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SENATE

ECONOMICS LEGISLATION COMMITTEE

ESTIMATES

(Budget Estimates)

MONDAY, 22 JUNE 2009

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SENATE ECONOMICS

LEGISLATION COMMITTEE

Monday, 22 June 2009

Members: Senator Hurley *(Chair)*, Senator Eggleston *(Deputy Chair)*, Senators Cameron, Joyce, Pratt and Xenophon

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hutchins, Johnston, Kroger, Ludlam, Lundy, Ian Macdonald, McEwen, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Bushby, Cameron, Eggleston, Heffernan, Hurley, Joyce, Pratt and Xenophon.

Committee met at 9.00 am

TREASURY

In Attendance

Senator Sherry, Assistant Treasurer, representing the Minister for Competition Policy and Consumer Affairs

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman
Mr Brian Cassidy, Chief Executive Officer
Mr Scott Gregson, General Manager, Enforcement Co-ordination
Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division
Mr Richard Home, General Manager, Strategic Analysis and Development, Communications Group
Mr Nigel Ridgway, General Manager, Compliance Strategies
Mr Mark Pearson, Executive General Manager, Regulatory Affairs Division
Mr Mike Kiley, General Manager, Enforcement
Mr Tim Grimwade, Executive General Manager, Mergers and Acquisitions Group
Ms Helen Lu, General Manager, Corporate
Mr Adrian Brocklehurst, Chief Financial Officer
Mr Richard Chadwick, General Manager, Adjudication Branch
Mr Peter Betson, Acting General Manager, Water Branch
Ms Michelle Groves, AER Group General Manager

Australian Competition and Consumer Commission

CHAIR (Senator Hurley)—I declare open this public hearing of the Senate Economics Legislation Committee. The Senate has referred to the committee the particulars of proposed

expenditure for 2009-10 and related documents for the Innovation, Industry, Science and Research; Resources and Energy; Tourism; and Treasury portfolios. The committee must report to the Senate on 25 June 2009 and has set 31 July 2009 as the date by which answers to questions on notice are to be returned.

Under standing order 26, the committee must take all evidence in public session. This includes answers to questions on notice. Officers and senators are familiar with the rules of the Senate governing estimates hearings. If you need assistance the secretariat has copies of the rules. I particularly draw the attention of witnesses to an order of the Senate of 13 May 2009 specifying the process by which a claim of public interest immunity should be raised and which I now incorporate into *Hansard*.

The document read as follows—

Order of the Senate—Public interest immunity claims That the Senate—

(a) notes that ministers and officers have continued to refuse to provide information to Senate committees without properly raising claims of public interest immunity as required by past resolutions of the Senate;

(b) reaffirms the principles of past resolutions of the Senate by this order, to provide ministers and officers with guidance as to the proper process for raising public interest immunity claims and to consolidate those past resolutions of the Senate;

(c) orders that the following operate as an order of continuing effect:

(1) If:

(a) a Senate committee, or a senator in the course of proceedings of a committee, requests information or a document from a Commonwealth department or agency; and

(b) an officer of the department or agency to whom the request is directed believes that it may not be in the public interest to disclose the information or document to the committee, the officer shall state to the committee the ground on which the officer believes that it may not be in the public interest to disclose the information or document to the committee, and specify the harm to the public interest that could result from the disclosure of the information or document.

(2) If, after receiving the officer's statement under paragraph (1), the committee or the senator requests the officer to refer the question of the disclosure of the information or document to a responsible minister, the officer shall refer that question to the minister.

(3) If a minister, on a reference by an officer under paragraph (2), concludes that it would not be in the public interest to disclose the information or document to the committee, the minister shall provide to the committee a statement of the ground for that conclusion, specifying the harm to the public interest that could result from the disclosure of the information or document.

(4) A minister, in a statement under paragraph (3), shall indicate whether the harm to the public interest that could result from the disclosure of the information or document to the committee could result only from the publication of the information or document by the committee, or could result, equally or in part, from the disclosure of the information or document to the committee as in camera evidence.

(5) If, after considering a statement by a minister provided under paragraph (3), the committee concludes that the statement does not sufficiently justify the withholding of the information or document from the committee, the committee shall report the matter to the Senate.

(6) A decision by a committee not to report a matter to the Senate under paragraph (5) does not prevent a senator from raising the matter in the Senate in accordance with other procedures of the Senate.

(7) A statement that information or a document is not published, or is confidential, or consists of advice to, or internal deliberations of, government, in the absence of specification of the harm to the public interest that could result from the disclosure of the information or document, is not a statement that meets the requirements of paragraph (1) or (4).

(8) If a minister concludes that a statement under paragraph (3) should more appropriately be made by the head of an agency, by reason of the independence of that agency from ministerial direction or control, the minister shall inform the committee of that conclusion and the reason for that conclusion, and shall refer the matter to the head of the agency, who shall then be required to provide a statement in accordance with paragraph (3).

(d) requires the Procedure Committee to review the operation of this order and report to the Senate by 20 August 2009.

(Agreed to 13 May 2009.)

(Extract, Journals of the Senate, 13 May 2009, p.1941)

Today, the committee will conclude its budget estimates hearing with the Australian Competition and Consumer Commission. I welcome Senator Sherry representing the Minister for Competition Policy and Consumer Affairs and officers of the ACCC. Minister or officers, would you like to make an opening statement?

Senator Sherry—I do not have one.

Mr Cassidy—We do not, either.

CHAIR—Thank you. We will start questions with Senator Joyce.

Senator JOYCE—Who has the discretion in the ACCC to pursue or not to pursue cases?

Mr Cassidy—That operates at several different levels. The initial assessment is undertaken by Mr Bezzi, on my right, who is the head of our enforcement and compliance area, along with our regional directors who run each of our state offices. That is an assessment as to whether a matter is worth going into an initial investigation stage. If you like, that is an initial sifting. Once it is in initial investigation then the decision as to whether it would go to detailed investigation would normally be made by our enforcement committee, which is chaired by one of our commissioners and has several commissioner members.

Senator JOYCE—Who is on the enforcement committee?

Mr Cassidy—It is chaired by Commissioner Sarah Court. Other commissioners on it are the two deputy chairs, Peter Kell and Michael Schaefer. The chairman, Graeme Samuel, is on the committee as well, although he does not chair it. As I said, it is chaired by Commissioner Sarah Court.

Senator JOYCE—He is on the committee as well?

Mr Cassidy—He is on the committee as well.

Senator JOYCE—He is on the enforcement committee as well?

Mr Cassidy—Yes. That is right.

Senator JOYCE—Mr Bezzi, generally there would be a range of items that go through to the enforcement committee and they are dealt with. What is the strike rate of items that you take forward to the enforcement committee?

Mr Cassidy—Do you mean in terms of their investigations?

Senator JOYCE—Yes. Do you get one a week or one a month?

Mr Cassidy—I will ask Mr Gregson, who is one of Mr Bezzi's senior officers, to talk a bit more through the process for you.

Mr Gregson—At present we are taking approximately 10 matters or thereabouts to the committee each week. I do not have the raw statistics as to which of those decisions to pursue are supported or not, but with a large percentage of matters that are taken up recommendations are either accepted or varied in some small form.

Senator JOYCE—Is the process of the enforcement committee by a vote or by a consensus of the committee?

Mr Gregson—Generally it is by consensus. If necessary, there would be a show of hands.

Senator JOYCE—How many Birdsville amendment section 46(1AA) related complaints did the ACCC receive since the last estimate's hearing? I know you will be ready for this question because I ask it every time.

Mr Bezzi—At the time of our last appearance our chair outlined that since 18 September 2007, which is the date that the amendment came into effect, the ACCC had received 154 contacts in relation to predatory pricing, with 145 alleging predatory pricing and nine seeking information about the provision. I can inform you that the ACCC has now recorded 188 contacts since that date, comprising 175 alleging predatory pricing and 13 seeking information about the provision. That is an increase of 34 contacts in total, comprising 30 alleging predatory pricing and four seeking information about the provision. None of the complaints received since our last appearance have progressed to in-depth stage.

Senator JOYCE—That is my next question. You must be reading my mind.

Mr Bezzi—However, we currently do have two in-depth predatory pricing investigations. I should say we have taken predatory pricing cases in the past, but we have not done so since the introduction of the provision in September 2007.

Senator JOYCE—Has the ACCC taken any Birdsville amendment section 46(1AA) cases to court?

Mr Bezzi—Not since the provision came in, no.

Senator JOYCE—None. This is the question that has to be asked. Has any instruction or direction been given to any ACCC staff member that would be seen as discouraging the investigation of breaches of the Birdsville amendment?

Mr Cassidy—No. Indeed, just to elaborate on that, given that it is a new provision, if anything we would like to be able to bring some cases before the court under that provision simply to start to get clarity from the court as to how it is going to be interpreted. The short answer is no but, if anything, with a leaning towards trying to find some cases to bring to the court. Certainly there is no instruction to the contrary.

Senator JOYCE—Obviously it has been in the paper that there is a strong wealth of feeling by such people as the Law Council who have made their position quite clear that they

do not agree with the Birdsville amendment. They do not like it as a piece of law. Do they make representations to you from time to time?

Mr Cassidy—I think I am right in saying that they have not said anything to us about the Birdsville amendment since early 2008 when the government sought to amend it and parliament did not accept the amendments. I do not think we have heard from the Law Council, or anyone else for that matter, on the Birdsville amendment in terms of its actual merits or whether anything should be done about it. As I said, we have not heard from any of those parties for some time.

Senator JOYCE—Has Mr Samuel ever said anything on the record that he does not agree with it as a law?

Mr Cassidy—When it was being debated back in 2007 I think we indicated—that is a collective we—that we had some difficulties with the proposed amendment, but since parliament has passed it, as far as we are concerned it is now part of the law and needs to be enforced the same as the rest of the law.

Senator JOYCE—What was the last public statement that has come from the ACCC that has said that they had issues concerning section 46(1AA)?

Mr Cassidy—Again, I am relying on memory, but I do not think we have said anything since it was before the parliament, because normally our approach is that while, as a regulator, we might comment on proposed changes to the law, we take a view that once they are before parliament it is then a matter for parliament. If they are passed by parliament then it is our job to enforce them.

Senator JOYCE—It is clinical; it is cut and dried. It is the law. There have been no representations or statements made. There is nobody in the ACCC who has given any warrant or recommendation that they will not pursue it to the nth degree or would be part of the process of trying to not pursue it; that has never happened?

Mr Cassidy—That is correct. As I said, if anything, we are trying to find some cases to bring on the amendment so we can start to get some clarity from the courts as to how they are going to interpret it.

Senator JOYCE—What happens if you take it upon yourself not to enforce a direction of the Trade Practices Act that would otherwise be enforced?

Mr Cassidy—Maybe I can cut this short by saying that we do not have any directions either from external parties or internally about not enforcing any sections of the law that we are responsible for. The law is there and it is our job to enforce it.

Senator JOYCE—I know that. What would be the ramifications, if you did?

Mr Cassidy—That is a hypothetical question.

Senator JOYCE—I will be more direct.

Mr Cassidy—Yes.

Senator JOYCE—Is there a section of legislation, the penal code or anything that provides—and I do not know what the technical term for it is—what happens to someone if

they decided to convert the process so as not to enforce a section of the act? Is that made aware to people in the ACCC?

Mr Cassidy—I am not aware of any such section of the law. Again, as a general comment, we need to exercise discretion in terms of what we go after and what we enforce. We have plenty of material in the public arena about how we do that, what criteria we use and so forth. That said, I am not aware of any statutory provision that in any sense obligates us to enforce the law, other than what is in the Trade Practices Act. The law is there and it is the commission's responsibility to enforce that act.

Senator JOYCE—If you saw something that was a breach of the Trade Practices Act you could, within your enforcement committee, decide on that occasion not to enforce it. You are not bound to enforce it.

Mr Cassidy—No. Indeed, I would have to say to you that we cannot and do not seek to enforce every single breach that we may see of the act. Our resources simply do not run to that and, to be honest, they never will because we see a number of breaches of different sections of the act which may be a technical breach by a single trader involving a single customer where there is no sense and no purpose in enforcing and taking that off to court. They are decisions that have got to be made every day.

Senator JOYCE—De minimis non curat lex. The court will not involve itself in trivialities.

Mr Cassidy—Yes, if you say so. I did not have the advantage of a classical education so I will rely on you for the Latin translations.

Senator Sherry—The *Hansard* might find that a little difficult. I am afraid my study of French at high school was an abysmal failure. I do not know what would have happened if I had studied Latin.

Senator JOYCE—Has the ACCC issued any guidelines specifically regarding the Birdsville amendment?

Mr Cassidy—No, we do not have guidelines as such.

Senator JOYCE—Why not?

Mr Cassidy—Basically because we are still coming to grips with what the new amendment actually means. While not putting out formal guidelines, we have issued some material that talks about predatory pricing generally which would apply to the so-called Birdsville amendment, 46(1AA), just as it applies to 46(1), but we have not put out specific guidelines on 46(1AA).

Senator JOYCE—This came in on 18 September 2007. We are now heading towards 18 September 2009. Obviously we are in June at the moment. Let us just be round with the figures. We are talking about two years here. Do you not think that is sufficient time to issue guidelines?

Mr Cassidy—It is not a time issue for us, it is more an issue that there are concepts in 46(1AA) that we might have a view on in terms of what they mean or what the courts might say they mean. We are a bit wary of putting out guidelines that may be proven wrong. We did

have an unfortunate experience back in the GST days where we put out, as I recall, a lot of guidelines on the GST, but some of those were subsequently proved to be wrong in terms of our interpretation, so we are a bit wary. Unless we feel reasonably confident from existing jurisprudence, we are a bit wary of putting out guidelines where either we run the risk of them being proven to be incorrect or, alternatively, the guidelines are so heavily qualified that they are not of great use to people.

The other thing I might say, which was a discussion that you and I have had before, people do not come to us saying, 'I've got a complaint under 46(1AA).' They say, 'I've got a complaint about predatory pricing.' We do have guidelines out there on predatory pricing, what it is and what it is not.

Senator JOYCE—Have they been updated to take into account section 46(1AA), the Birdsville amendment?

Mr Cassidy—They have.

Senator JOYCE—When you were talking about the previous guidelines—I think you were referring to the GST where you said you had problems with them—how long were those guidelines issued after the implementation of the legislation?

Mr Cassidy—We put those out fairly quickly.

Senator JOYCE—How quickly?

Mr Cassidy—I would have to go back and check.

Senator JOYCE—A month?

Mr Cassidy—It was very soon afterwards.

Senator JOYCE—Would it be a month or half a year?

Mr Cassidy—A month or a couple of months. It could have been a shorter time than that.

Senator JOYCE—It could have been shorter than a couple of months. Do you not find it peculiar that we are waiting a couple of years and we still have not got the guidelines out on this piece of legislation?

Mr Cassidy—I do not know if I can say much more than perhaps I have already said. We have thought about it, but then we worry about putting out specific guidelines that may end up being misleading.

Senator JOYCE—How many years do you think we should wait before we get them out?

Mr Cassidy—We would really like to have some clarity or at least some indications from the court as to how they are going to interpret 46(1AA).

Senator JOYCE—You have not taken anything to court yet, have you?

Mr Cassidy—No. As I said, we are really trying hard, but as yet we have not got a case to court on the 46(1AA).

Senator JOYCE—You could understand how someone from the outside looking in could say that as you have not got the guidelines out, not one case has been to the court and that 188

cases have been brought to you, which is the 175 with 13 wanting further information or representation, one might be able to deem that you are not serious about the law of this land.

Mr Cassidy—I can understand how someone might say that, in the same way as over a number of years some people have accused us of not being interested in section 46 more generally because we went through a long period following the High Court decision in the Boral case where we did not have any section 46 cases in court, but as I have said to this committee on a number of occasions we never gave up on section 46. We have always had matters under detailed investigation on section 46 and similarly we have matters under detailed investigation in relation to predatory pricing, which is part of section 46, but we have not been able yet to get one to court.

Senator JOYCE—Have you had any other piece of legislation where it has taken around about two years to get the guidelines out?

Mr Cassidy—I daresay we probably have but again, off the top of my head, I could not tell you.

Senator JOYCE—Can you take that on notice?

Mr Cassidy—Let me take that on notice.

Senator JOYCE—Is there any other piece of legislation where it has taken this long to get the guidelines out?

Mr Cassidy—Yes. We will take that on notice for you.

Senator JOYCE—Have you got any others that have taken a while that you can recollect?

Mr Cassidy—I am afraid you are testing my memory. Perhaps we could take that on notice. We could roll that whole question together for you and give you an answer which covers both, in a sense, no guidelines or where it has taken us a while to get guidelines out.

Senator JOYCE—How often do you have to put guidelines out?

Mr Cassidy—We look at putting out guidelines whenever there is a change in the legislation.

Senator JOYCE—That is often.

Mr Cassidy—As I say, we have to ask ourselves whether there are guidelines that we can usefully put out, but we do, in a sense, look at the possibility of getting out guidelines each time the legislation changes.

Senator JOYCE—Generally, what sort of time frame are you looking for to get them out?

Mr Cassidy—It varies. Let me give you a current example. With the unit pricing code—it might have been promulgated by an executive council last week, but I have not got an update on that—we have guidelines virtually ready to go on that simply because we have had a long lead time on it, whereas on some other occasions where either the legislation comes up at short notice or there is some uncertainty about whether it is going to receive passage or not, it may take a little while longer to get guidelines out.

I might say that it is not only 46(1AA), but section 46 more generally. We have not rushed to put out new guidelines simply because of the difficulty of the law and the lack of certainty on our part as to exactly how the court is going to interpret some of that.

Senator JOYCE—Does the minister or someone from the minister's office ever get on to you and say, 'You'd better hurry up with those guidelines. You're dragging the chain. We need them through.'?

Mr Cassidy—Again, I daresay that probably has happened on occasion. I cannot recall any specific instance. Ministers, over a period of time—and obviously I am talking about current and previous governments—have tended to take the attitude that, once legislation is passed, the administration of it is then up to the commission.

Senator JOYCE—You just said that at times they ring up and say, 'Can we hurry up with those?'

Mr Cassidy—They may have. I cannot recall a specific instance.

Senator JOYCE—Does anybody else recall whether they have ever rung up? No-one remembers ever getting a phone call saying to hurry up?

Mr Cassidy—I think it is a bit unusual for that to happen, simply because that is not the approach which successive ministers have tended to take once the legislation is passed.

Senator JOYCE—Do they ever ring up and say, 'Slow down.'?

Mr Cassidy—No, for much the same sort of reason I have just given you. I cannot recall ever getting that sort of phone call, nor would I expect we would. As I said, successive ministers and successive governments have taken the attitude that, once the law is passed, it is up to us as to how we administer it.

Senator JOYCE—Has the attitude of the government ever been conveyed that they do not agree with a certain law? Has it become clear and apparent that their position on a certain law is that they do not agree with it?

Mr Cassidy—No, certainly not that I can recall. I am anticipating the next question will be on Birdsville and no, absolutely not.

Senator JOYCE—Has the ACCC issued guidelines on component pricing, for example?

Mr Cassidy—We have. Again, we had some lead time on that because the component pricing legislation was passed in November-December last year with the deliberate strategy of having a six-month period before it came into effect. We had a six-month period during which we were out consulting with industry.

Senator JOYCE—You have issued guidelines.

Mr Cassidy—We have put out guidance on the component pricing, yes.

Senator JOYCE—Why have you not done it on the Birdsville amendment?

Mr Cassidy—Again, as I said, the Birdsville amendment, in terms of some of the concepts in it, is a lot more complex than component pricing. Component pricing is basically about putting a section of the law back to where most of us thought it was before a couple of court decisions which told us that the law did not say what we thought it said.

Senator JOYCE—How long did it take you to issue the guidelines on component pricing?

Mr Cassidy—As I said, we had a six-month window between when it was passed by parliament and when it came into effect. We had the guidelines out during that six-month period and I think shortly before the law actually came into force. You could say five months.

Senator JOYCE—Five months?

Mr Cassidy—Yes.

Senator JOYCE—It took you five months to get the guidelines out on component pricing and we are heading towards two years for the 46(1AA).

Mr Cassidy—Yes. As I say, component pricing is fairly familiar territory to us. We have jurisprudence on component pricing.

Senator JOYCE—How did you get the jurisprudence?

Mr Cassidy—The whole component pricing law was about putting the particular section of the act back to where we thought it was before we had the particular court decisions. We had an abundance of material to, in a sense, draw on in doing those guidelines.

Senator JOYCE—Have you taken a case to court on component pricing?

Mr Cassidy—No, not on the new provision, but we had court decisions which told us, in a sense, what the courts thought was wrong with the previous section and that is what shaped the drafting of the new section.

Senator JOYCE—Just briefly for the record, the reason post Boral that section 46 never went anywhere was substantial lessening of the competition test, as provided by the court, was virtually impossible to prove, wasn't it?

Mr Cassidy—It became very difficult to establish a substantial degree of market power.

Senator JOYCE—'Very difficult' would suggest that there was something that actually succeeded under that. Did anything ever succeed?

Mr Cassidy—No. As I say, it became more difficult. We have taken two cases in relation to section 46 post Boral.

Senator JOYCE—For the record, when was the Boral case?

Mr Cassidy—I will not rely on memory, otherwise I will end up giving you an incorrect answer. It was in 2003.

Senator JOYCE—From 2003 to 2007 you are saying that you had two cases. In fact, you were not successful with any section 46 cases, were you, post-Boral?

Mr Cassidy—Touch wood, we count one being successful, which is the Baxter case.

Senator JOYCE—Did it actually go to court?

Mr Cassidy—Although that may well be still appealed to the High Court for a third time. We are not quite sure on that one, but as it stands at the moment that is a successful case.

Senator JOYCE—That would suggest not 'very difficult', but impossible.

Mr Cassidy—Yes. That is why both the previous government and the current government amended section 46.

Senator JOYCE—And why there was the move towards the market share test away from the substantial lessening of competition test. Do you have strong feelings about the market share test? Has it been conveyed within the ACCC that there are strong feelings about the market share test?

CHAIR—That is opinion. Perhaps you could rephrase that.

Senator JOYCE—What education programs has the ACCC developed regarding the Birdsville amendment?

Mr Cassidy—For the reasons I have already referred to, we have not developed any at this stage.

Senator JOYCE—After two years there is no education program, either?

Mr Cassidy—No. We do have material up on our website in relation to it, but we have not developed an education program.

Senator JOYCE—Why not?

Mr Cassidy—For the reasons I was going through earlier. We do not have great confidence in exactly how a court is going to interpret 'substantial market share'.

Senator JOYCE—Could it be seen from what we have discussed so far that there are no education programs, no guidelines, no cases taken forward to the court, 188 cases that have been brought to your attention, and it was back in September 2007 that the actual legislation was passed so you would have to suggest that there is something going on as to why you are not pursuing this case and that somebody, somewhere, has decided rather than to push this agenda along, to slow it down. Where did that happen?

Mr Cassidy—I am telling you that is not the case. There have been 175 complaints on predatory pricing. I keep saying we do not have people phoning us saying, 'I've got a complaint under the Birdsville amendment.' One hundred and seventy-five complaints on predatory pricing since September 2007 is not a large number. That is running at about 10 a month. At the moment we are dealing with about 2,500 contacts a week, which is 10,000 a month, so to put it into context out of 10,000 contacts a month, we are getting in total about 40 in relation to predatory pricing.

Senator JOYCE—Do you have any sort of window into the future on when you think you will get the guidelines, you will develop a substantial education process and there will be cases pursued? How much longer should we wait before the Australian people believe that a law of the land is actually being pursued?

Mr Cassidy—There are two parts to that question. Let me firstly say I would not agree with the second part, that the people of Australia do not believe that the laws are not being pursued. In relation to the first part, we currently have two competitive pricing matters under detailed investigation. We are looking at both of them against 46(1) and 46(1AA) to see which of those is going to prove up. As soon as we can get some jurisprudence on 46(1AA) we will be putting out guidelines, education material and so forth.

Senator JOYCE—I am fascinated. What is holding up getting jurisprudence on 46(1AA)?

Mr Cassidy—To be quite frank, we simply are not quite sure what some of the concepts in it mean. I could start firing questions at you and get you to start trying to answer them in terms of the market share.

Senator JOYCE—You have got to remember that I ask the questions and you answer them.

Mr Cassidy—That is true, but I seem to be answering the same question several times. We just do not know with great confidence what some of the concepts in 46(1AA) mean or what the courts are going to say they mean.

Senator JOYCE—Are these the discussions in the ACCC? Is this the confusion in the ACCC?

Mr Cassidy—I would not say 'confusion'. It is something we are testing in terms of our investigations. It is something we are getting advice on, both legal and economic, so that we can hopefully put forward when we go to court as good a case as we can in relation to 46(1AA), but we have not got there yet.

Senator JOYCE—I will try to help you out. The problem is trying to understand what these concepts mean. Have you decided on issuing discussion or consultation papers to get industry feedback as to what the concepts of the Birdsville amendment mean?

Mr Cassidy—No, we have not. I have got to say, at the end of the day, that industry feedback on what the concept in law means is not much use to us. The guidelines we put out need to attempt to tell people what the courts are going to interpret the law as meaning, not the general population at large.

Senator JOYCE—You have never considered issuing a consultation paper to get industry feedback. One could also presume, watching this from the outside, that even in trying to raise the fog that is apparent in the ACCC about what it all means, you are not doing much to help lift it, are you?

Mr Cassidy—As I say, to go and ask the population at large what the law means is not a process that we or any other law enforcement agency goes through.

Senator JOYCE—Have you attempted to do it to see what happens?

Mr Cassidy—No, we have not, for the reason I have just given you. It would be of absolutely no use.

Senator JOYCE—It would be of no use.

Mr Cassidy—We cannot put out a guideline saying to people, 'The great majority of the population think it means this'; it is a question of what the courts think it means.

Senator JOYCE—No, it is a discussion or consultation paper to get industry feedback. You do not have to issue a guideline, you can have a consultation or industry discussion paper to get feedback, but you have never tried to do that, have you?

Mr Cassidy—No, because it would be of no use to us.

Senator Sherry—I think the questions are starting to go around and around. Mr Cassidy has well outlined the circumstances on this issue on three or four occasions that I can recall.

CHAIR—Senator Joyce, I know there are other senators with questions.

Senator JOYCE—Are you clear what 'substantial market power' means?

Mr Cassidy—As a result of a number of court cases over a number of years we think we know what a substantial degree of market power means although, as you know, it has been clarified in the legislation so we will not really know until we get a court decision on the new provisions, which we do not have yet. I might say that it is not only predatory pricing, we have not taken a section 46 case to court under any of the new provisions of section 46.

Senator JOYCE—That is what we are trying to fix, isn't it?

Mr Cassidy—That is right. Indeed, we are trying hard. We have 12 section 46 matters under detailed investigation at the moment, of which two are on predatory pricing, but so far we have not been able to get a section 46 case under new law to court; that is not just on predatory pricing, but the whole of section 46.

Senator JOYCE—It is quite evident even across the globe that there are descriptions in other trade practice jurisdictions on what 'substantial market power' means.

Mr Cassidy—No. You have got to be careful about making those sweeping statements.

Senator JOYCE—I am not making any sweeping statements.

Mr Cassidy—In the US, for argument's sake, section 2 of the Sherman Act says something like monopolisation is an indictable offence. That is the equivalent of our section 46, so there is no definition there of a substantial degree of market power. I think the European law, article 86 of the Treaty of Rome, says something along the lines of abuse of a monopoly position is an offence. Again, there is no definition of a substantial degree of market power there. The only other country that I can immediately think of that has that same terminology is New Zealand, which of course has similar law to us and similar jurisprudence; the courts in New Zealand look at the Australian courts and their interpretation of the law and vice versa.

Senator JOYCE—This is my final question. I will come back to other things, but I will let other people have a go. You are not using this statement of a fog of lack of clarity as a foil to specifically not pursue a case under 46(1AA) because of an inherent culture that is just at odds with 46(1AA)?

Mr Cassidy—No, quite the contrary, as I have already said this morning. If anything, we are leaning the other way, trying to get a case that we can take on 46(1AA) so that we can start to get it clarified.

Senator JOYCE—We will look forward, in the near future, to you taking a section 46—I do not care if it is 46(1) or 46(1AA)—case into court.

Mr Cassidy—I do not want to get hung on your word 'near', but you can look forward to us taking a case on predatory pricing as soon as we have one where we can get legal advice, which is the other issue you need to keep in mind. Before we can go to court we need to have legal advice that we have reasonable basis for instituting a case. As soon as we can get legal advice on a predatory pricing case to that effect, then we will take it.

Senator JOYCE—You will do everything in your power to remove this fog of concern about the clarity of 46(1AA)?

Mr Cassidy—Yes. We try to have the law that we administer as clearly understood by everyone as we can. With respect, to suggest otherwise, is disingenuous to say the least when you look at the efforts we make to explain the law.

Senator JOYCE—Thank you.

Senator Sherry—I know Senator Joyce referred to fog. I think it is appropriate to indicate that Mr Samuel was coming this morning, but regrettably the fog has delayed his flight.

CHAIR—Mr Cassidy is doing very well.

Senator Sherry—I know he is, but I just wanted to indicate that out of respect to the committee.

Senator HEFFERNAN—Anyone who is mug enough to want to get a morning plane into Canberra in the middle of winter needs to get their head checked.

CHAIR—Senator Heffernan—

Senator JOYCE—I have more questions, but I will let others ask questions.

Senator HEFFERNAN—Mr Cassidy, thanks for your help. Are you familiar with your like body in Canada?

Mr Cassidy—Yes. We have a fair bit to do with the Competition Bureau in Canada.

Senator HEFFERNAN—My understanding is that when they give a consideration to a competition matter they not only look at the retail impact of that, but also the producer impact of it. I just came back from there a month or two ago. In Canada my understanding is that of the retail market the top five companies have 60 per cent of the market, and in the US it is 40 per cent of the market. One of the things that I discussed with them is how do they work this out with their legislation. Given that here Coles and Woolworths allegedly have 80 per cent of the retail package market, 50 per cent of the vegetables and so on, I would have thought that is significant market power. There is also the fact that in Canada an Australian rack of lamb is considerably cheaper over there than it is here—it is our lamb and it is sent to Canada—and that beef cattle at the present time in the saleyards in real terms is cheaper than it has been for 25 years, and yet in the supermarket it has never been dearer. There is something wrong. They look at not only the impact of a proposed merger and market consolidation on the retail impact, but also on the market impact, the producer impact and the lack of competition for the producers. Have you given consideration to doing that?

Mr Cassidy—So do we, in the sense that when we are looking at any potential breach of the act, including under the merger provisions in section 50, we look at what you might call the horizontal market, which is the possible effect it might have on competitors, but we also look at the vertical market of what effect it will have on the supply chain and on suppliers to the particular firms involved. That is common throughout antitrust law. All countries look at these things both on a horizontal and on a vertical basis.

Senator HEFFERNAN—I have been over there and had a look because you cannot believe what you hear. For instance, on average, the US producer gets 50 per cent more at the

farm gate for his beef than an Australian farmer does, yet the consumer pays 50 per cent less on average at the retail market. Do you think there is a problem?

Mr Cassidy—I do not think I could answer that question.

Senator HEFFERNAN—This is just giving you a bit of a heads-up.

Mr Cassidy—Let me invite you to read the report we did on the red meat supply chain in Australia a couple of years ago, because that will get us started on the factors that are operating in the Australian market.

Senator HEFFERNAN—The difficulty we have now is that if Woolworths or Coles pull out of a market on any day, or decide to load the abattoir because they think the market is getting a bit ahead of what they think is a reasonable thing, they can draw out of a feedlot somewhere and absolutely use the market power, which is obviously what is going on. In another place with another committee we ought to deal with that because I have just been to the US and it is amazing that our lamb in Canada—prime lamb, cryovac rack of lamb—is cheaper than it is here, in some instances by 50 per cent. I would like to take you to a couple of inquiries that I would like to make. I am aware that there will be some protocols here. Has the ACCC had any referrals to it from issues arising out of the managed investment schemes? There is an issue of competition.

Mr Cassidy—I think they are issues that would probably go to ASIC rather than to ourselves. I cannot recall any issues being raised.

Senator HEFFERNAN—I am hoping you might come along and give evidence to another committee on that as well.

Senator Sherry—This issue has been raised before. Regulatory issues in financial services and managed investment schemes are the province of ASIC.

Senator HEFFERNAN—I understand that.

Senator Sherry—Alleged claims of competition and so on, and the consequences that may or may not flow from that are matters for ASIC.

Senator HEFFERNAN—Thank you. For instance, in the mango market where it is a very diabolical and traumatic time for the investors in this industry, it is not necessarily in the interest of maximising the benefit for shareholders and promoters but for the investors, because they own the crop, to necessarily market it in the most productive way. The owners, the shareholders, get their returns from management fees and capital appreciation, which of course has all turned to a bucket of custard now. There are instances of MIS produce being dumped on the market to get rid of it, and in turn that has serious competition follow-ons for producers that do not have the advantage of the capital structure and the production cycle of a managed investment scheme. Has anyone raised that with you?

Mr Cassidy—No.

Senator HEFFERNAN—I would have thought it would be a genuine competition issue.

Mr Cassidy—Let us be clear. The investment scheme issues would be ASIC.

Senator HEFFERNAN—The impact on the market.

Mr Cassidy—The question of the resulting physical produce being dumped on, say, the Australian market—

Senator HEFFERNAN—Is that an issue here?

Mr Cassidy—No. Firstly, it has not been raised with us and, secondly, selling goods at an artificially low price, if I can put it that way, unless it has some predatory context to it, is simply not something that the Trade Practices Act would deal with.

Senator HEFFERNAN—I will put it to you in a different context. Thank you for your indulgence, Madam Chair. If I am Woolworths and Coles or whoever it is with serious market power—would you agree they have serious market power?

Mr Cassidy—It would depend. We keep thinking of things in terms of the market.

Senator HEFFERNAN—I will put it to you another way. I will clarify the issue for you. You did find in another hearing that a company that had 73 per cent of the wholesale market and 100 per cent of the Australian manufacture of a product did have market power.

Mr Cassidy—Yes, in a particular market.

Senator HEFFERNAN—There were serious issues, which we will not deal with here. If two companies have 80 per cent of the retail package market and 50 per cent of the vegetable, meat et cetera markets, surely you would have to say they are in a position of influencing market power?

Mr Cassidy—On the face of it, now that you have defined the market, I would say yes.

Senator HEFFERNAN—If I were wanting to maximise the greed factor in that for the shareholders—there is an ASIC obligation to the shareholders of these companies to maximise the profit and bugger off the producers if you have to in the process because that is of no consequence to them—the next step that I would take if I were a Woolworths and Coles type operation where you have the majority of the market would have been in the long-term to tie up, for instance, strawberries to a managed investment scheme produced production line because it does not really matter to the shareholders of the MIS what they get for the strawberries. That only matters to the poor buggers that were the investors. That actually happens. The olive market and the grape market are really good examples. Are these serious considerations for you to consider? Should there be a study going on?

Mr Cassidy—As I said, what I might call the financial issues are for ASIC.

Senator HEFFERNAN—But the market issues are for you.

Mr Cassidy—If you are saying that as a result of produce being sold in the Australian market at artificially low prices unless that is done with predatory intent, in other words to try to knock out a competitor or damage a competitor, then there is no law in selling something at an artificially low price.

Senator HEFFERNAN—Thank you for that. In the business plan of the MIS arrangement, they can more or less sell their stuff for it does not matter what. That does not worry you because it is not predatory; it just means that because they have a business model that says the return from the crop does not affect the impact of the shareholders because it impacts the investors who got the tax deduction upfront, then it is not an issue for you.

Mr Cassidy—As I said, it is not something that falls within the purview of the law that we administer.

Senator Sherry—Timbercorp and Great Southern are in receivership.

Senator HEFFERNAN—I understand all of that.

Senator Sherry—Whatever flows in terms of pricing of the goods that they have been producing, when a firm is in receivership that is not deliberate dumping of products.

Senator HEFFERNAN—I respect your comments, but I am referring to pre-administration, like last year and previous years. No doubt that will all come out in due course, although I do note that some of my witnesses have now been put on legal notice. As you know, Mr Cassidy, we have an interim report on the sheepskin issue in Tasmania. Once again dealing with market power and Swift closing their kill for outsiders and the King Island operation—I take it that you will pull me up if I step over the line here—and the specific issue of the quaint system of tendering for sheepskins where you have a person who gets an economic return from managing the tender for the sheepskins, but who also gives Swift the opportunity to top the top price in the tender system when the tenders are opened, which absolutely put Cuthbertson Brothers out of business, whether temporarily or permanently, I understand, having followed a visit to Tasmania and telling the farmers to get off their backsides, some of them have. Have you any information you could supply to this committee on where you are up to with that that is appropriate, without breaching anything?

Mr Cassidy—As you probably know because it is fairly public—and indeed Senator Abetz who is not here has been taking a keen interest in it as well—it is something we have been investigating. There were a number of issues raised, but from our investigations it does basically come down to what you call perhaps a 'quaint' tender or bidding system that they operate. We are still looking into that. There are some mitigating circumstances in terms of the widespread knowledge that people seem to have of the way that system operates and the fact that Cuthbertson has been buying skins directly from the growers, which they are quite free to do. Whether at the end of the day there will be any sort of potential breach in that we are not sure, but we are still across this actual issue.

Senator HEFFERNAN—You would have to agree though that a tender system where someone gets to open the tenders and has the opportunity to top the price after the tenders have closed and been opened and examined is not a genuine tender system.

Mr Cassidy—To use your word, it is a 'quaint' tendering system. But perhaps I will not comment too much; otherwise, I will talk about matters being investigated. But the way we understand that having worked is that, if Swift exercise what you might call 'a last right of offer' or they do so at a price that is above the highest price that has been bid—

Senator HEFFERNAN—Wouldn't it be more appropriate to have an auction though?

Mr Cassidy—they do so at consumer-grower detriment, because they are paying a price that is above the highest one bid. It is a more complex issue whether that—

Senator HEFFERNAN—Is to put other people out of the market.

Mr Cassidy—Yes, whether it affects the bidding behaviour. That is what we are still looking at.

Senator HEFFERNAN—No; whether it is predatory in the impact that it would have on closing down the other business. That is obviously what they are up to.

Mr Cassidy—You say 'obviously'. I am sorry; we cannot see that it is predatory and—I think this is reasonably public also—as for the particular parties, our legal advice is that there is not any predatory behaviour in it. So we are not looking at a predatory issue; we are looking at a possible—

Senator HEFFERNAN—But you did say earlier 'if it is designed to do damage to the market'. I hope you have noted that 40 people in Brazil, in the head office arrangements of Swift, are facing criminal charges on a range of issues surrounding this sort of behaviour, as we sit here this morning. So this is company culture being imposed on Australia and, if allowed to go on, it will be at great cost to Australia's farmers. I hope you note that. Are you aware of the charges in Brazil?

Mr Cassidy—Yes, we are aware of that—

Senator HEFFERNAN—Are you following up the content of those charges—

Mr Cassidy—Under Australian law, we cannot—

Senator HEFFERNAN—to inform yourselves?

Mr Cassidy—go after someone because we do not like the look of them.

CHAIR—Senator Heffernan, Mr Cassidy is trying to answer.

Senator HEFFERNAN—He understands that I am—

Mr Cassidy—Yes, I know. But I think I have really gone about as far as I can in talking about—

Senator HEFFERNAN—Okay; thank you very much.

Mr Cassidy—a matter that is still under investigation, albeit in a very public sort of way.

Senator HEFFERNAN—Have you taken an interest in the impact on the provision of health care, running from Australia's agreement under the free trade agreement with America, to agree, by convention, with the patenting provisions in that agreement? I am referring to human gene patenting and the monopolisation of medical research, putting public laboratories on public notice and, in that way, withdrawing competition and monopolising research. Isn't that something you should be doing, given that an inquiry is coming up?

Mr Gregson—I might be able to assist by noting that the ACCC from time to time is asked to look at issues that arise in relation to intellectual property and its interaction with both sections 46 and 45 of the Trade Practices Act; we do that on an ongoing basis when issues are raised. I think it is on the public record that the ACCC was involved in looking at matters concerning gene patenting last year and it was involved in a specific issue—and I think you might be familiar with that one as well. We have also been watching with interest the Senate inquiry.

Senator HEFFERNAN—I guess it would be appropriate to ask here whether you will be appearing as a witness at that inquiry.

Mr Gregson—The ACCC has indicated to the relevant departments that we would be happy to receive an invitation.

Senator HEFFERNAN—Has the practice of preferred contractors and no tenders in government expenditure been raised with you? I do not want to politicise this issue, but billions of dollars are being spent at the present time, a lot of it through the system of preferred contractors rather than tenders. I have had many complaints from persons, such as the local builder, saying, 'God help us, we could have put that hall up'—or whatever it is—'for a lot less money.' Isn't that an issue that you should be looking at?

Mr Cassidy—Again, unless it involves either some anti-competitive aspect or, alternatively, some aspect of misleading or false information, it is not something that falls within our purview. As you describe it, it sounds like something where government money may not be being spent as efficiently as it might be—

Senator HEFFERNAN—Where should I go with that?

Mr Cassidy—so it is really something more for, I think, the finance portfolio.

Senator HEFFERNAN—Similarly, in a different jurisdiction, I have had complaints from people who own bobcats and tip trucks, saying that the tender for the clean-up of a place like Marysville in Victoria—cop this one—has been let to a preferred contractor; and a bloke who used to work for me has a bobcat and a tipper and he is doing quite well. Those who have complained have said, 'Well, we could do it in a day'—that is, per house block of 600 square metres, to clear the debris. My understanding is that a preferred contractor has been given that job at approximately $25,000 per block; whereas, some of these bobcat and tipper blokes are saying, 'We could do it for $3,000 or $4,000.'

CHAIR—Senator Heffernan—

Senator HEFFERNAN—Isn't that issue that—

Mr Cassidy—No.

Senator HEFFERNAN—It is not?

Mr Cassidy—No.

CHAIR—I think Mr Cassidy has already indicated—

Senator HEFFERNAN—Where should that go?

Senator Sherry—Mr Cassidy has indicated that he thinks it is for the department of finance, where they have a role in the issues you are raising. It may well be a state government matter.

Senator HEFFERNAN—I appreciate that.

Senator Sherry—It is not the ACCC; Mr Cassidy has clearly indicated that.

Senator HEFFERNAN—With great respect, this is my final shot: this is valuable work that local contractors feel they could do and deserve to do, and we are putting them out of business. This is a huge contract and we are putting people out of business.

CHAIR—Senator Heffernan—

Senator HEFFERNAN—God help us, the fog has lifted. Good morning.

Mr Samuel—I am not sure that my presence here, though, will help the fog lift on these proceedings.

Senator HEFFERNAN—No; we have been waiting with bated breath. Mr Cassidy has been doing a fantastic job.

Senator JOYCE—We were talking about the fog in the ACCC, but it has just lifted.

Mr Samuel—That is what I am saying: I am not sure that my presence here will help lift the fog on that.

Senator HEFFERNAN—Anyhow, do you get my point?

Mr Cassidy—Yes. I am not saying that it may not be a significant issue in its own right; all I am saying is that it is not an issue—

Senator HEFFERNAN—If it is true that they are getting $25,000 a block to clear a one building block of debris after a fire—

CHAIR—Senator Heffernan, we have been through this issue quite a lot and you indicated that you have to be through by 10.

Senator HEFFERNAN—Thank you very much for your indulgence.

Senator EGGLESTON—I have questions about the Australian Energy Regulator, which I believe assists the ACCC in relation to access decisions and, as I understand, is progressively taking over the functions of the state regulators. First, can the Australian Energy Regulator outline its current responsibilities in relation to the regulation of gas and the electricity distribution networks and gas and electricity transmission in wholesale and retail markets, highlighting the separate position of WA, for which I happen to be a senator?

Ms Groves—Currently, the AER has regulatory responsibility for the economic regulation of gas transmission pipelines throughout the country, other than in Western Australia. It also has responsibility for the economic regulation of electricity transmission networks in all jurisdictions, other than in Western Australia and the Northern Territory. It has responsibility for the economic regulation of—and I will do them separately—gas distribution networks in all jurisdictions, other than Western Australia. It also has responsibility for new economic regulation of electricity distribution networks in all jurisdictions, other than Western Australia and the Northern Territory. Other than in Victoria, where currently it is the economic regulator responsible for electricity distribution networks, the model is that the AER picks up the economic regulation functions as the businesses are scheduled for their next revenue determinations, which is why they are coming across on a gradual basis. To date, the jurisdictions that have come over are the New South Wales and ACT networks, and we are about to commence networks in Queensland and South Australia.

Senator EGGLESTON—Do you have plans to take over or seek to take over in Western Australia?

Ms Groves—I think that would be a matter for governments—for the Ministerial Council on Energy—rather than the AER.

Senator EGGLESTON—Do we know whether that discussion is occurring?

Ms Groves—At this stage, my understanding is that the energy market agreements reflect that Western Australia is responsible for both the gas and electricity regulation within that jurisdiction; it is my understanding that there is no ongoing discussion of that changing in the near future.

Senator EGGLESTON—Apart from what you have said, are you still to assume any outstanding responsibilities from jurisdictional regulators in all states but WA?

Ms Groves—Yes. The final tranche of regulatory responsibilities will relate to the national retail regulation package, which currently is being formulated by the Ministerial Council on Energy. This is to do with the non-price regulation of the retail sector. So it is the behaviour or regulation of retailers, the consumer protection measures for energy consumers and a range of other related issues but not to do with retail pricing.

Senator EGGLESTON—I would like to ask you about the weighted average cost of capital. The global financial crisis has increased the cost of capital, yet the regulator has a ruling reducing the price of capital. How long will this determination remain in force?

Ms Groves—The determination regarding the weighted average cost of capital has been completed recently by the Australian Energy Regulator. There is the model for how that is taken into account for different sorts of network infrastructure and, for electricity transmission networks, that decision is binding regarding transmission businesses. So 'resets', as we call them—the process through which the business's revenues are determined going forward—occur every five years. For the next round of those resets, the current weighted average cost of capital determination will apply to those transmission businesses. In respect of electricity distribution businesses, the decision is an indicative statement of the regulator's position. As part of their individual revenue determination processes, the businesses are open to make arguments that there are reasons for the regulator to depart from that determination. That process will be in place for the revenue determinations of electricity distribution businesses. For gas transmission and distribution businesses, the work regarding the weighted average cost of capital that has been done by the regulator to date provides businesses with an indication of the regulator's thinking; it is not binding on those businesses or on the regulator in making decisions for the gas transmission and distribution businesses.

Senator EGGLESTON—So there is a bit of room for flexibility and reconsideration there.

Ms Groves—Yes. Depending on the regulatory framework, there is a range of matters that businesses can further put to the regulator as part of their individual resets.

Senator EGGLESTON—What and how broad are the consultations that the AER takes, prior to releasing its interim and final determinations about the cost of capital for the energy network sector?

Ms Groves—There is a prescribed process under the electricity rules that the AER followed. As well as and earlier than that, the AER commenced what we call the 'WACC determination' to give businesses as much opportunity as they could. So approximately 12 months ago the AER put out an issues paper seeking industry views on the issues that it had raised. It then took those views into consideration in formulating its first interim position, which it then put out for further public consultation. Prior to making its final determination, it also conducted public forums as well as industry roundtables regarding its interim

determination and had extensive meetings with interested stakeholders representing network businesses as well as the finance sector.

Senator EGGLESTON—Did you consult with the Energy Networks Association, for example?

Ms Groves—We certainly did.

Senator EGGLESTON—What impact do you see flowing from the determination on the weighted average cost of capital, first of all, to the energy sector and, secondly, to the community, if you are lowering the price or the cost of capital?

Ms Groves—Certainly it is our intention and our belief that the weighted average cost of capital determination represents a reasonable balance of the interests of both networks and consumers. It has been formulated as a result of a very extensive public consultation process and it has drawn on very significant work done by a range of experts in the area. It allows for an efficient and effective return for those businesses in a regulated environment.

Mr Pearson—As you are probably aware, a 500-page report was done on the weighted average cost of capital, which, I would argue, is probably one of the best reports currently that you could find internationally on the weighted average cost of capital and the components of the WACC. In looking at whether prices will go up or down, it is a little more complex than that, because there are also a lot of issues to do with capital expenditure. The weighted average cost of capital is a fundamental building block and, indeed, within that weighted average cost of capital, we did change one or two factors, based on a lot of empirical work—that is the market risk premium, for example, and what we call the beta; both of those have a fairly big impact on the weighted average cost of capital and the returns to the businesses. Indeed, if we kept everything else steady and there were no other changes in operational costs or capital expenditure, there would be a tendency for prices to be lowered, just based on that weighted average cost of capital.

However, you asked a question about the financial crisis. We did take that into account when we were estimating the weighted average cost of capital. For example, we took a higher beta than all our empirical evidence demonstrates. We also went another 0.5 higher; so we went from six to 6.5 for our market risk premium, which was a recognition—I think it is fairly well recognised that the AER board made a conscious decision in recognising this—of the impact of the financial crisis on businesses. In addition, there was an acceptance by the AER that capital expenditure also needed to be increased. I do not have the exact figures here but, with a lot of the transmission and distribution businesses coming in, there are a lot of issues to do with demand, such as demand increases due to increases in air-conditioning and a whole lot of other things that are fairly public. So the overall balance there could lead to an increase in price, based on capital expenditure. You have to build in that reliability and that demand growth, so it could lead to slightly higher prices.

Senator EGGLESTON—There has been some criticism that the WACC has been set too low. Obviously, you would not agree with that criticism. From what you have just said, you believe that you have set a fair and reasonable level.

Mr Pearson—We think it is. Undoubtedly, there will be some criticism. I think the financial crisis has made it a lot more difficult in the short term to try to assess the impact on

businesses; on the other hand, in some respects we see the regulatory framework providing some protection to businesses from a lot of the so-called risks that would be involved. For example, when they come into the AER, they get a recognised forward price, their capital expenditure and their pricing. So some of that risk that would be faced outside a regulated framework the businesses themselves do not face.

In addition to that, as I think my colleague mentioned, these are long-term projections and trying to determine long-term price paths and that is very difficult at times; we accept that difficulty. I would not suggest that everybody run out and get the 500 pages—that is a pretty healthy read—but, if anybody were interested in that, they would recognise that we did accept the tension between the short-term financial crisis and the longer term needs of businesses, consumers and the broader Australian economy.

Senator EGGLESTON—I will change the subject now to ABC child care. Firstly, how many ABC childcare centre acquisitions were approved by the ACCC?

Mr Grimwade—The commission was not necessarily notified of all acquisitions by ABC, but we investigated the ones that were notified or complained of to us. There were three major acquisitions. The one in 2004 was the substantial acquisition that established ABC; that was Peppercorn Child Care, where there were, I think, 451 centres acquired.

Senator EGGLESTON—That was 451 centres?

Mr Grimwade—That is correct; that was in 2004. We also looked at the Kids Campus acquisition in 2006, where 96 centres were acquired, and at Hutchison's Child Care Services in September 2006, where 86 centres were acquired. There were two subsequent small acquisitions that we examined in 2007 and 2008.

Senator EGGLESTON—Two.

Mr Grimwade—Yes. In relation to Just Little People, six centres were acquired in 2007. In addition, in relation to Kids Academy—I believe this resulted from a court case that required ABC to fulfil a contract—five centres were acquired in November 2008.

Senator EGGLESTON—How many centres was ABC forced to divest itself of?

Mr Grimwade—We examined the acquisitions of these centres in local markets; they were the markets in which we felt that ABC could potentially exercise market power, particularly to the extent that it may be able to raise prices. We required the divestiture of a number of centres in local markets to ensure that there were competitors or at least a competitor remaining in each of the local areas. In relation to Peppercorn, eight centres were divested and another 13 management contracts were terminated. In relation to Kids Campus, four centres were divested and one management contract was terminated. In addition, in relation to Hutchison, divestiture was required of another seven centres. There were two cases where divestiture was not completed to our satisfaction, and we instigated court proceedings to require those divestitures. Those proceedings were discontinued because ABC essentially collapsed before a court decision could be provided.

Senator EGGLESTON—So, really, that is about 19.

Mr Grimwade—No. I think there were 33, because management contracts were terminated as well.

Senator EGGLESTON—So there were 33 that were divested. To what extent do you think the failure of ABC—when it did fail—was a competition issue?

Mr Grimwade—We do not consider that ABC failed because of lack of competition. Our view is that ABC failed for prudential reasons. It was highly leveraged. I am not an expert on this, but it did, as you know, make some very significant acquisitions in the US, which caused it some financial problems. There were—perhaps I could phrase it as—complicated business practices that might have contributed in some way to its failure.

Senator EGGLESTON—Did you in the ACCC have any concern about the level of market share held by ABC child care?

Mr Grimwade—As I said at the outset, our focus on the acquisitions was where we assessed any competitive harm was likely to result, which was on a local basis. It is true to say that, if you aggregated all the childcare centres or childcare places around Australia, I think at its peak ABC had about 20 per cent to 25 per cent of those childcare places or childcare centres. But that is not the market in which we assessed any anti-competitive effects. Our focus was on individual market areas because that is where the price effects would be felt. So our divestiture remedies were designed to ensure that there was always some alternative competition in those local areas where ABC acquired centres.

Senator EGGLESTON—I suppose that 25 per cent is not huge when you consider some other businesses in Australia that have a larger percentage of the market; wouldn't that be the case?

Mr Grimwade—Yes. I am not saying that it was the market though; it was not the market. I am just saying that it shared, I think, 20 per cent of childcare centres in Australia and 25 per cent of childcare places. In terms of assessing or administering section 50, which prohibits anti-competitive mergers in markets, and in establishing in what market we assess any anti-competitive effects, the market was a radius of about five to 10 kilometres in local regions, not nationally.

Senator EGGLESTON—So you focused on a much smaller market for your—

Mr Grimwade—We did. Indeed, that is how we look at a number of retail acquisitions.

Senator EGGLESTON—Such as?

Mr Grimwade—We look at the acquisitions of retail grocery and liquor stores—say, Woolworths or Coles—on a retail locale basis of around three to five kilometres, in examining whether there are any competitive constraints in those local areas. However, I should add that, in acquisitions of retail grocery and liquor stores, we also look at the wholesale market and the acquisition markets because there is a degree of power that Woolworths and Coles may exercise in relation to the acquisition of these inputs. But, in child care, there were not necessarily any wholesale markets from which ABC would acquire inputs into its services; it really was a retail provider on a local basis.

Senator EGGLESTON—Do you think creeping acquisitions legislation would have played any role in preventing the collapse of ABC child care?

Mr Grimwade—As I said at the outset, I do not think the ABC collapsed for any lack of competition. It was not a competition based failure; it was prudentially based.

Senator EGGLESTON—In relation to Fuelwatch, do we have the payout figure that Mr Patrick Walker received, following his departure from the role of Petrol Commissioner?

Mr Cassidy—It depends on what you mean by 'payout figure'. In the sense in which that term is normally used—

Senator EGGLESTON—At termination.

Mr Cassidy—there was not any. He resigned his position, which he was quite able to do in terms of the legislation. The only payout, so to speak, that he would have received would have been any accumulated leave that was due to be paid out; of course, given that he was not a commissioner for all that long, that would not have amounted to all that much. It was at his instigation that he resigned from the position of commissioner; therefore, there is no termination payment or other sorts of compensatory payments involved.

Senator EGGLESTON—So he really just received the benefits that he was due.

Mr Cassidy—That is right, as determined by the Remuneration Tribunal.

Senator EGGLESTON—I have a question about national consumer law. Do we think the proposed national consumer law will require greater resources from the ACCC?

Mr Cassidy—We are still considering that and certainly we have not raised it with government yet. You can look at national consumer law, if you like, under three headings. One is that it will add to our enforcement powers. You might say, 'Well, perhaps it doesn't involve all that much in the way of resource implications for the commission because, in a sense, it is just widening the array of remedies that we can seek by way of enforcement actions that we can take.' The second heading you might look at is new areas of law. I suppose that the most obvious one there, which has received a fair amount of publicity, is the proposed unfair contracts law—

Senator EGGLESTON—Yes.

Mr Cassidy—where enforcing a new area of law may potentially have some resource implications for us. The third heading is unclear at the moment: as we understand, it will be open for jurisdictions—obviously this is for states and territories—to decide that they will no longer, if you like, exercise their jurisdiction in relation to consumer law and simply leave it to the commission to do that. That would also potentially have resource implications for us, depending on how many state and territory jurisdictions decide to do that. That is still unclear and probably that will not be clear for a little while. So there are potentially some resource implications in it for us, but exactly what they might be is something that we find a bit hard to get a handle on at the moment. Certainly, it is not something that we have raised with government at this stage.

Senator EGGLESTON—Do you think this law is based on the European 'unfair terms in consumer contracts' law?

Mr Bezzi—English law and also Victorian law, in broad terms.

Senator EGGLESTON—English law is the EU law, though, isn't it?

Mr Bezzi—I think the Victorian model is really the major source of inspiration, if I can put it that way, but the English law was the basis for the Victorian law.

Senator EGGLESTON—Has the ACCC been approached by either the Minister for Employment and Workplace Relations or the Australian Industrial Relations Commission to provide advice in relation to award modernisation and, in particular, to the potential anti-competitiveness of awards that provide for default superannuation funds?

Mr Cassidy—I think the straight answer to that is no.

Senator EGGLESTON—More generally, does the ACCC have any concerns about employee superannuation contributions being directed into default funds?

Mr Cassidy—Again, this is a bit like some of the earlier questions from Senator Heffernan. It is not really something that falls within our purview.

Senator EGGLESTON—Is the ACCC concerned that the default funds nominated by the AIRC are almost all industry funds; is that not anticompetitive?

Senator Sherry—That is a matter for ASIC and AFMA.

Senator EGGLESTON—Thank you very much. I will leave it at that.

Senator BUSHBY—Thank you for coming along today. On 7 March this year, submissions were called for by the ACCC on the justification of the rules limiting the trade of water for the Murray-Darling Basin states. Have you received all submissions in that area?

Mr Betson—We have received numerous submissions in response to the issues paper on water trading rules. Staff are now considering those submissions and will be releasing a position paper in August in relation to the water trading rules; so there may be ongoing submissions. The date for submissions is now closed; however, we will take on submissions if they come between now and a time that allows us to respond to them prior to the position paper.

Senator BUSHBY—Did you say that you are releasing a position paper in August?

Mr Betson—That is correct.

Senator BUSHBY—What will a position paper entail?

Mr Betson—In relation to the trading rules, we have indicated that we will provide advice to the Murray-Darling Basin Authority by March 2010. We have a three-stage consultation process, the release of an issues paper, a position paper, draft advice and then final advice. The position paper will outline the commission's early positions and thoughts in relation to matters dealing with the trading rules, as required under the act. So there will be early positions prior to the release of draft advice.

Senator XENOPHON—Perhaps I could ask a supplementary question in relation to that. Obviously, you are aware that the South Australian government has indicated that it is preparing for or looking at a High Court challenge, particularly in relation to Victoria's position on the water trading rules, which has been complicated recently by the New South Wales government putting a stop on water trades. Is there any way that the timetable for your reporting process can be fast tracked, given the urgency of the situation both in terms of the state of the Murray-Darling Basin and also the fact that one state government is looking seriously at a High Court challenge? To what extent can the commission give even a tentative

view or advice with respect to any potential breaches as a result of water trades being impeded in the way that they have been?

Mr Betson—In relation to the timing of the advice, the authority could possibly instigate a request in that regard. At the moment, the timetable is in place and we feel that it is necessary to consult through a three-stage consultation process similar to how we did it with the water charge termination fee rules and the water market rules.

Senator XENOPHON—Further to that, though, if the authority requested that this be done more urgently, would you be able to accommodate that request?

Mr Pearson—With a lot of the issues that we face across the Murray-Darling Basin Commission, we promise consultation and, if we do not do it properly, not only do we get criticised but also it undermines a lot of the integrity and legitimacy of what we come up with. To date, Peter and his colleagues have done a very good job of trying to consult broadly. I read the other day a criticism about lack of consultation. But they travelled to a lot of irrigation areas and have been to capital cities and so on to consult on all the work that we are doing. I think it would be difficult even for the Murray-Darling Basin Authority, if they asked us to speed it up very much—although we could probably cut some corners—given both the complexity of the issues and, I think, what the Murray-Darling Basin Authority themselves need. Also, quite often there is confusion here between our rules, our regulations, what we can enforce, what we advise on and a lot of the policy issues; they tend to get co-mingled and it can be very difficult even for us to try to separate them out. That, I think, is causing some of the external confusion.

Senator XENOPHON—I understand that in terms of wanting to look at a reform of the rules; but, insofar as there is concern about one particular aspect of it—the four per cent cap in Victoria and the impact that has on other basin states, particularly South Australia—is there scope for the ACCC to say that this may be so glaringly in breach of—

Senator BUSHBY—Have you formed any opinions on that cap?

Mr Pearson—The cap itself—my colleague can contribute—is really a policy issue that, to date, has been dealt with through COAG and is not really part of our remit. COAG are the ones who are addressing the four per cent cap and the issue between the three major states there, so the cap per se is not really an issue for us to provide advice on.

Senator XENOPHON—Just finally on that: some constitutional experts have said that there could be an argument under section 92; would that be outside of your purview?

Mr Pearson—Yes.

Senator XENOPHON—Even though that strikes very much at the flow of commerce between states.

Mr Pearson—Again it comes down to the policy versus what we are being asked to do and are asked to do under the Water Act and under advice to the department and the Murray-Darling Basin Authority. It is really an issue for COAG to sort through for the states rather than for the ACCC. Whatever our personal views are, it is really a policy issue that we cannot be drawn into.

Senator BUSHBY—But it is an issue of competition to the extent of limiting the ability to sell water; it is limiting competition and you are a competition commission.

Mr Pearson—It would be naive of me to say that the four per cent does not have some impact, but it really sits outside of our remit in terms of what we are asked to do. I think all of our work within water is fairly prescriptively explained or put down through the Water Act and the relationship with the Murray-Darling Basin Authority. So it is not a competition issue in the broader TPA and it is not an issue that fits within the actual Water Act. Peter might want to say something.

Mr Betson—Perhaps I can elaborate. With the water trading rules, we are required to provide advice having regard to and contributing to the objectives and principles of the Water Act. One of the principles does refer to the specific process of managing the four per cent issue, particularly with regard to a review by the National Water Commission, with the intention ultimately of removing the cap by 2014. That is embodied within the Water Act itself and that is why it is a matter for the separate processes—

Senator BUSHBY—So does it or does it not come within your purview?

Mr Betson—A separate process has been outlined in the Water Act regarding one of the market and trading principles, where there is a separate process established—

Senator BUSHBY—As part of that process, are you able to look at competition issues that arise out of it, or are you limited to not being able to look at those issues?

Mr Pearson—In fact, that is a whole separate process that has been put on track through the act and it is not part of our purview or remit.

Senator BUSHBY—So you have not been asked to look at the competition consequences of this.

Mr Pearson—Not to my knowledge, and I had been in the job for four months maybe before that.

Proceedings suspended from 10.33 am to 10.50 am

CHAIR—We will recommence the hearing.

Senator BUSHBY—What was the extent of the government's consultation with the ACCC in the formation of the legislation for the Australian Business Investment Partnership?

Mr Cassidy—I am happy to answer that. We answered this question before this committee at estimates and when it inquired into the legislation, but I am happy to answer it again. We had some fairly, what I might call, 'broad-brush discussions' with Treasury early on, when I think they were thinking about how that might be formed and what shape it might take. We provided some fairly general advice about what we thought would be the relevant provisions of the act for the different processes that were available for possibly exempting ABIP or authorising its conduct, as the case may be. That was all fairly general broad-brush sort of stuff. In one of our previous answers on this subject, I think it was described as sort of 'trade practices 101' type material.

Really, our discussions with Treasury did not get much beyond that, in the sense that we had those discussions and the exchange of material along those lines and then heard nothing

from Treasury until, I think, following estimates hearings in February. Following some questions that were put on notice there, I think we were contacted by Treasury in relation to the issue and, at that stage, they indicated that serious thought was being given to a section 51 exemption for ABIP. We did not see, in a sense, confirmation of that until we saw the bill that was introduced into parliament with the so-called section 51 exemption in it. That was about it.

Senator BUSHBY—When Treasury came back to you and indicated that they were thinking about a section 51 exemption, did you provide any comment to them at that point?

Mr Cassidy—No. That comment was made in passing; I think something was said like 'serious consideration' was being given to that possibility. 'That possibility' was one of the possibilities that we had outlined earlier—

Senator BUSHBY—So at that stage it was—

Mr Cassidy—when there was a range of advice. It is a policy issue for government as to whether to use a section 51 exemption; it is not something that is within our remit, if I can put it that way. We took the view that it was a decision for government to make.

Senator BUSHBY—So you were never specifically asked to provide any comment or advice on the use of a section 51 exemption in that legislation.

Mr Cassidy—No. As I say, the only advice that we provided relevant to that was fairly general earlier advice.

Senator BUSHBY—The advice earlier.

Mr Cassidy—Yes, that is right. But, in terms of the section 51 exemption, we did not see the terms of that exemption until it appeared in the bill; we were not asked about its drafting or anything like that.

Mr Gregson—Mr Cassidy is quite correct in that regard. The only supplementary information I would provide is that, in or around May this year, when there was consideration of proposed amendments to provide the ACCC with monitoring and reporting functions, we saw those proposed amendments and made comments therein.

Senator BUSHBY—Have those comments been made public?

Mr Gregson—No.

Senator BUSHBY—Are you able to table those for the committee?

Senator Sherry—That is advice to government on a policy matter.

Mr Gregson—Indeed, the amendments have since been tabled before the Senate.

Senator BUSHBY—The amendments have been tabled—

Mr Gregson—Correct.

Senator BUSHBY—but the advice has not been.

Mr Gregson—That is right.

Senator BUSHBY—Minister, are you claiming a public interest exemption on the basis of that advice?

Senator Sherry—I will take that on notice.

Senator BUSHBY—That is the easiest way to deal with it, rather than having to think which of the eight public interest exemptions you are going to claim. If the government in that legislation had not provided a section 51A exemption, would the arrangement potentially have been anti-competitive under the Trade Practices Act?

Mr Cassidy—I will give you a fairly technical answer—it will not go anywhere—in the sense of saying: no, because it would be subject to a section 51 exemption. But obviously that is not, in a sense, the question you ask.

Senator BUSHBY—No. Was an exemption required?

Mr Cassidy—At the time we were dealing with Treasury on this, we were not sure, because we did not have the detail. Indeed, at the time we appeared before this committee when you were inquiring into the bill, we did not have the detail. In particular, at that stage the shareholders' agreement, I think, had only just been tabled. Having seen the shareholders' agreement, I would have to say that, if it had happened and the sorts of restrictions in the shareholders' agreement had been complied with, in terms of the individual bank representatives operating truly as independent arms-length individuals as far as their banks were concerned, we probably would not have thought there would be much in the way of an issue, as far as ABIP was concerned, with the Trade Practices Act.

Senator BUSHBY—Mr Cassidy, in the *Australian Financial Review* on 16 April, you were quoted as saying:

To the extent that the existence of the partnership and the possibility of information being passed back from the partnership to the banks involved, that may potentially reduce competition in the market.

Do you still stand by that comment?

Mr Cassidy—Unfortunately, that has happened sometimes with the press; that was one half of an answer that I gave to a question from Senator Eggleston. When this committee was looking at the ABIP bill, I was asked whether it would potentially have anti-competitive effects. I said, 'Well, on the one hand, if the existence of ABIP helped to shore up the commercial property market, you could actually, in a sense, view that as being pro-competitive; on the other hand, if as a result of the operation of ABIP you had information being passed back from the particular individual bank representatives to their banks or if they were, in a sense, operating in concert as representatives of their banks, that could have anti-competitive effects'—and I was not sure of what the balance of those two would be. Unfortunately, that particular press report missed the first part of the answer and only picked up the second—

Senator BUSHBY—That sounds like—

Mr Cassidy—but, as a general proposition, if you did have a situation where ABIP was in existence and where information about decisions being made by ABIP was being passed by the bank representatives to their individual banks, that could be potentially anti-competitive. But that would mean that they were not abiding by the shareholders' agreement, because part of the shareholders' agreement indicates that is ring fencing and that should not happen.

Senator BUSHBY—Mr Samuel reportedly also was quoted as being concerned that:

The diminished role of nonbank financial institutions could encourage anti-competitive behaviour between the big four banks and lead to tacit coordination of pricing.

Would you like to comment on that in this context, Mr Samuel?

Mr Samuel—That interview given to the *Financial Review* had nothing to do with ABIP; it was a more general discussion about competition within the banking sector and some of the impacts that have occurred of more recent times in the context of the global financial crisis.

Senator BUSHBY—The Treasurer has indicated that the ABIP legislation will be reintroduced, so it may still be a real issue. If it does become a real issue, does the ACCC consider that any further steps should be taken to limit the potential for anti-competitive behaviour that might arise out of the way that it was set up prior to being rejected by the Senate?

Mr Cassidy—As I say, the shareholders' agreement is there and, under that, the sorts of things that would worry us have been proscribed in terms of the way that ABIP is intended to operate. I think it would be difficult, therefore, for us to say that this or that should be done. If the shareholders' agreement is not complied with, I think that becomes a separate issue.

Senator BUSHBY—You mentioned 'if it is not complied with' and then qualified your earlier statement by saying 'so long as the shareholders' agreement is complied with'. That suggests there is some degree of doubt. I am not saying that it is your doubt; I am saying that there is scope then for activity that might be anti-competitive in those circumstances. Would the ACCC be of the view that there should be further checks and balances in place in respect of this, or do you think that the shareholders' agreement in itself is sufficient and, in comparable situations, you would consider a shareholders' agreement to be a sufficient protection against anti-competitive behaviour?

Mr Cassidy—We are starting to wander into a policy type discussion, I think. Leaving aside the government dimension to ABIP, if it were a completely private institution, the situation would be that, on the face of it, we would have no problem and no reason to be taking any action in relation to ABIP, unless as a private sector entity its shareholders' agreement was not complied with and, therefore, they were exchanging information with their partner banks. On the face of it, I think it is hard for us to say that it should be treated any differently from what might be an entirely private sector arrangement set up in the same way.

Senator BUSHBY—Thank you. We will move on to component pricing legislation. A practice of many restaurants and bars is to impose a surcharge at weekends and/or on public holidays. Will the addition, for example, of a 10 per cent surcharge to the customer's total bill represent a breach of the new component pricing regulations, as a single price was not provided to the consumer at the time that the representation as to price was made?

Mr Samuel—Yes. Let me put it this way: if past practice is maintained of simply having a small note at the bottom saying that on weekends and public holidays a surcharge of 10 per cent is applied, that would be a breach of the component pricing legislation; therefore, the view that we have expressed has been that it is necessary for restaurants to publish either a second column or a separate menu for those days on which the surcharge is applicable, stipulating the total price including the surcharge.

Senator BUSHBY—That legislation was due to take effect on 25 May 2015; is that correct?

Mr Samuel—Yes.

Senator BUSHBY—Have you put in place any regime for checking on how that is going—basically, whether businesses are complying?

Mr Bezzi—I might deal with the enforcement side of it. We have established within my division a group that monitors compliance and has a plan for ensuring that the law is enforced in this area. We also have a compliance strategies team, which is led by Nigel; I might let him talk to you about some of the other things that we are doing on the compliance and education side.

Mr Ridgway—I would just note that, as well as looking at the enforcement aspects of the new provision, we have been engaged in working with a number of industry sectors and industry organisations to get guidance on what the new law requires in relation to those sectors.

Senator BUSHBY—Have you had any requests for extensions of time in order to comply, or has industry been able to comply easily with the new rules?

Mr Ridgway—In the process of our discussions with some of the industry associations, there have been some particular questions as to how they might go about complying in particular circumstances. Our consistent guidance has been that the law is now in place and we expect that timely efforts are being made to ensure that traders are compliant.

Mr Samuel—In public statements, we have indicated that the law has now been passed by parliament, the commencement date has been stipulated by parliament and the law now applies; in cases of blatant disregard or contravention of the law, we will take action. In the cases of innocent ignorance of the law—which would be difficult to demonstrate now, given the high level of publicity that has been associated with the law—clearly we will take a more compliance type approach. But the law has now been given a lot of publicity. I think it is fair to say that there was extensive consultation on this law over a period of some two to three years leading up to its passing by parliament, so it would be quite difficult now for most businesses to be able to say that they are not aware of the law's existence and its implications.

Senator BUSHBY—What about purchasing goods with a credit card where there might be a different surcharge for a MasterCard from the surcharge for an American Express card? Do they have to include all of that in the prices?

Mr Ridgway—New provision 53C provides for an exemption of those components that are optional extras. So, in relation to the application of credit card surcharges, it depends on whether a particular method of payment is an option or a certain requirement. For example, if cash is one option, credit card surcharges, whatever they are, are each an optional method of payment and that component does not need to be included.

Senator BUSHBY—What about pricing of motor vehicles where a lot of advertising is done, plus delivery and statutory charges?

Mr Ridgway—Similarly, where the components are optional—

Senator BUSHBY—They are not optional.

Mr Bezzi—They are quantifiable. I think quantifiable is the test. If it is quantifiable, the obligation is to include it in the price.

Senator BUSHBY—So motor vehicle dealers would no longer be able to advertise 'plus statutory charges' or 'stamp duty' and—

Mr Bezzi—If those charges are quantifiable, their obligation is to include them in the single price.

Senator BUSHBY—That is probably all I have; thank you.

Senator EGGLESTON—I would like to go back very quickly to grocery prices. How long will the ACCC monitor milk prices in supermarkets to ensure that the price reflects the removal of the 11c levy?

Mr Cassidy—Basically, we are taking the approach of using the information that is readily available on milk pricing and also using the quite extensive contacts that we get from the general public in order to monitor whether we are getting any complaints about the 11c not being passed on.

Senator EGGLESTON—How often has the price been monitored to date and where specifically is that monitoring taking place?

Mr Cassidy—As I say, the approach that we are taking is really one of ongoing monitoring rather than saying, 'At this point in time, we'll be checking the prices.' So the answer would be that it is an ongoing process.

Senator JOYCE—This question goes to Amcor: did the ACCC grant immunity to Amcor and its executives in accordance with its immunity policy?

Mr Samuel—Yes.

Senator JOYCE—Did the ACCC investigate who the ringleader of the cartel was before granting immunity to Amcor and its executives?

Mr Samuel—Yes. I should perhaps be very specific about this: at the time of the granting of 'immunity', as you describe it, there was in place a leniency policy, which was then revised to become the immunity policy. The original grant of immunity was, as is always the case, subject to conditions. So it is granted on a conditional basis. Those conditions are ongoing throughout the whole process until completion of both the investigation and any litigation that might occur.

Senator JOYCE—When Amcor first sought immunity, on 22 November 2004, is it true that Russell Jones advised the ACCC that he, Russell Jones, had not been involved in any cartel conduct?

Mr Cassidy—Not as you phrase that question, no.

Senator JOYCE—If Russell Jones did not make a full and frank disclosure to the ACCC on 22 November 2004, why did the ACCC grant immunity to Amcor and its executives in accordance with its policy?

Mr Cassidy—Because he subsequently did so.

Senator JOYCE—Did the ACCC comply with its internal policy guidelines in relation to the Richard Pratt section 155 examination?

Mr Cassidy—We did.

Senator JOYCE—How many legal opinions did the ACCC or the DPP obtain concerning the proposed use of the agreed statement of facts as evidence against Richard Pratt in his criminal prosecution, apart from that of Mark Dean SC?

Mr Cassidy—That was a matter for the Director of Public Prosecutions, since he was the one conducting that prosecution. I am aware of the advice he received from Mark Dean, senior counsel; I am not aware that the DPP obtained any other advice. That is really a question that would ultimately be for the DPP.

Senator JOYCE—Did any ACCC commissioners express any, and if so what, dissatisfaction that the ACCC executives had consulted with the DPP about a potential criminal prosecution of Richard Pratt prior to a decision of the ACCC commissioners being made to pursue that path?

Mr Cassidy—That question is starting to ask about internal commission processes. I think the important issue is that the commission reached a position that prosecution against Mr Pratt should be pursued. I really do not think it is appropriate to divulge how it got to that position and who said what.

Senator JOYCE—Are you aware of the comments by Ed Willett that he had complained that no-one told the ACCC commissioners that the ACCC was considering a criminal prosecution of Richard Pratt?

Mr Cassidy—I am aware that he questioned whether the commission had been told about the contact with the DPP.

Senator JOYCE—Did the ACCC agree with Richard Pratt that the agreed statement of facts was not to be used for any other purposes?

Mr Cassidy—A clause was inserted in the agreed statement of facts—

Senator JOYCE—Paragraph 378.

Mr Cassidy—Yes—with our agreement. At the time, that clause was inserted at the request of Mr Pratt's legal advisers because they were worried about third-party actions; we agreed to it going in. We had no discussion with Mr Pratt's legal advisers at the time as to its legal force or otherwise. They wanted it included and we agreed to it being included.

Senator JOYCE—That is paragraph 378 in the agreed statement of facts. Is that right?

Mr Cassidy—That is right.

Senator JOYCE—Why didn't the ACCC, in any of their without prejudice negotiations, advise Richard Pratt, his lawyers or former High Court of Australia Justice Michael McHugh that the ACCC considered that a criminal prosecution of Richard Pratt for breach of section 155 was a possibility?

Mr Cassidy—I think there are two parts to the answer to that. Firstly, at the time we were dealing with Mr Pratt and his legal advisers and went through the Michael McHugh process, it

was by no means clear or decided in our minds that there would be any sort of criminal prosecution against Mr Pratt, because we had not had any serious engagement with the DPP on the matter. Secondly, despite some of what has been put around, at the end of the day it was the responsibility of Mr Pratt's legal advisers, who were well aware of what he had said in his 155 examination, to advise him on his legal position. I think the notion that somehow you have legal advisers but it is somebody else's responsibility to provide you with legal advice is a rather curious one, to say the least.

Senator JOYCE—But you acknowledge your role as model litigants.

Mr Cassidy—Yes, we do.

Senator JOYCE—A model litigant, in good faith, has a requirement to do so, doesn't it?

Mr Cassidy—No, I would not agree with that proposition. If at the time a firm decision had been made by the commission that we would be pursuing criminal proceedings, perhaps you could have a debate about that. But, at a stage where no decision had been made, no brief had been provided to the DPP and, therefore, no decision had been made by the DPP—who ultimately has the decision-making power in relation to criminal prosecutions—we do not consider that we had any obligation, under the model litigant policy, to say anything to Mr Pratt or his legal advisers.

Senator JOYCE—The ACCC executives never even asked their own lawyers or advisers about that issue, did they?

Mr Cassidy—Again, no. It was a hypothetical issue.

Senator JOYCE—Why didn't the ACCC ask the AGS whether they were under a duty of disclosure to Richard Pratt of the possibility of a criminal prosecution in the without prejudice negotiations?

Mr Cassidy—The AGS were, in part, our legal advisers in relation to the civil cartel matter and, as I say, we had nothing to ask them because nothing had been decided in relation to a possible criminal prosecution.

Senator JOYCE—Why didn't the ACCC executives ask counsel retained by them whether they were under a duty of disclosure to Richard Pratt of the possibility of a criminal prosecution in the without prejudice negotiations?

Mr Cassidy—Again, it is the same answer.

Senator JOYCE—Is it true that, on 7 October 2007, Geoff Williams, the ACCC investigator, discussed with Graeme Davidson of the DPP the possibility of using the agreed statement of facts in a criminal prosecution against Richard Pratt?

Mr Cassidy—Yes, he did.

Senator JOYCE—Did Graeme Samuel authorise Geoff Williams to speak to Graeme Davidson on 7 October 2007?

Mr Cassidy—Both Mr Williams and Mr Alexander, who were our two senior investigators involved in the matter, were reporting to me. As best I can recall, that discussion with Mr Davidson occurred at the time without my knowledge.

Mr Samuel—I can attest to that. To the best of my recollection, it occurred without my knowledge.

Senator JOYCE—Is it true that, until September 2008, the ACCC withheld from the defence the existence of Graeme Davidson's file note on the discussions of 7 October 2007, even though it was shown to Bob Alexander in July 2008?

Mr Cassidy—I do not know about 'withheld'. In a criminal process, you are subject to a subpoena process, which is similar to discovery in civil court proceedings, by which you are required to produce all relevant documents covered by the subpoena. I think it was September 2008 when we responded to the relevant subpoena.

Senator JOYCE—In that case, did the ACCC provide the DPP with all the required documents for a criminal prosecution of Richard Pratt?

Mr Cassidy—The DPP, in making his decision to pursue the criminal prosecution, was provided by us with a brief, which is normal process. That brief outlined the case and had all relevant evidentiary material attached to it. On the basis of that brief, the DPP made his own independent decision to pursue the criminal prosecution against Mr Pratt. I could not say that brief had every single piece of documentation attached to it, because that is not the nature of the brief; what it has attached to it is the relevant evidentiary material.

Senator JOYCE—My process of inquiry is not that you have a job to break up cartels and deal with that—I have no problem with that—but whether there was a fair and comparable process within that. Did the ACCC not provide the DPP with a certificate of disclosure, as required under the guidelines between agencies?

Mr Cassidy—I am not aware that we failed to provide the DPP with any relevant material.

Senator JOYCE—So you did provide a certificate of disclosure?

Mr Pearson—As I recall, at the time I was executive general manager, but Mr Alexander, who was our general counsel, was responsible. As far as I recall, he did, but I would have to double-check. As general counsel for the commission he was in charge of that.

Senator JOYCE—On FOI discussions it looks like we did not get that certificate.

Mr Pearson—I would have to double-check that.

Senator JOYCE—Prior to the commencement of the criminal prosecution of Richard Pratt what were the estimated legal costs of the prosecution of Richard Pratt?

Mr Cassidy—I do not recall that an estimate was actually made. I should explain that the criminal prosecution was a matter for the DPP. Our own legal costs in relation to the criminal prosecution—

Senator JOYCE—That is my next question.

Mr Cassidy—I do not have a precise figure, but I am happy to take it on notice. I think it was in the order of half a million dollars for us, but that was purely advice that we received in relation to legal professional privilege issues in responding to the various court subpoenas. The bulk of the cost of the prosecution itself was borne by the Director of Public Prosecutions, and I do not know what those costs were. That would be a matter for the DPP.

Senator JOYCE—You will either take the action costs on notice or they are not available to you?

Mr Cassidy—That is right. I can certainly take on notice what our costs were, but all I am saying to you is that our costs were peripheral and really were only related to advice we obtained from counsel in what was a fairly comprehensive subpoena process.

Senator JOYCE—When the ACCC commissioned its results to commence the criminal prosecution of Richard Pratt what information was provided to them about the state of Richard Pratt's health?

Mr Cassidy—We had various reports in the press in relation to Mr Pratt's health, which seemed to indicate that while he had some health issues he was nonetheless still active. I should also say—and again this goes to some of what has been put in the public arena about this—we had a standing offer, if I can put it that way, to Mr Pratt's legal advisers that if, at any time, Mr Pratt's health was such that they did not think that legal issues against him, which went all the way back to the cartel matter, could be pursued it was open for them to put that to us and we would consider it in a sympathetic fashion. Never, at any stage, did we have an approach from Mr Pratt's lawyers to say that he had serious health issues. Indeed, what contact we had from them was to the opposite, that Mr Pratt was adamant that he did not wish his health issues in any way to be taken into account in the conduct of the proceedings.

Senator JOYCE—Was that a personal representation that Mr Pratt made to you or did you obtain that from newspaper reports?

Mr Cassidy—That was the expressed view of Mr Pratt that we obtained from his legal advisers.

Senator JOYCE—From his legal advisers?

Mr Cassidy—Yes.

Senator JOYCE—Is it true that former High Court Judge Justice Michael McHugh in a brief meeting with Richard Pratt in September 2007 formed the view that Richard Pratt was unwell?

Mr Cassidy—At the time I was the senior ACCC representative present at that quasi-meeting. Justice Michael McHugh expressed no opinion on the day as to Mr Pratt's health. It was only subsequently during the course of the criminal proceedings against Mr Pratt, and indeed the preliminary hearing that was held late last year, that he expressed the view that maybe Mr Pratt was not in full health at the time of the so-called meeting. He certainly said nothing to us on the day to that effect.

Senator JOYCE—Regardless of what Mr Pratt said, is the ACCC bound in some way to take into account the health of Mr Pratt in pursuing this matter?

Mr Cassidy—Indeed we are. As I said, we had a standing offer with his legal advisers that if Mr Pratt had serious health issues and if they were prepared to inform us of that then we would take it into account. The view we got from them was the exact opposite, that they would not raise Mr Pratt's health as an issue to be taken into account.

Just to round that off, when the DPP decided to discontinue the proceedings it was only as a result of what was said in open court by Mr Pratt's legal advisers that he made the decision not to continue the proceedings. He had no approach from Mr Pratt's legal advisers in relation to Mr Pratt's health. He had to rely on what they said in open court to make his decision.

Senator JOYCE—Is it true that the ACCC would not join with the lawyers of Richard Pratt to seek an expedition of the criminal prosecution on the grounds of Richard Pratt's health?

Mr Cassidy—Again, this is getting into territory which is really the DPP rather than us, since the DPP was conducting the criminal prosecution. We understand that there was an approach from Mr Pratt's lawyers to the DPP to approach the presiding judge in chambers and seek an expedition. We understand that the DPP indicated that he was not prepared to approach the judge in chambers, but if Mr Pratt's legal advisers wished to approach the judge in open court to seek expedition then the DPP would decide on what attitude he took at that time. Really, if you like, the rejection—if I can call it that—was more about the process and doing it behind closed doors rather than the issue itself.

Senator JOYCE—After Justice Ryan had ruled that the ACCC could not use the agreed statement of facts against Mr Pratt, is it true that you advised the media that the ACCC would, in effect, do exactly the same again in relation to Richard Pratt as it had done in the past and the ACCC published a media release to the same effect? How could it do so in light of the ruling, the facts and circumstances of the criminal prosecution?

Mr Cassidy—I did say that outside the court. I said that because the documents in question that Justice Ryan had ruled inadmissible were less than half the documentary evidence that was available in relation to Mr Pratt. That was quite apart from the possibility of the DPP deciding to actually call the development witnesses to the stand so that they could give their account of what had happened. In deciding to discontinue the case, and in the statement that was read to the court immediately after Justice Ryan indicated that the four documents in question were not admissible, the DPP indicated that, in his view, and notwithstanding whatever decision the court made in relation to those documents, there is a case:

> The director's view and advice is that there remained reasonable prospects of conviction in accordance with the prosecution policy of the Commonwealth.

The DPP's assessment was that, notwithstanding those documents not being admissible, he had a case with reasonable prospects of conviction and that the only reason he was withdrawing the matter was because of what had been revealed in court about the state of Mr Pratt's health and the fact that the case could never reach conclusion.

Senator JOYCE—One of the problems that I have in looking over this is how you granted immunity without actually determining who the ringleader was.

Mr Cassidy—The way immunity policy works, as the chairman explained, is that it is conditional. The reason for that is because the way immunity works is people come in early. That is the incentive. If they are not the first one in the door to tell us about a cartel then they may well miss out on immunity. You need to be the first one in the door. Quite often they will come in and tell us about cartels that we do not know anything about, so rather than spending a lengthy period of time investigating whether the immunity applicant is the ringleader or has

been coercive or any of the other conditions, what we do is we say, 'We'll give you immunity, but there is a condition that if in the course of the investigation it turns out that you are the ringleader or that you have coerced other participants to be involved then that immunity will be rescinded.'

Senator JOYCE—Mr Russell Jones changed his story, did he not?

Mr Cassidy—I do not know that I would say that he changed his story. During the course of his sworn affidavit being developed he clarified, in his mind, exactly what had happened. It ended up being an affidavit, that as I said, he did swear and was prepared to go to court and repeat the contents of. That is not unusual when you are talking to people about incidents that have occurred three or four years ago; that as you go through the matters with them their recollection clarifies to some extent.

Senator JOYCE—That would all make sense except that you continued to use the agreed statement of facts.

Mr Cassidy—The agreed statement of facts was the document prepared for the court which had a paragraph in it which was inserted at the request of Mr Pratt's legal advisers, as I said, at a time with a view to possible third-party actions where Mr Pratt's legal advisers took the view that that clause meant that it could be used as a matter of law; the agreement statement of facts could not be used for any other purpose. That was not the legal advice that the Director of Public Prosecutions had.

Senator JOYCE—Is the whole process then starting to come into breach of your role as a model litigant and how you are supposed to conduct this, given that these other factors are coming into play?

Mr Cassidy—Without quite understanding what 'other factors' mean—

Senator JOYCE—Mr Russell Jones changed his story.

Mr Cassidy—Let me give you a hypothetical. If we had legal advice that the agreed statement of facts was not useable by us in the criminal proceedings and we had nonetheless sought to use it, then that would be wrong and that would be a breach of the moral litigant policy. But we did not have any such advice and indeed the advice which the DPP had was to the contrary, that the agreed statement of facts was capable of being used in criminal proceedings, which is the advice that he acted on.

Senator JOYCE—Has the ACCC conducted an internal investigation of any of its officers concerning the Richard Pratt prosecution?

Mr Cassidy—No, we have not.

Senator JOYCE—Is it true that in December 2008 both Geoff Williams and Bob Alexander gave sworn evidence that they did not have file notes of their conference with amongst others Graeme Samuel on 17 October 2007 when they, in fact, did have them?

Mr Cassidy—That could be the case. I should say that in those proceedings I gave two days of evidence. Mr Alexander and Mr Williams gave at least 1½ days of evidence. There were a number of matters that each of us could recall and there were a number of matters each of us could not recall. It turned out I personally was at several meetings over the course of a

three- or four-year period which I simply could not recall and it may well have been—and I daresay it was the case—that Mr Williams and Mr Alexander found themselves in a similar position. Whether that particular meeting or discussion was one of them, I am afraid I could not say, although it is all on public record as a result of the testimony that the three of us gave in court.

Senator JOYCE—Is the ACCC concerned about the fact that two senior ACCC officers should both coincidentally give sworn evidence about the non-existence of documents when they in fact existed?

Mr Cassidy—We are concerned that our document recovery processes were not such as to yield those documents when they should have been yielded in response to the subpoenas and that is something that we will need to do what we can to remedy in the future. With that said, I would have to say that there is an enormous volume of documents that we have produced in relation to the subpoenas. In addition, I think we are up to 115 FOI requests from Mr Pratt's legal advisers in relation to this matter, which has also yielded quite a significant volume of documents. So, the particular document you zero in on I could safely say would be one of thousands of documents that have been produced.

Senator JOYCE—I will leave it at that on that issue at the moment, but I am taking the questions down and I will be following you up. I would move to another section and then hand back to my colleagues on section 51AC. You can all take a big breath. How many unconscionable conduct complaints has the ACCC received since the last estimates hearing?

Mr Bezzi—Our statistics are not necessarily reported to coincide with estimate hearings. At the time of our last appearance on 26 February our chairman outlined that in the six months to 31 December 2008 we had received 67 section 51AC unconscionable conduct complaints. Between 1 January 2009 and 31 May we received 43 section 51AC complaints. Four of these progressed to in-depth stage.

Senator JOYCE—Did you say four? That is my next question.

Mr Bezzi—Four are in-depth. Two of those matters did not progress any further. The remainder are the two current in-depth investigations. Anticipating your next question, we have four section 51AC unconscionable conduct matters before the courts.

Senator JOYCE—That is my next question. You must be reading my notes.

Mr Bezzi—One is a matter known as Allphones, another is Dukemaster in Melbourne, Seal-A-Fridge and Australialink, which is a directory listing solicitations matter.

Senator JOYCE—Are there any involving retail leasing?

Mr Bezzi—I think Dukemaster is a retail leasing matter.

Senator JOYCE—Has the ACCC rejected any mergers in the last 12 months?

Mr Grimwade—It has opposed a number of mergers. It has opposed one publicly. It has opposed nine confidentially. It has also rejected a variation to an undertaking. In addition to those, there have been 19 matters where the parties have actually withdrawn the matter from ACCC consideration, and I would suggest that some of those would have been because they had gleaned that the commission may have been likely to oppose those.

Senator JOYCE—You have not taken any matters into court to stop a merger yet?

Mr Grimwade—We have not needed to.

Senator JOYCE—Just quickly back on the grocery sector. Can the ACCC tell us what steps it has taken to deal with restrictive covenants to prevent independent supermarkets opening up in competition to Coles and Woolworths?

Mr Gregson—Those matters that were raised in the course of the grocery inquiry, as previously mentioned to this committee, are being investigated. We have been conducting a number of market inquiries dealing with those participants who have complaints in this area, and continue to refine those investigations with a view to narrowing in on the matters that may constitute contraventions of the act.

Senator JOYCE—What steps are you taking to prevent creeping acquisitions?

Mr Grimwade—Currently there is an issues paper that Treasury has released. Submissions are due on that issues paper on 10 July. The commission intends to put its position in relation to that issues paper as to whether or not and how creeping acquisitions ought to be addressed in any legislative amendment in that process.

Senator JOYCE—For the record, can you tell us what laws we have to stop geographic price discrimination as it currently stands?

Mr Cassidy—We do not have any laws to stop geographic price discrimination. I might add that neither does Canada anymore; theirs has just been repealed.

Senator JOYCE—Thank you.

Senator XENOPHON—I would like to ask about GROCERYchoice. How much had the ACCC spent on the GROCERYchoice website before the handover to Choice?

Mr Cassidy—We spent $3.64 million.

Senator XENOPHON—Does the ACCC have any ongoing association with the GROCERYchoice website?

Mr Cassidy—We have been providing some limited assistance with the data collection process, but that is due to cease at the end of this month. I would say 'limited assistance'. We are not actually collecting the data. It is just some limited assistance with the application of the data.

Senator XENOPHON—Is the ACCC aware of the number of hits or visits that the GROCERYchoice website has received since the Choice takeover and how does that compare to previously?

Mr Cassidy—I think the first Choice publication was in respect of the month of January. I may be misleading you. I can give you the numbers and then I will jump back. I have numbers up until January, which was the period in which we were running the website, but I have no information on what the hits on the website have been since then.

Senator XENOPHON—Can you take that on notice?

Mr Cassidy—We can. That will involve our asking Treasury and Treasury may need to ask Choice.

Senator XENOPHON—So, you do not have any direct involvement?

Mr Cassidy—No. We certainly do not have that sort of involvement with it.

Senator XENOPHON—You have not been involved in the proposed redesign of the website?

Mr Cassidy—No. As I said, apart from the very limited technical involvement in relation to the data, we have not had any involvement in the GROCERYchoice website since it was transferred to Treasury and then to Choice earlier this calendar year.

Senator XENOPHON—Are you aware of any complaints about the correctness of information on that website? Have there been issues about incorrect information on that website because of the information that has been fed to Choice in relation to the prices given?

Mr Cassidy—Do you mean since Choice has been—

Senator XENOPHON—Yes.

Mr Cassidy—We do not have any knowledge of that.

Senator Sherry—I recollect similar, if not the same, questions to Treasury. We will take those questions on notice and make sure that the appropriate Treasury officials receive them.

Senator XENOPHON—I have a couple of questions in relation to the banking sector. Mr Samuel, I do not have the article in front of me, but not so long ago in the media you did raise concerns about the level of competition in the banking sector. How would you describe the level of competition in the banking sector now compared with, say, three or four years ago?

Mr Samuel—Perhaps it is better to describe it in respect of the period prior to the global financial crisis. It was what would be described as a comfortable competition, less than intense or aggressive. There was a very interesting discussion on this that took place at the ASIC summer school involving a number of regulators, including John Laker from APRA, Rick Battalino from the Reserve Bank, the representatives of ASIC and me. That followed a discussion that had been led by Ian Macfarlane, the former Governor of the Reserve Bank. Mr Macfarlane himself expressed the view that the banking sector in Australia had probably suffered less from the ravages of the global financial crisis due, in his view, to a less than aggressive or a less aggressive competitive structure than might have existed elsewhere, perhaps in the United States and the United Kingdom.

Our view is that since the global financial crisis has taken place some of the policy decisions that have been made have tended to concentrate the banking and finance activity in this country more towards the big four banks and, as I have described it in a couple of those articles that you have referred to, into a comfortable competitive environment with the regional banks being somewhat less competitive than they were prior to the GFC and the non-bank financial institutions, the NBFIs, I think I used the expression, had gone almost into hibernation.

Senator XENOPHON—The more comfortable banks are the less comfortable consumers can be in terms of fees, charges and the lack of fulsome competition?

Mr Samuel—Our view has been that the less intense competition then the less that consumers can derive the benefits of competition, which are both evidenced in Choice in the

prices that are available to them, as you described it in terms of interest rates, bank charges and fees, and in terms of innovation and quality of service.

Senator XENOPHON—Further to that, do you consider the government's deposits guarantee created distortions in the market to the detriment of non-bank financial institutions?

Mr Samuel—It is clear that the global financial crisis has created some distortions in the market. That is not only here but elsewhere in the world. This is an international global phenomenon that, we have expressed the view, will gradually ease out as the global financial crisis itself—

Senator XENOPHON—Would it be fair to say, though, that the bank guarantee would have at least exacerbated or accelerated that process where there is a greater degree of concentration of power especially in the big four to the detriment of non-bank financial institutions?

Mr Samuel—I do not think that we have undertaken a detailed analysis or study of that issue. Of course, the analysis that we have undertaken of the banking sector, in particular, since the global financial crisis primarily relates to one banking merger, that is, the Commonwealth Bank's acquisition of Bankwest. As I have said publicly, that has occurred under somewhat unusual—one way to describe it—and extraordinarily circumstances, which might be a better way to describe it, towards the end of last year and earlier this year when we were at the peak of the concerns being expressed worldwide about the stability of the financial system and some very real concerns in relation to the parent companies of Bankwest, which is HBOS.

Senator XENOPHON—But going back to the government's bank guarantee, the policy rationale or imperative of the government was very clear, but surely the consequences of that guarantee has been to affect the marketplace to the extent that it has given more strength to the major banks, and non-bank financial institutions have found it more difficult to raise money on the wholesale market, which flows on as an impact on to consumers. Surely there must be a competitive factor there.

Mr Samuel—I would have to repeat the observations that I made in the public arena, which is that the NBFIs, the non-bank financial institutions, except in very limited circumstances which involve APRA and their qualification, if you like, for a certain status, have a non-existent ability to access the guarantee. The regional banks can access the guarantee, but there is a cost. I have seen statements made by senior executives of the regional banks to suggest that the cost of accessing the guarantee is, in their view, higher. In terms of the relativity with the cost of the guarantee to the four major banks, it is higher than what they would otherwise suggest would be their cost of funds in a different environment. This all needs to be seen in the context of some quite unusual circumstances and some quite significant changes in circumstances that have occurred since the global financial crisis has descended upon us.

Senator XENOPHON—I understand that, but given what the non-bank financial institutions have said and what the regional banks have said about the cost of accessing the guarantee, does it not follow logically that there have been consequences in terms of banking competition and in terms of the ability of consumers to access finance as a direct result of the

bank guarantee? It has been a factor in having a lessening of competition to get to the comfortable situation that we have now?

Mr Samuel—As I said, we have not examined this issue in detail so it would not be appropriate to—

Senator XENOPHON—Do you think it is worth examining?

Mr Samuel—That is not a matter for me. That would be a matter for you and for government. It is a policy decision.

Senator XENOPHON—If you were concerned that consumers were not getting the best possible deal and that there were consequences, that is something that the ACCC has the power to initiate its own inquiries into.

Mr Cassidy—You are right in the sense that we probably could under section 29 have some sort of inquiry into or review of that issue. From our point of view—and I think I said this to this committee on a previous occasion—what is important is that these, what you might call, short-term impacts deriving from the global financial crisis be allowed to unwind as the crisis itself unwinds so that you then return to what you might call a position of normality rather than having structural changes in the financial system, be they as a result of our merger decisions or be they as a result of a government decision, which will be there well past the unwinding of the global financial crisis.

Senator XENOPHON—Is the ACCC concerned that banks are able to keep raising their fees and charges, it seems, way in excess of the rate of inflation or way in excess of the actual cost of providing those services, particularly in relation to penalties?

Mr Cassidy—I can give you two answers to that. One would be to say that the bank fees and charges are not something really within our purview.

Senator XENOPHON—Is it not a function of competition?

Mr Cassidy—Yes. But, given the carve-out that exists in consumer protection matters, that basically goes to ASIC rather than us. That is a matter of law. To go back to your previous question: I doubt whether under section 29 of the act we could decide to have some sort of review of bank fees and charges, because that would not be within our overall remit. The second comment that I would make, from the discussion we have had in other contexts in this committee, is that there is no law against someone charging a high price in and of itself. That is not something where we or ASIC can conveniently say, 'That is unlawful.' It may raise other issues, but it is not something regulators can immediately get involved in.

Senator Sherry—As Mr Cassidy has pointed out, the pricing policy of financial institutions is a responsibility of ASIC, to the extent that ASIC has power to enforce any change in respect of fees and charges of banks, credit unions, superannuation funds and so on. There is an interesting debate about whether it should, which I would acknowledge. The only other point I would make is that in some areas of banking fees and charges the states have responsibility under their consumer credit. That will change when the powers are transferred to the Commonwealth and specifically ASIC.

Senator XENOPHON—The point I was trying to make is that sometimes pricing structures are a consequence or a function of the level of competition in the marketplace.

Senator Sherry—I have no doubt about what you say and I think it is an important policy debate to have, but it is not a matter for the ACCC.

Senator XENOPHON—That is where we will agree to disagree. Thank you.

Senator EGGLESTON—I would like to ask a few questions about telecommunications. I believe that resolving the issue of the regulated cost of the underlying copper network is a matter that Telstra and the ACCC have spent some time on. In relation to cost models put forward by both Telstra and the ACCC for regulated costs for the copper network Telstra has proposed having the models undergo a rigorous independent assessment and said that it is willing to accept the decision that ensues. Is this something the ACCC will entertain and would this not provide a possible pathway for setting prices going forward on a fair and equitable basis?

Mr Home—As you indicated, Telstra has proposed what it terms an independent review of both a cost model it submitted to the ACCC in regulatory proceedings and a cost model that we have had separately developed. Telstra recently published a letter that the ACCC sent in response on that matter, where we pointed out that the ACCC does consider itself an independent expert on these matters.

Senator EGGLESTON—Does or does not?

Mr Home—Does. There are already independent review mechanisms available to Telstra under the Trade Practices Act, one of which it is currently availing itself of—being a tribunal review of our decision in relation to a ULLS undertaking.

Senator EGGLESTON—That is an unbundled local loop, for the uneducated or unfamiliar. How many staff in its telecommunications section does the ACCC have with formal qualifications in telecommunications and telecommunications networking, engineering and design?

Mr Home—I could say one. I could take on notice to provide whether there are any more.

Senator EGGLESTON—It would be good if you would. Is it within the statutory responsibility of the ACCC to offer advice on detailed matters of technology, choice, costs and capabilities for any specific industry sectors it regulates?

Mr Pearson—Could you just repeat the question, please?

Senator EGGLESTON—Is it within your statutory responsibility to offer advice on detailed matters of technology, choice, costs and capabilities for any of the specific industry sectors that you regulate?

Mr Samuel—It is not within our statutory responsibilities to offer detailed technical advice, which I think were the words you used.

Senator EGGLESTON—I understand that over the last six months or so the ACCC has engaged Analysys—now Analysys Mason—a UK telecommunications consulting firm, on a number of consultancies that cost a total of $824,995.42. My question is: did Analysys provide any advice, or did the ACCC seek any advice from Analysys, on the costs and feasibility of fibre-to-the-home or comparative costs of fibre-to-the-home compared with other technologies?

Mr Samuel—Not to my knowledge.

Senator EGGLESTON—Did the ACCC seek any advice from ACMA, who have considerable technical competence in network engineering costs, on the costs and viability or merits of a fibre-to-the-home rollout compared with a fibre-to-the-node rollout?

Mr Samuel—No.

Senator EGGLESTON—Has the ACCC done its own preliminary business case or analysis of the fibre-to-the-home proposal to determine what its impacts might be on the prices consumers will pay for broadband?

Mr Samuel—No.

Senator EGGLESTON—Does the ACCC have any understanding of what cost consumers would face for access to a fibre-to-the-home network?

Mr Samuel—No.

Senator EGGLESTON—In the absence of any understanding about costs, how can the ACCC hold the view that it would be in the consumers' interests to build a national fibre-to-the-home network?

Mr Samuel—The answer covers about four or five issues. If the question is addressed more broadly to the announcement by the government about the National Broadband Network then I would be happy to provide that answer, if we can extend the question to cover that. Or do you want to confine it to the fibre-to-the-home?

Senator EGGLESTON—We are interested in fibre-to-the-home, which is what the National Broadband Network proposes, as I understand it.

Mr Samuel—Let me perhaps try to provide you with a number of answers there. Firstly, to make it quite clear—and I think it has already been made clear in previous hearings in this committee and elsewhere—the ACCC has not been involved in the business case, the financial modelling or the financial analysis or assessment of a fibre-to-the-home national broadband network. That was not within its remit and it did not provide any advice in that area. The National Broadband Network announcement by the government, however, has a number of very significant consequences for telecommunications in this country. The first is quite clear. This is all on the assumption that the process that has been unveiled by the government will proceed and that the National Broadband Network and the other issues covered in the minister's announcement back on 7 April 2009 will fact to take place. The first, of course, is that the announcement breaks the stalemate in the upgrade of Australia's national broadband network that had been created over a number of years, particularly since 2005, by the confluence of ongoing political imperatives and Telstra seeking competitive advantage to cement its dominance in relation to the provision of telecommunication services to Australian consumers.

The second is that the fibre-to-the-home network, or the National Broadband Network announced by the government, which is a combination of both fibre-to-the-home and wireless technologies for less densely populated areas, pursues 21st century technology which is designed to replace the early 20th century copper network that we essentially have been relying on in this country.

The third and perhaps most important element of the government's decision is encompassed within the stated policy intention with respect to the ultimate structure of the NBN and the NBNCo. That structure involves a structural separation of the network ownership, that is, the fibre-to-the-home network ownership, and control from downstream competitors, that is, retailers. That structural separation that is contemplated in the announcement relating to the National Broadband Network and NBNCo, as I have stated previously, corrects the mistakes of earlier governments to allow what is generally acknowledged to be one of the most vertically integrated structures in perhaps the world in relation to telecommunications.

Fourth, and perhaps equally important, is that the government has announced a review of the regulations related to telecommunications which enables a rigorous and public examination of, and potentially rectification of, the weaknesses and deficiencies in the current regulatory regime, which in the view of the ACCC has operated to the detriment of competition and ultimately to the detriment of the long-term interest of end users, namely, Australian consumers.

CHAIR—Minister, you indicated you had to leave at 12. Senator Eggleston just has a couple of questions left, but on the understanding that we might need to take some on notice if you need to go.

Senator Sherry—I have to go; I was told it was 12 o'clock. But I am not particularly keen to leave a committee hearing. I can only suggest the time was given as 12 and Senator Eggleston should put his questions on notice.

Senator EGGLESTON—We could do that. There are not very many left. There is one question I would like to ask in conclusion. Given that markets such as Canada, the USA, France, Germany and Sweden all seem to be outperforming Australian broadband performance, and bearing in mind the Prime Minister's call for evidence based policy, can the ACCC outline what significant failings there are in the Australian regulatory regime compared with these other markets and how these regulatory shortcomings compared with better performing markets may have held Australia back? Do you wish to comment on that?

Mr Samuel—The best commentary I can give you would be to refer you to a 250-page submission that was filed last week or the week before with the department, which is the submission to the Department of Broadband, Communications and the Digital Economy titled *National Broadband Network: regulatory reform for 21st century broadband*.

Senator EGGLESTON—I will put the other questions on notice because the minister has to leave.

CHAIR—I thank the minister and officers of the ACCC for coming in. That concludes our estimates hearings.

Committee adjourned at 12.05 pm