us as to whether we pursue it—whether the potential beneficial outcome justifies the cost involved. So, depending on what our prospective ongoing financial position is, we may well need to have a look at our discretionary activities, including our enforcement activities.

The particular matter that you referred to in relation to the potential cost is some investigations we have been undertaking in relation to tobacco and possible misleading and deceptive conduct in tobacco advertising, which is not only Australian based, it is something that has been subject to international litigation as well. Basically there we have written to the government indicating that, if we are going to pursue those general issues any further, we would need additional funding specifically for that purpose because it does look to be a very long, complex investigation and if it then resulted in court action it would be a very fiercely contested court action. On the general issue of misleading and deceptive advertising in relation to tobacco, we have been told by our senior counsel that we would be in court for well over six months for any litigation relating to that. We have raised that specific issue with the government.

**Mr Samuel**—I will add three comments. The first is to say that in the context of the work that we have been doing over the past few months on our budget we have been conducting both

internally and with the assistance of external consultants reviews of our operations and efficiencies and the like, and I think it is fair to say that we have come to the conclusion that the efficiencies are in place, that the ship is a tight ship. I think we have managed to satisfy ourselves and others that the primary cause of our deficit problems is associated with the litigation issue. Litigation is becoming increasingly more expensive. We have been taken to higher courts of the land by bigger business, who have been perhaps more willing over recent years to take us on in relation to matters.

The second thing I wanted to say is that you should not take it from anything that Mr Cassidy has said that we are in any way reluctant to take on cases. We are absolutely determined that the sharp point of the pyramid I talked of before is enforcement and we would without any hesitation litigate if we think that that is the means of bringing about proper behaviour and correcting misbehaviour.

**Mr GRIFFIN**—I understand that, accept it and welcome it. The only thing I would say is that if you are dealing in an area where there is some discretion, for example enforcement as it relates to litigation, and when you are dealing with a situation where bigger businesses are keener to take you on and in effect trying to dry you up in relation to litigation action, if you are not been budgeted to actually deal with that then there are real implications for your operation at that pointy end.

**Mr Samuel**—That is right. I understand that. The third thing is that you asked what happens to costs where we win. They go into consolidated revenue.

**Mr GRIFFIN**—I knew the answer.

**Mr Samuel**—I knew you knew it, and I put it on the record. I also put on the record that, coming from the private sector, I found it somewhat incongruous. Mr Cassidy has yet to persuade me that for public interest reasons it is a good process. I do understand that of course we are budgeted to undertake a certain range of enforcement and other activities each year and we should not get the windfall of costs, but it certainly goes against the grain when you win a case and you have spent several million dollars to bring about a win and then you suddenly find that it doesn't matter if you get the costs because it goes to consolidated revenue. Fines I am prepared to give to the government; it is the costs I like to get back.

**Mr GRIFFIN**—The problem at the moment is that you carry the costs in terms of your own budget, in effect, if you pay costs.

**Mr Cassidy**—We have what is called a litigation contingency fund which is meant to meet other party costs where we lose. That fund we think will be basically depleted this financial year. It started the year at a bit over $7 million, but we have just had to pay close to $6 million in Boral's costs in relation to the Boral High Court case. By the end of the financial year that fund is probably going to have little left in it.

**Mr GRIFFIN**—I understand your reason for making the comment about the fact that if, for example, with tobacco advertising we are going to take this up there is an issue for the government there. I am sure you are conscious of it but I would certainly alert you to the fact that I am concerned about our getting into a situation where the budgetary position is so tight

that in fact it is government deciding what your priorities are. That I think is a very dangerous thing to get into.

**CHAIR**—To follow up on this as a general question, if your litigation costs are rising so much, does that mean that anticompetitive behaviour is increasing or is it that you are covering more? Are the lawyers you are employing costing more?

**Mr Samuel**—I do not think it is necessarily evidence of anticompetitive conduct increasing but it is to say that we have been taken on more by bigger business. They are taking us on and taking us to the higher courts in circumstances that perhaps may not have happened in the past. Frankly, legal costs are starting to escalate as well, well beyond anything that I guess we budgeted for in the past. They would be the primary causes.

**Mr Cassidy**—And the cases are getting more complex. Section 46 cases have always been complex but there are now a number of cases of an international dimension. That makes the cases complex and expensive because we need to send people offshore to obtain evidence—witness statements and so forth. It is a combination of those various factors.

**Mr Samuel**—Perhaps I can make one other thing clear which I think also reflects upon the issue of budgeting and litigation. I have been quoted in one paper as suggesting that we need to have a 40 per cent chance of success before we take a case on. That is nonsense. The rules we apply in taking on litigation are the same rules that any lawyer would apply when advising a client whether or not to proceed to litigation: have you got a reasonable prospect of success? 'Reasonable' is not measurable in percentage terms. It is measurable relative to the advice, 'You have no chance.'

We withdrew the Qantas litigation on the Brisbane-Adelaide air route because, on the information or evidence provided to us, particularly by Qantas, very late in the proceedings it became apparent that we had a negligible chance of success. Any legal adviser will tell you that, in those circumstances, you do not proceed with a case, with the potential of it costing us into double digit millions of dollars if the case were lost. All the advice was that we were going to lose the case.

**CHAIR**—The Federal Court has issued a warning on the question of negotiating penalties when a business breaks the law. In December the full bench considered whether it should accept deals or use its discretion. What has happened in that situation?

**Mr Samuel**—That is currently before the Federal Court in the case of Mobil.

**Mr Cassidy**—It was in relation to the sites act. That is the Crown and, in particular, the Minister for Industry, Tourism and Resources versus Mobil. There was an agreed penalty proposed at first instance. The judge at first instance has referred the matter to the full bench of the Federal Court to rule on the status of agreed penalties. We are seeking leave to intervene in that hearing because the agreed penalties are very important to us, particularly in the context of our cartel work. Comment has been made that perhaps some of our agreed penalties have been on the low side. We are looking at that as a general proposition. Being able to put to the court a proposed agreed penalty—of course, it is always up to the court to say that they do not agree;

that they think it is too high or too low—is important to us, especially in the context of our cartel work.

**Mr Smith**—We need to get the cooperation of people in the industry.

**CHAIR**—You are in the curious position of being both the prosecutor and the adjudicator, are you not?

**Mr Samuel**—No. We are in the position of being the prosecutor who has the capacity, as any prosecutor has, to in a sense reach a plea bargain.

**Mr Cassidy**—In the Mobil case the Crown, along with Mobil, went to the Federal Court with an agreed penalty. We are not the only ones who use agreed penalties. I think it would be fair to say that all regulatory agencies use them to a greater or lesser extent. Because of the nature of our work and because at the moment a lot of our jurisdiction is civil, we probably make more use of agreed penalties than some other regulators. It is open to any law regulatory agency to put an agreed penalty to the court, although there is no obligation on the court to accept it. It is up to the court to decide whether they think it is right or not. On occasions we have had our agreed penalties both increased and decreased by the court.

**Mr GRIFFIN**—According to your web site, while the ACCC cannot set or regulate interest rates or fees charged by banks and credit unions, 'it does maintain an informal oversight of bank fees and charges'. Can you explain what you actually do and what happens around it? As you would know, I am on the record ad nauseam calling for formal bank fee and charge monitoring.

**Mr Cassidy**—We do informally monitor bank fees and charges—by 'informally' I mean that there is no obligation on the banks to provide us with relevant information.

**Mr GRIFFIN**—So you ask them for the information and they forward that—

**Mr Cassidy**—It works reasonably well in that the banks have a habit of notifying us when they are proposing changes to their fees and charges. They know the particular areas we are interested in. We basically monitor the fees and charges that are particularly relevant to the average person: personal transaction accounts, basic bank accounts and credit cards. They are the three areas we monitor. That arrangement works, we think, reasonably well in terms of getting the information.

**Mr GRIFFIN**—Do you evaluate the information you are given? If you are provided with a new set of fees and charges by one of the majors, do you look at the question of whether they are reasonable increases?

**Mr Cassidy**—I could not say that we spend a significant amount of time thinking about their reasonableness. We do look at them in terms of understanding what is going on—

**Mr GRIFFIN**—They are going up!

**Mr Cassidy**—Yes and no. I can see that perhaps I am going to get into a debate that I do not want to be in here. But what has been happening typically is that the banks have been increasing their charges for face-to-face transactions—

**Mr GRIFFIN**—And also for electronic transactions.

**Mr Cassidy**—Yes, but some of the electronic charges have actually been reduced. So there has been a rebalancing going on between the face-to-face or over-the-counter transactions and the electronic transactions, although I would have to agree with you that, overall, there has been an upward lift in bank fees and charges. We look at it more to understand what is going on within the market.

**Mr GRIFFIN**—Do you produce any reports on them as part of that monitoring process? The web site says 'informal', and I understand the point you make about 'informal' there. I would say that it is not a transparent process in terms of results or anything like that coming out.

**Mr Cassidy**—There is certainly a truth in that. We have internal reports that are produced on bank fees and charges and what is happening and the results of our monitoring.

**Mr GRIFFIN**—Are you able to provide those to the committee? If you want to take it notice you can.

**Mr Cassidy**—I will take it on notice. The reports at the moment tend to be a mixture of information we obtain through that monitoring activity and also information we glean through other sources. We would have to look at our reports and particularly the information from other sources. Basically, the reports are not saying, 'This is what the latest monitoring shows,' it is more, 'This is what we think is currently happening in the financial sector, particularly with the banks.'

**Mr GRIFFIN**—Could you take it on notice? I will be interested to see what you can provide to the committee about the details. It is certainly an area of serious public concern. We have exchanged correspondence on codes of practice indirectly or directly. Where is the new process up to now?

**Mr Samuel**—As you know, it has been announced and we have issued some draft guidelines to a range of stakeholder interests, from consumers through to small and large business groups. There was a recent meeting of all stakeholder groups to discuss those draft guidelines. I think it is fair to say that there were three reactions that came out of that meeting. The first was from the consumer movement, which suggested that codes of conduct will never be able to deal with the rogues and it is the rogues that cause damage to consumers. On that I would have no disagreement at all. Ultimately, when you are dealing with rogues and scamsters and the like who are out there to rip off consumers, the only way to deal with them is with legislation, regulation and appropriate enforcement action.

The second reaction was from sections of business, who indicated that they thought that the proposed guidelines were too tough and that they imposed too significant an obligation on business, which might result in them not been adopted. There was an interesting corollary expressed which I found quite fascinating. They were concerned because there was evidence that

potentially seven or eight or maybe a dozen business groups might actually adopt codes of conduct consistent with our guidelines and they might achieve ACCC endorsement. I think the words used by one member representing business at that discussion were that, if there were seven, eight, 10 or 12 that actually achieved endorsement of their codes of conduct, that would, by implication, classify those that did not pursue business behaviour codes of conduct as pariahs. That actually seemed to me to be perhaps achieving part of what was sought to be achieved from the codes of conduct.

The third reaction was from other business groups that said, 'We would like to pursue the context of codes of conduct and see whether we can put together codes of practice that might assist the way our business activities operate within an industry.' We should remember that codes of conduct have three purposes, one of which relates to assisting with compliance with the act. I am thinking of things like orange juice codes, labelling codes and things of that nature. They relate to the specific details underpinned by a foundation of misleading and deceptive conduct requirements and other false representation requirements under part V of the act. They are specific codes that relate to compliance with the act. While they are codes that are voluntarily entered into by business, they have a regulatory overlay or burden which focuses on the general proposition that business should not engage in misleading and deceptive conduct or in false representation. They are to deal with some of the details associated with those issues.

The second role of a code of conduct, and one that I think will have a limited impact, is in dealings between business and consumers and in conduct between business, industry sectors and consumers. It will ultimately have an impact only if the vast majority of industry concerned is prepared to comply with the code of conduct and if it essentially leads to the non-compliers being disciplined and/or classified very publicly and very transparently as pariahs. This potentially leads to consumers being sufficiently informed that they should not deal with them. The primary role of codes of conduct is going to be in business to business. It deals with big business and small business concerns that very often governments are not keen to regulate or legislate on because they are not areas prone to regulation. They are not areas concerned with compliance with the Trade Practices Act—the law is already there. They are dealing with issues that have arisen. For example, I mentioned before the retail grocery industry code of conduct, which is dealing with areas of tension and dispute between big business and small business, from small farmers at the producer end through to processors and big retailers. It also deals with how behaviour might be conducted to meet tensions, community expectations and evolving aspirations on the part of producers, processors and retailers.

Those codes of conduct can be very effective if they are complied with by the more powerful members of the industry sectors concerned. If they are not then they are ineffective. In that context, it is perhaps appropriate to note one area where there is tension; that is, the insurance industry and the motor crash repairers. There are tensions that exist there. We have issued discussion papers and talked about the possibility of codes of conduct—in fact, I have done so publicly on the *7.30 Report*. We have been met with a position on the part of the insurers, the more dominant players in that industry tension group, if you like, that simply says they are not interested in a code of conduct. Why are they not interested? Because, frankly, it would impose on them certain standards of behaviour that they are simply not willing to engage in. They are the three elements we are dealing with.

**Mr GRIFFIN**—On that issue, I am not against codes of conduct. I am concerned about how they operate in certain circumstances. It is related to that issue about rogues in relation to industry, but dealing with consumers. The concern that I have is that if you have a code of conduct—and this is a question of finding out when it is actually done—where it is seen as being very widely accepted but there are people outside acting like rogues and pariahs, there can be by accident almost a sense of legitimacy given to them by the operation of that when they are not meeting it. The other point about it is that if a code of conduct is not strong enough in terms of what it does then there is the potential for a business to have it as a seal of approval that will in fact misrepresent what it does. I know that comes into conflict with other aspects of the operation of the act and so on, but a very quick example which is not exactly on that issue is the TGA. In respect of goods being registered and listed with the TGA, listing is a very simple process. It is a necessary process. But there are plenty of people out there who go around and say, 'And it's listed.' It gives an impression that is far beyond what it was meant to be in the first place.

**Mr Samuel**—And thus there is a high degree of caution on our part about endorsing any form of code of conduct that can lead to that form of misrepresentation. Tim might want to comment on, for example, the mortgage brokers' code of conduct or that of Medicines Australia as indications of business and consumer codes.

**Mr Grimwade**—This is in an authorisation context where we have codes of conduct which might raise competition issues in terms of imposing penalties on those who participate in particular practices and there is a risk that some of these codes might breach the act. One of them was the mortgage industry code of conduct. They lodged it for authorisation and we subsequently authorised that code. But it should be recognised that in authorising a code we make quite clear the fact that we are not endorsing that code of conduct—that it has passed a statutory test under the act but has not actually met the best practice criteria of the endorsement process.

**Mr GRIFFIN**—Could you please give us a quick update on where the vulnerable and disadvantaged consumers campaign that Allan Fels launched in June last year is up to?

**Mr Cassidy**—If you do not mind, because I will end up giving you a bit of a scratchy answer, we will take that on notice—that way we give you a fuller answer. But it is certainly still running and still active.

**Mr GRIFFIN**—Okay. All I have seen on that so far is a form on the web site which is there for consumer groups to fill in. I simply wondered where you were up to with that. The other issue is the question of referrals of complaints from other instrumentalities. Again, the particular instance I am looking at is the TGA. I have raised some issues with the TGA about false and misleading issues around the question of medicines, particularly of complementary medicines around the Pan saga. Although I clearly believe it is a TGA issue, they have repeatedly said, 'No, it's ACCC.' Do you have a record of the number of complaints you receive that are referred from other government agencies, state and federal? If so, are you able to provide us with some details about that on notice?

**Mr Cassidy**—Again, let us take that on notice. That will be in our database.

**Mr GRIFFIN**—I would be very happy to get some of that if I could. My last question, given the time, is about Louise Sylvan's recent comments which related to Danoz and the whole question of refunds and where your thinking is up to about what action is needed to be taken with that. I recognise it was only a couple of days ago, so you probably have not advanced it much further, but would you like to very briefly go to that issue?

**Mr Samuel**—It is at its incipiency. We are conscious, because of Medibank Private in particular, of limitations imposed upon us to obtain refunds or restitution for consumers, and I mentioned this in my opening comments. We have two primary courses of action at the moment. The first is to take a representative action under the Trade Practices Act, but that is an opt-in action—we need to get consumers to actually sign up to the representative action. If you were talking, for example, about Abtronics, where you have about $165 at stake, that is a major administrative process to get consumers to opt in.

There is another course of action available, potentially, under the Federal Court act. It is, again, representative action and has the advantage of being opt-out—that is, you can act on behalf of consumers. Providing, I think, you have got six consumers that have signed up to the process, you can act for a class of consumers. That is another course that we are examining. I guess in the end the whole issue of penalties and restitution for consumers will be the subject of some detailed material we will put to government through the appropriate processes with a view to potentially having some amendments to the act.

**Mr GRIFFIN**—Essentially what that Danoz case potentially shows is that one of the reasons you are dealing with litigation in these circumstances is that there is actually a commercial benefit, potentially, for a company to drag it out for as long as possible.

**Mr Samuel**—Absolutely. That is the frustration that I mentioned when I first started.

**CHAIR**—There are a couple more questions I would like to get in before we wind up. In the annual report you talked about Dawson's proposal for giving courts the option of sending to prison those who are involved in hard-core cartels, which you mentioned in your opening remarks. I am just wondering what progress has been made with the working party looking at this recommendation.

**Mr Cassidy**—The working party is actually nearing completion. In fact, Mr Smith is our representative on the working party. As I understand it, it is aiming to have its report to government by the end of this month.

**Mr Smith**—To Treasury.

**Mr Cassidy**—Yes, to Treasury by the end of this month. Then it will be something for the government to consider.

**CHAIR**—Dawson also recommended an increase of penalties for corporations involved in anticompetitive conduct, of this order:

- greater of $10 million or three times the gain from the contravention or, where gain cannot be readily ascertained, 10 per cent of the turnover—

of the company for the period it was engaged in the anticompetitive conduct. What is your view on that recommendation?

**Mr Cassidy**—We would certainly support that. As the chairman has indicated, criminal charges are particularly appropriate in relation to cartel behaviour. But then for other competition breaches, to be quite honest, if you are dealing with a large company, even if they get the maximum fine of $10 million, that is neither here nor there for them. We would certainly support the increase. Indeed, that sort of formulation that they have used is one that is used in quite a number of countries.

**Mr Smith**—Particularly with the cartel offences.

**Mr Cassidy**—And the setting of monetary penalties.

**CHAIR**—You rejected the proposal by the banks to scrap the interchange fee for EFTPOS purchases on the basis that it did not adequately address market access for new entrants. Is there any update on that?

**Mr Samuel**—That has changed since then.

**Mr Grimwade**—Ultimately the commission actually did authorise the proposal by the banks to reduce interchange fees to zero, on the basis that the commission had between its draft decision and its final decision become satisfied that there would be progress on access reform. That authorisation decision was appealed to the Australian Competition Tribunal. The tribunal has set aside, I think, three weeks in April to hear that matter. The appeal was lodged by groups of retailers who stood to lose from the proposed reforms.

**Mr Cassidy**—The reason that the commission changed its position between the draft and the final decision was that it received a submission from the Reserve Bank indicating that it also was concerned about the issue of access to the EFTPOS arrangements. In fact, if access did not occur then it would consider designating the EFTPOS scheme as part of the payment scheme under the payment systems act, which would then allow the bank to stipulate a set of access arrangements. That submission from the Reserve Bank was what gave the commission sufficient confidence that access would occur, so it was able to agree to the application in its final decision.

**Ms BURKE**—I might just put something on notice for next time. At our last hearing we had a great discussion about the authorisation process. Particularly, small individuals were saying that it was too onerous, too costly and too difficult. We had quite a discussion and we mentioned it in our report that we then tabled to parliament. Given the time needed for your ability to answer that, we might come back, if that is all right, with some questions about that authorisation process. Certainly small farming sectors still have problems with the whole process and the costs involved. So we might just revisit that later, if that is all right.

**Mr Samuel**—That is where the collective negotiation facilitation that we have talked of is not only important but also reasonably urgent.

**Ms BURKE**—That might be a better way to go.

**CHAIR**—I take it you are quite happy to take some questions on notice for the things we have not got to. That would be very helpful. I thank everyone for coming along today. I think it has been a very useful hearing. Certainly we are endeavouring to carry out what we said we would at the beginning. Thank you again.

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

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 11.56 a.m.**