COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

ESTIMATES

(Budget Estimates)

TUESDAY, 31 MAY 2005

C A N B E R R A

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SENATE

ECONOMICS LEGISLATION COMMITTEE

Tuesday, 31 May 2005

Members: Senator Brandis *(Chair)*, Senator Stephens *(Deputy Chair)*, Senators Chapman, Murray, Watson and Webber

Senators in attendance: Senator Brandis *(Chair)*, Senators Allison, Boswell, George Campbell, Chapman, Conroy, Lundy, Marshall, Murray, Mason, O'Brien and Watson

Committee met at 9.03 am

INDUSTRY, TOURISM AND RESOURCES PORTFOLIO

Consideration resumed from 30 May 2005

In Attendance

Senator Minchin, Minister for Finance and Administration

Department of Industry, Tourism and Resources

Executive

Mr Mark Paterson, Secretary
Mr John Ryan, Deputy Secretary
Ms Patricia Kelly, Deputy Secretary
Mr Tim Mackey, Deputy Secretary

Outcomes and Outputs

Mr Drew Baker, General Manager, ICT Services Branch, e-Business Division
Ms Tricia Berman, General Manager, Innovation Policy Branch, Innovation Division
Mr Chris Birch, Acting General Manager, Performance Management, AusIndustry
Ms Vicki Brown, General Manager, International Energy Branch, Energy and Environment Division
Mr Don Brunker, General Manager, Industry Analysis Branch, Industry Policy Division
Ms Chris Butler, General Manager, Business Development, AusIndustry
Mr Peter Chesworth, General Manager, Strategy, Office of Small Business
Mr Drew Clarke, Head of Division, Energy and Environment Division
Mr Peter Clarke, General Manager, Automotive and Engineering Branch, Manufacturing, Engineering and Construction Division
Ms Sarah Clough, Acting General Manager, Industry Sustainability Group, Tourism Division
Ms Tania Constable, General Manager, Resources Development Branch, Resources Division
Mr Ivan Donaldson, Executive Director, Australian Building Codes Board, Manufacturing, Engineering and Construction Division
Ms Robyn Foster, Acting Chief Financial Officer

Dr Michael Green, General Manager, Advanced Manufacturing & Space Licensing Branch, Manufacturing, Engineering and Construction Division
Mr Tony Greenwell, Acting General Manager, Policy, Office of Small Business
Mr Paul Griffin, General Manager, Business Entry Point Branch, e-Business Division
Ms Kerri Hartland, Head of Division, Innovation Division
Mr John Hartwell, Head of Division, Resources Division
Ms Marie Johnson, Head of Division, e-Business Division
Mr Barry Jones, Executive General Manager, Invest Australia
Mr Detlef Jumpertz, Acting General Manager, TCF and Construction Branch, Manufacturing, Engineering and Construction Division
Mr Terry Lowndes, Head of Division, Industry Policy Division
Mr David Luchetti, Acting General Manager, Aerospace & Defence Industries Branch, Manufacturing, Engineering and Construction Division
Mr Rob McKeon, General Manager, Industry Collaboration Group, Manufacturing, Engineering and Construction Division
Mr Ken Miley, General Manger, Trade and International Branch, Industry Policy Division
Mr Brendan Morling, General Manager, Industry Policy Branch, Industry Policy Division
Mr Paul Mornement, Acting General Manager, Online Systems Branch, eBusiness Division
Mr Peter Morris, General Manager, Tourism Market Access, Tourism Division
Ms Janet Murphy, Head of Division, Tourism Division
Mr Kevin Noonan, General Manager, ICT Operations Branch, e-Business Division
Mr Philip Noonan, Head of Division, Corporate Division
Mr Kevin O'Brien, General Manager, National Energy Market Branch, Energy and Environment Division
Mr Steve Payne, General Manager, Minerals and Fuels Branch, Resources Division
Mr Bill Peel, Executive General Manager, AusIndustry
Mr Craig Pennifold, General Manager, Pharmaceuticals and Biotechnology Branch, Innovation Division
Mr Ken Pettifer, Head of Division, Manufacturing, Engineering and Construction Division
Ms Karen Powell, Acting General Manager, ICT Operations Branch, e-Business Division
Ms Kerry Rooney, General Manager, Business Development Group, Tourism Division
Ms Margaret Sewell, General Manager, Safety Taxation and Projects Branch, Resources Division
Mr Paul Sexton, General Manager, Customer Services, AusIndustry
Mr Sam Skrzypek, General Manager, Small Business and Industry Programs, AusIndustry
Dr Terry Spencer, Acting General Manager, Chemical and Biological Metrology Branch, National Measurement Institute
Mr Garry Wall, General Manager, Energy Futures Branch, Energy and Environment Division
Mr Denis Waters, Acting General Manager, Business and Ministerial Services Branch, Corporate Division
Ms Sue Weston, Head of Division, Office of Small Business
Ms Judith Zielke, General Manager, Innovation Programs, AusIndustry

IP Australia

Ms Kate McRae, General Manager, Human Resource Management Group, IP Australia

Dr Peter Tucker, General Manager, Business Development and Strategy Group

Geoscience Australia

Dr Clinton Foster, Chief of Petroleum and Marine Division

Mr Peter Holland, General Manager, National Mapping

Dr Phil McFadden, Chief Scientist and Chief of Geospatial and Earth Monitoring Division

Dr Chris Pigram, Chief of Minerals Division

Dr John Schneider, Group Leader, Risk Research Group, Geoscience Australia

Mr Tony Robinson, General Manager, Corporate

Dr Neil Williams, Chief Executive Officer

Tourism Australia

Mr Geoff Buckley, Director, Strategy and Research

Mr Sasha Grebe, General Manager, Corporate Affairs

Mr John Hopwood, Executive General Manager, Corporate Services

Mr Scott Morrison, Managing Director

Mr Peter Robins, Manager, Tourism Research Australia

ACTING CHAIR (Senator Watson)—Order! Proceedings of the committee will now continue.

Senator O'BRIEN—In the resources part of the portfolio, I want to find out what the status of the low emissions technology fund is at present.

Mr Peel—Public consultations on the design of the fund will be commencing early in June.

Senator O'BRIEN—I take it that criteria for the processing of applications have not been determined?

Mr Peel—There has been a discussion paper produced for distribution to industry and consultations which will commence on 29 and 30 June. From those consultations we will finalise with the Australian Greenhouse Office the criteria for the program.

Senator O'BRIEN—Can the committee have a copy of the discussion paper?

Mr Peel—Yes.

Senator O'BRIEN—When is it envisaged that the first round of applications will be called?

Mr Peel—We envisage that we will call the first round of applications in about February 2006. Registrations will be in September or October 2005 and the applications will be in February 2006.

Senator O'BRIEN—Is it known yet what the process for assessing and determining the applications will be?

Mr Peel—It is likely that we will engage an expert committee to review the applications.

Senator O'BRIEN—Who will make the final decision?

Mr Peel—The Minister for Industry, Tourism and Resources and the Minister for the Environment and Heritage.

Senator O'BRIEN—When would you expect that the first round of applications will have been dealt with—that is, decisions made?

Mr Peel—We expect they will be announced in July or August 2006.

Senator O'BRIEN—Thank you for that. Where is the Australian Energy Regulator process up to?

Mr D Clarke—The necessary legislation for commencement of the Australian Energy Regulator has been passed by the Commonwealth parliament and the South Australian parliament. The current plan is for the AER to commence operation on 1 July this year.

Senator O'BRIEN—Are the final funding arrangements in place?

Mr D Clarke—No. There are interim funding arrangements that will cover the 2005-06 financial year, which are that the Commonwealth will fund the AER through the Treasury portfolio, given that it is a constituent part of the ACCC, and the states will jointly fund the complementary body, the Australian Energy Market Commission, which will also commence on that date.

Senator O'BRIEN—Are they the interim arrangements for one year?

Mr D Clarke—Yes.

Senator O'BRIEN—Will there be any new arrangements?

Mr D Clarke—The Ministerial Council on Energy agreed to this Commonwealth AER and states AEMC interim funding arrangement to apply for the 2005-06 financial year. The long-term funding arrangement to apply beyond that has not yet been agreed.

Senator O'BRIEN—Is the process for determining agreement at the ministerial council level?

Mr D Clarke—Yes.

Senator O'BRIEN—I suppose it is, in a sense, hypothetical, but what is the plan for dealing with a disagreement at that level with regard to future funding?

Mr D Clarke—As you say, it is hypothetical. All governments and the MCE process are committed to the AER and AEMC as a central element of the COAG reform program. I am confident that a funding arrangement will be negotiated and agreed within the next 12 months.

Senator O'BRIEN—That would be one of the few areas where there has been a straight and simple process to agreement between the Commonwealth and states. I am surprised at your confidence. That is why I said that in a sense it was hypothetical, but the reality is that there have been many matters that have been subject to disagreement. My question was: is there a plan for dealing with this eventuality, if I can put it that way?

Mr D Clarke—The issue is being actively addressed through the MCE process. Ministers—I use the plural to apply to all Ministerial Council on Energy ministers—are very conscious of the need to determine the long-term funding arrangements. It is not on the

backburner, so to speak. The MCE is aware that it needs to settle that issue as soon as possible.

Senator O'BRIEN—Has a dispute between the states and the Commonwealth over funding held up the practical implementation of the AER to date?

Mr D Clarke—No, it has not. The interim agreement ensured that the long-term funding arrangement was not an impediment to the commencement of the two new bodies.

Senator O'BRIEN—The Australian Energy Market Commission, at what stage is that development up to?

Mr D Clarke—It is tracking exactly in parallel with AER. The plan is that it will also commence on 1 July and the interim funding arrangement, as I said, for the AEMC is that the states will collectively fund the AEMC.

Senator O'BRIEN—When do you expect gas regulation to be transferred to those bodies?

Mr D Clarke—The MCE discussed that issue just recently on 20 May and agreed on a timetable for a major package of gas legislation that will address the transfer of gas regulation to the two new bodies and the response of the Productivity Commission gas access inquiry. The current timing is that that should occur in 2006. We are thinking exposure draft of the legislation by late 2005, finalisation of the bill first half of 2006, then passage of the necessary legislation in the second half of 2006. There will be a market bulletin advising participants of that detailed timeline I would hope issued in the next week or so.

Senator O'BRIEN—Is that the Commonwealth legislative process you are talking about?

Mr D Clarke—The gas package will actually require legislation in all jurisdictions. South Australia again will be the lead legislator for the states, but the nature of the gas arrangements across the country is that while SA will lead all jurisdictions will need to pass at least applications acts or mirror legislation in order to achieve the full gas package.

Senator O'BRIEN—Is it true to say that until all of the states and the Commonwealth pass their legislation there will be a barrier to full implementation?

Mr D Clarke—Correct.

Senator O'BRIEN—Could the committee be advised what initiatives the department is working on and planning to facilitate increased investment in discovery and development of minerals an energy resources?

Mr Hartwell—The government has acknowledged that there has been a decline in exploration effort, in particular in minerals, and is also concerned to increase our petroleum exploration and has a resources exploration strategy. As a part of that we have an implementation program in relation to the minerals exploration action agenda and, of course, over the last two budgets there have been a number of initiatives in the petroleum area, in particular increased funding for Geoscience Australia in relation to frontier programs and more recently in the budget some changes to the petroleum resource rent tax, which should all contribute to further development of our resources.

Senator O'BRIEN—What are you actually doing about it? That is the framework. What is the department actually doing on a day-to-day basis?

Mr Hartwell—If we take minerals exploration, we are in the process of implementing the minerals exploration action agenda. There was a strategic leaders group set up which came up with a number of recommendations. These recommendations were largely replicated by what was called the Prosser inquiry into impediments to resources exploration. Under that agenda, that is the minerals exploration implementation action agenda, there are four working groups, one dealing with land access, one dealing with human and actual capital, one dealing with finance issues and there is a fourth one in respect of pre-competitive geoscience. They are the four working groups that are working in relation to various issues which might impact on our exploration effort.

Senator O'BRIEN—They are interdepartmental working groups are they?

Mr Hartwell—No, the implementation group is actually led by industry. It is chaired by John Dow who is the former managing director of Newmont Australia.

Senator O'BRIEN—Could you supply on notice the memberships of those four groups?

Mr Hartwell—We certainly can.

Senator O'BRIEN—You talked about budgetary initiatives, given that the government has increased the value of the exploration deductions in designated frontier areas from 100 per cent to 150 per cent when determining liability for the petroleum resource rent tax. I would like to get a response to claims by the Santos Chairman, Stephen Gerlach, who said:

> ... through market and financial incentives, Indonesia is focused on strengthening its domestic energy supplies—disappointingly, it is something that Australia appears unwilling to do.

Does that not imply that the government's policy initiative in this area does not have the support of industry and is therefore not likely to work?

Mr Hartwell—No, I do not think you could make that judgment. The recent initiatives in relation to the petroleum resource rent tax which were contained in the budget received strong approval from industry, including from the industry association, but also received commendation from a number of companies within the petroleum area. We can table letters from, say, the Managing Director of Woodside supporting what the government has done in that area.

Senator O'BRIEN—I will take you up on that offer, if you could table that correspondence. Is the department aware of the alternative initiatives that Mr Gerlach is referring to, in Indonesia?

Mr Hartwell—We have noted some of the comments that have been made by Santos executives.

Senator O'BRIEN—You have noted the comments, but my question was: do you know what he is referring to as the Indonesian initiatives, with which he is comparing the Australian incentives?

Mr Hartwell—We do certainly have a look at what other areas of the world are doing in relation to their fiscal settings for petroleum and minerals. In that context we try and ensure that the Australian fiscal settings are as competitive as they can possibly be, taking into account all arrangements. Certainly, in relation to what we have seen in terms of comparative analyses, the Australian system ranks pretty highly.

Senator O'BRIEN—I think there was some discussion about the extent to which condensate produced in association with natural gas on the North West Shelf was excisable. I think, Mr Hartwell, you said in February that you did not think it was. Senator Campbell asked, 'If the same excise provisions were applied to condensate produced with natural gas as are applied to condensate produced with oil, what value could be assigned to forgone revenue from this source for the period 1 July 2003 to 31 December 2003?' Mr Paterson later responded to this question, saying that extracting the treatment of one element of a production excise and royalty regime from the treatment under a PRRT regime is not something that could be done easily. I am told that the calculation can easily be made, although it would need to be appropriately qualified. For example, can you provide the production figures for condensate produced in the North West Shelf in association with natural gas in the last two financial years?

Mr Hartwell—Yes, I think we could do that. We do not have those figures with us at this point in time, but that could be done, yes.

Senator O'BRIEN—Could the department then not provide a range of estimates of excise payable by treating the condensate as if it had been old, new or intermediate oil?

Mr Hartwell—We can do those comparisons. We are in the area of secondary taxation and, as you would be aware from previous questions that have arisen during the Senate estimates process, the North West Shelf is the only area in offshore Australia which is subject to an excise and royalty system of secondary taxation, whereas in the rest of our offshore petroleum areas a petroleum resource rent tax regime applies. We have also offered the view, despite what has been put forward, for the exemption of condensate from excise produced out of the North West Shelf. If you had applied the petroleum resources rent tax to the North West Shelf leases, the total collections on secondary taxation would have been approximately the same. The comparisons need to made—as indicated by the secretary and which you referred to last time—in the context of the regimes that are applying.

To answer your question specifically on whether we can provide the figures on condensate production, yes, we can certainly do that. I hasten to add that one has to be careful about then suggesting it is forgone revenue in the sense that there has been no collection of revenue on behalf of the community in terms of a secondary taxation regime. One has to be careful about making those judgments because of the different regimes that apply in the North West Shelf leases compared with the rest of offshore Australia.

Senator O'BRIEN—It has been put to me that the department could provide a range of estimates of excise payable by treating the condensate as if it had been old, new or intermediate oil and a range of estimates on this basis would provide an appropriate indication of the revenue forgone. You don't agree with that?

Mr Hartwell—It would provide a figure which would suggest that that is the revenue forgone, but, as I am saying, one would have to look at it in the context of the overall regime that exists. I accept the broad point that you are making.

Senator O'BRIEN—Could the department provide the range of estimates, including appropriate qualifications on how they were determined?

Mr Hartwell—Indeed, we can do that.

Senator O'BRIEN—Mr Hartwell, I think you advised the committee in February that crude oil excise changes in 2001 had resulted in forgone revenue of $140 million between July 2001 in February 2004. Can you bring that figure up to date for the value of forgone revenue between February 2004 and the current point in time?

Mr Hartwell—We can certainly bring it up to date. We do not have that figure in front of us at this point in time, but certainly we can update that figure for you.

Senator O'BRIEN—You said that the beneficiaries of that initial $140 million were Woodside, BP, BHP Billiton, Shell, Chevron and MIMI in equal one-sixth shares. Is that still the case?

Mr Hartwell—That is still the case.

Senator O'BRIEN—I believe Australia still has about five other potential LNG projects in play at present—Greater Gorgon, Sunrise, Scarborough and one or two further projects in the Browse Basin. Do the very favourable arrangements which currently apply to the North West Shelf place these other projects at a competitive disadvantage?

Mr Hartwell—Certainly not in our view. As has been already indicated this morning, those projects would come under the petroleum resource rent tax regime, which is a different regime from what applies in the North West Shelf leases, where it is an excise royalty regime. Our view is that the petroleum resource rent tax regime is a profits based tax. It is project specific and it has a number of factors attached to it which in our view make it a very efficient and effective secondary taxation regime. We do not believe that it places any other projects at a disadvantage.

Senator O'BRIEN—I do not understand that rationale.

Mr Hartwell—The rationale is that if you were to apply the PRRT on the North West Shelf leases—and this is the point I have been making—our view is that the collections of secondary tax would not be much different from what they are under the excise and royalty regimes, despite the condensate excise exemption. In terms of comparative disadvantage, if that is the point you are making, we are not convinced of that.

Senator O'BRIEN—Has the department had representations from industry expressing a contrary view?

Mr Hartwell—We have had representations for improvements in the administrative regime, various aspects of the petroleum resource rent tax, and we have responded to those, including some recent announcements in the budget. We continually look at the regime to ensure that it is competitive in terms of our fiscal attractiveness, if that is the right way to describe it. Certainly we will listen to representations—some of them we accept, some we do not, but we constantly have the regime under review.

Senator O'BRIEN—My question was: have you had submissions which put a contrary view of those arrangements to those that the department holds?

Mr Hartwell—We have had submissions which suggest that the petroleum resource rent tax regime is better suited to oil developments than gas developments. We have had suggestions for certain changes to the regime in relation to certain aspects which attach to it—some of the deductibility provisions going forward. As I mentioned, in terms of the technical

aspects of the regime we have also had views put forward. We have responded with advice to them when we believed—and that is really not my call, it is our minister's and the Treasurer's call—there was a case. In certain other areas we have not accepted those views.

Senator O'BRIEN—I am not asking for your judgment; I am asking whether parts of industry have put a view to the department for the purpose of lobbying the government or the minister that these other projects are at a competitive disadvantage. I am not asking what the department's view is; I am asking if sections of industry have the view that that is the effect of the arrangement?

Mr Hartwell—When you say that these projects are at a disadvantage—

Senator O'BRIEN—Competitive disadvantage.

Mr Hartwell—I am not sure that it has been put quite in that context. It has been put to us that in relation to the petroleum resource rent tax for gas developments, there are certain aspects of the regime that do not suit gas developments going forward, especially some of the more marginal projects. We have looked at that and we still have that under review. As I have mentioned, we have had some changes instituted to the regime reflecting some of the points that have been put forward. This is an iterative process. As you would be aware, there is always lobbying by industry in relation to tax regimes which they believe may not be suitable to development. We can only advise ministers on the basis of the evidence before us. We go through an assessment process of that.

Senator O'BRIEN—As one would expect. As you were not able to say with certainty whether the contrary view had been put, could you check and let the committee know—that is, if the position is different.

Mr Hartwell—We can do that.

Senator O'BRIEN—I take it from your earlier answers that there is an ongoing dialogue about measures of this type. Is there any formal or informal working party or committee structure within the department which has under review the sorts of submissions that you indicate you are receiving from industry on an ongoing basis?

Mr Hartwell—We would describe it as more of an informal working arrangement. Certainly as part of our stakeholder consultation process we are open to views that are put forward in relation to the fiscal regime and other matters affecting resource development, for that matter. We would think that it is more of an informal arrangement, but we do have regular discussions with companies and various committees which serve the Petroleum Production and Exploration Association and often they are on fiscal issues.

Senator O'BRIEN—Going back to the issue of exploration deductions in designated frontier areas, can you tell us what uptake there has been, or indicated uptake, of the designated frontier area initiatives since the policy was introduced?

Mr Hartwell—We can do that, Senator. Each year the minister releases areas for program bidding under our exploration acreage release program. Up to 20 per cent can be put forward as designated frontier areas. There have been six areas released. We have bids on three of those six.

Senator O'BRIEN—Is there a forecast of exploration expenditure in the areas released as they are released?

Mr Hartwell—I would need to go back and have a look at the individual bids. These are work program bids. I do not have the specific figures under each of those three bids, but we can provide that for you—although I would take advice on that because of the nature of the bidding system. There is a competitive bidding system so in aggregate we may be able to do that. I just need to take advice.

Senator O'BRIEN—What initiatives does the department have in place or does it plan to put in place to facilitate the gaining of greater market access for Australian resources, including winning further major LNG contracts?

Mr Hartwell—The government stands ready to assist, as appropriate, efforts by Australian companies to sell LNG. As you have pointed out already, there are a number of prospective LNG developments in Australia. LNG is essentially based on long-term, take-or-pay contracts. There are markets where our company proponents believe government support is important in the context of winning bids. But for the most part it is companies; it is a commercial transaction between buyers and sellers. So, when asked, the government—and a whole range of agencies are involved in that—will assist. One of the ones that is in evidence most, of course, is the China Quandong project. Because of the nature of the Chinese system, the government role was considered important.

Senator O'BRIEN—So rather than initiatives it is just standing ready to respond to requests, is it?

Mr Hartwell—I think that is a fair way of describing it, Senator. Ministers often carry in their briefs support for Australian marketing efforts in a whole range of areas, and not only in resources. Certainly there has been quite a bit of publicity in relation to LNG. But, as well, ministers would support other efforts by Australian companies to market their products, where it is appropriate, but it is recognised as essentially a relationship between buyers and sellers.

Senator O'BRIEN—There is nothing else you want to add to that answer about the initiatives that are in place?

Mr Hartwell—No, there is nothing of a specific nature that I would add at this point.

Senator O'BRIEN—Thanks. Can you tell us what initiatives the department or the government have in place to address export infrastructure constraints with regard to this sector—the resources sector.

Mr Hartwell—Yes, we can do that. As was reported at the last Senate estimates, some concerns were expressed last year about constraints in relation to our port facilities for coal. Our minister took the initiative to write to the Minister for Trade and to the Deputy Prime Minister, the Minister for Transport and Regional Services, setting up a group of officials to look at the whole coal supply chain and coal infrastructure issues. We reported at the last Senate estimates that that report was near completion. It has been completed and submitted to ministers. It became part of the input into the process that the Prime Minister set up, looking at broader infrastructure—that was the group that was chaired by Brian Fisher. So there is

quite an active bit of work on our part in terms of at least articulating some of the issues that are presently facing our resource exporters.

Senator O'BRIEN—What developments can be connected with that work to date?

Mr Hartwell—The decision-making processes, as I mentioned, are presently with the government—they have been submitted to ministers. There is the work that has been done under the Prime Minister's task force, which has also been delivered to the Prime Minister. That is now with ministers. I cannot really say much more at this point in time.

Senator O'BRIEN—No, I understand. I am just trying to be clear that within the process there is not anything that has emerged in terms of a particular project or a substantial development. Is that correct?

Mr Hartwell—Sorry; I am not sure I understand the direction of that question.

Senator O'BRIEN—I thought I saw you nodding; that was why I was asking if you did.

Ms Constable—Senator, that is correct.

Senator O'BRIEN—Can I get an update on the status of the planned oil code and retail petrol reform?

Mr Hartwell—I will ask my colleague Steve Payne, from the Minerals and Fuels Branch, to answer that question.

Mr Payne—The minister has undertaken a round of consultations with industry stakeholders, and he is considering their position on a late draft of the oil code which has reflected some changes that stakeholders wanted made to the code. Basically, the minister is considering his position in response to those industry views.

Senator O'BRIEN—Can you advise us of the nature of those late views?

Mr Payne—Some stakeholders had views about tenure arrangements which had been provided in the previous draft of the code, and the minister responded to those by making changes to the code. He then wrote to all the stakeholder groups to ask them what their position was on the code proceeding. Stakeholders have responded, and the minister is considering those responses.

Senator O'BRIEN—This is lease tenures, is it?

Mr Payne—I did not hear that.

Senator O'BRIEN—The tenure of leases.

Mr Payne—Yes, for franchisees and commission agents.

Senator O'BRIEN—When you said that the minister responded, what was his response? How would you categorise the response?

Mr Payne—He has made a change in the code to return the length of tenure for franchisees to nine years, and he has provided tenure of five years for commission agents.

Senator O'BRIEN—And that has gone back out to allow the interested parties to put in their final submissions?

Mr Payne—That is true. The stakeholders are aware of those changes, and a final version of the code has been sent out to all stakeholders. They have then responded to the minister with their views on the reform package going ahead.

Senator O'BRIEN—Do you know of a timetable for implementation?

Mr Payne—It is a little unclear. As you know, legislation has to be introduced to repeal two current acts as part of the reform package. Because of these changes to the code, it is not quite clear when that legislation would be introduced. It would be a matter for the government to determine the priority for that.

Senator O'BRIEN—So it does not have a slot at this stage?

Mr Payne—That is correct.

Senator O'BRIEN—Does that mean it does not get on this year unless something is pushed aside?

Mr Payne—I do not think you could rule it out. Getting on this year would still be possible. It is just uncertain what month, what time of the year the legislation could be introduced.

Senator O'BRIEN—On another subject, the budget provides for a $10 million contribution to the conversion of the Queensland Alumina refinery from coal to gas. That is at Gladstone. The PBS states that this funding is to be absorbed by DITR from within the existing administered appropriations. It is quite a large amount of money to be handled this way. What program areas is the $10 million coming from?

Mr Paterson—It is being funded out of commercial ready. The overall allocation to commercial ready has been reduced by $10 million, and that has provided for this project.

Senator O'BRIEN—All in the coming financial year?

Mr Paterson—Correct.

Senator O'BRIEN—Can someone show me, if that is represented in the PBS, where it appears.

Mr Paterson—Queensland Alumina is in a number of spots. Page 40 of the PBS shows the $10 million provided for in the budget estimate for 2005-06. Page 24 of the PBS shows the Queensland Alumina contribution to the conversion of the refinery. You will notice there is a note to that. That note appears on page 26, which is where it is to be absorbed within existing administered appropriations. Commercial ready is an administered appropriation, and it appears.

Senator O'BRIEN—I am just asking whether the source of the money is represented in the PBS somewhere.

Mr Paterson—No.

Senator O'BRIEN—Is this a conversion of an existing turbine or is it the installation of a new turbine?

Mr Hartwell—I think it could be described as a conversion of the power source into the QAL refinery from coal to natural gas. That may involve some changing of turbine

configuration. I am not a technical expert on how that would be achieved, but I assume that would be the case.

Ms Sewell—The proposed conversion is essentially largely of existing coal-fired generators to gas-fired generators.

Senator O'BRIEN—So it is not the replacement of the turbines themselves.

Ms Sewell—Like Mr Hartwell, I am not necessarily an expert in the generating facilities at QAL. This is a very new announcement.

Senator O'BRIEN—I am just trying to be clear. If it were a replacement of the turbine rather than an adaptation of the power source, would that qualify for funding under this measure?

Mr Hartwell—As has been publicly announced, the measure is, in a sense, based on conversion from coal to gas as a part of a broader program of CO_2 abatement.

Senator O'BRIEN—So whatever it takes to do that is able to be funded. Is that what you are saying?

Mr Hartwell—As has been explained, there is funding to achieve that objective.

Senator O'BRIEN—And my question is: as long as that objective is achieved, there is no barrier to the aspect of the process that can be funded? Is that true?

Ms Sewell—The minister announced a number of conditions precedent to take-up of this money. In particular, it is tied to a reduction of at least 2½ million tonnes of CO_2 emissions and the take up of 12 petajoules of gas from Papua New Guinea. The third condition precedent is matching funding from the Queensland government.

Senator O'BRIEN—As long as that is achieved, that is the criteria?

Ms Sewell—Yes.

Senator O'BRIEN—It means it is not germane to the funding initiative; it is outcome driven?

Mr Hartwell—I think that is a fair description. As Ms Sewell just said, there are conditions attached to it that have been publicly announced and we have just indicated those to you.

Senator O'BRIEN—Thank you for that. The activities of Industry Capability Network Ltd's Supplier Access to Major Projects are funded at $1 million a year. What has this program achieved for the resources sector over the current financial year?

Mr Hartwell—That is not one under my division.

Senator O'BRIEN—I am told they were questions that were asked last night. If they have not been dealt with, I will put them on notice.

Mr Ryan—We might have to take those on notice.

Senator O'BRIEN—I will proceed. The Mining Industry/Indigenous Communities Working in Partnership program is funded to $500,000 per year. Can you tell me what that program has achieved in the current financial year?

Mr Hartwell—This program has been renewed. Formerly, it was for four years. The program is aimed at encouraging Indigenous employment within the mining industry and changing the cultural awareness of Indigenous people to benefit from the mining industry, which often is in remote areas and in areas of Aboriginal land. I will ask Ms Constable to broadly indicate some of the parameters of the program.

Ms Constable—We have held a number of workshops under the working in partnership program. These workshops are held in regional Australia. In the last 12 months we have held two workshops in the Queensland area. We also provide a DVD that goes with the working in partnership program. There are a number of fact sheets that relate to the program. We have also set up two regional committees that are offshoots of the program—one in the Mount Isa area and one in the Rockhampton area. These two particular regional committees have been very successful in looking at some broader issues. For example, at the moment corporate governance is one area that they are particularly looking at.

Senator O'BRIEN—How would that $500,000 be broken down and the money used? How much, for example, is spent on departmental salaries?

Ms Constable—There is $160,000 spent on departmental salaries and the rest is spent on the program itself.

Senator O'BRIEN—What about travel?

Ms Constable—Some of the other $340,000 is spent on travel within the working in partnership program—a small proportion.

Senator O'BRIEN—Can you get us some figures on those?

Ms Constable—I can.

Senator O'BRIEN—How much was spent on printing?

Ms Constable—On printing we would have spent about $7,000 last year.

Senator O'BRIEN—Where does the bulk of the remaining money find its way to?

Ms Constable—The bulk of the remainder is spent on the consultancy for the workshops, Grant Sarra Consultancy's services, and also to allow some of the Indigenous participants to attend the workshops and to run the workshops themselves.

Senator O'BRIEN—How long has that consultancy been engaged in the work in this program?

Mr Hartwell—We used the Grant Sarra Consultancy in 2003-04 and in 2004-05 as well. That consultancy group has conducted four workshops for us.

Senator O'BRIEN—Are they contracted for the coming financial year?

Mr Hartwell—That will be a competitive process. We will look at other potential candidates, but certainly we have been very satisfied with the Grant Sarra Consultancy. Grant himself is from an Indigenous background. But we have used other consultancies in the past. This program has run since 2001-02 and others have been used.

Senator O'BRIEN—Can the committee be supplied with the details of payments to that consultancy over the previous and the current financial year?

Mr Hartwell—We can do that. In fact, we can provide those figures now if you want them.

Senator O'BRIEN—If you have them, yes.

Mr Hartwell—For 2003-04, the exact amount was $79,648.80. For 2004-05, it was $112,912.80. I am not sure where the 80c amounts come from, but they are the figures in front of me.

Senator O'BRIEN—So there is actually still over $200,000 in each of those two years to be accounted for. Where would that money go?

Mr Hartwell—As Ms Constable has indicated, there is a salary attached from the division in terms of administering the program. There are some other costs outside what is paid to the consultant for running these workshops. They are in very remote areas. Sometimes we need to fund some of the traditional owners and Indigenous groups that attend the workshops. We can certainly provide you with the details of how that money was spent. The amounts that were allocated for the program were somewhat below what is being allocated over the next four years, the $½ million a year that you indicated. I think the amount was $250,000?

Ms Constable—The amount was $300,000 in each of the previous four years.

Senator O'BRIEN—So, presumably, there will be more workshops?

Mr Hartwell—We will continually evaluate the program and look at what has been the most successful in terms of encouraging Indigenous people into the mining industry. We think this program needs to be outcomes based. We go back and look at those workshops that we have held, but we are really looking for groups on the ground to be set up so that there is an ongoing process. We can go in and facilitate these workshops, but really the proof in the longer run is that more Indigenous people are employed in the mining industry.

Senator O'BRIEN—Is industry satisfied with the program?

Mr Hartwell—Certainly industry have participated in it. We have had great support from industry, so the answer to that is yes.

Senator O'BRIEN—Have you had any feedback from the Indigenous communities that have been involved in the program to date?

Ms Constable—At the end of each of the workshops, we do a survey of participants. I can tell you that the level of participation in the workshops is very high. We have a large proportion of regional based Indigenous people participating in those workshops, and that is a good indication of the value that the workshops are bringing to that particular region. They are a partnership between the Indigenous people of the region, service providers and the mining industry itself.

Senator O'BRIEN—There has been a bit of a focus on Queensland recently. Is there a particular reason for that?

Ms Constable—It was just that Queensland was the state that we focused on for this particular year. Previous to that we did look at Western Australia and South Australia.

Senator O'BRIEN—I know of some of the initiatives in Western Australia. Are parallel initiatives being developed in Queensland at this stage? I am thinking of, for example, the

contractor groups at Port Hedland and the Argyle Diamond Mine's proposed quota system for Indigenous employment.

Mr Hartwell—In relation to Rockhampton, we have established a small consultative group which, having brought the various stakeholders together, we have recently encouraged. We continue to try and bolster that in terms of the issues that might still need to be addressed in terms of more active Indigenous employment in the mining industry around the Rockhampton region. While it varies from area to area, we believe that similar sorts of mechanisms, as evidenced from Port Hedland, are a way forward. We cannot say that it is totally replicated in every area. It depends on the circumstances and the willingness of the various groups that are there to carry this forward.

Senator O'BRIEN—It depends on the companies, too.

Mr Hartwell—I agree.

Senator O'BRIEN—Have the companies indicated a preparedness to embrace models such as this?

Mr Hartwell—Certainly in Rockhampton the companies are a part of the ongoing group.

Ms Constable—There is high-level participation in both the Mount Isa and the Rockhampton groups. As many as 60-odd people from across the areas that I indicated previously are participants in the two consultative groups that have now been established.

Senator O'BRIEN—My recollection is that north-western Western Australia saw one of the initiatives arise from the ATSIC regional council, which of course no longer exists. What framework is being considered to engender the same level of involvement and success that has been seen in north-west Western Australia?

Ms Constable—Broadly, Indigenous issues would be a matter for the Indigenous affairs portfolio. In respect of our responsibilities, our minister will be participating in announcing a memorandum of understanding between a number of government departments and also the mining industry, through the Minerals Council of Australia, where we will look at broad initiatives from a whole-of-government point of view working with the mining industry and Indigenous people in particular regions on issues that are relevant to that particular area.

Senator O'BRIEN—So we could expect a multiministerial announcement of that nature?

Ms Constable—We can.

Senator O'BRIEN—Can we expect that shortly?

Ms Constable—Very shortly.

Senator GEORGE CAMPBELL—Mr Paterson, have we found our $51.3 million yet?

Mr Paterson—We have. We are happy to respond to that question now if you would like us to.

Senator GEORGE CAMPBELL—Yes.

Mr Paterson—It was not lost.

Senator GEORGE CAMPBELL—Thank God for that.

Ms Foster—No, it was just a matter of finding it in the right place. You yesterday referred to page 61 of the PBS, which showed a decline in the estimated investing activities of $181.6 million. Let us move over to page 69 of the PBS, which is the schedule of budgeted administered cash flows for the period ended 30 June, and move down to total cash used, which picks up those two numbers. Am I going too fast for you?

Senator GEORGE CAMPBELL—Yes. I am on page 69.

Ms Foster—So if you go two-thirds down page 69, you will see that the total cash used was $228,887,000 and $47,258,000, which are the numbers back on page 61. You can see just above those that there has been a decline in the movement of cash used for advances and loans made. The difference between those two numbers, $184,241,000 and $36,258,000 is $147,983,000. If you move down to the next line, which is cash back to the official public account, it is $44,646,000 and $11 million. That is a difference of $33,646,000, which is the total difference. If you would like the details of what those two totals are, I can break those down further for you.

Senator GEORGE CAMPBELL—So this is money that has been returned?

Ms Foster—They are advances and loans made. For example, the estimate for the AusIndustry concessional loans in 2004-05 was $16.9 million. If you are looking at 2005-06, the estimate is $9 million, so that is a reduction of $7.9 million. For the AusIndustry IIF loans where advances are made, the estimate in 2004-05 was 22,080 and in 2005-06 it is $13.9 million, which gives a reduction of $8.173 million. Details of both those AusIndustry loans, as you would know, can be found on the web site. The two big items that bulk into this on advances made relate to Comalco, which you should be familiar with from additional estimates where the final third milestone payment was made in 2004-05, so there is nothing in 2005-06. The difference is the 45.7 when looking between the two years. It is the same in AMC. That was also discussed at the last estimates hearings where the loan guarantee was recognised and called in—the expense was recognised and booked as a liability and it was paid in 2004-05. Therefore you have that large amount of 84.558 in 2004-05, following through to a zero in 2005-06, which lumps that amount in for you.

In AusIndustry preceded loans there is an estimated variation from $15 million in 2004-05 to $13,000,351 in 2005-06, which is a difference of $1.649 million. If you added up all those differences that I have just read out, we get a running total difference of 147,983, which is the variance to advances and loans made on the same page that we are on, page 69, which I referred to earlier. Then if we go down to cash that is paid out from the official public account, we have the repayment of money for strategic investment back in 2004-05 for 31.5 and nothing in 2005-06. So that carries through; it is a one-off. The IIF repayment, again, is a one-off in 2004-05 for 2.146. Again, there is nothing in 2005-06 and that variance carries through. If we add all those up we get a difference of 181,629.

Senator GEORGE CAMPBELL—That was excitingly interesting.

Mr Paterson—Did you want to summarise that for us now, Senator?

Ms Foster—At least I understand the numbers now.

Senator GEORGE CAMPBELL—She lost me in the second line.

Mr Paterson—The 51 is accounted for.

Senator GEORGE CAMPBELL—I will take your word for it. It was a bit like a three-card trick. Where is the thimble? Mr Hartwell, in the last estimates you stated that Syntroleum still had $15 million in relation to the technology license fee that was paid over to them, but if Syntroleum found a commercial application for that particular licence, they would be obliged to repay that money to the Commonwealth. Have they found a commercial application for the licence yet?

Mr Hartwell—No, not at this point in time. Certainly they are actively marketing the licence on our behalf.

Senator GEORGE CAMPBELL—So they still retain the $15 million?

Mr Hartwell—The amount of money which was paid over to Syntroleum in relation to the licence was $13.5 million—$15 million less the $1.5 million that was held by the ATO. The Commonwealth holds that as an asset on its books. The Syntroleum company are actively in discussion with a number of project proponents with the objective of commercialising the licence.

Senator GEORGE CAMPBELL—Are you saying that we are holding the money? I thought on the last occasion you said that they were holding the money?

Mr Hartwell—No. There needs to be some clarification here. The Syntroleum licence is an asset on our books.

Senator GEORGE CAMPBELL—But the money is in their bank account?

Mr Hartwell—The money was paid to them as a part of the licence fee, but we do hold the licence as an asset. It is on our books and Syntroleum are attempting to market that licence on our behalf.

Senator GEORGE CAMPBELL—They have the cash and we have the asset?

Mr Hartwell—That is one way you could describe it.

Senator GEORGE CAMPBELL—What other way would you describe it?

Mr Hartwell—I like to term it as an asset on our books which Syntroleum are marketing on our behalf.

Senator GEORGE CAMPBELL—Considering the activity they have taken so far, Mr Hartwell, do you see any prospect that we will ever get the $15 million back?

Mr Hartwell—There is always the prospect that we will get the $15 million back. We have had discussions with Syntroleum representatives in the last two weeks, and they have indicated their efforts to try and commercialise the licence. Essentially they are focused on a brown coal gasification project in Victoria, but they are also having discussions in Papua New Guinea in relation to a possible GTL project up there. They are just two of the possibilities.

Senator GEORGE CAMPBELL—On page 40 of the PBS there is a line item entitled ‘Syntroleum depreciation’. Can you explain to us what that refers to?

Mr Hartwell—It is, as I mentioned, an asset on our books, but it is also a depreciable asset. It is being depreciated at the rate of $1 million per year.

Senator GEORGE CAMPBELL—So we will eventually get rid of it off the books?

Mr Hartwell—That is a possibility, yes.

Senator GEORGE CAMPBELL—One way or another, this $15 million is going to disappear.

Mr Hartwell—We need to be hopeful that the licence will be able to be commercialised. I cannot guarantee that outcome, but certainly active efforts are taking place to achieve that outcome.

Senator GEORGE CAMPBELL—How did you pick the figure of $1 million for depreciation?

Mr Hartwell—I would need to take advice on that. The licence arrangements apply out to 2015 and arithmetic would suggest that, if you depreciate it at $1 million a year, by that time it will be down to zero.

Senator GEORGE CAMPBELL—So you just pluck a figure?

Mr Hartwell—No, there is a rationale to it. The licence arrangements apply up to 2015 and you depreciated it at $1 million per year.

Senator GEORGE CAMPBELL—What is the normal rate of depreciation that is used?

Mr Hartwell—The asset value at the moment on our books at the end of June will be around $10 million, I believe. If you take it forward for 10 years, the licence ends in 2015. By 2015, if we are not successful in commercialising it—if that happened it would take the asset of our books anyway, because they would repay monies—it will be down to zero.

Senator GEORGE CAMPBELL—But that is not the standard way in which you depreciate, is it? Aren’t there set figures?

Mr Hartwell—I cannot answer for all depreciation regimes.

Senator GEORGE CAMPBELL—The minister is here. He should be able to tell us.

Senator Minchin—Sorry, Senator Campbell, I am not an expert on depreciation. We have Treasury coming up next; you could ask the tax office about depreciation.

Senator GEORGE CAMPBELL—Someone here must know how assets are depreciated within the department.

Mr Hartwell—We have had advice that this is an appropriate way to depreciate the asset. It is consistent with ANAO guidelines. There have been discussions to that effect. We have had discussions with the department of finance on this, as I understand it, and the methodology I have outlined to you has been accepted by those parties.

Ms Foster—It all comes back to the effective life of the asset as to how it is depreciated.

Senator GEORGE CAMPBELL—The effective life—

Ms Foster—The effective life of the asset.

Senator GEORGE CAMPBELL—But this is the technology. This has an ongoing effective life.

Mr Hartwell—The licence agreement ends in 2015.

Ms Foster—And that would be how it is calculated.

Mr Hartwell—That would be the basis of the calculation, as I have already outlined.

Senator GEORGE CAMPBELL—So if nothing happens with this to the year 2015, our asset is valued at zero, Syntroleum walk away with the $15 million and everybody is happy. Mr Hartwell, I have in front of me a copy of an internal departmental email dated 19 May 2003 from Marie Taylor, manager of refining and fuels, and John Ryan, the deputy secretary, to you as head of the resources division. It refers to the federal government's decision which was announced on 4 May 2002 to provide shale oil company Southern Pacific Petroleum with a 12-month sales grant worth nearly $55 per barrel of shale oil, or up to $36.4 million annually. It says in that email that the government's decision to put this arrangement in place was made subject to SPP taking legal action against Greenpeace. Is it correct that the government's decision to put this arrangement in place was made subject to that legal action occurring?

Mr Hartwell—The answer to that question is no, the arrangements between the government and SPP had no reference to any legal action being taken against Greenpeace.

Senator GEORGE CAMPBELL—Where would Ms Taylor get this information from? Why would she contain it in an email?

Mr Hartwell—I cannot answer that.

Senator GEORGE CAMPBELL—Would Ms Taylor have had access to the cabinet documents in relation to that decision?

Mr Hartwell—She may have, Senator.

Senator GEORGE CAMPBELL—And you say there was no decision in respect of the legal action?

Mr Hartwell—I am saying, Senator, the contractual arrangements between the government and SPP—

Senator GEORGE CAMPBELL—I am not talking about the contractual arrangements. I know what was in the contractual arrangements. I am talking about whether or not there was an arrangement between the government and SPP to take legal action against Greenpeace.

Mr Hartwell—I can only answer as I am answering, Senator: there is nothing in the contractual arrangements that I have mentioned that makes any reference to legal action against Greenpeace.

Senator GEORGE CAMPBELL—Are you saying Ms Taylor manufactured this information?

Mr Hartwell—I cannot answer that question, Senator.

Senator GEORGE CAMPBELL—Did you work closely with Ms Taylor?

Mr Hartwell—She is a member of our division, yes.

Senator GEORGE CAMPBELL—Did you challenge the email when you received it?

Mr Hartwell—I did not challenge it at the time, no.

Senator GEORGE CAMPBELL—Why not?

Mr Hartwell—I cannot remember the specific response. I just would have noted it.

Senator GEORGE CAMPBELL—Why not, if you believed it to be incorrect?

Mr Hartwell—I have no specific answer to that. There are a number of emails—we maybe receive 50 or 60 a day. Not all would necessarily get a reply along the lines of what you are suggesting.

Senator GEORGE CAMPBELL—I think we all get a lot of emails during the day, but if somebody sent me one with obvious information that was untrue in it, I would be challenging it, first up. Did you challenge the email, Mr Ryan?

Mr Ryan—No. Like Mr Hartwell, I receive a lot of emails. When you get to them and look at them, some of them you respond to and some you don't.

Senator GEORGE CAMPBELL—So neither you nor Mr Hartwell, in senior positions, challenged Ms Taylor's advice in the email that the arrangement was subject to SPP taking legal action against Greenpeace. That would not have stood out at you?

Mr Ryan—No, it didn't in particular.

Senator GEORGE CAMPBELL—Did SPP take legal action against Greenpeace?

Mr Hartwell—The answer to that is no.

Senator GEORGE CAMPBELL—They didn't.

Mr Hartwell—No.

Senator GEORGE CAMPBELL—Did anyone communicate with SPP in respect of them taking legal action against Greenpeace?

Mr Hartwell—I am not aware of any communication.

Senator GEORGE CAMPBELL—Who would have conducted the discussions with SPP at the time. Can you remember that?

Mr Hartwell—I would have to take that on notice. I can only say that we had many discussions with SPP because of the arrangements that were in place to assist the SPP project. I cannot specifically answer that. All I can say is that there would have been a number of discussions between officers of the department and SPP.

Senator GEORGE CAMPBELL—Parliament was advised on 29 March 2004 by Senator Minchin that the Commonwealth government had turned down a request initially from South Pacific Petroleum and subsequently from SPP's receiver Ernst and Young and then Sandefer Capital Partners to extend the effective excise exemption available to petroleum products from shale oil. Can you detail the reasons why the Commonwealth government refused the request?

Mr Payne—I could take that on notice. I do not have a list of those reasons with me at the moment. As you said, it was a public announcement by the government not to extend that assistance.

Senator GEORGE CAMPBELL—Can you also take on notice to provide us with copies of any documents relating to the request, including correspondence to and from the parties making the request and advice from other departments?

Mr Hartwell—We can do that.

Senator O'BRIEN—There appears to have been a significant movement of administered funds from the current financial year to the coming financial year. Why has the strategic investment incentive for HIsmelt been delayed to the coming financial year?

Mr Hartwell—Part of the contractual arrangements that the government has with HIsmelt relates to the commissioning of that project. It was expected that that would have happened earlier than has been the case. For those reasons, we have needed to rephase some of that money.

Senator O'BRIEN—How much of the money was spent?

Mr Hartwell—There has been no money spent at this point in time in relation to HIsmelt.

Senator O'BRIEN—So you have rephased all of the money, not some of the money?

Mr Hartwell—There still could be the possibility of some payment this fiscal year, but that is dependent on the final commissioning and the milestones being met in the contractual arrangements.

Senator O'BRIEN—But the PBS says that there has been a complete rephasing of the funds.

Ms Sewell—If I can clarify that slightly, the moneys that have been rephased amount to $30 million. They attach to a tranche 2 payment that HIsmelt becomes eligible for if it has entered into a licence agreement with a large Chinese company in relation to the construction of a plant in China using the HIsmelt technology. That money was originally rephased into this year because HIsmelt was slightly ahead of its schedule and there was an expectation that they may have been able to meet the requirements of the contract. Subsequently HIsmelt did not meet the requirements of the contract.

Senator O'BRIEN—So it is the yoyo effect—it was brought forward and now it has come back to the original point. The timing of the biofuels infrastructure grants has been delayed. What is the reason for that?

Mr Peel—All contracts have now been signed with the seven biofuels grantees, and the PBS reflects a rephasing of the money to line up with the expectations of the contractors to how they will spend the money in the future.

Senator O'BRIEN—So a lot of it is back-ended to 2007-08—in fact, the majority of funds?

Mr Peel—Yes. The way the payments are made is that 25 per cent of the grant amount is paid on evidence of a final investment decision and commencement of construction, another 25 per cent is paid on commissioning of the plant and then 50 per cent is paid once the commercial sale into the domestic transport fuels market commences. So half of the grant is very late in the project.

Senator O'BRIEN—I am looking at the change to the profile, in that $4.893 million is removed from the current year's administered fund silo and $505,000 from 2006-07, and that is distributed roughly as 40 per cent for 2005-06 and about 60 per cent for 2007-08. Does that relate to the first stage of a number of processes? That is, is it a decision to commit to a project?

Mr Peel—The spread of expenditure would be an aggregation of the expected timing of each of the grants, so it is not quite as neat as you suggest because some projects would have different timings to others.

Senator O'BRIEN—So all grants have been committed?

Mr Peel—All contracts have been signed. They are all on foot.

Senator O'BRIEN—Have all those who have signed contracts received some payment?

Mr Peel—Not as yet.

Senator O'BRIEN—Could we get a profile of the payments that have been made under this program, and those that are expected to be made according to the profiles set out on page 28 of the PBS?

Mr Peel—For each of the grants?

Senator O'BRIEN—Yes.

Mr Peel—Yes, we can do that.

Senator O'BRIEN—What is the nature of the strategic investment incentive for ethanol production?

Mr Payne—Are you referring to the production subsidy of 38c a litre, which is paid to domestic producers of ethanol?

Senator O'BRIEN—Has there been any change in who receives it?

Mr Payne—There are three ethanol producers.

Senator O'BRIEN—In the past we have been supplied with information on who has received a grant and how much, and on the quantity of ethanol, which probably follows from the amounts. Can we have an update of current times for the subsidies paid under that scheme?

Mr Payne—I can give you those figures now.

Mr Hartwell—We can do those figures. They are: Manildra, $37.5 million; CSR, $1.5 million; and Rocky Point, $485,000—if you want to round that it is $0.5 million. They are the dollar amounts. If you want the quantity—that is, the litres it has been paid against—we can also provide that.

Senator O'BRIEN—Yes, if you could.

Mr Hartwell—According to my figures, for Manildra it is 98,373,813 litres; for CSR it is 4,007,203 litres; and for Rocky Point it is 1,272,430 litres.

Senator O'BRIEN—Can you explain the variation to the administered expenses set out in table 2.4A of the PBS? Under 'Production grants' you have 'Creation of forward year 3 estimate'. I take it that extends the out years by a year. Is that right?

Mr Peel—That is correct. We are extending it out to 2010-11. The other figures are based on an update from the grant recipients of their likely production levels over the intervening period. I expect these figures will change from time to time as we go forward.

Senator O'BRIEN—The current year shows a reduction of $5 million.

Mr Peel—Yes. In additional estimates we showed an adjustment of minus $25 million and that has now been adjusted by another minus $5 million, to give us $15 million.

Senator O'BRIEN—So the actual budget for 2004-2005 was reduced from what to what?

Mr Peel—The original budget for 2004-2005 would have been $40 million.

Senator O'BRIEN—And it was reduced to $15 million?

Mr Peel—Yes.

Senator O'BRIEN—What about 2005-06?

Mr Peel—For 2005-06, the current budget is $32,344,000 and that has been reduced by $22,200,000.

Senator O'BRIEN—So it is a tick over $10 million?

Mr Peel—No, sorry. It was $54 million; it is now $32 million.

Senator O'BRIEN—Okay, and 2006-07?

Mr Peel—That has been reduced by $10.6 million and it is now $51,693,000.

Senator O'BRIEN—Given that the current year is $15 million, how do we arrive at the $32 million for 2005-06 and the $51 million for 2006-07? What factors have been assumed to arrive at those figures?

Mr Sexton—The figures that we now have in the budgets for 2004-05 going through to 2007-08 are determined primarily by the contracts that we now have in place with the three grant recipients. If they meet the timing of the production outlined in those contracts, that will be the payments that will be made.

Senator O'BRIEN—Does the department have figures on consumption of ethanol in the economy?

Mr Payne—We do not monitor the sales of E10 but just through the payment of the subsidies—that is, only for ethanol that has entered into the home market for consumption as a fuel—transport fuel.

Senator O'BRIEN—That has entered into the home market? How does it enter into the home market?

Mr Payne—Basically, that is a Customs term so that when the ethanol is sold from the terminal, if you like, into the fuel market, the excise arrangements come into effect, so the excise subsidies are only paid at that point.

Senator O'BRIEN—There are three eligible companies at the moment. Are you expecting that to increase to 10 over the life of the grant scheme?

Mr Sexton—We are. There is a third company that has received funding under the Biofuels Capital Grants Program for the production of ethanol and we would expect that at some time in the future it will also become a recipient under this program.

Senator O'BRIEN—Which company is that?

Mr Sexton—Lemon Tree.

Senator O'BRIEN—When would you expect they would come on stream?

Mr Sexton—I do not have the details of their contract to understand when their first commercial sale is to occur. We could get that for you.

Senator O'BRIEN—Could you get that with the other figures that we asked for—the milestones?

Mr Sexton—Yes.

Senator O'BRIEN—Is the $63.4 million figure based on existing production levels plus the seven contracts?

Mr Sexton—That is the out years figure. It is a provision in 2008-09 and I expect that some of that may well be carried forward into out years given that the government has made a decision to continue this program to 2010-11.

Senator O'BRIEN—So you are not expecting the expenditure to achieve the level that is set out in the PBS today?

Mr Sexton—Could you repeat the question?

Senator O'BRIEN—If you are expecting some of the funds to be rephased further into the out years because of the extension of the program, does it follow then that you are expecting that the money set out in the PBS will not be required to fund the subsidy for the out years as set out in the PBS?

Mr Sexton—That is a possibility.

Senator O'BRIEN—My question arose from your earlier answer, where you suggested that was going to be the case. Is there built into your assumptions some sort of optimism that prudence would dictate is unlikely to be achieved?

Mr Sexton—Senator, we can only go on our understanding of the market at the present time and the plans that have been put in place by the recipients. We are very much in their hands and the market.

Senator O'BRIEN—The market has shown a decline in production, hasn't it?

Mr Sexton—At the present time it has, yes.

Senator O'BRIEN—Quite a substantial one—it is down to about 40 per cent or thereabouts of the level of production two to three years ago.

Mr Sexton—It is significant.

Mr Peel—Senator, could I just refer back to the seven grantees under the program. Only three of those will be producing ethanol. The rest will be producing biodiesel. I may have given you an incorrect impression earlier, for which I apologise.

Senator O'BRIEN—So for those three that will be producing ethanol, what volume of production is assumed in the PBS for the purposes of calculation of monetary amounts?

Mr Peel—The agreed annual production is CSR 26 million litres per annum, Rocky Point 15 million litres per annum and Lemon Tree 33,600,000 litres per annum.

Senator O'BRIEN—What is Manildra producing at the moment?

Mr Payne—That figure would be about 27 megalitres.

Senator O'BRIEN—So they have 95-plus per cent of the market at the moment.

Mr Payne—That is correct.

Senator O'BRIEN—We are going to quadruple the market? Is that the assumption this is based on, or is Manildra going to disappear? It cannot, because you will then have a shortfall in these subsidy requirements, won't you? I am just trying to find out what the assumptions are. These are numbers in the PBS. They keep being rephased. At the same time as you are predicting an increase in production, the market is in decline. We have had this conversation before; it is not a new conversation.

Mr Payne—The recipients of the Biofeuls Capital Grants Program had to provide evidence of future offtake of their production. It is on the basis of that evidence that the grants were provided.

Senator O'BRIEN—So have they provided evidence of uptake into the motor vehicle fuel market?

Mr Sexton—Into domestic transport? Yes.

Senator O'BRIEN—So there are about 85 million litres per annum production in those three figures—just a bit under that—that we have just been advised are the subject of these Biofuel grant arrangements.

Mr Ryan—I think it is 75 million. We certainly do not need an extra 10 million.

Senator O'BRIEN—Are you telling me that the PBS assumptions are based on the market consuming four times as much ethanol as is not being consumed?

Mr Peel—They are essentially based upon the contractual arrangements we have entered into with the companies and that is their estimation.

Senator O'BRIEN—So the department and the government have accepted that as the likely level of consumption and therefore made provision for it in the budget?

Mr Peel—We have provided for that in the budget, yes.

Senator O'BRIEN—So that is the government's assumption of what the level of consumption of ethanol will be? It is provided for in the budget on the basis of contractual arrangements. Does it follow that the government believes that that is the level of consumption that will need to be subsidised and therefore provision has been made in the budget, or is this a rubbery set of numbers that can keep being phased off into the out years?

Mr Peel—It is based on the contractual arrangements that we have entered into. I do not think you could draw a conclusion from that that the government necessarily accepts that assumption, but we do need to make financial provision for what we have signed contracts about.

Senator O'BRIEN—I understand that answer, which I suppose goes back to the original decision. What you are telling the committee is that the contractual arrangements have required the grant recipients to say that they have a market for all the fuel they are going to produce. Did I understand that correctly?

Mr Peel—The contractual arrangements require that they meet those production levels. If they do not meet them they will not receive the benefits that attach to them. And I think I did mention earlier that the expectation is with programs such as this that those numbers may change going forward, so I would expect further rephasings into the future.

Senator O'BRIEN—So 50 per cent of those biofuel infrastructure grants are paid by the start of the actual construction process?

Mr Peel—No, 25 per cent at the start and 50 per cent when they start selling fuel into the domestic transport market. So it is 25 per cent on evidence of a final investment decision and commencement of construction, 25 per cent on commissioning of the plant, and 50 per cent on the first commercial sale into the domestic market. So, as you said earlier, it is back-ended in that sense.

Senator O'BRIEN—So how much do they have to be selling into the market to get the last 50 per cent of the grant?

Mr Peel—That just refers to their first commercial sale, so they have to start selling it.

Mr Sexton—I should add, though, that they must achieve those agreed production volumes over a three-year period, and we will be monitoring them over that three-year period. The contracts provide us with the ability to claw back the funds if they do not achieve those targets.

Senator O'BRIEN—How much of the funds can be clawed back?

Mr Sexton—All the funds.

Senator O'BRIEN—So if they do not achieve the production targets the Commonwealth can require the repayment of all of those funds?

Mr Sexton—Yes, the contracts provide for the Commonwealth to have that right.

Senator O'BRIEN—You may end up running a few ethanol plants by the sound of it! Why has the strategic investment incentive for GTL Resources been revised?

Mr Jones—As I think I explained at the last estimates hearing, GTL Resources did not meet the conditions laid down for becoming eligible for the incentive. Therefore, the offer of the incentive has lapsed.

Senator O'BRIEN—Okay. So this is a project that has fallen over effectively?

Mr Jones—I would not say it has fallen over yet, but they were given a certain time frame in which to meet some conditions from the Commonwealth's point of view and they did not meet those conditions within that time frame.

Senator O'BRIEN—So that matter is at an end so far as Invest Australia is concerned? Their potential to receive funds under this program has lapsed?

Mr Jones—That is correct. If the project does proceed and they wish to have an incentive, they would have to reapply under the program.

Senator O'BRIEN—To how many projects in the resources sector has Invest Australia granted a strategic investment incentive?

Mr Jones—Over the life of the program, five projects have received an incentive, but of those only two are proceeding. The other one, Syntroleum, we have discussed this morning; it may yet produce an outcome through the licence agreement.

Senator O'BRIEN—Is that amongst the five?

Mr Jones—That is amongst the five.

Senator O'BRIEN—So it is in the three that have not to date?

Mr Jones—Perhaps it would be easier if I explained the five: for Syntroleum there is a licence agreement still on foot; the Comalco alumina refinery is now commissioned and producing; Methanex methanol plant will not proceed; the HIsmelt plant, which we have also discussed, is in the advanced stages of commissioning, I guess; and for the GTL methanol plant the offer has lapsed

Senator O'BRIEN—So is HIsmelt in the two that have proceeded or in the three that have not?

Mr Jones—The one that is definitely not proceeding is the Methanax methanol plant. For GTL Resources the offer has lapsed. With Syntroleum, the original plant will not proceed, but there is still a prospect of Syntroleum doing something in this region and us getting some value out of the licence. Comalco and HIsmelt are proceeding.

Senator O'BRIEN—What applications for strategic investment assistance to the resources and energy related projects does Invest Australia currently have before it?

Mr Jones—There are no active applications at the moment.

Senator O'BRIEN—What is Invest Australia doing about including requirements for private sector investments in skills and training as a criterion or condition for obtaining a strategic investment incentive?

Mr Jones—There is nothing laid down in the program guidelines along those lines but, in making decisions on granting incentives, the government often attaches conditions and may choose to attach conditions like that on a case by case basis.

Senator O'BRIEN—So it is somewhat of an ad hoc approach then?

Mr Jones—The SIC process applies to a very wide range of projects. It would be difficult to lay down too many conditions at the outset; it is a case by case project consideration and the circumstances of each project need to be taken into account before conditions are attached.

Senator O'BRIEN—Can you explain the variations in administered expenses appropriations for petroleum royalties?

Mr Hartwell—Petroleum royalties really depend on the level of production and oil price. They are essentially the main factors driving any change in terms of the estimates.

Senator O'BRIEN—You seem to have reprioritised $52 million. Most of that is appearing in the out years and some additional moneys. Is that all that has happened there?

Senator O'BRIEN—In table 2.4(A) on page 30 of the PBS, you seem to have reprioritised $52 million. Most of that is appearing in the out years in some additional moneys. Is that all that has happened there.

Mr Hartwell—That is just an adjustment in the forward estimates that really takes into account any revised production forecasts we might have but also a changed estimate in relation to oil prices going forward.

Senator O'BRIEN—Can we get a table setting out the way that those figures have been calculated—the variables that have been built into that.

Mr Hartwell—We can do that for you. We work with Treasury on that estimate and forecast and we essentially use their estimate of oil prices going forward.

ACTING CHAIR—This might be a convenient point at which to take a break.

Proceedings suspended from 10.46 am to 11.01 am

Senator O'BRIEN—I omitted to put one question on notice. I understand I need to put it on notice because the figures are not available. I would like the figures for the current financial year to date for the strategic investment incentive ethanol production grants for the current year—quantity and amount of money—by company. My next question is: could someone explain the nature of the loan to Comalco/Rio Tinto of $45.7 million?

Mr Hartwell—That was the final payment in relation to the assistance that had been made available to the Comalco alumina refinery in Gladstone, Queensland.

Senator O'BRIEN—And the capital injection into AMC of $84.558 million?

Mr Hartwell—That was a payment by the Commonwealth to the ANZ bank. The Commonwealth had guaranteed a loan to the AMC by the ANZ bank and that was a payout for that.

Senator O'BRIEN—So it is meeting a bank guarantee that the Commonwealth gave?

Mr Hartwell—Indeed.

Senator O'BRIEN—Does that finalise the Commonwealth's obligations to AMC?

Mr Hartwell—That is true. In a sense the Commonwealth has now exited out of AMC by paying out that loan guarantee. As well, the Commonwealth did receive, as a part of the final settlement with AMC, a share of the escrow account. As well, a number of the assets that AMC held have been realised and they represent some receipts to the Commonwealth, along with the Queensland government. So the net cost to the Commonwealth from AMC involvement from our perspective will be somewhere—and this is yet to be finalised—between $55 million and $60 million.

Senator O'BRIEN—How much of the commercial ready program will be allocated to the renewable energy development initiative in the current financial year and the coming financial year?

Mr Peel—Senator, 2005-06, $22 million; 2006-07, $28.47 million; 2007-08, $28.22m; 2008-09, $12.21; 2009-10, $4.46; and 2010-11, $2.04.

Senator O'BRIEN—Have the full criteria been established for the payment of grants?

Mr Peel—The program will be launched on 8 June by the minister and the criteria will be made public.

Senator O'BRIEN—On that date?

Mr Peel—On that date, yes.

Senator O'BRIEN—So it is all determined and waiting for announcement?

Mr Peel—Yes, announcement next week.

Senator O'BRIEN—Thank you for that. What work has been done on quantifying the impact on employment of the ratification of Kyoto by this department?

Mr Ryan—In recent times no work would have been done.

Senator O'BRIEN—What do you call 'recent times'?

Mr Ryan—What I am thinking about is that some time ago various bits of work had been done macro modelling about the impacts of various climate change strategies, but that is going back at least four years, I would say, four or five years.

Senator O'BRIEN—So has there been any broad economic modelling to project the impacts of ratifying Kyoto?

Mr Ryan—I do not know. I cannot think of any work that we have done.

Senator O'BRIEN—Do you know if there have been any business opportunities that are being lost by not ratifying Kyoto?

Mr Ryan—There is a mixture. Some firms would look for benefits that they could make under the Kyoto Protocol through the various clean development mechanisms, but then other firms have indicated what would be to their disadvantage.

Senator O'BRIEN—In that context why has the department not done some work to quantify the impacts, positive and negative, of ratifying Kyoto?

Mr Ryan—As I indicated, early work shows and virtually all studies show that the net economic impact is negative—we know in aggregate—for signing up to any significant changes to our emissions targets. And then previous works certainly indicated the various industries that would be most adversely affected by that.

Senator O'BRIEN—How do we know they are negative? I mean, any work that has been done is four years old; there are some positives, from the sound of your answers, in terms that some firms are looking to benefit from some of the remediation measures that they might want to market. How do we know that overall for Australia it is negative?

Mr Ryan—The comparison I would make is that when we had the debate on tariffs, the modelling showed that a reduction in tariffs led to a stronger and larger economic benefit, while some industries had to do adjustment through that. The modelling for environmental impacts—the economic modelling of that—invariably shows that what we are actually doing is putting constraint on growth and therefore there is a negative economic impact. No models will show that there is a positive, despite that some firms may show some positive.

Senator O'BRIEN—You say there is no modelling the department has done in recent times that shows that?

Mr Ryan—None that we have done. Certainly there is other modelling around, and there is no modelling I have ever seen that would show there is a real positive.

Senator O'BRIEN—If there is no modelling then it is other people's assumptions—other organisations' models—that we are relying on. It is contingent on their assumptions.

Mr Ryan—In this country there are basically three major models that you can use. One is the Monash model, one is the ABARE model and the third is what we call the Econotech model. Different models will find different aspects of the modelling, whether it is regional or international, but all of them come with that same fundamental answer.

Senator O'BRIEN—What work has been done, if any, to identify lost opportunities to sell credits to other countries from remediation industries or potential industries?

Mr Ryan—We have not done any specific work in that area. We certainly keep a monitoring eye on the development of these mechanisms—the clean development mechanism—but it is having a very slow start, you would have to say.

Senator O'BRIEN—I am told there are extensive carbon sink opportunities for farmers which are severely limited by their inability to trade internationally. What can the department tell me is their experience, or what work has the department done in that area, if any at all?

Mr Ryan—I think that question is best addressed by the agriculture people.

Senator O'BRIEN—So Industry, Tourism and Resources has not done any. Can you tell me—and you may want to answer this on notice—what work ABARE is doing for this department and what financial arrangements are in place between ABARE and this department for the performance of that work.

Mr Ryan—For all of our work we have done with ABARE?

Senator O'BRIEN—Yes. Just break it down by project and cost.

Mr Ryan—I can tell you in the broad that we have an agreement with ABARE for a certain amount of what we would call data collection work and research work. We can break it down into those two components.

Senator O'BRIEN—That would be good. And is any work being done by BRS?

Mr Ryan—No.

Senator O'BRIEN—Unless someone else has questions, I am proposing now to proceed to Tourism.

Mr Paterson—Before we proceed, there are two issues I would like to raise. Senator Lundy and I had an exchange yesterday in relation to the Regulation Reduction Incentive Fund, and there was a discussion in relation to the amount of money provided for in the current financial year and our spending patterns against that amount of money. I did not have my additional estimates statement from February with me at the time—there is a copy to your right, Senator, on the table. I take you to page 25 of the additional estimates statements. In table 1.1, about halfway down, the Regulation Reduction Incentive Fund, the spending profile for the 2004-05 budget and the out years appropriations are identified. You will note under the appropriations for 2004-05 it was a total between administered and departmental outputs of $6.5 million for the current year. Yesterday we were having a conversation as if that number were $10 million, and so the spending pattern needs to be measured against an appropriation of $6.5 million, not $10 million. So it was addressed in the additional estimates in February.

Senator LUNDY—I was working on the election promise. You did not have this paperwork; you did not realise that the additional estimates had brought forth the break in the promise, as opposed to the budget?

Mr Paterson—Yes.

Senator LUNDY—Thank you.

Mr Paterson—Mr Hartwell had some responses to Senator O'Brien's questions in relation to travel, which he raised not long before the break.

Mr Hartwell—Senator, you asked some questions in relation to the Working in Partnerships program, related to travel. We have the figures now, so I will ask Ms Constable to give those to you.

Ms Constable—The travel figure for 2003-04 for the Working in Partnership program is $15,776. You also asked a question about the participants on the minerals exploration action agenda. I will give you details of the strategic leaders group now. The chair of that group is John Dow, former Managing Director, Newmont Australia; John Hartwell, Department of Industry, Tourism and Resources; Dr Neil Williams, Geoscience Australia; Mr Mitch Hooke, Minerals Council of Australia; Tim Shanahan, Chief Executive, Chamber of Minerals and Energy of Western Australia; Michael O'Neill, Chief Executive, Australian Gold Council; David Harley, President, Association of Mining and Exploration Companies; Ian Gould, President of the Australasian Institute of Mining; Dr Jim Limerick, Director General, Department of Industry and Resources, Western Australia; Malcolm Cremer, Deputy Director General, Department of Natural Resources and Mines, Queensland; and Dr Ron Matthews, Manager Exploration, Cameco Australia.

Of those people, Dr Williams is the chair of the precompetitive geoscience group; Mitch Hook is the chair of the finance subgroup; Tim Shanahan is the chair of the human and intellectual capital subgroup; and Dr Limerick is the chair of the land access subgroup.

Senator O'BRIEN—Thank you for that. Let us start with Tourism Australia. Now that it is fully operational, can someone remind me what the roles of Tourism Australia versus the department are? Perhaps I can ask it this way: would I be right in assuming that the department is setting the policy direction while Tourism Australia is the delivery agent?

Ms Kelly—Yes.

Senator O'BRIEN—Can I get an idea of the staffing profile for Tourism Australia? How many staff are currently employed by that organisation?

Mr Morrison—Currently there are 244 staff employed at Tourism Australia.

Senator O'BRIEN—Can I have a breakdown of within Australia and overseas, please?

Mr Hopwood—Currently of the 245, we have 115 overseas plus another four in New Zealand. So the figure for overseas is 119. The balance are in Australia.

Senator O'BRIEN—Did you say 245?

Mr Morrison—It is 245, not 244.

Senator O'BRIEN—I am sorry; I thought you said 244.

Mr Morrison—I did, but I corrected it to 245.

Mr Hopwood—The confusion covers the part-time employees. There is a half in here.

Senator O'BRIEN—We will stay away from New Zealand and hobbits and things in that one! Does Tourism Australia use contractors?

Mr Morrison—Yes, we do.

Senator O'BRIEN—How many?

Mr Morrison—I am happy to provide you with that on notice.

Mr Hopwood—Perhaps I can explain. We use them for project work. These are not contractors within our payroll system; they are contracted through a contract for specific work. They vary according to what projects are on hand at some point in time. They could be there for several days or several months.

Mr Morrison—We could provide you with a breakdown.

Senator O'BRIEN—If you could, I would appreciate that. How many employees of Aboriginal or Torres Strait Islander background are on the payroll of Tourism Australia?

Mr Morrison—Again, we would have to take that on notice.

Senator O'BRIEN—Can you give me that information, and also information on the number of people with disabilities and the male-female staff mix?

Mr Morrison—Yes.

Senator O'BRIEN—Would most of the staff be engaged on administrative support work?

Mr Morrison—Could you flesh that out a bit?

Senator O'BRIEN—I will put it another way: how many staff are engaged in specific marketing projects as against providing administration or basic communication functions in Tourism Australia?

Mr Morrison—There are 44 that sit within the headcount of the corporate services area.

Mr Hopwood—Can I add that 22 of those 44 are involved in technology, so it is not necessarily administrative support; they are supporting, for instance, our internet site and development of our technology programs. It depends if you put that into classification.

Mr Morrison—In short, the vast majority are involved directly in marketing programs, either here in Australia working on our domestic activities or supporting the work of our international offices, where obviously the predominant focus is the marketing activities.

Senator O'BRIEN—Are all staff engaged on Australian workplace agreements?

Mr Morrison—There is a variety of arrangements, from Australian workplace agreements through to what until December was a certified agreement. Others at a senior level are on individual contracts.

Mr Hopwood—Also, overseas staff have their own local terms and conditions according to the country of the office.

Senator O'BRIEN—Are all staff employed under the Tourism Australia Act or were some able to stay under the Public Service Act?

Mr Hopwood—My understanding, but I will have to check this, is that they are all under the TA Act.

Senator O'BRIEN—Previously we have talked about the Brand Australia advertising campaign, specifically the cost and the need to reshoot some material. What has happened about that?

Mr Morrison—There was an answer to a question on notice from our last session where that cost was $122,000.

Senator O'BRIEN—So that process has been completed?

Mr Morrison—For that campaign, it has. We have rolled out the campaign now. It is everywhere that it is being implemented.

Senator O'BRIEN—What life would be expected of the footage that has now been shot for the campaign? Is there a budget projection? Have you assumed that there will be no further shoot necessary for five years? Is the campaign on foot for five years in its current form? What are the projections?

Mr Morrison—These are matters that are obviously regularly reviewed by our board and our management in terms of the needs in the marketplace. One of the things we are noting constantly is that things are moving very quickly and there is a very voracious appetite amongst consumers for new images and new information and the inclusion of new products and new experiences. So with that as a background I would anticipate that it would be a natural course of activities for us to be refreshing this regularly over the next three years, but we have an excellent base stock of images that I think will serve our library well for quite a period, certainly over the next three years. But that is not to say that it does not need to be added to.

Senator O'BRIEN—There should not be a shortage—that is clearly the case—with the amount of money that has been spent on shooting image.

Mr Morrison—I disagree, in that consumers tend to define what they want to see and what is going to excite them, and that changes over time. We are in a very competitive marketplace and we are up against a lot of other destinations that are constantly refreshing their images. We need to keep pace with that if we are to be competitive and—

Senator O'BRIEN—No, but there are a lot of images that you have not used yet is the point that I make; or is that stock which has not been used been thrown out?

Mr Morrison—No. As I said, we have a fantastic library of great images, but the consumer ultimately directs what we need to put into our campaigns.

Senator O'BRIEN—Okay. How do you know what to shoot?

Mr Morrison—It is always the subject of a creative brief as part of any process, and it is based on the knowledge at that time. Consumer preferences are shifting quickly.

Senator O'BRIEN—So the style of the Brand Australia campaign is likely to change significantly over the next few years, requiring reshoot?

Mr Morrison—No, I would not say that. What I would say is that all of our campaigns will continue to evolve to meet what we are learning in the marketplace from the consumers through the research we do. That is just a fact of modern marketing.

Senator O'BRIEN—So what is the budget over the next three years for revising the Brand Australia campaign?

Mr Morrison—The budget as yet has not been confirmed by the board.

Senator O'BRIEN—When will that happen?

Mr Morrison—I expect the board will consider that later this week.

Senator O'BRIEN—Can we be supplied with the details of what is budgeted to supplement the Brand Australia campaign in terms of production of images or advertisements?

Mr Morrison—I would be happy to take that up at these future sessions.

Senator O'BRIEN—Sorry, I am not sure what you mean.

Mr Morrison—I will be back before the committee—

Senator O'BRIEN—In November; but, if you are going to make a decision in the next week or so, as the period for answering questions on notice runs for six weeks I would have thought that, if there is a change, if there is a decision made in the next week or so, you could advise us accordingly.

Mr Morrison—Fine.

Senator O'BRIEN—Thanks. There has been a fair amount of discussion in the media over recent months in relation to the Tourism Australia advertising account and it seems that some in the advertising industry have expressed some concern about the process used for selecting a new advertising agency and there has been, I think, a suggestion that the process used was not fair or open. Can you outline for the committee, firstly, the rationale behind bringing all advertising, including the media buy, under one account?

Mr Morrison—Are you asking me to address creative as well as media buy?

Senator O'BRIEN—Yes.

Mr Morrison—The rationale for moving towards a global set of agency arrangements is the need for us to deliver a consistent set of campaigns across the world. We have found that working with a multiplicity of agencies makes that very difficult to achieve in terms of getting a consistency of presentation, particularly in often tactical messages that we are doing in each of the campaigns, as well as getting a consistency of thinking across all of the agencies. When you are working with different agencies in different places there can tend to be a bit of a 'not invented here' syndrome between agencies and a fair bit of competition between agencies in different places about who can roll these campaigns out in a more unique way in each market. All markets need tailoring and all markets need some customisation to make sure that the execution works effectively. But what needs to happen underneath all of that is a consistent set of thinking, of strategy, behind the campaign. The view that we came to was that that is going to be more effectively achieved if we are working with a global partner who also thinks globally, where we do not have this competition between various agencies around the globe and who will work with us closely both in Sydney and right across the world in having this global set of thinking. So that is the major reason behind the creative agency.

On the media agency, there are many advantages but the most significant is the ability to have the information on all of our global media buy at our fingertips through proprietary products such as Extranet and others, which enables us to have greater controls and disciplines over our media buying practices and a greater degree of discipline and consistency in how our media buying strategies are executed around the world.

Senator O'BRIEN—Given the expenditure of taxpayers' money on this, are you able to tell us how this achieves the best value for money outcome? How do you make that judgment?

Mr Morrison—There are aspects of this process which are still before my board in terms of the selections of agencies and, obviously, negotiations of various fees and the like. The key is to work with people who understand what the current agency fee environment is globally to have a very good handle on what you are currently spending on fees, and how that is affected by having a multiplicity of arrangements around the world. If you get back to a straight fee-based approach, which is where we intend to go—that is, no commissions on buy, no commissions on production, these sorts of things—then you get a very flat set of arrangements which enables you to work with one partner. The terms are very clear. The nature of the relationship is very clear and there are no incentives in the contract, or disincentives in the contract, for going down particular creative paths. So from that point of view I think a global agency arrangement sets a very good set of arrangements for the taxpayer and certainly for us as an organisation, because we want to spend more on programs which are reaching consumers and reducing what we spend on supporting that.

Senator O'BRIEN—Is it possible to get a breakdown of the cost of the accounts that were in place, and have now been replaced by the new single entity, and the full cost or estimated projected cost of the combined account? I am trying to get a like-for-like comparison.

Mr Morrison—We can provide that to you obviously after we have finished the process we are going through. I am happy to do that.

Senator O'BRIEN—Thank you for that. How was the preferred agency selected? Can you tell me what the steps in the process were?

Mr Morrison—I am happy to deal with it at a broad level. As I said, the process is still under way and we have obviously been careful to offer not too much commentary on that process while it is under way but obviously happy to answer questions once it is completed. The process has several stages. It started with the invitation to tender. Those tender submissions were then short-listed. The short-listed tenderers were then the subject of several months of internal scrutiny in in-market reviews in each of our core markets around the world, which completed with a final presentation conducted in Sydney, which actually included two members of our board as observers to overview the process. That is the general timetable. It has been a fairly exhaustive process, and the opportunity to actually ensure that what was presented to us in a written format was actually being lived out in the markets which make this agency contract work, or not work, I think has been extremely valuable.

Senator O'BRIEN—When will the final decision be made?

Mr Morrison—The board is considering this matter on Friday, at our board meeting. Because it is a contract which requires a ministerial approval, it will then go to the minister.

Senator O'BRIEN—When the new agency is contracted, does it just take over the current Brand Australia campaign?

Mr Morrison—Yes.

Senator O'BRIEN—Will it be recommending where changes need to be made, or responding to requests for changes?

Mr Morrison—What we will be asking the agency to do is to work with us to continue to evolve this campaign.

Senator O'BRIEN—Will they be doing the market testing as well?

Mr Morrison—No. The market testing is done independently of them through our own market research agencies, but obviously they review the material that comes through on that and help us to get that strategic thinking that underpins our campaign tighter and more effective.

Senator O'BRIEN—I take it that would be a collaborative approach on whether there is a need for further expenditure.

Mr Morrison—Sorry?

Senator O'BRIEN—The decision on whether there is a need for a change, a need for new expenditure, would be a board decision, not the agency's decision, I take it.

Mr Morrison—The agency is a contractor of the organisation.

Senator O'BRIEN—Will the work that is done create issues about intellectual property ownership?

Mr Morrison—No.

Senator O'BRIEN—All the intellectual property to be owned by Tourism Australia?

Mr Morrison—Yes.

Senator O'BRIEN—Is this combined account domestic and international advertising?

Mr Morrison—Yes. I should stress there are two accounts. There is one for media and there is one for creative.

Senator O'BRIEN—Can you tell me what the budget for the domestic and the international advertising spend for the current financial year is and whether that will be met?

Mr Morrison—Are you asking if we will spend our budget this year?

Senator O'BRIEN—Yes.

Mr Morrison—Yes.

Senator O'BRIEN—In the way that it was originally budgeted, or have you made changes?

Mr Morrison—The budget is reviewed at every board meeting—

Senator O'BRIEN—I understand that. You look at one market and if things are not going well—

Mr Morrison—The plans and strategies as outlined and approved by the board and as revised by the board will be implemented, yes.

Senator O'BRIEN—Has there been for the current financial year a by country allocation, or simply a national/international?

Mr Morrison—There was an international by country allocation, which I tabled at the last estimates hearing.

Senator O'BRIEN—Has that changed?

Mr Morrison—No.

Senator O'BRIEN—When will the planned advertising spend, domestic and international, be determined for the coming financial year?

Mr Morrison—It is a two-stage process. One is obviously for it to be considered by our board. Then it is approved in the form of our annual operating plan by the minister.

Senator O'BRIEN—When would you expect that to have happened?

Mr Morrison—Our board will consider it on Friday.

Senator O'BRIEN—And then it is a matter for the minister. What is the normal turnaround?

Mr Morrison—Tourism Australia is a new entity.

Senator O'BRIEN—Wasn't there an approval last year?

Mr Morrison—There was. It took place as part of a different cycle because of the changeover from the ATC to TA. I would probably have to refer that to my departmental colleagues for timetables for turnaround from the minister.

Mr Paterson—Nothing out of the ordinary is expected. It would be done in the normal course of business.

Mr Morrison—That is on top of the corporate plan as well.

Senator O'BRIEN—Fast business or slow business, Mr Paterson?

Mr Paterson—Normal course of business.

Senator O'BRIEN—You did not answer my question. What do you say, Mr Morrison, about the criticisms that have been levelled at Tourism Australia about the process followed for the advertising account? I am particularly referring to the article in the *Australian* on 31 March.

Mr Morrison—I would refer you and the committee to the response made to that article by our chairman, Tim Fischer, who wrote a letter to the editor following that. I am happy to table it. The process we have followed for this tender has been rigorous and comprehensive. It is not uncommon in the advertising industry for those who have been unsuccessful in that process to raise questions about it.

Senator O'BRIEN—Where do you think the leaked short list for the account came from?

Mr Morrison—To my knowledge, no short list has been leaked. Any reports on this matter have been the product of media speculation and industry speculation. No journalist to my knowledge has received any list.

Senator O'BRIEN—Have the evaluation measures for future accounts been determined? Have you determined how you will evaluate the performance of the successful tenderers?

Mr Morrison—That is all being worked through as part of the negotiation process. It is part of the contract but it sits within the broad framework of what our own performance measures are as an organisation in terms of the performance of each of our campaigns, the performance of shifting consumers through what we call our consumer cycle, which at the international level is to shift consumers from a preference to visit Australia to an intention to visit Australia within the next 12 months, and at a domestic level to shift consumers from considering a holiday in Australia to preferring a holiday in Australia. These will be key measures.

Senator O'BRIEN—Since it was formed as Tourism Australia has it changed its methodology of tracking visits and visitor numbers to Australia?

Mr Morrison—Not of tracking visits or visitor numbers; they are tracked by the ABS, as I understand it.

Senator O'BRIEN—So the methodology has not changed at all?

Mr Morrison—The Australian Bureau of Statistics collects that information.

Senator O'BRIEN—Yes, but you have not suggested any change in any consultation with them?

Mr Morrison—No.

Senator O'BRIEN—Do you actually talk to them about their methodology?

Mr Morrison—It is an arrivals figure and is based on who is coming through the gates.

Senator O'BRIEN—Who tracks the spending?

Mr Morrison—That is undertaken by Tourism Research Australia, through our international visitor survey.

Senator O'BRIEN—Is it the same for the time that visitors spend here?

Mr Morrison—It is the same survey.

Senator O'BRIEN—And has the methodology for that survey changed?

Mr Morrison—No, but the sample size has been increased under the white paper funding from 20,000 to 40,000—survey responses, I should say; sample.

Senator O'BRIEN—Not the cost?

Mr Morrison—No.

Senator O'BRIEN—How much has the cost gone up?

Mr Morrison—The IVS is $2 million.

Mr Robins—The NVS is currently $1.729 million per year, and the IVS is currently $2 million per year.

Senator O'BRIEN—What about Australians? Are they spending more time and money holidaying in Australia?

Mr Morrison—We have found that the domestic market is flat, and that came out of the most recent tourism satellite figures as well. It is a major challenge for us as an industry. The domestic market tends to move with various other indicators. We have found that there has been very strong growth in outbound tourism, which is often the product of an economy that is performing well. As a result, the current campaign we are working on domestically is trying to retrieve some of that outbound.

Senator O'BRIEN—It could be affected by the strength of the currency, too.

Mr Morrison—It is a function of all of these things.

Senator O'BRIEN—Is Tourism Australia commissioning any work to get a better understanding of the way the currency factor affects domestic tourism.

Mr Morrison—It has been the product of a lot of work that has been done both academically and throughout the industry, as well as at the TRA and its predecessor, the BTR.

Mr Robins—And in forecasting.

Mr Morrison—It is also factored into our forecasting models, which are undertaken by the Tourism Forecasting Committee, of which Bernard Salt is the chair. We also subscribe to various industry based sources of data, such as the holiday tracking study and those sorts of things, to get a better understanding of the movements and trends happening in the domestic market. The domestic market comprises the lion's share of the business for the tourism industry in terms of the bread and butter of its business. It is an enormous part of the industry. Over $57 billion, $60 billion, goes through the domestic side of the business, and that is why the domestic campaign is a very important part of what we do.

Senator O'BRIEN—So we are spending $57 billion?

Mr Morrison—No. That is the total domestic visitor spend and economic betterment coming through domestic tourism.

Senator O'BRIEN—What is Tourism Australia spending on the domestic tourism promotion sector?

Mr Morrison—In the current year we are spending $11 million.

Senator O'BRIEN—Can you take on notice to give us a breakdown of where that money is being spent?

Mr Morrison—On the domestic campaign?

Senator O'BRIEN—Yes.

Mr Morrison—Yes, we can. That figure was noted in the previous document I tabled in February.

Senator O'BRIEN—Okay. So it has not changed.

Mr Morrison—That is right.

Senator O'BRIEN—What are the performance measures that Tourism Australia judges itself by? What should we judge it by?

Mr Morrison—There is a hierarchy of them outlined in our corporate plan, which is going through its approval process now. The hierarchy of those measures begins with the spend of visitors that makes its way to Australia, a measure called 'Real inbound economic value', and the dispersal of that spend around the country. These are the two primary measures by which the tourism industry's performance is assessed in terms of the government's investment in it, and obviously form the primary indicators of what we as an organisation are trying to stimulate.

Underneath that, though, there are a series of indicators that drive those two indicators. They range from everything from visitor arrivals to length of stay to average stay per visitor. And then beneath that then you have a series of projects and programs that we undertake that we are obviously directly accountable for, because these things only have a leveraged influence on these ultimate numbers. They range from our brand tracking work in terms of shifting consumers from a preference to an intention phase to travel, or from a consideration to preference phase based on our brand tracking, looking at the consistency of our communications across our network, the effectiveness of getting positive media stories up from a tourism point of view about our destination in the various travel journals and articles around the world. But ultimately it is about spend and dispersal.

Senator O'BRIEN—You mentioned the corporate plan. That needs to be approved by the minister, does it?

Mr Morrison—Correct.

Senator O'BRIEN—When will the minister have the corporate plan?

Mr Morrison—The minister has already reviewed the corporate plan and we expect to be able to see that document out soon.

Senator O'BRIEN—Its approval is imminent: is that what you are telling me?

Mr Morrison—Correct.

Senator O'BRIEN—What would be our key export market at the moment?

Mr Morrison—Just to go back to an earlier question, page 189 and 190 of the estimates documents set out the various performance measures for the organisation, for the record.

Senator O'BRIEN—Thanks for that. Is that outputs 1, 2 and 3?

Mr Morrison—Correct.

Senator O'BRIEN—Is that Tourism Australia or both Tourism Australia and the department?

Mr Morrison—Tourism Australia.

Senator O'BRIEN—Which country is our key tourism export market at the moment?

Mr Morrison—The United Kingdom.

Senator O'BRIEN—Can the committee be supplied with a list of the campaigns that are currently running, domestically and internationally?

Mr Morrison—Certainly.

Senator O'BRIEN—With a cost breakdown?

Mr Morrison—Yes. Just to be clear, you mean in May, June—we run many campaigns over lots of different periods of time and obviously a lot of them will be itemised in annual reports that are prepared.

Senator O'BRIEN—Perhaps the campaigns that are running or expected to run in the last quarter of the current financial year. Is there any specific work that is being done on the impact that the use of the internet is having on the Australian tourism market—obviously the travel internet bookings for accommodation, internet research for holidays, hits on our own website and how that relates to travel, can you trace it by country, et cetera.

Mr Morrison—Yes, we can trace it by country. It is the way our site works. But in terms of understanding the broader digital online space, this is another very important reason to be working with a global media partner. All of these major global media agencies have a very intricate understanding of how this space is developing, what the new technologies are providing, what the usages are right across the world, breaking it down by market. For example, Korea is the highest broadband penetration of any of our markets, which obviously has large implications for how we work in that market. It is a culmination of work which is done by our partners, by what is done in the industry, by our own reports back from the partners we work with in markets like Japan. It is an enormous part of what we do. The online digital environment is the future of where our marketing will ultimately go.

Senator O'BRIEN—Is Tourism Australia placing in substantial expectation on the successful tenderers in the marketing area to assist it to cope with the demands of the new technological environment?

Mr Morrison—Absolutely; it is literally something which gets our attention every day.

Senator O'BRIEN—The research budget within Tourism Australia, that is more than the Bureau of Tourism Research's original budget pre—

Mr Morrison—Pre white paper?

Senator O'BRIEN—Yes. Does Tourism Australia draw on or commission research undertaken by any other government entities other than the ABS?

Mr Morrison—I will pass that to Peter.

Mr Robins—Do you mean Tourism Research Australia or Tourism Australia?

Senator O'BRIEN—I suppose if Tourism Research Australia does it, it is for Tourism Australia, isn't it?

Mr Morrison—That is right, but if the question is does TRA contract—

Senator O'BRIEN—If they do it for you.

Mr Morrison—It is a question that Peter I am sure can answer.

Senator O'BRIEN—I will put the question to both of you so I get the answer to cover both areas.

Mr Robins—In general, we conduct our own research rather than contracting it out, although the conduct of the surveys is contracted out to market research companies.

Senator O'BRIEN—It is just data collection?

Mr Robins—That is right. Occasionally we may engage in a joint venture, for example with the Sustainable Tourism CRC, but that is not quite the same as contracting out the research.

Senator O'BRIEN—At the last hearings it was indicated that $2 million would be set aside over the current and the coming financial years for the accreditation regime. What has happened with regard to this program? How much has been spent, for example?

Mr Morrison—It is a matter for the department.

Ms Murphy—To date the amount of funding that has been spent on accreditation in total is in the order of $290,000.

Senator O'BRIEN—What is happening about the accreditation regime? Is that program still under way?

Ms Murphy—Yes, certainly the accreditation program is under way. The direction of that program is to develop a business and accreditation portal to aid tourism businesses in the process of accreditation.

Senator O'BRIEN—What does the term 'portal' mean?

Ms Murphy—The term 'portal' is basically an IT platform which will have two components. There will be two main tool kits to the platform. One will be on business development skills primarily and the other will primarily be on tools to assist industry to improve quality and become accredited if they so wish.

Senator O'BRIEN—What has happened to Tourism Accreditation Australia?

Ms Murphy—Tourism Accreditation Australia Ltd is still in existence. It is an independent board and it is a company limited by guarantee.

Senator O'BRIEN—Is it being funded by the Commonwealth out of this program?

Ms Murphy—It has received some funding from the Australian government. It is not currently receiving any funding from the Australian government.

Senator O'BRIEN—Are there arrangements in place which will lead to Commonwealth funds being paid to Tourism Accreditation Australia?

Ms Murphy—It is unlikely. The funding for accreditation is primarily being directed towards the portal that is currently under development.

Senator O'BRIEN—Have any of the state governments put money towards the accreditation regime?

Ms Murphy—Most state governments, with the exception of New South Wales and Queensland, have supported their own state-based accreditation programs either through cash or through in kind support.

Senator O'BRIEN—They are not contributing to this portal project?

Ms Murphy—No.

Senator O'BRIEN—What work with industry has taken place to change the focus of the funding?

Ms Murphy—The minister has set up a working group, which has a number of industry representatives, to advise on the development of the portal. I can read out the names of the members, if you wish.

Senator O'BRIEN—Yes, please.

Ms Murphy—The members of the business and accreditation portal consultative group are Mr Tony Charters, Mr Jeff Floyd, Mr John Hart, Mr Matt Hingerty, Mr Bill Healey, Ms Sally Hollis, Mr Daniel Leesong, Mr Rob Giason and Mr Nick Hunt. The consultative group is supported by the department.

Senator O'BRIEN—What is the program for expenditure of the remaining $1.71 million?

Ms Murphy—$1 million of that is allocated for 2005-06 and the remainder has yet to be finally committed. We have engaged Decipher Technologies to develop the portal. We are in the process of finalising a contract with them which will determine the amount of money that will be paid to them this financial year and next financial year. But that is still under negotiation.

Senator O'BRIEN—What does that mean about the total funding? Has the $2 million, or part of it, been rephased into 2006-07 yet?

Ms Murphy—No. At this stage we are not envisaging that any of it will need to be rephased into 2006-07.

Senator O'BRIEN—Apart from what has been spent this financial year, how much more is expected to be spent this financial year?

Ms Murphy—That is subject to negotiations with Decipher Ltd. We have not yet settled that amount.

Senator O'BRIEN—Does that mean that there could be contractual arrangements where the work would possibly be done in the coming financial year but be paid for in this financial year?

Ms Murphy—No. Under accruals budgeting, we do not prepay. There is likely to be some funding made available to Decipher for work undertaken this financial year, as well as a significant amount of funding for next financial year, when the bulk of the developmental work is expected to take place.

Senator O'BRIEN—So it is likely that the expenditure for this program will be something significantly under $2 million?

Ms Murphy—At the moment it is hard to estimate what the total expenditure will be, but the Australian government is certainly committed to spending $2 million on accreditation.

Senator O'BRIEN—You have $1 million for next year?

Ms Murphy—Yes, we have. We still have around $900,000 for this financial year.

Senator O'BRIEN—With a month to spend it.

Ms Murphy—If necessary, we would seek some rephasing.

Senator O'BRIEN—What has happened with the Indigenous Tourism Business Ready Program?

Mr Peel—We have engaged five mentors under the program. Contracts were signed in March.

Senator O'BRIEN—How much has actually been spent this financial year?

Mr Peel—I think our estimate this financial year is that we will spend about $160,000.

Senator O'BRIEN—What is your estimate for the coming financial year?

Mr Peel—Our estimate is $0.986 million for the coming financial year, 2005-06, $0.988 million for 2006-07, and $0.991 million for 2007-08.

Senator O'BRIEN—What other work is under way within the department in relation to Indigenous tourism?

Ms Murphy—The bulk of the work is through the Business Ready Program for Indigenous Tourism. We are also working with Tourism Australia to find the way to best give effect to the coalition's election commitment to set up Indigenous Tourism Australia within Tourism Australia. We have provided secretariat support to the Indigenous Tourism Leadership Group. The role of that group, the way it might complement the commitment to set up Indigenous Tourism Australia, is an activity that we are undertaking with our colleagues in Tourism Australia.

Ms Kelly—I would just point out that on page 191 of the portfolio budget statements there is information about the Australian government Indigenous expenditure in the tourism area which relates to Tourism Australia.

Senator O'BRIEN—How much in total is involved there? Is that $300,000 for all of those projects, or $300,000 for support of the first project, the *Outback Cafe* television series? I am not sure what that means.

Mr Morrison—Out of a total budget of just over $2 million for development of the niche program, Tourism Australia has identified a number of key segments we are working on. The top tier of those is Indigenous. What is noted there is some work that is being done specifically on those projects. But beyond that we hope to do quite a bit more under the general umbrella of our niche program, which, as I said, has a budget up to $2 million.

Senator O'BRIEN—You hope to do more. Those items there on page 191, in the first paragraph under 4.3, account for $300,000 of expenditure, do they?

Mr Morrison—I would have to confirm it, but the wording indicates that it comprises all of those programs, yes.

Senator O'BRIEN—Perhaps you can give us a breakdown on notice.

Mr Morrison—Sure.

Senator O'BRIEN—At the last hearings, it was indicated that $1 million was set aside for the department for the implementation of the white paper. Is that figure still accurate? What was the allocation for the current financial year?

Ms Murphy—For the current financial year it was about $500,000.

Senator O'BRIEN—Will that be spent?

Ms Murphy—Yes, it will.

Senator O'BRIEN—And the same amount for 2005-06?

Ms Murphy—For 2005-06, there is $185,000 for implementation coordination, in 2006-07 there is $133,000 and 2007-08 there is $134,000.

Senator O'BRIEN—Is that all staff resources?

Ms Murphy—Primarily staff resources, yes.

Senator O'BRIEN—Can you update the committee on the status of Australia's involvement in the World Tourism Organisation?

Ms Murphy—Yes. Australia rejoined the World Tourism Organisation in July last year. We have undertaken a number of activities in relation to the World Tourism Organisation. Our Deputy Secretary Patricia Kelly participated in meetings of the World Tourism Organisation's emergency task force in Phuket at the end of January, and we had an Australian government representative at the similar meeting in Berlin in March, which was driving the Phuket action plan following the tsunami in the Indian Ocean.

We also had the chief of the WTO's Sustainable Tourism Development unit make a presentation to Ecotourism Australia's annual conference. In March this year an officer of the department attended a meeting of the WTO's Committee on Statistics and Macroeconomic Analysis of Tourism in Madrid. We had the WTO Chief of Statistics, Antonio Massieu, come to Australia in April this year to attend an International Statistical Institute conference in Sydney and he met with a number of ITR officials to look at future cooperation. More recently, we have had an officer speak to the seminar on crisis management in New Delhi, which was auspiced by the WTO and South Asia Travel and Tourism Exchange Asia Pacific. We are also organising a series of seminars by the WTO to familiarise Australian consultants

with the WTO's work program and therefore hopefully get some better access to consultancy work through the WTO. We are also working with the WTO on further work on tourism satellite accounts.

Senator O'BRIEN—How many staff are involved in working with WTO processes or issues?

Ms Murphy—It is spread across the division. It depends on the issue. But we do have half a staff member dedicated to WTO coordination type activities.

Senator O'BRIEN—Are you able to give us details of the cost to the department of its participation in WTO matters and events?

Ms Murphy—Broadly, I certainly can. If you count the cost of our membership of the WTO plus our general activities relating to the WTO, we are looking at a cost so far this year in the order of $300,000.

Senator O'BRIEN—Is that including travel?

Ms Murphy—That includes some travel, yes.

Senator O'BRIEN—Can we get a breakdown of the cost of travel?

Ms Murphy—Yes.

Senator O'BRIEN—What is happening with the niche segment development initiative?

Mr Morrison—As I indicated before, there is a budget of around $2 million which is provided to Tourism Australia to develop our marketing strategies in niche areas. Those niche areas are broken down into three areas: tier 1, called *Compelling Australia*, which deals with Indigenous tourism and ecotourism; tier 2, which we describe as signature opportunities for the Australian product and includes backpackers, study, food and wine; and then tier 3, which deals with providing insights and distribution and communication more broadly across a range of things—everything from cycling to a myriad different types of specific experiences. But the key issue behind the niche strategy is that, increasingly, travel consumers around the world, as well as here, are looking for experiences as opposed to consumption of specific products. The challenge for us to ensure that we are not just putting new products in these areas into the market but conveying them as what is part of a fairly rich and dynamic experience that the visitor can engage with. That is something that really needs to be done in emotional rather than rational territory. But it means that a big part of our marketing programs is incorporating these experiences into what we are presenting.

Senator O'BRIEN— Is there a current work program? You described the three areas. How many staff are working on these initiative areas?

Mr Morrison—I will get you the staff numbers in just one second. The types of activities they are involved in is what is called product matching: identifying some very good products that match these experiences that we can actually feature in everything from our Visiting Journalists Programs to our famil programs to increase the familiarity of the international travel trade with what is on offer. It involves getting further details and information on these very different types of products and experiences and populating our website with them, and it is part of our general information that we distribute to trade and directly to consumers. It is a

matter of trying to see how we can find these various experiences and work them into our own above-the-line marketing communications as well. There is a lot of research work involved and there is a lot of engagement with the trade and industry, particularly in Australia, in terms of getting a better understanding of what products are being offered, working with them to try and make sure they are tailoring their products more to where consumers want them to be, to make those products more effective in the marketplace. And the number of staff is five.

Senator O'BRIEN—In budget estimates last May, we were taken through the funding profile for the Tourism in Protected Areas Initiative. Can we get an update on those figures?

Ms Murphy—The figures are unchanged, I suspect, from last May, but I will read the profile out to you again. It was $4.6 million over four years. The profile is $1.1 million in 2004-05.

Senator O'BRIEN—Is it $1.1 million, $1.9 million and $1.7 million?

Ms Murphy—That is right.

Senator O'BRIEN—How much is the Commonwealth paying Tourism Australia for next year and the three out years?

Ms Murphy—For Tourism Australia it was in the order of—

Mr Morrison—Could you repeat the question, please?

Senator O'BRIEN—How much is the Commonwealth contributing to Tourism Australia's budget for next year and the three out years?

Mr Morrison—To our budget?

Senator O'BRIEN—Yes. Page 194, is it?

Mr Morrison—The figures are on the top line. For 2006-07, it is $137,971,000.

Senator O'BRIEN—Isn't it $133 million? Or is it 137 million?

Mr Morrison—I am sorry. I thought you were talking about 2006-07.

Senator O'BRIEN—Yes. Is it $133,971,000 or—

Mr Morrison—That is what it says here, yes.

Senator O'BRIEN—I am sorry. I think you just said it was $137 million.

Mr Morrison—I am sorry. For 2006-07, it is $133,971,000; for 2007-08, it is $136,146,000; and, for 2008-09, it is $92,386,000.

Senator O'BRIEN—The line below that is what you expect to raise from sales, I take it.

Mr Morrison—Correct.

Senator O'BRIEN—What sorts of items—commissions and all that?

Mr Morrison—That ranges from anything from sales of research publications through to participation in trade events.

Senator O'BRIEN—Is the estimated actual for 2004-05 for goods and services and interest expected to be accurate?

Mr Hopwood—Yes. There would be very little change there.

Senator O'BRIEN—Where would I find the figures for the tourism division of the department?

Ms Murphy—There are a number of them.

Senator O'BRIEN—What are they?

Ms Murphy—Which figures, precisely, are you interested in?

Senator O'BRIEN—I'm interested in the amount of funding that is available to the tourism division of the department for conducting its activities in the coming financial year and, to the extent that it is known, the out years.

Ms Murphy—The out years are unknown, but the next financial year is in the order of $8.9 million.

Senator O'BRIEN—What is or was the figure for the current financial year?

Ms Murphy—It is very similar; it is almost exactly the same. It is $8.935 million.

Senator O'BRIEN—At last year's hearings, the department spoke about a consultation group that had been established with the Department of Transport and Regional Services to look at ways of better coordinating regional spending between the two agencies. Can we get an update on how that consultation group has been working, what has happened?

Ms Rooney—The last time the consultative group met was during the stages of designing the Australian Tourism Development Program. That would have been, I think, in the order of 12 months or so ago.

Senator O'BRIEN—So it has not met for 12 months?

Ms Rooney—That is right. That was really the purpose of the group.

Senator O'BRIEN—Are you saying its work has concluded?

Ms Rooney—Yes. Its role was to look at the development of the Tourism Development Program and how that related to a number of DOTARS programs.

Senator O'BRIEN—Again at the estimates last year, we were told that the board of Tourism Australia could establish advisory panels to advise Tourism Australia on key issues. Have any such advisory panels been established?

Mr Morrison—Yes. Four have been established—one looking at international, one looking at research, one looking at domestic and another one looking at business events.

Senator O'BRIEN—Can you, on notice, supply us with details of the membership of the advisory panels?

Mr Morrison—Certainly.

Senator O'BRIEN—Or refer us to a media release?

Mr Morrison—I am happy to provide it to you.

Senator O'BRIEN—I understand that this department and the Department of Transport and Regional Services have recently established a National Tourism and Aviation Advisory Committee. Who is on that committee?

Ms Murphy—The members of that committee, which is co-chaired by the Department of Transport and Regional Services and this department, are: Phil Hoffman, Chair, South Australian Tourism Commission; John O'Neil, Executive Director, Tourism New South Wales; Richard Muirhead, Chief Executive Officer, Tourism Western Australia; Fae Robinson, Manager, Strategic Projects, Tourism Tasmania; Ross MacDiarmid, Chief Executive, Australian Capital Tourism; Peter Roberts, Aviation Development Director, Northern Territory Airports; Peter Keage, General Manager, Aviation Infrastructure, Tourism Victoria; Peter Wade, Deputy Chair, Tourism Queensland; Col Hughes, Chair, National Tourism Alliance; Mark Dimech, Tourism and Transport Forum Australia; David Mazitelli, Australian Tourism Export Council; Michael Cannon, Executive Director, Association of Australian Convention Bureaux; Mike Hatton, Australian Federation of Travel Agents; Shaun Gaskett, Australian Hotels Association; Warren Bennett, Board of Airline Representatives of Australia; Rod Gurney, Qantas Airways Limited; John O'Callaghan, Virgin Australia; Greg Timar, Sydney Airports Corporation; Chris Barlow, Melbourne airport; Cam Macphee, Brisbane Airport Corporation; Dennis Chant, Gold Coast Airport; and George Vallence, Mildura airport.

Senator O'BRIEN—How many times has it met?

Ms Murphy—It has met twice, most recently on 15 April this year.

Senator O'BRIEN—Does it always meet in Canberra?

Ms Murphy—It has met in Canberra on both occasions, but we are open to meeting outside Canberra.

Senator O'BRIEN—Is there a budget for this council?

Ms Murphy—No. The cost of it is being absorbed within the division.

Senator O'BRIEN—What has the cost to the division been to date?

Ms Murphy—We estimate that the cost for this financial year so far is in the order of $112,000. That comprises staffing costs, venue hire and catering, some consultancy fees for papers and a small amount of money for printing and transport.

Senator O'BRIEN—Which is the lead agency? I take you it you are the lead agency because you are paying for it.

Ms Murphy—It is co-chaired, but we have probably so far paid for much of the research to support the committee.

Senator O'BRIEN—Are there formal terms of reference?

Ms Murphy—Yes, there are. I am happy to table them.

Senator O'BRIEN—That would be great; thank you. Does it deal with technical aviation issues?

Ms Murphy—It depends on how you define technical. I suppose the more technical issues it has dealt with so far are some of the issues around air services agreements—bilateral air services agreements—and the technical nature of some of those agreements.

Senator O'BRIEN—Its terms of reference will set out its charter and its aims, will they?

Ms Murphy—Yes.

Senator O'BRIEN—Are there any other advisory councils or groups to provide advice to the government or the department on tourism issues?

Ms Murphy—There is quite a range. I think we provided a response to that on notice from the last estimates.

Senator O'BRIEN—Is that still current?

Ms Murphy—Yes, it is.

Senator O'BRIEN—Have you provided information on the funding devoted to supporting those groups?

Ms Murphy—No, I do not recall that we did that.

Senator O'BRIEN—That would come out of the departmental budget as well, would it?

Ms Murphy—Yes, it does.

Senator O'BRIEN—Can we get an estimate of the cost of each of them? I want to touch on appointments to Tourism Australia of a number of people who were formerly on the staff of members of the government, ministers of this government or people otherwise connected to the same political party—Mr Morrison, you, Mr Grebe and Ms Neary. There is no barrier to people of any persuasion, but there seems to be a career pathway forming. Could you outline for me in each of the cases the recruitment process that was followed?

Mr Morrison—In terms of my own—

Senator O'BRIEN—I think Mr Paterson has dealt with that in part in the past. We will see if we can keep him out of trouble this time!

Mr Morrison—Where would you like me to start?

Senator O'BRIEN—Start with Mr Grebe.

Mr Morrison—Mr Grebe was appointed after a fairly long process, which involved the advertisement of the positions, the appointment of a recruitment agency, Talent 2, to run that process for us and to present us with a series of short-listed candidates who were interviewed. The recommendations from that series of interviews were then provided to the board, who approved the appointment of Mr Grebe on my recommendation.

Senator O'BRIEN—What was the agency again?

Mr Morrison—Talent 2.

Senator O'BRIEN—How many names were short-listed?

Mr Morrison—More than one.

Senator O'BRIEN—That is not a number.

Mr Morrison—This matter was canvassed last time.

Senator O'BRIEN—I do not understand why you cannot give us the number of names short-listed.

Mr Morrison—I have told you there were more than one, and the reason for that is that these processes, whether there are five or two or seven or six, depend on what short list is put up by the agency. There are various ways they come to those numbers, but I can assure you there was more than one. That was advised to the board as well.

Senator O'BRIEN—In relation to Ms Neary?

Mr Morrison—She is only on a casual contract. She was filling in. We have had a number of changes in that area and she is on a casual contract.

Senator O'BRIEN—What is the salary range for the three positions we are talking about?

Mr Morrison—I will come back to you on that on notice.

Senator O'BRIEN—What consultation, if any, occurred with the minister in his or her office in relation to these appointments?

Mr Morrison—None.

Senator O'BRIEN—There was no referee involvement?

Mr Morrison—Not from the minister's office, no.

Senator O'BRIEN—I am taking it by your answer about Ms Neary that there was no process because it was a casual position and it was simply filled.

Mr Morrison—It was a casual contract on a short-term basis.

Senator O'BRIEN—When you say 'short-term', what term?

Mr Morrison—It is a casual contract.

Senator O'BRIEN—A casual is daily.

Mr Morrison—It could literally terminate tomorrow. We had some short staffing in that area and we took on a casual position.

Senator O'BRIEN—So it is a position in addition to the normal quota for that area.

Mr Morrison—We have some vacancies in that area presently and we needed some experience in public relations and we filled that position.

Senator O'BRIEN—Was it Talent 2 that did the interviewing for the short-listing purposes and you?

Mr Morrison—For Mr Grebe's position?

Senator O'BRIEN—Yes.

Mr Morrison—No. The short-listing process was done completely by Talent 2 with no involvement from me.

Senator O'BRIEN—So they presented a written—

Mr Morrison—They provided a short-list of candidates, which were interviewed by me, a representative from our HR department and Mr Buckley, who is the director of research and strategy and who was overseeing the area at the time.

Senator O'BRIEN—The board then made the decision?

Mr Morrison—Then a recommendation was made to the board, which was then approved by the board.

Senator O'BRIEN—The recommendation was some consensus process of the three people on the short-list interview panel?

Mr Morrison—Correct.

Senator O'BRIEN—Was that with Talent 2 involved, or were they at arm's length from that point on?

Mr Morrison—Their role was to provide the short-list candidates for an interview.

Senator O'BRIEN—Does the Australian government provide any funding or in kind support to ATEC?

Ms Murphy—No, the Australian government does not provide operational support to ATEC.

Mr Morrison—Can I just clarify?

Senator O'BRIEN—Australian Tourism Export Council.

Mr Morrison—I know who they are, but when you say from time to time Tourism Australia will work with ATEC on various events and activities and projects as part of industry consultation, the sums of those I would have to check, but it is a fairly common part of our practice to work closely with industry bodies.

Senator O'BRIEN—Mr Hingerty moved into that area from Tourism Australia, didn't he?

Mr Morrison—No. Mr Hingerty was not employed from Tourism Australia.

Senator O'BRIEN—From the minister's office then?

Ms Kelly—Mr Hingerty was previously the minister's chief of staff.

Mr Morrison—I should also note that I am a director of ATEC, but was not at the time of the appointment.

Senator O'BRIEN—When were you appointed as a director?

Mr Morrison—It was April, but I would have to confirm that. I am happy to confirm the exact time with you.

Senator O'BRIEN—How did that come about—an invitation from the board or a nomination?

Mr Morrison—No. It is a longstanding practice that ATEC, and prior to that the Inbound Tourism Operators Association, has had a representative on its board from the ATC and now Tourism Australia. It is a practice that has been around for a very long time.

Senator O'BRIEN—The Productivity Commission's research paper *Assistance to tourism: exploratory estimates* recommended changes to the definition of the tourism industry. I understand that the report was delayed by some months as a result of a dispute between this department and the commission. What was the nature of that dispute?

Ms Murphy—The department was of the view that there is already an international definition of tourism which has been adopted by the World Tourism Organisation and the Australian Bureau of Statistics and that, ideally, that definition should stand and be taken by the Productivity Commission in its research paper.

Senator O'BRIEN—Has the disagreement between the department and the commission been resolved?

Ms Murphy—I think it is fair to say that the department is of the view that the international definition is the one that is best used for international comparability. The Productivity Commission, as you could tell from the definition they adopted in the research paper, were exploring a different line.

Senator O'BRIEN—Are there any potential impacts for the tourism industry if the Productivity Commission definitions are adopted?

Ms Murphy—This was simply a research paper. The Productivity Commission made it quite clear in its title that it was exploratory estimates, and that is the way in which the research paper is being handled. It was a research paper that was simply exploring a different definition of tourism.

Senator O'BRIEN—So there are no potential consequences for the tourism industry of the Productivity Commission's survey findings?

Ms Murphy—That is eventually up to the Australian government. But this was not a report that was commissioned by the government; it was initiated by the Productivity Commission.

Senator O'BRIEN—What additional work is being done by the department or Tourism Australia as a result of the Australian location of APEC 2007?

Mr Morrison—From Tourism Australia's point of view, APEC is a very important profiling event for Australia, and we have seen that effectively leveraged for tourism purposes in other countries, particularly in New Zealand in 1999. Our events unit, which sits under our director of marketing, Ian Macfarlane, will be working closely with Tourism New South Wales and the other agencies involved to ensure we get the maximum leverage from the event, from a publicity point of view and a tourism point of view, as is possible.

Senator O'BRIEN—What budget has been set aside?

Mr Morrison—No budget has been set aside as yet, but this is an event that will take place in a number of years, so the budgetary issue will arise as we go through the next few years of planning processes.

Senator O'BRIEN—Will there be a need for budget supplementation for a special event like this?

Mr Morrison—I do not believe so—not for a tourism promotion, no.

Senator O'BRIEN—Minister Bailey's press release of 11 March this year talks about a rapidly growing cruise ship market in Australia. Is the department to play a role in monitoring this industry to ensure that the people working in it and the consumers are adequately protected?

Ms Murphy—The department has quite a significant role to play, particularly under the white paper, in relation to the cruise shipping industry.

Ms Rooney—The department has been consulting with the industry on a review of an action plan which was developed by the industry back in 1997 and which raised a series of issues. That review was part of the tourism white paper process. We are looking to develop a draft report in about a month's time.

Senator O'BRIEN—There have been a number of events. A ship sailing out of Brisbane recently had lots of problems on cruises. That is the sort of thing you are factoring into your consideration?

Ms Rooney—Those issues with the cruises out of Brisbane were commercial issues with, I think, P&O Cruises. We would not be looking at the operational activities of particular companies.

Senator O'BRIEN—Although that could impact on the rights of consumers, couldn't it? I am not suggesting you would be investigating the company per se but they are examples of the problems that consumers might experience.

Ms Rooney—If consumer issues were raised with us we would look at them, but no consumer issues have been raised with us.

Senator O'BRIEN—Mr Morrison, you intimated in one of your responses earlier today that the certified agreement for staff has expired. I understand that the proposed agreement was not endorsed by employees. What steps have been taken to restart consultations for a replacement agreement, if any?

Mr Morrison—We have had a number of discussions with the union. We are seeking some clarity on a number of points from the union. In our communications with staff we have said that the arrangements which were set out in that agreement will be honoured until another arrangement is in place. I have written to staff to confirm that in the last few days.

Senator O'BRIEN—The old agreement or the proposed agreement?

Mr Morrison—The old agreement.

Senator O'BRIEN—That old agreement will continue in place until such time as it is replaced by the certified agreement?

Mr Morrison—Until whatever set of arrangements the staff seek to enter into, together with us, is in place.

Senator O'BRIEN—I am given to understand that Tourism Australia is or was seeking to change the focus on performance remuneration policy from increases in base pay to one-off bonuses. Is that right?

Mr Morrison—Correct.

Senator O'BRIEN—Can you advise whether employees would possibly be worse off under this proposal either in relation to their base pay or their superannuation?

Mr Hopwood—Yes, it would be possible. If you extend the calculation of their pay over subsequent years, it is obvious that if base pay has increased by a bonus payment and that cumulative figure is increased each year by an applied amount for CPI or market rates, et cetera, then logically it will be greater with the bonus than without the bonus.

Mr Morrison—Our issue here is ensuring that our remuneration costs going forward do not eat into a significantly larger proportion of our budget going forward. We consider the arrangements provided to staff, with a 4.2 per cent increase, which is advised from 1 July, off their base pay, to be a good set of arrangements.

Senator O'BRIEN—Will the proposed arrangements have any negative effect on superannuation entitlement?

Mr Morrison—Not that I am aware of.

Mr Hopwood—Each staff member has the ability to change their superannuation arrangements. For instance, if they are salary packaging it would depend on the components of the package they have put together. Hypothetically, if everything was in cash and there was a larger cash component of a person's salary then, if that cash component is reduced because of the removal of the bonus, then the superannuation potential will be reduced.

Mr Morrison—I would also stress that staff of Tourism Australia are on the 16 per cent arrangement for superannuation, which, compared to most other employers, is a very generous arrangement.

Senator O'BRIEN—It probably means the base is even more important—16 per cent of whatever the base is as compared to 9 per cent magnifies the difference, I suppose. The only purpose of my making that comment is that, whether it is 16 per cent or nine per cent, the superannuation factor is obviously something which might be an issue, and that is why I was raising it with you.

Mr Morrison—Sure. I suppose my point is that, with the 4.2 per cent increase on base pay from 1 July and 16 per cent superannuation, Tourism Australia staff, I think, are well provided for.

Senator O'BRIEN—Obviously the employees did not agree.

Mr Morrison—That is a different issue.

Senator O'BRIEN—That is a different issue, is it?

Mr Morrison—Yes.

Senator O'BRIEN—Can you tell me what support Tourism Australia has provided to the tourism industry in the Indian Ocean territories?

Mr Morrison—I will have to take that one on notice. I am not aware of any major project which involves Tourism Australia and that organisation at all. We are active in PATA, the Pacific Asia Travel Association.

Senator O'BRIEN—The wrong side of the country.

Mr Morrison—We do not have any profile involvement there.

Senator O'BRIEN—Has the territories branch of the Department of Transport and Regional Services talked to Tourism Australia about Indian Ocean territories tourism market development?

Mr Morrison—We have had a number of discussions recently about visiting journalist programs and the like, which we will consider as part of our normal course of business in running those programs. Those programs are focused on ensuring consumers are looking at things that we would hope they want to come and experience and which trigger their interest to attend, to come to Australia.

Senator O'BRIEN—I think your Brand Australia map depicts the islands with a little red arrow—no distance, no inset. It is not seen as an important destination for tourists to Australia?

Mr Morrison—What I would say is that with all of our marketing activities we tend to take our lead on what destinations to promote from our consumers. They tend to define for us those places which have the greatest interest and where we have the biggest opportunity to leverage interest in Australia and grow the overall economic contribution of tourism to Australia. It is consumer led.

Senator O'BRIEN—So the big markets get covered and the small ones do not.

Mr Morrison—The big markets?

Senator O'BRIEN—The big tourism markets on your—

Mr Morrison—When you consider that 63 per cent of the inbound economic value that comes into Australia comes from just seven markets, and if we were not to continue our presence in those important markets then that 63 per cent of the business could come under threat, then I think the industry would very much expect us to focus on those markets.

Senator O'BRIEN—When other departments, such as the Department of Transport and Regional Services, fund tourism projects, do they consult with Tourism Australia as a matter of course?

Mr Morrison—It depends on the nature of the project. Our role, as we started off this session saying, is that we are a leverage marketing organisation, we are an operational agency of government, and it really does depend on the project and whether it is considered to have a particular bearing on our activities.

Senator O'BRIEN—It is not unusual for another department to pour money into a tourism project without consulting Australia's national tourism marketing body?

Mr Morrison—It depends on the nature of the project.

Senator O'BRIEN—In the view of Tourism Australia, should Tourism Australia be consulted from the point of view of its knowledge of the international market?

Mr Morrison—Of course we would always welcome the consultation, but we are a very active organisation and there are decisions that are made every day which impact on tourism at every level of government. It would be great to be consulted on them all, but that is all we would end up doing, providing opinions back on these things. We take a fairly pragmatic

approach to it and endeavour to build strong relationships with all of those agencies that are involved in this area, and we think that is the right way to approach it.

Senator O'BRIEN—I do recall you talking about the work that you do on the product that is available, so that you can have good product available. Was there any consultation with Tourism Australia about the funding of Beaudesert Rail?

Mr Morrison—That program is administered by the department.

Senator O'BRIEN—The department of transport.

ACTING CHAIR (Senator Watson)—It being 12.45 pm, I suggest that further questions be placed on notice.

Mr Paterson—Senator Watson, before you conclude this session, there was a question raised by Senator O'Brien this morning in relation to the supplier access to major projects and the industry capability network in relation to resource projects. Between July 1997 and mid-2005, 55 resource projects have received assistance under SAMP. That is 55 of the 82 projects that have been supported over the same period. The cost in terms of SAMP funding for that assistance was $2.9 million out of a total cost of $5 million for the 82 projects.

ACTING CHAIR—Thank you. The committee will resume after lunch on the Treasury portfolio, with the ACCC first up.

Proceedings suspended from 12.46 pm to 1.36 pm

TREASURY PORTFOLIO

In Attendance

Senator Minchin, Minister for Finance and Administration

Department of the Treasury

Dr Ken Henry, Secretary

Outcome 1: Sound Macroeconomic Environment

Output Group 1.1: Macroeconomic Group

Dr Martin Parkinson, Executive Director
Mr David Parker, Alternate Executive Director
Dr David Gruen, Chief Adviser, Domestic,
Mr Roger Brake, General Manager, International Finance Division
Dr Steven Kennedy, General Manager, Domestic Economy Division
Ms Meghan Quinn, Principal Adviser, Forecasting, Domestic Economy Division
Dr Gordon de Brouwer, General Manager, G20 and APEC Secretariat
Mr Adam McKissack, Manager, Macroeconomic Policy Division
Mr Peter Downes, Specialist Adviser, International Economy Division
Mr Luke Yeaman, Acting Manager, International Economy Division
Mr Brian Thomas, Acting Manager, International Economy Division
Mr Phil Garton, Specialist Adviser, International Economy Division

Outcome 2: Effective Government Spending and Taxation Arrangements

Output Group 2.1: Fiscal Group

Mr David Tune, Executive Director
Mr David Martine, General Manager, Budget Policy Division
Mr Matthew Flavel, Manager, Budget Policy Division
Mr Jason McDonald, Manager, Budget Policy Division
Ms Maryanne Mrakovcic, General Manager, Industry, Environment and Defence Division
Mr Rob Heferen, General Manager, Social Policy Division
Mr Michael Willcock, General Manager, Commonwealth-State Relations Division

Output Group 2.2: Revenue Group

Mr Mike Callaghan, Executive Director
Mr Bruce Paine, General Manager, Board of Taxation Secretariat
Mr John Lonsdale, General Manager, Superannuation, Retirement and Savings Division
Mr Nigel Ray, General Manager, Tax Analysis Division
Mr Phil Gallagher, Manager, Tax Analysis Division
Mr Colin Brown, Manager, Tax Analysis Division
Mr Peter Greagg, Manager, Tax Analysis Division
Mr Neil Motteram, General Manager, International Tax and Treaties Division
Mr Patrick Colmer, General Manager, Indirect Tax Division
Mr Colin Johnson, Business Tax Division
Mr Tony Regan, Manager, Business Tax Division
Mr Mark O'Connor, Acting General Manager, Individuals and Exempt Tax Division
Ms Marisa Purvis-Smith, Manager, Individuals and Exempt Tax Division

Outcome 3: Well Functioning Markets
Output Group 3.1: Markets Group

Mr Jim Murphy, Executive Director
Mr Chris Legg, General Manager, Financial System Division
Ms Kanwaljit Kaur, Manger, Financial System Division
Ms Vicki Wilkinson, Manager, Financial System Division
Mr Iain Scott, Manager, Financial System Division
Mr Trevor King, Manager, Financial System Division
Mr Damien White, Manager, Financial System Division
Ms Kathryn McCrea, Financial System Division
Mr Mike Rawstron, General Manager, Corporations and Financial Services Division
Mr Matt Brine, Manager, Corporations and Financial Services Division
Ms Kerstin Wijeyewardene, Manager, Corporations and Financial Services Division
Ms Ruth Smith, Manager, Corporations and Financial Services Division
Mr David Love, Manager, Corporations and Financial Services Division
Mr Steve French, General Manager, Competition and Consumer Policy Division
Ms Sandra Patch, Senior Adviser, Competition and Consumer Policy Division
Ms Louise Seeber, Senior Adviser, Competition and Consumer Policy Division
Mr David Hall, Competition and Consumer Policy Division
Ms Suzanne Howarth, Senior Adviser, Competition and Consumer Policy Division
Mr Simon Vickery, Competition and Consumer Policy Division
Ms Jacky Rowbotham, Senior Adviser, Competition and Consumer Policy Division
Mr Brad Archer, Competition and Consumer Policy Division
Mr Gerry Antioch, General Manager, Foreign Investment and Trade Policy Division
Mr John Hill, Manager, Foreign Investment and Trade Policy Division
Ms Susan Antcliff, Senior Adviser, Australian Government Actuary
Mr Peter McCray, General Manager, Financial Literacy Foundation
Ms Sally Webster, Manager, Financial Literacy Foundation
Ms Gillie Kirk, Senior Adviser, Financial Literacy Foundation
Mr Grahame Crough, Manager, Financial Literacy Foundation
Mr John Riley, Financial Literacy Foundation
Mr Scott Rogers, Competition and Consumer Policy Division
Ms Jane Benson, Competition and Consumer Policy Division
Mr Chris Lyon, Competition and Consumer Policy Division

Australian Competition and Consumer Commission

Mr Graeme Samuel, Chairman
Mr Brian Cassidy, Chief Executive Officer
Mr Joe Dimasi, Executive General Manager, Regulatory Affairs Division
Mr Mark Pearson, Executive General Manager, Enforcement and Compliance Branch
Ms Lee Hollis, General Manager, Criminal Enforcement and Cartel Branch
Ms Rose Webb, General Manager, Enforcement and Co-ordination Branch
Mr Tim Grimwade, General Manger, Mergers and Asset Sales
Mr Scott Gregson, General Manager, Adjudication Branch
Mr Robert Antich, General Manager, Policy and Liaison Branch

Mr Nigel Ridgway, General Manager, Compliance Strategies Branch
Mr Michael Cosgrave, General Manager, Telecommunications Group
Ms Helen Lu, General Manager, Corporate Management Branch
Mr John Bridge, Chief Finance Officer
Ms Lisa-Anne Ayres, Executive Branch
Mr Chris Steger, Executive Branch
Ms Colette Downie, Director, Enforcement and Co-ordination Branch
Mr Sam Ceravolo, Director, Finance and Services

Australian Bureau of Statistics
Mr Dennis Trewin, Australian Statistician
Ms Susan Linacre, Deputy Australian Statistician, Population Statistics Group
Mr Peter Harper, Deputy Australian Statistician, Economic Statistics Group
Ms Kerrie Duff, Acting First Assistant Statistician, Corporate Services Division
Mr Paul Williams, Assistant Statistician, Census & Geography Branch

Corporations and Markets Advisory Committee
Mr John Kluver, Executive Director

National Competition Council
Mr John Feil, Executive Director
Mr Alan Johnston, Director, Government Businesses and Regulation

Productivity Commission
Mr Ian Gibbs, Assistant Commissioner
Mr Garth Pitkethly, First Assistant Commissioner

Australian Prudential Regulation Authority
Mr Ross Jones, Deputy Chairman
Mr Stephen Somogyi, Member
Mr Charles Littrell, Executive General Manager, Policy, Research and Statistics
Mr Wayne Byres, Executive General Manager, Diversified Institutions
Dr Darryl Roberts, General Manager, Enforcement, Supervisory Support
Mr Stephen Glenfield, General Manager, South West Region, Specialised Institutions

Australian Securities and Investment Commission
Mr Jeffrey Lucy, Chairman
Mr Jeremy Cooper, Deputy Chairman
Ms Jan Redfern, Executive Director, Enforcement Mr Peter Clark, Senior Counsel

Australian Taxation Office
Mr Michael Carmody, Commissioner of Taxation
Mr Murray Crowe, Assistant Commissioner
Mr James O'Halloran, Assistant Commissioner
Mr Bill Gibson, Chief Information Officer
Mr Greg Farr, Second Commissioner
Ms Jan Farrell, Deputy Commissioner
Ms Erin Holland, Deputy Commissioner
Mr Mark Jackson, Deputy Commissioner
Mr Mark Konza, Deputy Commissioner
Mr Neil Mann, Deputy Commissioner

Ms Stephanie Martin, First Assistant Commissioner
Mr Michael Monaghan, Deputy Commissioner
Ms Donna Moody, Chief Finance Officer
Ms Tracey Nicholson, Assistant Commissioner
Mr Shane Reardon, Deputy Commissioner
Mr Greg Topping, Assistant Deputy Commissioner
Mr Graham Whyte, Assistant Commissioner
Ms Anne Ellison, First Assistant Commissioner

Inspector-General of Taxation

Mr David Vos, Inspector-General of Taxation
Mr Steve Chapman, Deputy Inspector-General of Taxation

Australian Office of Financial Management

Mr Neil Hyden, Chief Executive Officer
Mr Paul Power, Chief Operating Officer
Mr Pat Raccosta, Chief Finance Officer
Mr Michael Bath, Director, Financial Risk
Mr Gerald Dodgson, Head, Treasury Services

Australian Competition and Consumer Commission

CHAIR—I call to order this public hearing of the Senate Economics Legislation Committee. On 10 May the Senate referred to this committee the particulars of its proposed additional expenditure in respect of the year ending 30 June 2006 for the portfolio area of the Treasury. The committee is required to report to the Senate on or before 20 June 2005. Agencies that are released from the hearings may have written questions on notice directed to them. The committee has set Friday 22 July 2005 as the date for the receipt of written responses to questions taken on notice. The committee will consider the proposed expenditure for departments and agencies in the order they appear on the circularised agenda.

This afternoon the committee will begin its examination of the Treasury portfolio with the Australian Competition and Consumer Commission. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees, unless the parliament has expressly provided otherwise. I also draw to the attention of witnesses and senators the relevant parliamentary privilege resolutions agreed to by the Senate on 25 February 1988. Resolution 9 provides:

> A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.

Resolution 10 provides:

> Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the

relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.

Resolution 16 provides:

An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister.

Giving false or misleading evidence to the committee may also constitute a contempt of the Senate. All officers appearing before the committee are protected by parliamentary privilege with respect to their evidence. I now welcome Senator Minchin, the chairman of the Australian Competition and Consumer Commission, Mr Samuel, and officers of the commission. Mr Samuel, do you wish to make an opening statement?

Mr Samuel—Yes. We last appeared before the Senate estimates committee in February. I think it is fair to say that we have been very busy in the period since then. In the budget released by the Treasurer in May this year we received an extra $25 million over a four-year period. That covers expenditure relating to the establishment and the ongoing operations of the Australian Energy Regulator and additional funds that we require for the implementation of the legislation arising from the Dawson recommendations.

I want to cover a few of the items that have occurred and a few of the issues that have raised their head and been dealt with since February. Perhaps one of the most significant of these relates to the use of light and mild descriptors on tobacco packaging. We completed an extensive investigation into this issue, which took our investigating officers and lawyers throughout this country and overseas. The result of the investigation was that we obtained from two of the major tobacco marketers and manufacturers in this country, British American Tobacco and Philip Morris, court enforceable undertakings. Those undertakings required the immediate removal of those descriptors—that is, within the next few weeks. I think one of the companies, British American Tobacco, has agreed that by today light and mild descriptors will be removed from their tobacco packaging; and for Philip Morris, it will be within the next few weeks. We have obtained from them court enforceable undertakings to immediately remove the light and mild descriptors from their cigarette packets. In addition, we obtained from the two companies a total contribution of $8 million towards an antismoking campaign, which will be supervised by the ACCC. We will doubtless do that in conjunction with the Department of Health and Ageing.

While that is good news in respect of British American Tobacco and Philip Morris, we have not had the same response from Imperial Tobacco, which is the third major manufacturer and marketer of cigarettes in this country. Imperial Tobacco have simply adopted the attitude that they are not prepared to meet the time imperatives for the removal of light and mild descriptors that have been met by their two competitors, British American Tobacco and Philip Morris. They have said that, while they are beginning at this stage to remove the descriptors

from some of their brands, they do not see the need to hasten that process of removal and that they will instead be focusing on March next year when new regulations come into place in respect of the packaging of cigarettes in this country.

I have to say that we are not just disappointed but, frankly, somewhat bewildered at the attitude that has been adopted by Imperial Tobacco. If I can express a personal view, I regard it as displaying a significant lack of corporate social responsibility, a significant lack of sensitivity to community expectations. I think it is a matter that can best be described as reprehensible behaviour on the part of a leading company in this country, particularly compared with the attitude that has been displayed by British American Tobacco and Philip Morris.

The issues with Imperial Tobacco relate not only to the timing for the removal of the light and mild descriptors but also to their refusal to make what we consider to be a reasonable contribution towards the antismoking campaign. The contribution that has been requested of them is in proportion to their market share relative to the other two main manufacturers, British American Tobacco and Philip Morris. When you relate that contribution to their annual profit of just short of $50 million, and the annual worldwide profit derived by this group from cigarettes sales and the like of $2.1 billion, the amounts that we are talking about are really very small—indeed, they are paltry. I can only repeat that, in my view, the attitude of Imperial Tobacco displays a complete lack of sensitivity to community expectations, a lack of sensitivity to those expectations that have been reflected by governments and parliaments around the country and a lack of corporate social responsibility. We will be dealing with Imperial Tobacco in our own way over the next short while.

I note by way of an inherent contradiction, if you like, in Imperial Tobacco's approach to this matter that they maintain they have done nothing wrong but at the same time they protest that they are already withdrawing light and mild descriptors from their cigarette packets. I think that raises an interesting conundrum as to why they are removing the light and mild descriptors if they do not consider that they are doing anything wrong. But, as I said, we will deal with Imperial Tobacco in the very near future.

This morning, Mr Justice Giles in the Federal Court has confirmed a $4.75 million penalty against Liquorland, a member of the Coles Myer group, for five contraventions of section 45 of the Trade Practices Act. This related to some issues involved in liquor licensing applications being made by independent liquor licensing applicants in New South Wales. I will not offer too much more comment about that particular matter because a similar suite of issues is currently before the Federal Court involving Woolworths. I can say that Coles Myer—that is, the Liquorland group—did, from the time that this investigation was first raised with them and when it first commenced, cease the activity that was the subject of the contraventions in respect of which these penalties have today been awarded. They did cooperate with the ACCC in reaching an agreement as to the appropriate penalties and thus saved the considerable costs, time and other issues associated with a lengthy court case. The case against Woolworths is continuing at the moment, so it is perhaps not appropriate to make any further comment.

On 16 May Justice Allsop in the Federal Court delivered the judgment in respect of Baxter Healthcare. That was an allegation by the commission of a contravention of section 46 and

several contraventions of section 47 of the Trade Practices Act. While Justice Allsop found that the allegations complained of did amount to breaches of section 46 and section 47, he applied issues of derivative Crown immunity and dismissed the ACCC's application. This raises some significant constitutional issues in relation to the application of the Trade Practices Act, not only to the Crown but to those dealing with the Crown, in the context of derivative Crown immunity. The ACCC is considering its position on this matter, particularly in relation to an appeal on those quite important constitutional issues.

Just a few weeks ago the Federal Court ordered $23.3 million in penalties for petrol price fixing. That involved eight companies and eight individuals in respect of price fixing in the Ballarat region in Victoria. As a result of those penalty awards, five of the corporations involved are in various stages of administration or liquidation, and we are currently seeking counsel's advice about the recovery of penalties from insolvent companies—noting that, in principle, penalties are not able to be proven as debts in certain instances where companies move into stages of insolvency administration. But we were particularly pleased with the awards reached in those cases. Some of those awards by the Federal Court resulted from agreed penalties—that is, levels of cooperation beforehand—and others resulted from adjudications reached by the court. We are particularly pleased at the level of the penalties that were awarded in respect of some significant price fixing matters that had occurred in the Ballarat region in relation to the retail sale of petrol.

Just a couple of weeks ago we launched the consumer product safety standard for baby bath aids. This is the first mandatory standard that has been developed by the ACCC under its new role as the agency primarily responsible for product safety standards. That was transferred a short while ago from the Department of the Treasury to the ACCC.

We are currently in the process of arbitrating a number of telecommunications access disputes. As those are in the course of being arbitrated, I will not offer any more comment on those at this point in time.

We released our fourth monitoring report on public liability and professional indemnity insurance. In summary, that report showed that there had been some decreases in the premiums and that the underwriting performance of the insurance industry generally, in relation to public liability and professional indemnity insurance, had now moved into a state of profitability.

The one point that is made in these reports and in subsequent comments is that it is not possible for us at this point of time—and we are not sure whether indeed in the future we will be able to, on the basis of our monitoring—to determine whether the movements in premiums are the result, either direct or indirect, of the tort law reforms that have been instituted by governments around this country. Therefore, it is not possible for us to draw a direct causal link between those movements in premiums and those tort law reforms.

On the matter of Skybiz, the United States Federal Trade Commission has secured $US20 million for consumer redress following legal action against Skybiz.com in the US. Australian consumers may be able to reclaim some money they spent on this internet pyramid scheme by lodging appropriate claims. This indicates some of the processes that we have been engaging in and our cooperation with counterparts in other jurisdictions.

On 29 April we issued final revenue cap decisions for TransGrid and Energy Australia, transmission network providers in New South Wales and the Australian Capital Territory. We took action against the Australian Communications Network, ACN, in the Federal Court for a pyramid selling scheme in breach of section 65AAD of the Trade Practices Act. The Federal Court found that the scheme operated by ACN is a pyramid selling scheme. The case was important in that it provided some further guidelines on what constitutes a pyramid selling scheme as distinct from a legitimate business that falls outside the concept of pyramid selling—noting that the primary factor, particularly in this case, was looking at the returns on selling the products of the subject of the business concerned as against what I call the recruiting returns available to the promoters of the scheme.

We succeeded in obtaining from the Federal Court a ban on a promoter of educational materials to Indigenous peoples from entering the Northern Territory Indigenous communities to conduct his business. That was essentially under the basis of unconscionable conduct provisions in part 4A of the Trade Practices Act.

Penalties totalling a quarter of a million dollars have been imposed on Dermalogica, a wholesaler of prestige skincare products, for engaging in resale price maintenance. Interestingly, the Federal Court noted that this penalty would have been considerably higher but for the company's cooperation in admitting certain contravening conduct. I think this reflects an increasingly tougher approach by the Federal Court for breaches of part 4 of the Trade Practices Act. We have welcomed that approach publicly, particularly in the context of the $23½ million of penalties that were imposed for the Ballarat price fixing and the approach of the Federal Court to adopt a much tougher lines in terms of penalties for breaches of the anticompetition provisions of the Trade Practices Act.

We obtained a mareva order from the Federal Court to freeze the funds in L&L Supply Pty Ltd's Australian bank account over an alleged office supply scam. The litigation on that matter is continuing, so I will not comment any further. The Federal Court also found that Gary Peer and Associates had engaged in misleading conduct in the way it advertised a property in Caulfield. It advertised the property initially for buyers in the $600,000-plus range and then lifted that to the $650,000-plus range when in fact the reserve for the property was of the order of $780,000. I think that sent a salutary lesson out to the real estate industry that underquoting is, in the view of the ACCC and now in the view of the Federal Court, a breach of the misleading and deceptive conduct provisions of the Trade Practices Act.

To provide some enforcement statistics: we have 32 matters in court. Fourteen of those are part 4 matters, with four awaiting judgment; 15 are part 5 matters, with one awaiting judgment; and three are part 4A matters—that is, unconscionable conduct. The profile of the matters that are coming before the court now, and of our investigation processes generally, is moving towards more complex matters of significant consumer detriment, and that profile is starting to show itself in the nature of those matters that are the subject of our litigation.

We have 137 in-depth investigations. Of those, 56 are part 4 matters, 72 are part 5, six are part 4A and three are other. We have 519 initial investigations, but those initial investigations will move up and down almost on a daily basis as the matters are referred either by direct calls to us or through our info centre into the investigatory process. They may then move into

in-depth investigations or, after a period of time, be dropped as no longer being appropriate to undertake further investigation into.

We now have in excess of 30 cartels under investigation. Other investigations have been recently concluded—that is, we have been clearing the pipelines of what we call the 'dry holes,' which are cartel investigations that prove to be no-cases. Since we last appeared before Senate estimates we have launched proceedings against three companies for alleged market sharing in the distribution of alluvial garnet in Australia and overseas. I am sure senators will ask me later what alluvial garnet is and what its uses are. I will be happy to explain that should the question arise.

The leniency policy has raised the quality of information that comes to us. I have said on previous occasions that, when we had a close look at our cartel investigations, it was quite clear we had a number of dry holes. We had a number of false leads that were utilising our resources and misallocating the investigative resources. The use of the leniency policy has raised the quality of information, although one or two of those applications for leniency had themselves proved to be dry holes—that is, there has been excessive caution on the part of the applicants or their legal advisers which caused applications for leniency to be made but, when we conducted an investigation, we discovered that there was no cause for the application to be made in the first place because there was no potential breach of the act. But the leniency policy is working very well. We are receiving about one application a month and over half of our current serious investigations are the direct result of the application of the leniency policy. The leniency policy has been the subject of a very public review of recent times, since our cartels conference in late November last year. We will be releasing the results of that review, and some enhancements to the operation of the leniency policy that we have gleaned as a result of that review and a study of practices in overseas jurisdictions, particularly the United States, in the very near future.

On 29 April we launched a business guide on how to avoid becoming involved in or a victim of cartel behaviour. I doubt that there is any medium or large sized business in Australia that is not aware now of the very serious attitude that we take towards cartels; therefore, we do not have any view that it is appropriate for people to be saying to us that they were not aware of the law and that they ought to be excused for their misconduct in relation to cartel activity. We regard cartels as very serious offences of the act and are pursuing those with as much vigour as our resources will permit.

Last week we released a guide concerning unconscionable conduct and the way that unconscionable conduct is interpreted by the courts. It is a very easy to read guide. It is available free from the ACCC's offices and also available on our web site. It is principally a guide for small business so that they understand what remedies might be available to them in relation to unconscionable conduct on the part of larger businesses in their negotiations with them.

Going to mergers, between 1 July 2004 and 30 April 2005 we have not opposed 117 matters and we have opposed two. We have opposed but resolved with undertakings nine matters. We have finished 12 matters where no decision was made and we have finished two matters where there were some confidential concerns. In total we have had 143 merger matters in the 10-month period to 30 April 2005. A very unusual matter recently was that

involving the acquisition by the Ramsay Health Care group of Affinity Health's private hospital network. We managed to resolve that matter in principle to enable the transaction to proceed in a period of six days from the matter being first brought to our attention.

We did so on the basis of receiving a very extensive undertaking from the parties concerned that they would, after we completed our market inquiries, which are currently being conducted, provide undertakings to us as to divestitures and other remedies that would enable us to resolve any competition concerns that might arise as a result of our market inquiries. Those market inquiries are currently proceeding. But it did demonstrate I think the manner in which the informal merger process that we adopt at the moment can work very much to the advantage of the business community and, at the same time, enable us to properly and efficiently enforce section 50 of the Trade Practices Act.

We dealt with the ABC Learning Centre's proposed acquisition of the Peppercorn Child Care Centres. That again was resolved by undertakings and investiture of a number of centres in regional New South Wales, Victoria, Queensland and WA. ABC is not to acquire further centres in certain regional centres for a specified period identified in the undertaking.

We oppose the Pacific Brands acquisition of Joyce Corporation because we consider that that would raise issues of substantial lessening of competition in a number of state based markets for foam.

The informal clearance process is working very well. The guidelines which came into operation relating to that process commenced in October last year. Despite some concerns raised by practitioners in the area that these guidelines would reduce flexibility, I think that almost without exception those involved in dealing with the commission on merger matters have found the guidelines have in fact enhanced our process. They have enhanced the transparency and accountability of the process. They have found they have worked very well indeed and have welcomed the innovations that we have introduced as to the transparency and accountability of our informal merger processes since the guidelines have been in place.

Most importantly, as part of those guidelines we have set in place time lines for the conduct of merger investigations. In all but a very few—I think two or three—of the cases we have met the time lines that we first set. In many cases we have actually exceeded those time lines in terms of being able to have a shorter investigation period and decision-making period than we initially predicted might be the case. In very few cases we have put out into the public marketplace prior to reaching a decision a statement of issues of competition concerns that we might have. That has very much enhanced our ability to obtain information from all stakeholders as to the issues that we are concerned about. They enable us in some cases to dismiss those issues. In other cases, we get enhanced information and enhanced responses from our market inquiries.

Most importantly, we have since September 2003 been increasingly putting out competition assessments which identify the manner in which we have been assessing mergers, particularly those of a more complex nature. This is now providing a body of precedent and guidance to the business community and to the professions as to the manner in which we are defining markets and dealing with issues of competition and substantial lessening of competition.

Importantly, they make the ACCC accountable in terms of the business community for the way in which we conduct our informal merger process.

Finally, let me deal with the issue of authorisations or adjudications. We are dealing with some complex matters, some affecting Australian exports. In particular in relation to exports we have dealt with the allocation of slots at Port Waratah to try and deal with some of the bottlenecks that were occurring in the delivery of coal from the Hunter Valley coalmines to Port Waratah and then onto the ships. I think the result of that particular authorisation process is that the ship queues in the port have reduced from around 50 on average to now around 10 on average. That has substantially reduced the $200 million to $250 million in demurrage fees being paid on an annual basis for simply having ships sit in a queue in the port.

We have dealt with a similar matter in Dalrymple Bay. Interim authorisations have been provided there to again assist in dealing with a reduction in the vessel queues off Dalrymple Bay. It was estimated by those involved in these applications that those queues were costing the users of the port and coalminers upwards of $500 million in demurrage fees, which is just simply a dead weight loss which impacts upon the Australian economy generally.

Very recently the Australian Competition Tribunal provided its reasons in the Qantas-Air New Zealand decision, which, as senators will recall, overturned the decision of the ACCC reached in August-September 2003, and determined that authorisation of that strategic alliance should be granted. That strategic alliance of course will not proceed in that form because of the decision of the New Zealand Commerce Commission and the New Zealand High Court affirming the NZCC's decision. But the ACT has overturned the decision of the ACCC. In doing so, it has provided some extensive reasons for judgment, which we are currently examining in some detail to determine their impact on authorisation and other issues concerning merger matters; and we will deal with those in due course. I think at that stage, Chairman, I will cease my introductory comments and hand over to senators for questions.

CHAIR—Thank you very much, Mr Samuel. I have four questions. Any successful section 46 cases in the last year?

Mr Samuel—Yes, one: Safeway—no, and Northern Territory PAWA.

Mr Cassidy—Let us sort out those. We won Safeway, of course, in the full bench of the Federal Court, and the High Court declined an appeal for special leave.

CHAIR—That was a very good win, Mr Cassidy.

Mr Cassidy—Indeed, and it remains our only win in a contested section 46 case since 1974. I suppose there was a half a win in the Baxter case, where we had I think four section 46 counts. The judge found in our favour in one of those but, as the chairman has mentioned, unfortunately that whole case was in a sense lost because the judge found against us on a constitutional issue of derived immunity. He made it clear that, had it not been for that derived immunity, he would have found in our favour. But, as I say, it was only one out of four section 46 counts.

CHAIR—Thank you. Mr Samuel, are you satisfied with the promptness with which decisions of the Australian Competition Tribunal are being delivered?

Mr Samuel—In the most recent matter of Qantas-Air New Zealand, I think all parties, including the tribunal itself, recognised that the delay between the handing down of the one-line determination, which was that the ACCC's determination would be overturned, and then the reasons for determination was probably beyond what would have been preferable in the circumstances. I think the tribunal recognises that. There have of course been some changes in the construct of the tribunal in recent times with the president of the tribunal now adopting a full-time position as a member of the tribunal and ceasing his duties in the Federal Court, and some additional tribunal members have been appointed. But it certainly would assist I think the ACCC and parties dealing with some of these complex issues if it were possible for these matters to be dealt with somewhat more speedily than is currently the case. But I think the changes in the construct of the tribunal are going to assist that taking place.

CHAIR—Thirdly, I want to ask you about the leniency policy. Is it your view that the leniency policy is a time limited policy in the sense that, after a finite period, having a leniency policy in place may in fact begin to work against the objectives for which the policy was first instituted?

Mr Samuel—I am not sure that we have considered that matter at this point in time, given that the leniency policy has been in operation about only 18 months or just short of two years. The experience in other jurisdictions has not been to put in a finite period or a sunset in the operation of the leniency policy. I guess we would like to think that the combination of the investigative focus that we have been placing on cartels and the penalties, both financial and potential criminal penalties, that we impose on cartels might see a finite period to the operation of cartel activity all told—and we would also see some flying pigs outside, I think, if that were the case.

CHAIR—But do you understand my point, Mr Samuel?

Mr Samuel—Absolutely.

CHAIR—I know a leniency policy is not exactly like an amnesty, but it is not the sort of policy that would necessarily continue to be efficacious ad infinitum.

Mr Samuel—It is efficacious to the extent that it succeeds in breaking down or breaking open the very foundation stone of a successful cartel, which is secrecy. So long as cartels rely on secrecy, then leniency helps to break that down. I have often talked of the risk weighted cost-benefit analysis that those participating in cartels engage in. The cost-benefit issue of course is now being swung against the benefit in favour of the cost, if I can put it in those terms, by the very substantial financial penalties that are part of the Dawson legislation and by the potential gaol sentences-criminal penalties recently announced by the Treasurer.

But from June-July 2003 onwards the risk weighting shifted very much against those participating in cartels because they never know when one of their co-conspirators is going to blow the whistle and provide us with information that will enable us to launch a serious investigation and ultimately a serious prosecution that could end up with executives being placed in jail. If we were to remove the leniency policy at a point of time in the future, the prospect is that that risk weighting will suddenly then move against the regulator, against the enforcer of the law and back in favour of the conspirators.

CHAIR—Finally, you made an observation in your opening remarks that there was no direct causal relationship between tort law reform and movements in insurance premiums. Is it nevertheless your view—and I know that this cannot be expressed empirically—that there is some, albeit indirect, causal relationship between tort law reform and movements in insurance premiums?

Mr Samuel—Perhaps just to correct a misimpression I might have given, I did not indicate that there was no causal link. What I indicated was that our monitoring processes and the information available to us do not enable us to draw a causal link.

CHAIR—What do you think?

Mr Samuel—It is too early to tell because we have only just started to see premium reductions occurring. We are now moving into the second stage of insurance premium monitoring. That will occur on an annual basis rather than a six-monthly basis into the future. It will be interesting to see whether those premium reductions continue or whether in fact we start to see a reversal. Of course, a number of factors give rise to adjustments in premiums for public liability and professional indemnity insurance. Some of them are the risks, partly affected by the tort law reform. Others will relate to the efficiency of managing claims, to the efficiency of the underwriting, the measurement of the underwriting business itself. Some will also relate to the investment performance of the insurance companies concerned. It is perhaps interesting to note a coincidence between the rather poor investment performance of the insurance industry and the collapse of HIH and then the concerns being expressed over tort claims which ultimately led to the tort law reforms. I should say, by the way, the coincidence to bring into place four factors was the increasing premiums and lack of availability of effective insurance cover, and then the lowering of premiums but also a vastly improved investment performance with improvements in share market prices that have occurred in recent times.

Senator CONROY—Could I start by thanking you, Mr Samuel, for your willingness to appear before one of the other estimates committees so that we did not spend an hour or two discussing communications issues. I appreciate that ultimately this was vetoed by the government, but I wanted to put on record my appreciation of your willingness to split your time to avoid spending, as we are about to, an hour or two on fundamentally communications issues.

I would also like to talk about some questions that you took on notice at the last Senate estimates hearings in February. I understand that answers to those were delivered to us within five minutes of your beginning your speech. Did you forward the answers to these questions on notice to the Treasurer’s office or did they come direct from you?

Mr Cassidy—We forwarded them to the Treasurer’s office.

Senator CONROY—Did you forward them yesterday?

Mr Cassidy—No. We forwarded them some little while ago. I am afraid, off the top of my head, I am not quite sure exactly when that was.

Senator CONROY—But we are talking about a few weeks or a month?

Mr Cassidy—Yes, I suspect something of that order.

Senator CONROY—I appreciate that. Minister, would you forward answers to estimates questions 10 minutes before the start of a session? Is that your practice?

Senator Minchin—Would I?

Senator CONROY—I am not aware of it. I think you are far and away one of the best ministers—

Senator Minchin—I do not like answering hypotheticals, and I have never been in a situation where that has occurred. I do not know the circumstances personally, so I am not going to comment one way or the other on that occurrence.

Senator CONROY—Do you think it is ideal for senators to receive the answers to questions asked three months or four months ago five minutes before a hearing starts?

Senator Minchin—It is obviously preferable that they are received earlier so that the estimates committee can be conducted efficiently and quickly. But I simply do not know the circumstances that caused that late arrival.

Senator CONROY—On our behalf, would you take up the opportunity to explain the efficiency of your own office to the Treasurer's office and perhaps encourage him to emulate your office?

Senator Minchin—That is a very condescending and cheeky question—

CHAIR—Senator Conroy, it is also—

Senator Minchin—that I will ignore, Mr Chairman.

Senator CONROY—Let us not turn this into a leadership fight between you and—

CHAIR—Now, now, Senator Conroy, that is not a proper question. Stick to your last, Senator Conroy.

Senator CONROY—Anyway, back to the topic at hand.

Mr Samuel—I was hoping this debate could continue and I could—

Senator CONROY—The leadership debate in the Liberal Party we hope continues as well. Senator Minchin is doing his best to broker the transition; we saw him on the TV recently.

Senator Minchin—You might need me to broker peace in the Victorian Labor Party, mate. I am happy to. It looks to me like you need some help, Senator Conroy.

CHAIR—You do not give me any comfort in reprimanding Senator Conroy for making cheap political points if you make them back at him. Come on, Senator Conroy, Senator Minchin, everybody behave.

Senator CONROY—I have a number of questions about the recent broadband competition notice. I want to pick up where we left my question the last time and review the transcript. I believe you pulled me up three times saying 'Let us not presume there will be a settlement'. That was on 17 February. On Thursday, 17 February we could not presume there would be a deal, and on Monday, the 21st we had a press release announcing the settlement. Must have been a busy weekend?

Mr Samuel—No, but I can say to you quite truthfully that as at the time of the last Senate estimates hearing it was not appropriate to presume that there would be a settlement. We had not reached a settlement at that point in time. There were still matters that needed to be resolved and, had those matters not been resolved, there would not have been a settlement.

Senator CONROY—So it must have been a pretty frantic weekend, then?

Mr Samuel—For a number of parties, yes. But that is probably not unusual. We often have frantic weekends.

Senator CONROY—Did the ACCC undertake imputation testing of Telstra's wholesale pricing behaviour as part of the competition notice?

Mr Samuel—Yes.

Senator CONROY—What was the result of this testing?

Mr Cosgrave—There is not a single result. The result was carried across a number of broadband plans using a number of scenarios. There was a variety of results occurring from that testing.

Senator CONROY—Are you able to give us an indication of what the variety was?

Mr Cosgrave—I cannot give you specific figures.

Senator CONROY—A broad range is fine.

Mr Cosgrave—I can indicate in a general sense under various scenarios there were pass and fail results.

Senator CONROY—We are interested in the entry level plan results.

Mr Cosgrave—The testing is carried across the full suite of broadband products offered by Telstra and not in relation to a specific plan.

Senator CONROY—Did Telstra's offer include any change to any other products other than the entry plan?

Mr Cosgrave—Sorry, I do not understand the question.

Senator CONROY—You are saying there is a bundle. If you say 'imputation tested on a bundle'—

Mr Cosgrave—What I am saying is there is a number of broadband offerings in the marketplace offered by Telstra. The purpose of imputation testing is to determine fundamentally whether an efficient competitor can compete across the range of those plans.

Mr Samuel—In answer to your question, yes, in relation to the offer by Telstra the negotiations reflected across the broad suite of plans, not just on the entry plan.

Senator CONROY—I am talking about the $29.95 retail plan.

Mr Samuel—Yes. That is what we call the entry—

Senator CONROY—The price movement. I was just wondering whether there were other price movements at that time that I did not notice.

Mr Samuel—Yes. There was a suite of plans, and perhaps Mr Cosgrave can provide some details on that, where there had been some changes of the retail pricing by Telstra going back to February last year. The final settlement that was reached involved significant changes by Telstra in the whole suite of plans, not just on what you describe as the $29.95 plan, which we call the entry plan.

Mr Cosgrave—As I understand it, as a consequence of a motion by you a report was prepared for the Senate and provided on 10 May. Section 4 of that report asks for specific details of the pricing conduct for which Telstra rebates its wholesale customers. That is set out in that report.

Senator CONROY—Did the ACCC engage in any imputation testing after 2 February 2005?

Mr Cosgrave—The ACCC continues to conduct imputation testing around broadband pricing and has released to the market since—

Senator CONROY—Specifically in relation to the competition notice? Be as narrow as you like.

Mr Cosgrave—In relation to the competition notice itself, again, as Mr Samuel has indicated, the competition notice was resolved on 21 February.

Senator CONROY—No, I am asking whether you did any between the 2nd and the 21st.

Mr Cosgrave—I would have to take that on notice. I am not quite sure.

Senator CONROY—I would be surprised if you were not able to say yes, to be honest, Mr Cosgrave.

Mr Cosgrave— I think the answer is yes, but I would not want to answer along those lines until I check with some of my officers in that regard.

Senator CONROY—What was the specific result for imputation testing of Telstra's pricing of the entry plan during the period 20 March to 30 March 2004?

Mr Cosgrave—Again, I would say that the imputation testing is not conducted in relation to that. It is conducted across the suite of services, not for a specific plan.

Senator CONROY—For the suite of services.

Mr Cosgrave—As I have already indicated, it depended upon the assumptions for the imputation testing. On some it came in as a pass, on some as a fail. I think as we have since publicly indicated, there remains a number of issues between us and Telstra in relation to—

Senator CONROY—I am talking specifically about between 20 March and 30 March. I am not talking about after the competition notice; I am talking about that period before.

Mr Cosgrave—So am I, Senator.

Senator CONROY—Which areas were negative and which areas were positive?

Mr Cosgrave—It depends upon a number of assumptions you make in relation to inputs into the imputation testing. As I have indicated, we have since released a public paper that indicates there are a number of issues such as your assumptions about what an efficient

competitor would look like, assumptions around bundled plans, duration of offerings et cetera, which all feed into the modelling you do.

Senator CONROY—No, I understand Telstra will have disputed it. I am asking for your view. What was ACCC's view of your testing of your assumptions? I appreciate Telstra will contest that.

Mr Cosgrave—Our view, as we have consistently stated, was that imputation testing was an imprecise tool. As I have indicated, there was a range of outcomes that occurred as a consequence of that testing, and that was a factor in the commission's decision in relation to it.

Senator CONROY—I want to explore that a little further if I can, Mr Cosgrave. Exactly how is it imprecise?

Mr Cosgrave—Because what you are testing for fundamentally is using Telstra's costs to determine whether an efficient competitor can compete against those costs. There are a number of variables in imputing those costs that are, as I say, the subject of some disputation.

Senator CONROY—It must be hard for you to prove anticompetitive conduct if there is always a dispute about the assumptions in your economic modelling.

Mr Cosgrave—Are you looking for a comment on that? Imputation testing is a diagnostic tool we use in determining whether there is a price squeeze. It is certainly one of the factors the commission took into consideration in determining whether or not it proceeded with an action against Telstra.

Senator CONROY—Is it possible to litigate without accurate imputation testing?

Mr Cosgrave—At the end of the day, it is about whether you can prove a breach of the statute. The interrelationship between a diagnostic tool like imputation testing and the words of the statute is not something that has yet been tested.

Senator CONROY—In your view, is it possible to litigate, given that you admit that there are imperfections in your imputation testing?

Mr Cosgrave—I do not think we are admitting there are—

Senator CONROY—I am sorry, I was not trying to verbal you then. I may not have used the exact words you used. I am trying to get an understanding—

Mr Dimasi—Perhaps I can add a point here. I think the point that Mr Cosgrave is making is not that there was a problem with our imputation testing per se but rather the nature of imputation testing can give rise to a number of disputes about the methodology and how you go about it. It is the nature of modelling, as indeed it is in many instances of modelling, that there is no perfect answer and there is no precise answer that everybody can agree to. It is always a question of the assumptions.

Senator CONROY—Would you anticipate the other side would ever agree to your assumptions or your outcomes?

Mr Dimasi—I think that is the point Mr Cosgrave was making, that you use it as a diagnostic tool. We certainly use it to indicate areas of concern, but then you have to take into

account all the other issues. It is a tool that can be used, but I would not tend to overemphasise what it can do.

Senator CONROY—That is the point I am trying to get an understanding of. I just want to get it very clearly expressed. I do not mind who answers the question—anyone can have a go. In a price squeeze situation like that of a competition notice, can you litigate without accurate imputation testing?

Mr Cosgrave—I think the answer to your question would be that imputation testing is one of those factors you would take into account—

Senator CONROY—How big a factor?

Mr Cosgrave—If I can finish my answer to the question—it is one of the factors you would take into account in determining whether you would litigate. We have made clear in the guidelines we have since released in relation to imputation testing that it would not be determinative of our views as to whether or not you could litigate. In other words, the failure of an imputation test in and of itself would not necessarily lead to a view by the commission that there had been a breach of the act. Conversely, however, a pass in whatever version of imputation testing you went forward with could not necessarily give a carrier comfort that the ACCC would not litigate.

Senator CONROY—It might not give them comfort, but what I want to know is the view of the ACCC. Would you proceed with litigation without imputation testing?

Mr Cosgrave—I think what our guidelines say is precisely what I have just said, that it is not determinative of the ACCC's decision as to whether or not it has a reason to believe there has been a breach of the law.

Senator CONROY—You say it is a factor. How much of a factor?

Mr Cosgrave—That would depend on the individual circumstances of each case and the views of individual commissioners.

Senator CONROY—The issue as Mr Dimasi described it is methodology. I cannot imagine any corporation ever agreeing in a heated battle like this with your methodology. That would be commonsense.

Mr Cosgrave—I would agree with that. We indicated at the time we resolved the competition notice that there would be a future process to see whether we could come to some agreement with Telstra. That was conducted. It is unsurprising that that is not a—

Senator CONROY—I cannot imagine they would ever agree to set up a set of rules they could be knocked over on. I appreciate you have got to make the effort, but what concerns me is that—

Mr Cosgrave—I have been having these sorts of discussions with Telstra for a number of years, and I cannot say I have come to agreement with methodological issues—

Senator CONROY—We all know the way the game is played. They have five different accounting methods that they can use on any given day. On any given day they can make assumption X and they can mount a perfectly reasonable business case for assumption X to be plugged into the model. The next day they can have the exact opposite—call it assumption Y.

They can mount a very good business case for why option Y should be the assumption. I understand the game they are going to play, but I am seeking to understand whether or not the ACCC believes that imputation testing is necessary. Would you go ahead with a case if you had not got an agreed—agreed by the other party—methodology on imputation testing? Is there a point in your chancing your arm if the other side has not agreed to your testing methodology?

Mr Cosgrave—Again, the guidelines we have just released make clear that the result of imputation testing under whatever scenario, whether it is under the current views of the commission or the views of Telstra, will not be determinative of the commission's view of whether there has been a breach of the law.

Senator CONROY—I am afraid what you have given me there is an out to not lock you into anything. You have not actually answered the question. I do not want you to think for a moment, Mr Cosgrave, that I think you have actually answered my question. You have given me a legalish answer for a reason for avoiding answering my question. I think it is a bit more fundamentally important. If the parliament has no confidence that imputation testing can actually deliver you the weapons you need to fight these battles, we are entitled to have an understanding that that is the case.

Mr Cosgrave—I can only repeat what I have said to you, that it is a diagnostic tool we use in price squeeze investigations.

Senator CONROY—What other tools do you have?

Mr Cosgrave—Tools we use during the course of the broadband competition notice investigation, which is to actually determine from the carriers whether they are obtaining margins across the suite of broadband products that they are offering.

Senator CONROY—So apart from asking people—

Mr Cosgrave—It is a bit more than asking people. I think we spent many months working with carriers, and in some cases I think those carriers had to actually construct systems that would enable them to determine whether they were making a margin across ADSL services.

Mr Samuel—I think that points to the issues that we have to deal with in dealing with breaches of any of the provisions of either telecommunications specific provisions of the act or a part IV, and that is that we are dealing in many cases with quite complex scenarios that involve a combination of economic evidence and economic analysis—in this case imputation testing—and at the same time evidence from participants in the marketplace, that is, witness evidence. I think it is quite clear that the Federal Court will not treat kindly a proposition put by us, litigation that is instituted by us, based solely on economic modelling, based solely on economic theory. They want to see more, and that involves evidence from those that are participating in the marketplace. It may well be that the evidence that can be adduced from participants in the marketplace, with satisfactory rigorous analysis as to the veracity of that evidence and the verifiability of it, may be in and of itself sufficient to be able to mount a case for a breach of part IV or a breach of the telecommunication provisions of the act. I think what Mr Cosgrave and Mr Dimasi are saying is this: imputation testing is but a tool. Its relevance or its importance may depend upon the other evidentiary matters that can be brought before the court and the rigour with which those—

Senator CONROY—That is why I am struggling. Either it works or it does not. I accept your point that additional information can make or break a case. But there has got to be some basic point where either it is an accepted methodology that is useful to you or it is not. It is not a question of each individual case—that is just not right. Economic modelling is economic modelling.

Mr Samuel—But, as we all know, economic modelling—through debates that you yourself have participated in in federal parliament—can be subject to a whole range of different assumptions and different methodologies.

Senator CONROY—You can pay an economist to tell you the earth is flat if you pay them enough. I have not met any flat earth economists in the ACCC, but I have met plenty of paid consultants who appear in court to testify against you that can testify that the earth is flat.

Mr Samuel—Let me give you perhaps three different scenarios. Scenario 1 is that we institute proceedings and all we have is imputation testing analysis that has been conducted by us using the methodology that we believe is right. There will be two fundamental problems with litigation based on that alone. The first will be that inevitably the party against whom we are litigating will have a whole series of economic experts that will be able to put their own views that the methodology that we have used is incorrect, based on international experience and their own analysis over a period of time. Ultimately, the court will adjudicate one way or another. The second difficulty with that particular process is that the court has shown a reluctance to accept pure economic modelling, economic theory, on its own as a basis for determining that there has been a breach of either part IV or the telecommunications specific provisions of the Trade Practices Act.

Scenario No. 2 is where you have imputation testing modelling and at the same time you have some evidence from market participants. The evidence from market participants may or may not support the economic modelling. The imputation testing modelling will be subject to the same, if I can call it loosely, cross-examination and contradictory evidence provided by experts from the alleged offender, as will indeed the evidence provided by participants in the marketplace.

The third scenario is that you actually have very rigorous, very well tested and very well analysed evidence provided by participants in the marketplace which of itself provides very clear evidence that a breach of the act has occurred. I would have to say that more recent experience with the Federal Court has indicated that that is in itself probably—this is not necessarily in the context of telecommunications alone—of at least equal if not more significance than some of the economic modelling that can be undertaken. That is why I think Mr Cosgrave is having some difficulty in providing a specific answer in respect of the broad nature of these cases, because it will differ. And it will differ on the quality of the information that can be provided by market participants.

Senator CONROY—I appreciate that there will always be an argument from the other side about your methodology. You would sack a lawyer that in the first place did not start with hiring an economist to give an alternative view on the assumptions and methodology. You would just sack any law firm that did not. I absolutely accept that it will be contested and vigorously, as is their legal right. I appreciate these things now go through your legal

committee, I think it is, Mr Samuel. You have got a legal committee before you decide to go ahead?

Mr Samuel—The litigation committee, though, is more concerned with the processes of litigation than with the decisions that are made as to whether or not litigation should be instituted. That is a decision that is made by the full commission and it is made on the recommendations of both the enforcement committee and the litigation committee. The litigation committee will consider—

Senator CONROY—They will have to consider this issue?

Mr Samuel—Yes, they will consider the nature of the material that is before them. They will consider whether or not it—

Senator CONROY—You have told me in the past that the litigation committee has terminated legal action by advising you to do that. Now I am seeking to know whether or not you consult them before you commence legal action. I am presuming you do and I think you have indicated that.

Mr Samuel—Always. And pleadings go before them. They are there to ensure that we do not start off on some chase in the litigation process that is going to be ineffective.

Senator CONROY—Has your litigation committee considered whether or not you should proceed to trial without imputation testing?

Mr Samuel—Keep in mind the litigation committee consists of some representation from the commission and our internal legal counsel. All of those parties were certainly involved in the ultimate decision making in respect of this particular matter. As a matter of general principle, I do not think that they have considered specifically the issue of whether we would proceed with litigation in respect of a telecommunications matter without imputation testing because I do not think we have actually put it as a general proposition. It is something that we discussed—

Senator CONROY—They must have thought about it. I am not trying to sound silly. One of the things they have to take into account is the likelihood of success. You have said that to us often.

Mr Samuel—Yes.

Senator CONROY—This is one of the factors. So they must have considered this. You must have got some legal advice to sort this out. Have you received legal advice on this matter?

Mr Samuel—Yes. We have received legal advice on the specific issues relating to this competition notice. But I do not know if we have received legal advice in relation to the general issue of proceeding to court without imputation testing.

Mr Cosgrave—The answer to that is no.

Senator CONROY—Given you have answered Mr Samuel's somewhat broad question, I can be very narrow, if you like, Mr Cosgrave. I will come back to it. What did the litigation committee say about the broadband competition notice?

Mr Samuel—The matter did not go to the litigation committee, because this is an issue that was determined by the full commission with advice from both external lawyers and our internal legal counsel after taking into account the full advice provided by our telecommunications branch, the advice provided by external legal counsel, senior legal counsel and others, advice provided by internal legal counsel and considering all of the factors that we considered in reaching the decision. It would not normally go to the litigation committee until an in-principle decision had been made to litigate, at which stage we go to the litigation committee to ensure the processes are right—

Senator CONROY—I understand you on the process. Thank you for that. As you said, you have got your internal advice; you have got your external advice. Did the legal advice cover the issue of imputation testing?

Mr Cosgrave—The legal advice?

Senator CONROY—The external legal advice.

Mr Samuel—I wonder if I could just at this point indicate perhaps the difficulties that we have in talking about our legal advice. We have had a discussion in another place about the extent to which we should discuss these matters in public as distinct from doing so in camera. One of the concerns we have is that, whether it be this matter or any other matter, if the nature of the advice that we have acted upon were to be paraded into the public arena, it may well have an impact on our ability in future to deal with matters outside the courts on the basis that the nature of the advice that we receive, the nature of the manner in which we deal with that advice and the nature of the manner in which we conduct negotiations that might lead to a satisfactory outcome in relation to any particular matter might well be prejudiced by the fact that parties will be able to point to a particular instance and say, ‘Well, the commission reacted in this particular instance to a given scenario and a given body of legal advice which caused them to react in a particular manner, so you might expect that they would react in a similar way in relation to a new matter that is before them.’ I just raise that as a caution.

Senator CONROY—I appreciate that. I am doing my best to accept that perspective. It is not a definitive position for what questions I ask or ultimately what answers you give.

CHAIR—Can I also indicate, having listened to what you just said, Mr Samuel, that it has always been my view that questions which would require the publication of confidential and sensitive material, in particular legal advice, if objected to on apparently bona fide grounds by a witness, should not be allowed. I think Senator Conroy understands that. We will listen to the questions and you consider your position in view of what you have said and what I have just said. If you do have a problem, could you indicate that to me, please.

Mr Samuel—Thank you.

Senator CONROY—I appreciate the point you made about a general position, but I am attempting to move between a specific issue and a general interpretation of the law. I am trying to avoid asking questions about individual cases. If there is an issue that goes to an interpretation of the law and how the law can operate, I think it is fair for the ACCC to give us an indication. I do not think that is an unfair thing to do. If in every single case you receive the same piece of legal advice—and let us say it said that you should not proceed without imputation testing and you were to get that every single time—that is going to impinge on

whether or not the ACCC can in actual fact do its job. I appreciate that you need to closely guard your legal advice but, equally, these matters, as you have made clear, are on a case-by-case basis.

Mr Samuel—Perhaps I can assist by giving a general answer and we can see if that draws us any closer towards a satisfactory outcome.

Senator CONROY—Please.

Mr Samuel—I have indicated the length and breadth of the legal advice we received in relation to this matter, both external and internal. That advice was based upon both the specific issues that we were dealing with in relation to this matter and a more general view as to the approach adopted by the courts in relation to matters where economic advice or economic evidence is adduced as part of the evidence. In summation, let me go back to what I indicated before, which is that it is the view of the totality, the aggregation, of the legal advice we have received that imputation testing is but one issue. It is but one issue that it will be subject to rigorous debate and, on any analysis, uncertain outcomes as to the adjudication by the court on those matters. In the absence of any further evidence, the prospects of bringing about a successful outcome in litigation that is based on economic modelling that will be subject to that rigorous debate and uncertain outcomes is itself uncertain. Therefore, if one were to proceed with litigation based purely on economic modelling, you would have to conclude that, except in very rare cases, the prospects of success would not be high. Thus we then look at the other tools, and the other tools are the evidence of market participants. I am putting this in the more general sense.

Senator CONROY—I think we are moving forward, so I do appreciate what you are saying.

Mr Samuel—In that context—and we have this particularly in part IV matters—in every case we look at the quality of the evidence before us, we look at the quality of the witnesses and we look at the credibility of the witnesses and where that credibility might be undermined by other factors, as the case may be. When we get into complex issues that in themselves involve evidence from witnesses that might require either detailed accounting or detailed economic modelling of its own, then that has to be subjected to rigorous testing, because it will be subjected to rigorous testing under cross-examination in a court. So they are all of the factors that we will build into the process of assessment as to whether or not it is appropriate to proceed with litigation. I am not sure that I have actually added much to what I have just—

Senator CONROY—I thought you did.

Mr Samuel—Okay.

Senator CONROY—I thought you helped move the discussion forward a little bit, so I do appreciate that. As I said, I appreciate that you cannot afford to reveal your hand, but if the interpretation and operation of the law is predicated on the ACCC having to bluff because it has a concern that the methodology of imputation testing will always be challenged—and I think we are agreed that commonsense says firms will always challenge it; as I said, you can pay an economist to tell you the earth is flat—if the best legal advice from your own legal department and the view of the litigation committee is that to proceed without imputation testing would mean that you were bluffing to a degree, then that actually goes to the operation

of the law. I would happily stay away from this issue, except this is one of the few cases that ever got there. I would happily stay away from the individual case. But it is over, it has been settled, so I think you are being a little overcautious. If the position or the view has been formed based on advice in a generic sense that, for instance, it was a prerequisite to proceed, then I have to say to you that I think it is incumbent on you to put that view into the public domain, that is, answer the questions and have a discourse about it publicly. In my view, if you absolutely had to have this, and we all know it will be challenged, then the operation of this section has been crippled and you are being made to operate with one hand tied behind your back.

Mr Samuel—Perhaps I can answer in this fashion. Firstly, no party to a negotiation after the event will ever concede that they were bluffing.

Senator CONROY—I accept that.

Mr Samuel—As we all know, in any negotiation both parties will say that they have got the most rigorous advice that says they are going to win.

Senator CONROY—Yes.

Mr Samuel—And this is no exception. Secondly, it is well known that as part of the process of settling this matter with Telstra we have, between Telstra and the ACCC, agreed to undertake a process to try and narrow the points of difference on issues of imputation testing. I have carefully used the word 'narrow the points of difference' rather than 'remove the points of difference', because it is unlikely that we would ever get to a point of actually removing the points of difference. If you could remove the points of difference, then we would have a clear definition, a clear defined path forward, so that in the event that this issue arose again we would be able to apply imputation-testing methodology, we would have an agreed process of methodology to be applied and then we could apply that. Provided we could get hold of the appropriate information, we would be able to reach a relatively quick determination as to whether or not there have been breaches of the provisions of the Trade Practices Act in terms of anticompetitive conduct being engaged in. Even that, I have to say to you, probably overstates the case because, whatever methodology you apply, ultimately there are assumptions that are required to be made as part of imputation testing. Those assumptions relate to future forecasts and, of course, we will never have, even with the best agreed protocols in the world, a pre-agreement as to future forecasts and future assumptions that can remove all debates out of the methodology for imputation testing. What we have done is engage with Telstra in trying to narrow those points of difference, but the narrowing has only gone so far, and there are still some gaps. For so long as those gaps are there there will always be a debate.

Senator CONROY—Do you think either of us will still be in our jobs by the time Telstra reaches an agreement with you?

Mr Samuel—It is not for me to predict your prospect of staying in your job, but certainly I can indicate to you that it is unlikely that I will still be in mine at the time.

Senator CONROY—Thank you, Mr Samuel. Have you had time to take a step back—it has been three or four months now—and consider the implications of all that transpired during that case, considering the legal advice you received, considering the outcome? As I

said, ultimately it is not in the community's interest and it is not in the parliament's interest for the ACCC to be sent into battle and to have to be in a position where it is bluffing. Have you had a chance to consider the implications and what arose from it, without tying yourself to any revealing of confidential information? Have you had a chance to consider where this case got you to in terms of the application of the law and ongoing examples?

Mr Samuel—Yes, obviously. It is not a matter that suddenly passes into your mind after we reach a settlement. We have considered the implications of the manner in which this matter was dealt with and where our strengths might have been and where our weaknesses might have been. I think a number of factors come out of it. The first is to say that, in the event that there was an apparent engaging in of anticompetitive conduct by a party that fell within the specific provisions of the telecommunications act in the future, we would probably find ourselves acting a little faster than we did this time around. This was done very quickly, but we would find ourselves acting somewhat faster. We might cut out some of the processes that we adopted this time around, other than those that are compulsory processes under the act. I am thinking particularly of the advisory notice provisions. We might remove those from the process. It simply delays the exercise.

The second thing is that, while we endeavour to engage with the party concerned in discussion about imputation testing, it just may be that we would engage less at least in the initial stages in the future and that we would simply say to the party: 'You now have a competition notice in place. It has a potential to give rise to some significant financial penalties for you. You know where the problem is, you better fix it, because if you don't fix it then ultimately this may have to be adjudicated upon by the Federal Court, and that could result in substantial financial penalties.'

The third element of it is that we have been engaging with market participants over some difficulties we had in that process, in getting the relevant market participant evidence in place. And that raises a number of issues. It raises issues of the ability of market participants with their systems to be able to provide us with the rigorously analysed evidence that we might require to be able to successfully mount litigation. It also relates to the ability of an alleged offender to, shall I say, pick off the major market participants by entering into commercial negotiations and commercial agreements with them that make it, shall we say, less desirable or less advantageous for them to provide evidence to the commission that might assist us in proceeding with litigation. We have managed to narrow down some of the points of difference between ourselves and Telstra on the issues of imputation testing. We have entered into a protocol as part of the settlement with Telstra on a notification process. That is a 15-day notification process for any future movements in prices so that we are forewarned. That means that before any movements in prices come into effect we could, if need be, be as close to being able to actually file a competition notice and so place the party, in this case Telstra, in the position of being subject to a competition notice at the relevant point in time.

Ultimately, all of these processes are designed to enhance the quality of the information provided to us, the transparency of the information that is available to us, and to make it easier for us to reach a conclusion as to whether or not there is anticompetitive conduct being engaged in and whether that conduct might amount to a sufficient case to enable us to take

this to the Federal Court in a period perhaps less than we were able to deal with this, which was nine months, from March through to January/February this year.

Senator CONROY—In your response to the request by the Senate for a report on the conclusion of the competition notice, the ACCC states that the effectiveness of part XIB is impacted by a number of issues. The first issue cited by the ACCC in this regard is the difficulty in establishing that the conduct has the effect or likely effect of substantially lessening competition as opposed to having a merely transitory effect on competition. To this end, you state that the more effective the issue of a part A competition notice is in stopping anticompetitive conduct the less effective that conduct is in damaging competition. This does seem to me to be an extraordinary construction of how part XIB is intended to operate. Are you seriously saying that if a competition notice makes Telstra change its conduct the TPA does not allow you to pursue Telstra with respect to its initial conduct?

Mr Cosgrave—I think what you are pointing to is a potential tension in terms of the law that says an effect on competition must be more than merely transitory. Ultimately, if a party changes its conduct as a consequence of a competition notice, you may well have an argument before the court as to whether the effect upon competition has been anything more than transitory. You could come up with a construction or an argument that said if you are effective in stopping the conduct, within our language, or ameliorating the conduct fairly quickly, a court might reach the conclusion that there had not been a substantial lessening of competition because the effect had been merely transitory.

Senator CONROY—Surely an assessment of whether conduct has breached the law must be separate to a consideration of any subsequent impact that the regulatory intervention has on the conduct? Shouldn't an assessment of whether conduct has resulted in a substantially lessening of competition be made on a hypothetical basis assuming that the initial conduct will continue in the long term?

Mr Samuel—No, because the provisions of the act talk about having the effect of or being likely to have the effect of lessening competition. If, for example, a party engaged in anticompetitive conduct for a period of 24 hours and then, as a result of regulatory action, the party remedied its course of conduct and, as a result, ceased to have any potential for an anticompetitive effect, a court might well take the view that, although for a period of 24 hours contact was being engaged in which, if it had continued for a significant period, might have had an anticompetitive effect, the very fact that the regulator stepped in and, as a consequence, the conduct ceased after a period of 24 hours meant that there was not a sufficient period for an anticompetitive effect to take place, that is, on the basis that 'anticompetitive effect' means, in the broadest terms, without wanting to be legally definitive about it, having an effect which impacts adversely on one's competitors.

Senator CONROY—That is an extraordinarily conservative view that you put, Mr Samuel.

Mr Samuel—It may be conservative, it may be robust, but it is certainly a view that has been considered by legal advisers, and it is a view that needs to be taken into account.

Senator CONROY—You are seriously suggesting that part XIB should be read as meaning that enforcement action can only be taken in circumstances where the issuance of a

competition notice has completely failed to address the conduct? Might they keep going and just say, 'On your bike, Graeme'? Seriously, that is the proposition you are putting to the committee.

Mr Samuel—No. What it is saying is let us assume that a competition notice is issued in a hypothetical case and the result of that is that no action is taken or insufficient action is taken to remedy the anticompetitive conduct on the part of the alleged offender. It may well be that a court will say, 'This is not just transitory, because the length of time over which the anticompetitive conduct is taking place is such that there is likely to be an anticompetitive effect, and it will be an adverse effect on the marketplace and on the competitors to the party concerned.' If a court is looking at the likely effect of conduct as distinct from looking at perhaps the purpose of the conduct or the objectives of it or at per se breaches, as is provided for in some parts of part IV, the court may well take into account the period during which the conduct took place to determine whether or not it was likely to have an anticompetitive effect.

Senator CONROY—Mr Samuel, a breach of the law does not depend on how quickly the ACCC does its job. A breach of the law is a breach of the law.

Mr Cassidy—No. There are two breaches of the law in our legislation. One is a so-called per se breach, which is as you describe it. Price fixing, for argument's sake—

Senator CONROY—But they are not mutually exclusive.

Mr Cassidy—No, but the second breach is where there is a substantial lessening of competition. Depending on how long the conduct occurs for, there may or may not be a substantial lessening of competition. Getting away from the telecommunications provisions, we have had actual cases where, because we have moved quickly, the conduct stopped. The court has been prepared to give us injunctions to prevent the conduct from recurring. But we have got very little or no penalty because the court has held that there has been very little impact on competition in the market, because the conduct stopped as soon as we intervened. It is something which pervades, if you like, the Trade Practices Act. It is not peculiar to the telecommunications provisions. Where it is an SLC test, it does depend on how long the conduct occurred for.

Senator CONROY—It seems to me the message you are sending to Telstra today is, 'If you are worried about whether your conduct breaches the law, do it anyway. See what our response is and, if we respond, you will have a chance to stop and, if we do nothing, you have gotten away with it.'

Mr Samuel—Yes, but that is one of the reasons I have indicated that part of the settlement agreement reached with Telstra is that they, as a matter of protocol now, will provide at least 15 days notice of intention to move prices in relation to their ADSL services. That gives us the chance to put in place, if necessary, a competition notice on or prior to the date upon which the price changes occur. At that point in time, if Telstra were to react, that is, by recognising that there may well be anticompetitive conduct involved in their pricing processes, I guess we have achieved our objective. If Telstra were not to so react—

Senator CONROY—You have not upheld the law, but you might have achieved your objective.

Mr Samuel—No, that is upholding the law, though, because it is preventing ex ante the alleged offender from breaching the law.

Senator CONROY—No, they breached the law when they stepped across the line. The fact that you made them step back across the line eventually does not mean they did not breach the law initially. You continue to make the point that, in your view, Telstra did break the law, they were in breach. So let us not pretend there was not a breach. Telstra's claim of course—and we will look at this a bit later—is that they did not. But you have continued to maintain they did breach the law, so you are having it a bit both ways there.

Mr Samuel—I was talking about a general case. We are talking about the specific case. We took the view that they had breached the law, and specifically we were very clear about that matter, for the 10-day period that you identified, 20 March through to 30 March. The point I was putting, or the hypothetical case I was putting, was that, where they have given us 15 days notice of intention to put in place certain pricing processes, certain pricing models, we take a view that that might amount to a breach of the law, we put in place a competition notice, and they have two or three ways of reacting, the first of which is that they recognise that if they proceed with those pricing models they may well be in breach of the law. In that event, they will face potential penalties. If they do not proceed with the pricing models, the competition notice has had the very effect that we would want it to have, and that would be an enforcing of the law. It would be enforcing it by preventing it being breached.

Senator CONROY—Part XIB needs to be supported by the presumption that if you break the law you will be punished, not, 'If you break the law, we will have a chat for 12 months or so and ask you to stop it.'

Mr Samuel—That is clear. One of the propositions I put to you before is that we would like to be able to see that, in the event that future cases arise, two or three things would happen. The first is that the delay that occurred this time between 27 February, which was the date upon which the new pricing models/scales came into place, and 19 March, which was the date the competition notice was put into place, was in our view a period during which anticompetitive conduct was being engaged in but during which a competition notice was not put in place. On 19 March it was put in place. There was a 10-day period, through to 30 March, when the competition notice was in place. The behaviour of Telstra on 30 or 31 March, I think, indicates that they believed that they were engaging in anticompetitive conduct, because they partly rectified—

Senator CONROY—You should have proved it and got a guilty verdict. Then you would not have to sit here and keep saying, 'We think they did, we allege they did,' and they can keep sitting there saying they did not.

Mr Samuel—If I might say so, this goes to a debate that you and I have had for the past 18 months or so, and that is: do we always prove things by going to a court and getting a court to adjudicate or do we prove it by the outcome that we might otherwise achieve? I think the view of the commission is that, if we can achieve an outcome whereby Telstra provides a payment of over $6 million to parties that we believe may have been harmed by its conduct in that 10-day period, that takes you as close to an admission by Telstra that it has engaged in anticompetitive conduct as you would want. To use an expression you have quoted to me in a

recent hearing: if it walks like a duck, quacks like a duck and looks like a duck, it is probably a duck.

Senator CONROY—Do you think that the tension that Mr Cosgrave has described—I put it at a bit more than that, but to use the word Mr Cosgrave has used—is a demonstration that there is a clear need for regulatory reform of part XIB to ensure that this is clear and so that there is no tension?

Mr Samuel—Any area by which we could obtain greater transparency to assist us in determining whether or not—using all of the economic modelling in the world that we can define and that we can produce with the best economic experts—there has been, for example, a price squeeze of the nature that we alleged occurred through the 2004 period is going to be of assistance to us.

Senator CONROY—Wouldn't it have been nicer to be able to say 'that we proved occurred'?

Mr Samuel—I did not get that last word?

Senator CONROY—That you proved that it occurred, as opposed to your having again to use the word 'alleged'?

Mr Samuel—Let me put this to you: let us assume that this matter had gone to court and let us assume that the court had adjudicated, after all of the information had been put to it, that in a period from 20 March to 30 March there had been a price squeeze, and the court adjudicated at that point that a penalty was appropriate of X million dollars. I would have to say to you that I doubt that there is an enormous amount that would have come from that adjudication that would assist us in 2005 or 2006 if the matter arose again.

Senator CONROY—You do not think a penalty is in any way a deterrent to future behaviour? That is an unusual position for a top corporate regulator to take.

Mr Samuel—No, I did not say that. What I said was I doubted that the adjudication by a court that a very specific course of conduct relating to very specific pricing models and pricing scales—that specific set of circumstances—that was engaged in amounted to a breach of the provisions of the Trade Practices Act would automatically apply to enable us to say in 2005 or 2006, 'Different set of conduct, different set of pricing scales, different suite of pricing scales. Yes, now we have got a Federal Court decision of 2005 which makes it very clear to us that that is a breach of the act and therefore we can proceed to obtain penalty.' The circumstances will be different, the modelling will be different, the suite of pricing scales will be different, leaving aside the fact that, if we had proceeded with this matter to court, I doubt that in 2005, 2006, 2007 or 2008—and maybe not before 2010—would we have received a final adjudication by the High Court on this particular matter.

Senator CONROY—The second issue raised by the ACCC as impacting on the operation of part XIB is the fact that access seekers face a tension between the need to seek to negotiate more effective commercial outcomes while at the same time progressing preparation for possible litigation. Are you saying that access seekers were not cooperating with the ACCC because they fear that this would jeopardise their commercial relationship with Telstra?

Mr Cosgrave—No, we are not saying that. We are saying that access seekers seek to conduct a profitable business. To do that, they have inevitably, in the circumstances where they are obtaining a lot of services from Telstra, simultaneously to seek to progress that objective by obtaining services from Telstra and at the same time seek to assist the commission. Using that same word, again, sometimes there are ‘tensions’.

Senator CONROY—Many of those service providers and access seekers appeared before us at another committee and insisted that that tension did not exist and that they were keen to do whatever was necessary to assist the ACCC to bring about enforcement action against Telstra. I am talking about companies like Primus, iiNet, AAPT and Internode. They are testifying to us that they were more than willing to cooperate with you in every way. Are you verballing them a bit?

Mr Cosgrave—No.

Senator CONROY—Were separate witness statements sought from access seekers with respect to the impact of Telstra’s pricing behaviour at different points in time? For example, were specific witness statements sought for the period 20 March to 30 March 2004 to enable the ACCC to engage in imputation testing for this period and gather the other evidence that you have said was so necessary?

Mr Cosgrave—Evidence was sought over different periods of time.

Senator CONROY—Including 20 March to 30 March specifically?

Mr Cosgrave—From my recollection, yes, but I would have to check that.

Senator CONROY—Could you take that on notice?

Mr Cosgrave—I will do that.

Senator CONROY—The third issue the ACCC raises as an impediment to the effectiveness of part XIB is the incentive for Telstra to delay the issuance of a competition notice. Did this occur with respect to the competition notice? I think you have made reference to it, but I would just like to recount the facts and get you to expand a bit on what you said a little earlier. Did this game playing over the competition notice occur?

Mr Samuel—I would not like to lay it entirely at the feet of Telstra. There are four stages of process that are involved in laying a competition notice. The first is to assess whether or not there is reason to believe it can give rise to the laying of a competition notice. The second is the step of filing an advisory notice, which puts in this case Telstra on warning. The third is a consultation notice and the final step is the competition notice. I think it is fair to say that the advisory notice is a voluntary discretionary process that I doubt we would engage in in the future. There is no point in it.

The consultation notice is a required process. The time frame between that and the filing of a competition notice need not be lengthy. It could be a matter of a very few days. I think that is the course of action that we would again follow in the future. Perhaps the most difficult issue is the forming of the reason to believe such that would justify a competition notice being put in place in the first place. If it is put in place without the appropriate reason to believe, that can give rise to a challenge. You want to be reasonably sure that you have got at least that reason to believe as the foundation stone for putting in place the competition notice. Both the

processes that we engaged in through the February/March period were done with significant efficiency and speed, if I might say so without any sense of self-satisfaction. I think they were engaged in with significant efficiency and speed, but we believe that we can do it faster next time. The 15-day notification protocol that has been put in place recognises the time that we think we would need to be able to form the requisite reason to believe to enable us to put in place a consultation and then a competition notice before the conduct starts to take place.

Senator CONROY—Telstra was stalling for a few days while you were trying to implement a competition notice.

Mr Samuel—To receive advice on a Sunday evening, along with the public, that it proposed to make these price changes probably does not assist our processes in any way at all. Although our people are quite attentive right over the weekend, it is sometimes difficult to get action that quickly. I would have to say that I think our telecommunications branch operated very quickly in this matter. It did mean that the period from 27 February to 19 March was uncovered as far as the competition notice is concerned. We have learnt from that. It is unlikely that will ever happen again.

Senator CONROY—But Telstra were regulatory game playing?

Mr Samuel—They were taking every opportunity available to them to—

Senator CONROY—You are in a remarkably polite mood today. Would you like me to read you some of Mr Scales's quotes to get you fired up?

Mr Samuel—Mr Scales is in the process of retirement; I am not.

Senator CONROY—Has the ACCC received any freedom of information requests in respect of its telecommunications operations in recent times?

Mr Cassidy—Yes, we have a request, which we are in the process of dealing with at the moment.

Senator CONROY—Who lodged that request?

Mr Cassidy—We have a request from Telstra.

Senator CONROY—To what did it pertain?

Mr Cassidy—It pertains to a statement that the chairman made following a recent speech. I am afraid I do not have the date immediately in mind. The chairman made reference to us receiving complaints—again, I do not have precise words in mind—along the lines of 'on an almost hourly basis' from some of Telstra's competitors. That was in relation to getting access to Telstra exchanges for installing new broadband equipment.

Senator CONROY—What is your view about the availability under FOI legislation of information provided to the ACCC in response to market inquiries made by the ACCC?

Mr Cassidy—In relation to that particular request, we are still to make a decision in terms of what documents will actually be provided to Telstra. Let me not comment on that specific request, but let me make a more general point that we, as a matter of practice, are very loath to provide and will defend information that has been provided to us in the course of market inquiries.

Senator CONROY—What is the process that you go through to determine your position?

Mr Cassidy—When we get the request, we identify the documents that are potentially subject to the request. A list of those documents is provided to the applicant along with an indication of what the cost will be of meeting that request. We then go through a process of consulting with third parties—that is where we are at the moment in relation to this specific request—in relation to any documents that have actually originated from third parties, as to how they would feel about the documents being made available, and whether they believe they have a public interest claim for the documents not being made available. We assess our own documents in terms of the public interest in their being made available to the applicant, and then the designated decision maker in relation to the particular FOI request makes his or her decision on which documents will be provided to the applicant.

Senator CONROY—So everybody who has given you information now gets a letter back from you saying, 'Telstra are after the information you have given us; what do you think?' I am sure you set it out in slightly more—

Mr Cassidy—We outline the terms of the FOI legislation and seek their reaction. I might say that it is up to the designated decision maker to make a decision in relation to each document. Even if a third party says, 'Look, I'm quite happy for this document to be made available' or alternatively they say, 'Gee, we believe on very strong grounds, on this and this basis, that the document ought not be made available,' it is still for the internal designated decision maker to decide whether the particular document should be made available or made available with, say, certain parts dropped out.

Senator CONROY—It just seems that people who are trying to help and cooperate with you are basically now being put to a lot of time and expense by Telstra, in what I can only describe as a try-on. Again, it just seems to me like it is a tactic of intimidation by Telstra to try to warn off people from even making complaints to you. I cannot see any other reason why they would be trying this one on.

Mr Cassidy—Telstra are quite within their rights under the FOI legislation to seek that particular information. I would not personally particularly single out Telstra. I would have to say that there does seem to be a bit of a developing practice for parties to seek to use the FOI legislation in conjunction with other legislative activities in order to, if you like, gain more access to what information we have than they might otherwise. Telstra is certainly not alone in making this sort of FOI request.

Senator CONROY—Sure. But there is a public interest exemption where providing information would inhibit the supply of information to the government and you in the future. It just seems like a complete try-on. If I was a business and wanted to make a complaint about Telstra to you, even if all of the information I provided you with is not commercial-in-confidence, I would still actually want to know that that information I passed on to you was not going to be passed on to Telstra through particularly an FOI process but in any way. It just seems to me like it is a straight-up intimidation and a bit of a try-on.

Mr Cassidy—Given that we are still in the processes under the FOI legislation in relation to this request, you will probably understand if I do not respond to suggestions of a try-on or intimidation. Telstra is within its rights under the FOI legislation to make the request it has.

We are still to make our decision in terms of what documents will be provided. All I can do is revert to the general proposition I referred to earlier—that we do all we can in FOI and other processes to protect what information we have been provided with during market inquiries.

Senator CONROY—Just returning to your report to the Senate about the broadband notice: the ACCC considers that its swift reaction to Telstra's pricing conduct has sent a clear signal to Telstra that anticompetitive conduct will not be tolerated. But only a few weeks ago Telstra was telling the Senate committee, 'We have always believed that we have done absolutely nothing wrong. The ACCC has found that we have done nothing wrong.' Those were the words of Telstra to the Senate committee. How can you say the ACCC has sent Telstra a clear signal, if it still does not recognise that it has done anything wrong?

Mr Samuel—Forgive me, but what would you expect in terms of a response from Telstra other than just that? I think their actions perhaps speak louder than their words. It goes back to the item I mentioned in my opening comments regarding Imperial Tobacco. Imperial Tobacco says it has done nothing wrong, yet it does see it necessary to remove 'light' and 'mild' descriptors from cigarette packs. Telstra might say it did nothing wrong, but it did see it appropriate within 10 days of the issue of the competition notice on 19 March to significantly change its pricing structure. It saw it appropriate during the period from 31 March through to 1 January this year to enter into arrangements with a number of its wholesale customers that reflected the concerns that we had raised in relation to a price squeeze. And it saw it appropriate on 1 January this year to put in place a whole new pricing structure, and then ultimately in February this year to enter into an agreement with us that involved the payment of in excess of $6 million to its wholesale customers through the period of March. That seems like a significant suite of absolutely voluntary but maybe completely altruistic actions on the part of Telstra.

Senator CONROY—Did the ACCC seek an admission that Telstra had contravened the law as part of the settlement?

Mr Samuel—Yes, obviously, but as part of the negotiations that admission in that bland or direct form was not forthcoming. But, as I say, actions would tend to speak somewhat louder than words.

Senator CONROY—That is why we have laws about them; that way it is incontestable.

Mr Samuel—We went into that before, as to whether the only means of enforcing the law is to proceed through litigation that might run through to 2010—

Senator CONROY—You do not think that parties are entitled to use all their legal means?

Mr Samuel—Of course they are.

Senator CONROY—If the workings of the courts take that long, that is a deterrent for the ACCC now, is it?

Mr Samuel—No, it is a question of the ACCC determining as a body, based on all of the best legal advice it can obtain, what is the most effective means of achieving the most effective outcome.

Senator CONROY—How about enforcing the law? Is that a consideration at any stage, enforcing the law? Or is it about just an effective outcome?

Mr Samuel—You and I have had this debate on many occasions, and you have expressed to me a view that enforcing the law means litigating. I guess I have expressed—

Senator CONROY—No, enforcing the law for breaches of the law does normally require you to get a guilty verdict to enforce the law.

Mr Samuel—Let us put it in specifically legal terms, that is, enforcing the law for alleged breaches of the law. If we knew that every action that we were concerned about was without any debate and without any alternative view a breach of the law, I guess we would not need courts, because we would never have to litigate. We would simply say, ‘We say it is a breach of the law and that is it.’

Senator CONROY—You did not go near one, so you do not have to worry about it.

CHAIR—Senator Conroy, I want to ask a question arising out of your last question, which as I understand it put to you the proposition that enforcing the law meant getting a guilty verdict from a court. Do you consider that preventing breaches of the law is also a mode of enforcing the law?

Mr Samuel—That has always been our view.

CHAIR—Is that not also the policy of the act? Is that not why we have provisions like competition notices and a suite of interlocutory procedures provided for, so that you do not have to go to an ultimate determination by a court in order to make sure the law is enforced?

Mr Samuel—And that is why we have a number of processes available to us to enforce the law. The best enforcement of the law is to ensure it is not broken in the first place.

Senator CONROY—But it was in this case, according to you.

Mr Samuel—It was allegedly broken.

Senator CONROY—You keep saying that as far as you are concerned they breached the law?

Mr Samuel—Let me just continue. The best means of enforcing the law is to prevent it being breached in the first place. If we believe there has been a breach of the law—we have not been able to get it before it has been breached—we have a number of processes available to us to deal with what we believe is a breach. Those processes will range from reaching a negotiated administrative settlement to producing court enforceable undertakings, all of which are provided for under section 87B of the act, through to proceeding to court to obtain various remedies. They are a suite of processes that are part of what is known as the compliance or enforcement pyramid. They are a normal part of every regulator that enforces the law.

CHAIR—Some people, Mr Samuel, think that a regulator fails to do its job well if the outcome of every act it takes is to proceed to an ultimate final determination via the court rather than to arrest the conduct which it seeks to regulate at an earlier stage; would you agree with that?

Mr Samuel—I think it is clear in every approach and every analysis that has been undertaken of enforcement processes that there is a pyramid. It is known as the enforcement or the compliance pyramid. The foundation stone of that pyramid, the very base of it, is preventing breaches of the law in the first place. Then it moves up through various levels,

through administrative settlements and court enforceable undertakings and through to the sharp point of the pyramid, which is litigation. The sharp point, the litigation process, is the powerful weapon, the powerful tool.

Senator CONROY—But you did not prevent a breach. Your case collapses because you still claim they breached the law. You did not prevent the breach by your actions. You are hoping maybe they will not do it again. But you did not prevent the breach.

Mr Samuel—Let me go back. You endeavour in every circumstance that you can to ensure that breaches do not occur. If that had been achieved, we would never have litigation, we would never have administrative settlements and we would never have court enforceable undertakings. But unfortunately it is not achieved, and there are occasions when actions are undertaken by parties that we allege are breaches of the law. Then we proceed through the next stage of the pyramid.

CHAIR—So an 87B undertaking is halfway up the pyramid?

Mr Samuel—It is halfway up the period. Administrative settlement is a quarter of the way up the period. It would be nice to have everyone fall into the foundation stone of the pyramid, that is, they do not breach the law, because they understand what the law is and they do not breach it. Unfortunately, that does not happen, either through ignorance or through deliberate failure to comply with the law. Then we move up the pyramid.

CHAIR—But there is another reason, too, is there not, Mr Samuel, that the sufficient facts to enable litigation to be brought might not come to light?

Mr Samuel—They are all of the evidentiary issues that we would normally deal with as lawyers in determining whether or not to litigate or what process we adopt. Of course, the litigation process and the strength of one's hand in contemplating litigation is all part of the negotiating process to bring about a satisfactory outcome. It is clear to be able to observe that the commission's belief is in the totality of that pyramid. It uses the sharp point of litigation and the threat of litigation to bring about compliance with the law, starting with the base. Those who are contemplating actions in business know that in the ultimate they may face that sharp point. In due course, the point may indeed be even sharper with respect to part 4 of the act with the increased financial penalties under the Dawson legislation and hopefully with the prospect of jail sentences for cartel conduct. That will make that sharp point very sharp indeed.

Senator CONROY—Telstra assured us at a parliamentary hearing that the ACCC was doing an excellent job.

Mr Samuel—I am pleased to hear that.

Senator CONROY—I know you are fond of saying you were able to negotiate $6 million in rebates for access seekers, but access seekers would have been able to use an admission of guilt to mount their own claims for compensation, wouldn't they?

Mr Samuel—Yes, they would. That could well have occurred if litigation had been undertaken. If the litigation had been successful, based on the evidence that we were able to adduce in the process of litigation, if the litigation had moved from first instance to an appeal to the Full Federal Court and that had been successful in favour of the ACCC and then it had

moved from the Full Federal Court to the High Court and that had been successful in favour of the ACCC, and if the access seekers were still in business at that relevant point in time, they may well have had a position from which to launch their own legal proceedings, at their own cost, to attempt to recover damages. There is no prohibition on access seekers doing just that now. They can proceed with their own court actions if they want to at this point in time. Certainly, if they do proceed with their own court actions, with their own litigation, they will have their own knowledge as to the impact of Telstra's conduct, whether it is for that 10-day period or for the 10-month or 11-month period during which the various pricing models were in place. They will have their own ability, with their own accounting systems and their own modelling, to determine whether or not they had negative or positive margins. That ought to put them in a very good position to determine whether or not it is appropriate for them to invest in the litigation process against Telstra.

Senator CONROY—They should do your job for you?

Mr Samuel—No, that's not what I said.

Senator CONROY—I continue to enjoy you explaining to us the detailed legal processes that would happen after you have your initial victory and how long they would take. It just does not fill me with any confidence, Mr Samuel, that you would ever bother to litigate in the face of all of this outrageous amount of time up to the High Court that you keep stressing is one of the key factors behind your decision-making process.

Mr Samuel—I have indicated in my opening statement a significant number of measures—**Senator CONROY**—I appreciate that it was snowing in here a while ago, as you tried to thump your chest on these ones.

Mr Samuel—That is not a matter of snowing; it is stating particular facts. You are well aware of that. You are aware of the number of matters that we are currently litigating. You are aware, because I have explained it, of the complexity of the matters that we currently have before the courts. You are also aware of the number of matters where we have managed to secure very satisfactory outcomes through the process of obtaining court enforceable undertakings. I think I can say in the view of the commission that the enforcement activities of the commission are as effective and as efficient and probably more so than they have been for some time, and I say that without any significant fear of contradiction.

CHAIR—Just to clarify this, when you use the word 'litigation', it seems to me you and Senator Conroy may be at cross-purposes. For example, 87B undertakings are litigation. Once an application is filed in the court, you are in litigation. That does not mean that the matter is going to proceed to a final determination after a full trial.

Mr Samuel—That is so, but very often what we will do is achieve an 87B undertaking without having to file matters in the court. It will be the mere threat of potentially filing matters in court that will lead to offending parties entering into 87B undertakings. I have to say to you that an 87B undertaking that achieves a court enforceable undertaking from offending parties that they will not engage in conduct that we allege to be misconduct under the act, that they will publicly state that they may have misled consumers or that they may have been engaging in anticompetitive conduct or whatever, and which achieves restitution

for those that have suffered loss, can be as effective if not more effective in terms of speed, efficiency and effectiveness of outcome as proceeding to litigation.

CHAIR—I would have thought that getting an outcome like that is a far better outcome than having a win after a full trial, given the expenditure of resources that the latter process would require, which can be achieved without the expenditure of those resources by an 87B undertaking.

Mr Samuel—If I might say so, that will not always be the case.

CHAIR—I understand that will not always the case.

Mr Samuel—But if we determine that a party has blatantly contravened the act, has engaged in conduct well knowing that it has breached the act, and that the only way in which the matter can be satisfactorily dealt with is through court process, or indeed through briefing the Director of Public Prosecutions to proceed with criminal prosecutions, we will take that course of action, even if the party concerned were to offer an 87B undertaking.

Senator CONROY—Thank you for your kind diversions, Senator Brandis.

CHAIR—I do not think they were diversions, Senator Conroy; I was just elaborating on your questions.

Senator CONROY—What you were elaborating on had nothing to do with my questions, actually. The ACCC further states in its submission that it notes that the $6.5 million rebate amount has been compared with the maximum potential fine that may have been imposed under the competition notice; that it considers that the court ordered penalty was not likely to have approached such an amount. Why is that?

Mr Samuel—Based on the analysis that was undertaken both through the process of imputation testing, the analysis of the market participant evidence that was available to us, having regard to the movements in Telstra's pricing scales and suite of pricing scales that took place on 31 March, we were able to form a conclusion as to the likelihood of a finding of anticompetitive conduct and the likelihood of fines being imposed, and the level of fines that might be imposed, for the period 19 March through to 31 March and then from 31 March, say, through to 1 January 2005. I think some in the media picked up a headline figure of a million dollars a day and thought that sounded terrific. It certainly gets a headline. We have to do a far more calculated analysis than that. We did that and formed some conclusions, with the best advice we could obtain, as to the likely outcome had this matter gone to court. We believe that the $6.5 million restitution settlement achieved in terms of the imposition on Telstra about what we thought we might have got had we gone through the court process, but certainly in terms of the market participants that obtained some restitution through this process, achieved a more satisfactory outcome rather than the alternative, which you have described before, which is that they would have had to proceed with their own individual court actions to obtain the same process of restitution, and that could have taken many, many years.

CHAIR—Senator Conroy, I was going to take a brief afternoon tea break until four o'clock. Does that suit you?

Senator CONROY—Sure.

Proceedings suspended from 3.46 pm to 4.07 pm

Senator CONROY—I have a question that you can take on notice. The ACCC stated that it was engaging in the monitoring of retail BigPond customer applications as a percentage of total applications for broadband services during the period of the competition notice, and you also produced a graph summarising these figures in your report to the Senate. Could the ACCC provide the committee with the raw figures upon which this graph was created? I am asking for this information, Mr Samuel, because, while you like to say that Telstra's conduct had no impact on the structure of the market because Telstra lost market share over the period of the competition notice, it seems pretty plain from the graph in your Senate report that, during the period 20 March to 30 March 2004, Telstra's pricing was having an enormous impact, and it is further evidence that Telstra's pricing during the period was anticompetitive, from my perspective. Can you take that one on notice? Thanks very much. I am sure you saw in the press yesterday, Mr Samuel, that Telstra has intentions to move into IPTV. It seems that Telstra is currently negotiating with the commercial TV stations and Hollywood film studios to secure content to provide a new IPTV service. Is the ACCC aware of the activity?

Mr Samuel—We are certainly aware of yesterday's report in the press, but we do not always react on media reports. However, two of my recent speeches—both of which are on our web site if you have not had a chance to read them: the speech given to the National Press Club on, I think, 27 April this year, and a subsequent speech given as the Henry Mayer Lecture at the University of Queensland about a week ago—reflect, in broad general terms, the awareness of the commission regarding the prospect for technology and the development of technology to lead to the sorts of processes in terms of development in the media that were described in yesterday's articles in the *Financial Review*.

Senator CONROY—Has Telstra contacted you about its plans in this area?

Mr Cosgrave—No.

Senator CONROY—As you have indicated, you have been very vocal about what you see as Telstra cornering the market for content—for example, in 3G mobile phones recently. Are you concerned about the same sorts of issues in the IPTV market?

Mr Samuel—Yes. If you read those two speeches I think you will find that, so far as they provide an indication of our thinking at the moment, we have not confined our attention in terms of exclusivity of content aggregation to 3G. It focuses upon the various mediums for broadcasting that we might be seeing in the foreseeable future.

Senator CONROY—Telstra do not seem to be listening to you, though, do they, if they are going down this path?

Mr Samuel—Again, I am always a bit cautious to overreact to reports in the media, even if they do come from the *Financial Review*. I think it is fair to say that we are developing our thinking in this area. We have already given public notice that we would be seriously looking at examining exclusive content aggregation within the context of both sections 45 and 47 of the Trade Practices Act. Let me simply say that these are issues that are under constant attention by the commission at the present time.

Senator CONROY—From media reports it also looks like Telstra Wholesale and Telstra BigPond have been negotiating content agreements in parallel. Would you have any concerns

about Telstra Wholesale controlling IPTV content distribution rights in Australia while Telstra BigPond was trying to offer a competitive price?

Mr Samuel—I am not sure that I can add much more to what I have already indicated—that is that we are concerned about any form of content aggregation on an exclusive basis that could give rise to a substantial lessening of competition in a range of markets. The markets that we are focusing on in this context, of course, would range across the prospective new technologies—the 3G, IPTV and other broadcasting mediums.

Senator CONROY—What is the difference between movies and sporting rights? Are you more concerned about one than the other, or are you concerned about them both?

Mr Samuel—We have not at this stage exercised a judgment as to whether one is more important than the other. There will be some differing views on that, and market analysis will help us to reach some more specific conclusions. There are some views that say that sporting content of a particular nature might be, for example, more valuable than movie downloads on mobile 3G telephones—in the sense that trying to watch movies on a screen about the size of a BlackBerry or a 3G telephone is not a terribly edifying experience, whereas watching certain sporting clips might be a valuable content issue in terms of 3G telephony. On the other hand, if we look at the sorts of issues that were discussed—

Senator CONROY—What would be the difference between, say, being able to watch on your mobile phone a clip that Telstra owned and only being able to watch the highlights of the Olympics on the one channel that bought the exclusive rights to them, while the other channels are not even allowed any pictures?

Mr Samuel—That is what I was just going to say. In the context of IPTV, it may be that the aggregation of exclusive rights to content could have a similar anticompetitive impact, but it may be that in the context of IPTV we are talking about a broader range of sensitive product markets than, say, sporting content. All I have done is express a personal view that, for example, watching a full-length movie on a screen that size is probably not going to be a very entertaining experience. Watching short sporting clips of goals being kicked or marks or whatever it might be—I am, of course, talking about the most relevant sporting content, Australian Rules football—

Senator CONROY—Of course.

Mr Samuel—But, leaving that aside, that in itself could be valuable sporting content for a 3G telephone, while full-length movies, sporting content, musical content and those sorts of issues might well be far more relevant to IPTV.

Senator CONROY—Channel 7 had the rights to the Olympics, and Channel 9 were not allowed to show the highlights on their news of, say, the last 10 metres of a gold medal swim from Ian Thorpe. How is there a difference there? How do you delineate the difference?

Mr Samuel—The important word in this context is ‘aggregation’. If we were talking about a diversity of sporting content being offered across a range of different mediums then we would not be dealing with aggregation. We are concerned about the prospect for a single carrier—whether it is through 3G telephony, IPTV or free-to-air television—aggregating

valuable content on an exclusive basis such that it had a substantial anticompetitive context within that particular market for the retail distribution of product to consumers.

Senator CONROY—Could you give me an example? I am trying to get my head around your concern. What would you see as a bad example?

Mr Samuel—Let us assume a party—we will not identify any particular one—was one of several that had developed the technology for IPTV in the way in which it was described in yesterday's *Financial Review* article, and that particular party had acquired the IPTV audiovisual rights to AFL football, rugby league, rugby union, cricket and tennis—I run the risk now of leaving a particular sport out and offending an awful lot of people, so let us just assume that they had acquired all the relevant major sporting content—and had done so on an exclusive basis such that potential purchasers of the particular service being offered would look and say, 'There is absolutely no point in looking at the alternative suppliers, because all the valuable content is held in the hands of one particular supplier.' That could have a substantial anticompetitive context.

Senator CONROY—Do you believe that will ultimately lead to those other competitors being shut out and no-one bothering to buy their product?

Mr Samuel—They could be shut out from a range of things. They could be shut out from pursuing their competitive pursuit in terms of the IPTV service. They might well even take a view that they are so shut out that they will not even develop the infrastructure to provide the IPTV service. I have taken that purely as an example at the moment.

Senator CONROY—I understand. Have you noticed any real-world examples along these lines in the last few years?

Mr Samuel—At this point of time, no. If we look at the mediums for retail distribution of audiovisual context, for example, at this point of time then I do not think—and I stand to be corrected by my colleagues—that we have seen such an aggregation occur that would give rise to concern. However, it is starting to raise our awareness of and sensitivity to the issue when we start looking at, for example, the development of new technologies—and I am thinking particularly of 3G telephony. If we saw an aggregation of content that we could determine, through market inquiries, was particularly relevant to, say, 3G telephony and it was being aggregated on an exclusive basis—there are an awful lot of ifs in this—and if we could see that that was a relevant factor to the development of a customer base in 3G telephony, we might well take a view that the exclusive aggregation of content for that purpose would be anticompetitive and we would proceed with it in respect of sections 45 and 47 of the act.

Senator CONROY—Do you think there are any parallels with C7 and the loss of the footy rights and its ultimate demise?

Mr Samuel—It would be best if I do not answer that question. As you know, at the present time one of the respondents is the AFL, and I was involved with the AFL at the time, so it might be better if I do not answer the question. I could refer it to one of my colleagues.

Senator CONROY—It is all right; I will move on. Mr Samuel, on 20 May it was reported in the *Financial Review* that you have been having a series of meetings with media executives

ahead of possible changes in the media ownership laws. What are your objectives in holding this round of private consultations?

Mr Samuel—To obtain better knowledge of potential developments in the media—technological developments, business plan developments—to get a better feel for where the media might be heading in this country, whether with or without amendments to the current regulatory regime relating to both cross-media and foreign takeover legislation. Each of the meetings has been extremely valuable in helping us to develop our thinking in this area, and the development of that thinking has in part been revealed by the two speeches that I referred you to.

Senator CONROY—Who else from the ACCC attended these meetings?

Mr Samuel—I think there were about 15 of us in total there. They included representatives of the mergers and asset sales branch, representatives of the telecommunications branch, two or three of our commissioners and senior management—a vast number, I cannot give you all of them but it was around—

Senator CONROY—I have been trying to avoid asking whom you met with, so I am doing my best to not—

Mr Samuel—Sorry, are you asking about people from within the ACCC?

Senator CONROY—No. Given that you have now described so many, what was the type of format that you were using for these meetings? Did you invite them all in a group?

Mr Samuel—Yes. In each case they came into our office. Where appropriate we linked up via videoconferencing unit with those of our officers or commissioners who were in other states at the time. We had a very frank and open discussion, most of which, I have to say, focused on some of the technological developments. You get different views, depending on who you are talking to and where the technology might be heading.

Senator CONROY—Have to you talked to any public interest groups concerned that changes in media ownership laws could reduce the diversity of news and current affairs? Or have you talked only with the media players?

Mr Samuel—No, not at this stage. At this stage, we are focusing more on where technology might lead us and where some of the players might be developing in their own thinking as to where they might head in the development of media and their media businesses in the foreseeable future. I should emphasise that this is all for the purpose of us attempting to better inform ourselves as to what the relevant markets might be, where technology might go and what the prospects of new competitive disciplines and mediums might be. We are just starting to focus on those areas and on the areas that perhaps we ought to be having more sensitive concerns about. You have raised one of them, of course, which is the issue of aggregation of content on an exclusive basis.

Senator LUNDY—Did any of them raise IPTV?

Mr Samuel—Yes, a number of them raised it as a future technological development and technological possibility, which, again, is referred to in those two papers that I have referred you to—from the National Press Club and the Henry Mayer Lecture.

Senator CONROY—The minister for communications told an estimates hearing last week that she has a document prepared by her department that she is using as the basis for her consultations with the industry. Has the ACCC seen this document?

Mr Samuel—No.

Senator CONROY—Did you have any input into it or were you asked to provide some input?

Mr Samuel—I do not know because I have not seen the document.

Senator CONROY—You could have been asked to put some information forward to the minister's office as part of pulling it all together—that is all I am asking.

Mr Samuel—In this context, we obviously talk to officers in the department about our developing views on market definitions. There have been some public documents that we have had there, including the two speeches I have referred to, but I could not tell you whether or not the views expressed in those documents or the views that we have expressed to members of the department had any input to the discussion paper.

Senator CONROY—I appreciate that you said you have not seen the document, but I was just asking whether you had actually had any discussions that have led to, as you say, your advice being taken into account. If you have not seen the document it is hard for you to make a call on that—I appreciate that. You mentioned your recent speeches. You have talked about possible changes in the way the ACCC defines media markets. Previously the ACCC has regarded print and electronic media as separate markets, for example. Your recent comments suggest that may no longer be the case. Can you update the committee on the work that the ACCC has done recently in defining media markets?

Mr Samuel—It is a bit hard because it is an iterative process, which is why I referred you to the two papers. You will see that between those two papers, which were barely three weeks apart, the analysis that we have undertaken and some of the thoughts that we have had have developed in certain areas. Part of the difficulty in this area is not so much the economic definition of the relevant markets but understanding the way the technology is developing. As we conduct our discussions with those that are intimately involved in this area, we are learning more and more about the prospects and the limitations on the technological developments that are potentially facing us over the next year, two years and five years.

Within the commission itself there would be a debate as to whether the time frame for this so-called technological revolution is two years or 10 years. There will be a debate as to whether certain technologies will be taken up by the public or taken up by those that supply or are proposing to supply media offerings to the public. So there is a lot of forecasting involved in this. Of course, in the context of the provisions of the Trade Practices Act that I have talked of, we need to be reaching a level of specificity in our own mind to satisfy the requirements of demonstrating a likely effect on competition rather than a mere speculative effect on competition.

Senator CONROY—Is there a separate market for news and current affairs, or have you mainly looked at advertising for the purpose of defining the relevant media market?

Mr Samuel—I do not think we have formed any conclusive views at this point in time; it is too early. We have been overwhelmed by the information that we are gleaning, both from here and overseas, on where technology might head. It has brought us to a position where we have started to reach some tentative views that the former definitions of print and media being two separate markets may no longer be applicable in the context of some of the technology developments that we have been examining. As to whether news and information is a separate market, I again refer you to those two speeches as to what the source of that news and information might ultimately be. They start to give some guide as to some of the information that has been brought to our attention at this time.

Senator CONROY—The Productivity Commission has said that there should be a media specific public interest test inserted into the TPA if the cross-media rules are repealed. What is the ACCC’s view on that proposal?

Mr Samuel—I do not think we have formed a view at this stage. It is too early in the development of our thinking.

Senator CONROY—Does the competition test in section 50 of the TPA allow the ACCC to fully consider the effect of a media merger on the diversity of opinion in news and current affairs?

Mr Samuel—I am sorry to give this answer again, but it is a bit too early for us to be able to indicate a concluded view on that. It is a matter of open debate as to whether news and information can form a market within the normal economic definitions of that term. There are some economists who say it can, but it is more difficult to measure. There are others who say that because it is so difficult to measure, it is not capable of being so defined. That is a matter we are currently examining, and it will form part of our ultimate considerations in this context.

Senator CONROY—Do you consider there is a need for three operators on Australian wharves?

Mr Samuel—I do not think it is for us to indicate whether or not there should be three operators. What we said in our recent stevedoring report—I say recent; I think it was issued towards the latter quarter of last year—is that there are some indications of capacity constraints in stevedoring. The indications are that there is rising unit revenue, rising unit costs. At the same time, what we can identify from published accounts is that the return on assets employed amongst the stevedores is sitting at, shall we say, a relatively attractive rate of 28 per cent. There are two explanations for a return of 28 per cent on assets employed. The first is—

Senator CONROY—They are very efficient.

Mr Samuel—that your profitability is very high indeed because you have got some very high prices and significant margins. The second is that you have not invested in new assets for some period of time, so you are measuring your revenue as against heavily depreciated assets. Our report has indicated, and subsequent comments by one or two of the stevedores has also indicated, that at the very least the lack of investment in new assets is probably a significant contributing factor to a return of nearly 28 per cent on average assets employed. The lack of investment in new assets would go some way towards explaining capacity constraints. It

would go some way to explaining some of the other issues that we have talked about in that stevedoring report. All that would say is that there are some issues that need to be addressed by stevedoring and container stevedoring on our ports. Whether that is addressed through the introduction of a third stevedore or through other processes is a matter that is beyond our examination at this stage.

Senator CONROY—I have always viewed the decision by the previous government to lease the terminal space to Ansett and Qantas as one of the worst decisions it made. It effectively created an extra bit of the monopoly. It was great, because you could get planes up in air, but you had no way to land them or take them off once you got rid of the two-airline policy. You would be aware that a company called Anglo Ports has been attempting to obtain access to Australian wharves. I understand there is some expansion of a number ports—Melbourne in particular—and yet they seem to be struggling to even get access to the expanded port. Do you consider the entry of this company onto the Australian wharves would be a positive development for competition?

Mr Samuel—I do not think we have enough information to be able to express a—

Senator CONROY—Twenty-eight per cent return is not enough?

Mr Samuel—Yes. Let me simply indicate what we have done in at least a semipublic sense, if not a public sense. If there is to be the introduction of a third stevedore onto Australian wharves and into Australian ports, then the generally accepted view appears to be that there needs to be some cooperation and some collaboration between at least two, if not three, of the parties that control the wharves down the eastern seaboard of Australia—that is, Brisbane, Sydney and Melbourne. That may involve some cooperation between the state governments that are involved ultimately in the ownership and control of those wharves. It would appear to be the case—and I subject this to those caveats—that inviting a third stevedore to enter only one of the ports is not an economic and viable proposition. If we were to see the introduction of a third stevedore—

Senator CONROY—Do you think they would get strangled too quickly by the others?

Mr Samuel—No, there would be a lack of economies of scale, I think, and the fact that the cargo shipping services tend to move down the eastern seaboard and unload at—

Senator CONROY—They would be locked in?

Mr Samuel—Yes.

Senator CONROY—Do you think that if a third competitor were to come in, they would have to be given space in all three ports?

Mr Samuel—Not all three, but at least two of the major ports. To the extent we are able, we have drawn the attention of this fact to those involved in the control of the ports, and particularly to those in control of the expansion of the ports, and suggested that they may wish to engage in some form of cooperation to bring this about, if that is seen as being to the advantage of competition on the wharves.

Senator CONROY—I will move to the subject of backhaul. I think the question is for Mr Cosgrave again. Does the ACCC monitor competition levels in rural and regional Australia?

Do you maintain records of the level of competition in rural and regional areas specifically as opposed to the broader market share statistics you keep for the industry?

Mr Cosgrave—No, we do not have a specific index or anything of that sort.

Senator CONROY—Does the ACCC monitor the prices quoted by Telstra for backhaul into rural and regional areas? And could you provide us with that information?

Mr Cosgrave—The commission has not monitored those prices, historically. As I think you are aware, we have indicated recently that we are going to look into whether we need to provide more guidance to the market around those prices.

Senator CONROY—I note—and I congratulate you on taking action here—that you have commenced an investigation into this issue with a view to issuing indicative pricing principles for backhaul routes. I want to get a feel for the information the ACCC has on it.

Mr Cosgrave—We have done that with a view to looking at whether they are necessary.

Senator CONROY—So you are not even at the stage where you can give us a feel for the information the ACCC has at present? From the sound of it, unfortunately you do not have much, other than a lot of loud screams.

Mr Cosgrave—I think that is accurate. The first step we have to undertake is simply to identify, from a range of sources, the nature of the problem, and that is what we have started doing.

Senator CONROY—Mr Samuel, I want to return to a debate before the Senate Economic References Committee that I think you might have been involved in—and which fortunately I was not involved in—in relation to its consideration of Trade Practices Legislation Amendment Bill (No. 1) 2005. I would be grateful if you could in detail analyse the precise course of events that led to what was clearly quite an extraordinary occurrence. I want to run through the details and get you to correct anything that I have wrong here. Treasury began its testimony I think before you arrived and you are now aware that Mr Lyon presented a briefing to the committee that purported to show that in relation to the proposed merger provisions of this bill you 'did not have a concern and acknowledged that the ACCC had a significant and important role to play in the tribunal's merger authorisation process'. Could you comment on the veracity of this statement?

Mr Samuel—The statement by Mr Lyon?

Senator CONROY—Mr Lyon of Treasury.

Mr Samuel—Perhaps I ought to explain the circumstances surrounding the position that we were placed in—and, I guess, I was placed in—in the context of that particular hearing. I was not privy to the information that had been provided to the committee by Mr Lyon, nor, until I was about to enter the committee hearing, was I privy to a memorandum that had been prepared by Mr Justice Goldberg—and, I think, provided to Treasury—which was then tabled at that committee hearing. Indeed, I had the opportunity to read only about the first page of that particular memorandum before I was asked to give evidence before the committee, and I was caught a bit short on some of the statements made. Since the time of that particular hearing—and this might shorten the discussion I think we are going to have—there has been extensive opportunity for the President of the Australian Competition Tribunal and I to sit

down and discuss the processes that will apply in the ACCC's involvement in tribunal hearings for authorisations under the Dawson legislation. I think it is fair to say that, as a result of those discussions, we are satisfied that the ACCC will be able to have a significant role in future hearings by the Australian Competition Tribunal of authorisation applications should the Dawson legislation be passed.

Senator CONROY—I appreciate that that is what has happened subsequently, but I want to be clear. Do you deny that the quote attributed to you by Mr Goldberg which pretends to state your position on the proposed arrangements was a true reflection of the views you communicated to him?

Mr Samuel—I think there was a misunderstanding between Mr Justice Goldberg and me. It related to a telephone conversation which had occurred sometime earlier. My recollection of the conversation is that it was not as outlined in that memorandum. I think that has since been clarified. Mr Justice Goldberg and I have had some extensive discussions. We have a much better understanding of our respective positions and, more importantly, of the role the ACCC will play in authorisation applications. So I put it down as a misunderstanding. But by way of—

Senator CONROY—It is not a misunderstanding; he has verballed you big time.

Mr Samuel—Let me explain. It was extremely difficult. I had delayed the committee hearings extensively because of a delayed flight. I had arrived very late.

Senator CONROY—That does not come to the fact that Mr Justice Goldberg—

Mr Samuel—No, but I did not have an opportunity to find out what Mr Justice Goldberg had meant by the comments that he put in his memorandum. As I say, I had only had a chance to read the first page of the memorandum before being asked to give evidence before the committee. So that made it a little difficult to be able to deal with the matter satisfactorily.

Senator BOSWELL—What is the view of the ACCC about the bypassing of the ACCC by the tribunal on mergers? Are you happy with that?

Senator CONROY—Not at all.

Mr Samuel—It is not for us to have a view on whether we are happy or not. It is a matter of government policy. The government has legislation currently before parliament. Once government has reached a decision on these matters, it is not appropriate for us to express a view as to whether we are happy or not.

Senator CONROY—But you have previously expressed concerns about it.

Mr Samuel—In the context of the Dawson review and the post-Dawson review we have raised questions as to why it was appropriate to pursue this course of action. But that is now irrelevant. This is a matter of government policy, and government has resolved that we will no longer have a primary role in authorisation matters. Those matters will now go on a primary basis to the Australian Competition Tribunal.

Senator BOSWELL—How do you mean you will not have a primary role?

Mr Samuel—In authorisation matters relating to mergers.

Senator BOSWELL—So if you want to merge, you do not go to the ACCC anymore.

Mr Samuel—You will go to the ACCC if you want a clearance of the merger on competition grounds alone—that is, if you want an adjudication by the ACCC as to whether or not in the ACCC's view the merger is likely to lead to a substantial lessening of competition in a market. If we so adjudicate, then depending on the process that is adopted, whether it is through the informal or formal process, it may be subject to review by the tribunal. On the other hand, if a merger party determines that they are not going to seek our views on competition grounds—that is, on the issue of substantial lessening of competition in the market—but are rather going to attempt to prove that whatever the anticompetitive detriments the public benefits flowing from the merger will outweigh the public detriments, then they will bypass the ACCC and proceed directly to the Competition Tribunal for that matter to be adjudicated.

Senator CONROY—I think he is indicating he has been dudded and you are going to vote for it.

Senator BOSWELL—I do not know what I am going to vote for.

Senator CONROY—Thank God for Barnaby!

Senator BOSWELL—That weakens the position a bit on this substantially lessening competition in the market if we can just bypass it. If you go to shop one and do not get the right answer, you go to shop two.

Senator CONROY—Congratulations, you have worked it out. I think Senator Allison has also been very patiently waiting. I am happy to defer to the pair of you now because I know you both would like to ask Mr Samuel some questions and I do not want to monopolise all of his time—but I do appreciate all of his time.

Senator ALLISON—Can I start by congratulating you, Mr Samuel, on the ACCC's win on mild and light. As you might expect, I have some questions to ask in that area. By the way, has this caused much of a stir internationally? This is, as I understand it, a first for Australia.

Mr Samuel—I cannot give you the definitive position internationally, but I think we have probably adopted a significant lead role in terms of the outcomes of international regulators in this area. But I stand to be corrected. Mr Antich might want to comment.

Mr Antich—I know that we are in contact with the Canadian competition bureau and they are very interested in the outcome as well because they have a similar suite of issues before them.

Senator ALLISON—Let us hope it is taken up elsewhere. By the way, in your negotiations, did the question of the South Pacific region come up? Will tobacco companies automatically withdraw from mild and light descriptors for their cigarettes which go into the Pacific region?

Mr Samuel—It did not come up. It would be outside our jurisdiction.

Senator ALLISON—I understand that, but I thought there might have been—

Mr Samuel—So it was not part of the discussions.

Senator ALLISON—What are the options now for dealing with the Imperial Tobacco situation?

Mr Samuel—I think there are two or three options, though I do not want to be too definitive, because it would be the subject of negotiations at the moment. Of course, the ultimate option would be to institute litigation against Imperial Tobacco. I can put it quite frankly. I have already expressed the view that I think Imperial Tobacco, to coin a phrase that is well known in the Australian political scene, are just being recalcitrant. In my view they are being socially irresponsible in the approach they are adopting. I find it difficult to understand how on the one hand they can maintain that they have no issues to deal with and that they are not guilty of any misconduct in the context of retention of the light and mild descriptions while on the other hand, in an extraordinary burst of altruism and voluntary compliance, they are removing the light and mild descriptors from some of their cigarette packs at present.

I am equally, shall we say, bemused if not bewildered at some of the public protestations they make. They say that, if they were forced to remove the light and mild descriptors from their cigarette packs at the current time, it would be anticompetitive—it would put them at a competitive disadvantage—and that, as we are promoters of competition, they find it strange that we want to inhibit their competitive advantage. Forgive me: we have an overwhelming interest in consumer welfare and in the interests of the Australian community. Enhancing the competitive position of Imperial Tobacco in this fashion that they describe just seems to me to be quite bewildering. I just do not understand it.

Senator ALLISON—Apart from describing them as recalcitrants, litigation is the only other option?

Mr Samuel—Litigation is a course of action. One would hope that they will recognise that the course of action they are following will not be of significant commercial advantage to them in due course. I do not want to go into the other options at this point in time because it will be the subject of negotiations we will be undertaking in the short-term future, but litigation is there as a tool. If we were litigating against one company—in this particular case, the smallest company of the three majors—it would be a much easier process than having to litigate against three of them.

Senator ALLISON—Do Imperial argue that your encouragement to bring them into the market, because we had just two players previously, is a factor in all of this? Is it also the case that Imperial sell all of their cigarettes branded as mild or light or variations thereof? I am sorry; they are two questions; I should have asked them separately.

Mr Cassidy—In answer to your first question: yes, they do seek to make that argument. The position we put to Imperial is that why and how they came into the market is neither here nor there. What we are concerned with is conduct that has occurred since they entered the market, in this case in relation to the marketing and selling of light and mild cigarettes. The motivation for them entering the market in the first place is, in our view, a complete aside to the issue we have been discussing with them.

Senator ALLISON—So no undertakings were given to Imperial at the time of encouraging them into the Australian market?

Mr Cassidy—No, certainly not in relation to this matter and, as far as I am aware, no undertakings full stop. In relation to your second question about whether light and mild cigarettes are the bulk or the major part of what Imperial Tobacco sells in Australia—

Mr Antich—I do not know if we can answer that question in terms of knowing all their brands. Our understanding is that around 60 to 70 per cent of the market had light and mild descriptors. If Imperial were within that ballpark, it would not be any different from the other two.

Senator ALLISON—You might take that on notice. But, if you have been in heavy negotiations with them, I would be surprised if this point was not made if it is a relevant one. Not that I am defending Imperial; I am just trying to understand where you are at with them.

Mr Cassidy—It may well have been made; Imperial seem to have made all sorts of points in the course of our discussions. But even if light and mild cigarettes were the totality of what they sell in Australia, that still does not alter the issue of whether marketing and selling light and mild cigarettes is a breach of the Trade Practices Act. It is a point which they may well have raised, but it is not to germane to the issue.

Mr Samuel—It is fair to say that, in all the discussions we have had with Imperial Tobacco, there has not been raised—trying to look at this as objectively as we possibly can—a single justification that can in any way be sustained on any objective grounds for their failure to undertake the same process of undertakings that British American Tobacco and Philip Morris have undertaken. There just does not appear to be any reasonable justification for their doing so.

Senator ALLISON—You are pretty convinced that these descriptors are misleading. I note your language which says, ‘are likely to be, and that can only be tested in the courts’. Is that accurate?

Mr Samuel—That is accurate.

Senator ALLISON—What are the implications of the outcome of your negotiated agreement with the big two? What are the implications of that for consumers who might want to take action against tobacco companies for the results of being fooled, if you like, or misled into smoking mild or light cigarettes.

Mr Cassidy—It certainly leaves the opportunity there for individual consumers or groups of consumers to take their own individual action. Without proceeding to court, we do not achieve any findings of fact which would probably help such actions. On the other hand, the resolution that we have reached on this matter, at least with British American and Philip Morris, does not preclude third parties taking their own individual actions if they wish to.

Senator ALLISON—Did you take advice on the implications of going down this path?

Mr Cassidy—For third parties?

Senator ALLISON—Yes.

Mr Cassidy—I do not know that we took specific advice in the sense that this is something that we come across reasonably frequently and we reach a negotiated settlement with the parties who we believe have breached the act. But our long-held understanding is that those settlements do not in any way preclude third-party action.

Senator ALLISON—That was not my question.

Mr Cassidy—I am sorry.

Senator ALLISON—My question was not whether they preclude action; it is whether that action is likely to be more or less successful.

Mr Cassidy—I think it leaves it untouched, in the sense that we have not—

Senator ALLISON—But did you get advice on that?

Mr Cassidy—No, not in relation to this particular issue. As I say, it is something that we have encountered over quite a period.

Mr Antich—The principle holds true for any other action that we would take or section 87B undertaking we would get in terms of the chairman's point about findings of fact. If you have a court sitting and you have finding of fact, it may have some relevance to coat-tails actions. If you do not have proceedings, you are in a neutral position that neither hinders nor assists parties one way or the other through an 87B.

Senator ALLISON—So tobacco companies could not mount a defence against an action on the basis that the government was (a) happy for misleading labelling to continue for some months after entering negotiations and (b) that there would be no legal action taken against companies by virtue of the agreement struck?

Mr Samuel—I do not want to provide a legal opinion on all the issues you have raised, but certainly the absence of court action, litigation, by the ACCC would have no impact on the ability of third parties to commence their own action. There are no constraints, there are no agreements and there are no settlement arrangements reached with the major tobacco companies that in any way attempt to inhibit the ability of third parties to take their own litigation.

Senator ALLISON—But you did not put the words to some legal adviser to judge whether any of the words in the agreements might have put such cases in jeopardy—the wording or the totality of?

Mr Samuel—No.

Senator ALLISON—Can I come to those agreements. They are different, but I think they both list the descriptors which are deemed unacceptable and not to be used further. Can you advise the committee why you chose in your agreement to go down that definitive path?

Mr Samuel—As distinct from?

Senator ALLISON—As distinct from indicating that misleading descriptors would not be allowed.

Mr Samuel—They would not be allowed anyway within the context of section 52 of the Trade Practices Act. The underlying foundations and the watermark through those agreements is that misleading and deceptive conduct—that is, misleading and deceptive descriptors—is prohibited under the Trade Practices Act. In the context of this particular issue, the misleading descriptors are those particularly defined which encompass all those used by the two companies concerned on their packaging.

Questions have been raised since as to whether certain other words would be acceptable or otherwise. I guess we could have filled a hundred pages with a range of different suggestions as to different words, colour coding, number coding or letter coding that might or might not

have been used as substitutes. But it does not matter, section 52 of the Trade Practices Act will apply to whatever descriptors are used and whatever packaging is used by the cigarette companies which may be misleading or deceptive. They are well aware that, in that context, if they engage in misleading or deceptive conduct in the context of any new packaging they will have to deal with us again.

Senator ALLISON—But they have already tied the ACCC up in discussions over, what, 18 months or two years?

Mr Samuel—Yes, but I was just going to say that, in the context of tying up the executives of the companies concerned up to chief executive level, they would prefer to avoid that sort of confrontation in the future.

Senator ALLISON—But they did get away with selling cigarettes during that period of time and beyond.

Mr Samuel—They have got away with selling those for a significant period, but I think it is a bit like some of the other issues we have been discussing today. When you achieve an outcome that is, we think, again without wanting to be arrogant, a satisfactory one, you pave a way forward for dealing with similar circumstances in the future. It could be expected that the cigarette companies, having been through the mill on this particular exercise, would be at least taking notice of the fact that we are looking very carefully at any new packaging procedures that they adopt to see whether or not they might be involved in misleading and deceptive conduct under section 52.

Senator ALLISON—So if on 1 June they come out with a cigarette and call it ‘natural and healthy’, what will the ACCC do?

Mr Samuel—I would think that would have a lifetime of about one nanosecond.

Senator ALLISON—Because you would sue them?

Mr Samuel—They would know straightaway that that is misleading. I am expressing a personal view, but my immediate reaction would be that it is misleading and deceptive to describe something as natural and healthy when it is—

Senator ALLISON—Would you bring about an injunction? What would you do to stop it?

Mr Samuel—I do not want to overstep the mark, but I would have thought that if something were as blatant as that we would probably go for some interlocutory proceedings.

Senator ALLISON—But you chose not to do that with mild and light, even though it has been known for a very long time that that is misleading.

Mr Samuel—Yes. Let me not go into the details of the reasons why we reached the decision we did. I have to say that, in all the circumstances, we think the outcome we achieved was a very satisfactory one for consumers, not the least of which is that we now have $8 million that will go into an antismoking advertising fund. There may be further outcomes that will be achieved by private parties and private legal advisers.

Senator ALLISON—But, by being definitive, it begs the question of what list of descriptors is acceptable and what is outside acceptability. You just told me that presumably

‘healthy’ and ‘natural’ would not be, but there has been the suggestion that we are about to see ‘fresh’ and ‘smooth’ as replacements for mild and light. Is that the case?

Mr Samuel—I do not know. We hear speculation. It is interesting when you raise the issue of natural and healthy. My immediate reaction was to say we would jump on that in a nanosecond. That has not been one of the suggestions that have been put to us, I might say.

Senator ALLISON—I deliberately chose it because I did not expect it would be.

Mr Samuel—Obviously, yes. But it may well have been that in 100 pages of examples we would have missed natural and healthy because it would be so bleedingly obvious that it was unacceptable and would not be listed. But, by having expressed a whole range of other alternative descriptors while leaving that out, you might come to the impression that it was acceptable to the ACCC. Thus we have said to the companies—and they well understand—that anything they use that has the effect of misleading or deceiving consumers will be jumped on by us.

Senator ALLISON—So fresh and smooth—in or out?

Mr Samuel—I do not know. We have not considered it. I think our view would be that as these are put to us we will consider them, keeping in mind that the use of the expressions ‘light’ and ‘mild’ create a connotation that they are lighter or milder than full-yield cigarettes. The impression has been created that, by being lighter or milder than full-yield cigarettes they are therefore healthier or have a lesser propensity to have unhealthy consequences. I think that we have determined that that is misleading and deceptive.

Mr Cassidy—I think the issue has been clearly established: if they use any terms which have a health connotation that somehow the cigarette is better for you than other cigarettes, then that takes the companies into the same territory as light and mild. The issue, if you like, that remains open is whether a word like ‘smooth’ has a health connotation to it or whether that is more about taste or smell. That is something—

Senator ALLISON—But the ACCC does not protect consumers just from health related misleading statements.

Mr Cassidy—Indeed, but I suppose what I am saying is that the light and mild action and its resolution was, as the chairman said, about what were portrayed to be health benefits from smoking those cigarettes.

Senator ALLISON—Let us focus on fresh and smooth again. If they decide to come up with ‘fresh’ new cigarettes, and they are demonstrably no fresher than any other kinds of cigarettes, would you take action then?

Mr Antich—On this issue, my understanding is that fresh and smooth are already out in the market; it is not a hypothetical. My understanding is that there were some brands out there—

Senator ALLISON—I am not a cigarette purchaser or consumer, so I do not know these things. Thank you, Mr Antich.

Mr Antich—People have raised that issue with us at a very low level. We have considered it at a low level. The point is really consistent with the way we have dealt with the light and

mild issue. Issues are raised. We look at those in the context of what is stated, what the representations convey, and in the context of that you get legal advice and come to a view as to whether it is a breach of the act or not. With fresh and smooth you have to start again and ask what fresh and smooth convey, what the context is and whether it conveys a significant health issue or a more healthy cigarette than other types of cigarettes.

Senator ALLISON—I take issue with that. Why is it we are talking about health here?

Mr Antich—That was the focus of the light and mild investigation, in terms of the connotation.

Senator ALLISON—Indeed it was. But could it not also be seen to be misleading—for whatever reason, whether it is health or whether it is talking about freshness when it might not be fresh?

Mr Samuel—I think you make a valid point that, if the description raises connotations or impressions in consumers' minds that are not backed up by the reality, we would clearly be concerned. It is the old adage that we use on many occasions: don't oversell and underdeliver.

Senator ALLISON—So we know from surveys that have been done that 55 per cent of smokers were misled by mild and light. Have you done some work on fresh and smooth to understand whether they are also misleading people with regard to health or anything else?

Mr Samuel—No, we have not done any work on alternative descriptors because they have not been put to us at this point of time. We have not had specific proposals put to us as to what the alternative descriptors might be at this point of time.

Senator ALLISON—I am sorry, but Mr Antich just said—

Mr Antich—I think the chairman is referring to tobacco companies putting those proposals to us.

Senator ALLISON—I see. Is there a new process? Is there a process where a new descriptor must come before the ACCC for some sort of judgment about whether it is acceptable or not?

Mr Samuel—No. But, as I have indicated, I think the approach that BAT and Philip Morris have adopted is one of understanding that we will clearly be watching the descriptors to be used. They are likely to approach us. We have to remember that the process of preparing blocks and preparing packaging is a very expensive and time consuming process, and if they proceed down a course of action and then find that it is in our view still a breach of the Trade Practices Act they have a very expensive process to rectify the problem.

Senator ALLISON—But it is up to them. They can come to you, seek advice about whether this will be acceptable or not and you will provide that advice. Is that correct?

Mr Samuel—That is correct, yes.

Senator ALLISON—Did that happen with fresh and smooth?

Mr Samuel—No, that has not happened.

Senator ALLISON—Is that because it predated this current agreement or because it was an oversight?

Mr Antich—It is not that they have said they will undertake to give us advance notice of everything they do in terms of changing packaging. There is not an agreement in those terms. As the chairman put it, it is a matter for them as to whether they choose to put on a descriptor. They may well come to us before they do it, or they may come after, but there is no agreement that they have to.

Mr Samuel—I do not think that it is within our resources, nor is it appropriate for us as a regulator, to be sitting there and saying to manufacturers of every product, but in this case of cigarettes: 'Look, your packaging must be subject to prior approval of the ACCC. We'll adjudicate as to whether or not the package is appropriate, misleading or deceptive.' That is for the judgment of the businesses concerned. Ultimately, if they make the wrong judgment, we act.

Senator ALLISON—Nonetheless, you have an agreement, which is probably a bit unusual in terms of your agreements with companies. It did not come up in the negotiations, it was not suggested that this might be a way forward in finding what was acceptable and what was not by way of descriptors?

Mr Samuel—No. I think it is fair to say that we did not see ourselves as having to adopt a position of starting to approve every bit of packaging that is used for every brand of the two cigarette manufacturers concerned. That is not our role and it ought not to be.

Senator ALLISON—I understand that. However, we have had the first instance after the agreement where fresh and smooth are now apparently on the market and they did not come to the ACCC for that. So is there a process? Will you do any further work on fresh and smooth or is that now agreed to be not misleading?

Mr Antich—I suppose the short answer is that our current view is that we do not think it raises the same sorts of concerns as light and mild and we do not at this stage have a strong view that it is a problem in same way that we view the light and mild descriptors as a problem. So that is our current position on fresh and smooth.

Senator ALLISON—Is there a rationale for that? Is there somewhere a policy or a protocol or some sort of document that spells that out?

Mr Samuel—It is just the application of the law as we interpret the law.

Senator ALLISON—And it is expressed in words somewhere, apart from what Mr Antich has just said?

Mr Samuel—No—when you say expressed in words somewhere, it applies the principles that have been developed as to the application of section 52 of the Trade Practices Act over the past 30 years and it is a view that we form as a matter of judgment as to whether or not those sorts of descriptors are not taken on their own but taken in the context of the totality of packaging and the promotion or lack of promotion, as the case may be, of the particular cigarettes concerned. So it is taken in the total context: what impression is created by the use of the words 'fresh' or 'smooth' in the context of the total marketing of those particular products.

Senator ALLISON—Was the use of fresh and smooth at all raised or agreed as part of the negotiations?

Mr Samuel—No.

Senator ALLISON—So the tobacco companies gave no indication of what they would use instead of light and mild?

Mr Samuel—No.

Senator ALLISON—More recently there has been—I am not sure whether these are on the market or not—promotion of cigarettes which are fruit flavoured and have some sort of sweetness to their taste. Can you indicate whether the ACCC is interested in this development?

Mr Antich—They have been brought to our attention. The issue has been raised with us and I think the preliminary position is that it does not raise the same sorts of issues again as the light and mild type descriptors. That is our preliminary view. Again it depends on information we might get subsequently, what people may want to give us. That may better inform our views. Again, as the chairman said, it is the totality of the context in the way those representations are made, how they are put on the packet, whether they are put on the packet, whether they are put somewhere else. But in the context at the moment—it has been raised only very recently with us—I think our initial view is they do not raise those sorts of concerns.

Mr Samuel—I think we need just to clarify one thing and that is that we are there to deal with the fundamental provisions of part V, which relate to misrepresentations to consumers, misleading and deceptive conduct. The attractiveness or otherwise of a particular product is not a matter that we can adjudicate on. If they started to sell pink or purple cigarettes because they felt that they would be more attractive to consumers, it would not be for us to adjudicate unless the so-called advertised pink cigarettes happened to be green.

Senator ALLISON—What if they were promoted as fruity and had cherries all over the pack and there were no cherries in the tobacco—would that be misleading?

Mr Samuel—It would depend upon the impression provided by the packaging. If they said ‘a fruity taste’—I do not know how you taste cigarettes but apparently some people can—and there was in fact a fruity taste that was experienced by smokers of the cigarettes, then we could not argue on the surface that that would be misleading or deceptive. If, on the other hand, the impression was given by the packaging that if you smoked these cigarettes you are ingesting the health nutritional value of taking a particular mouthful of fruit or whatever might be the case then clearly we would have concerns. We had these issues in relation to fruit juices recently. But I am drawing a long bow on this. I have no idea what is being promoted.

Senator ALLISON—With mild and light you could draw some distinctions of that sort as well.

Mr Samuel—No, because—

Senator ALLISON—It is difficult to see where you say one is and one is not, I have to say.

Mr Samuel—No. With mild and light, what was being represented was that they were less harmful than full-yield cigarettes, and we considered that to be misleading and deceptive for a whole range of reasons, not the least of which is the smokers compensation type issue that we

are all familiar with. If a particular product is advertised as having a fruity taste and, in fact, it has a fruity taste, then consumers are not being misled by that description alone. If, on the other hand, the impression is given that by smoking these particular cigarettes are you getting the benefits of consuming quantities of fruit, then we clearly have a view that that may be misleading and deceptive.

Senator ALLISON—I do not have the section number, but what about the other part of the Trade Practices Act that protects consumers against unsafe products? What sort of work have you done on this concept, given that one would expect sweet and fruity to be of appeal to underage smokers? Does this not then make it an unsafe product? One could argue that it is an unsafe product to begin with. Is there no scope under this part of the act to act?

Mr Ridgway—The Compliance Strategies Branch of the ACCC has the relevant product safety function. The issue of descriptors on packages of tobacco products in the view of the product safety function is more one that goes to potential for misleading or deceptive conduct rather than an issue of an apprehended hazard within the meaning of the relevant provisions of the act.

Senator ALLISON—It was not so much the labelling as perhaps the taste. Does it not make it less safe for young people by virtue of its attractiveness from a flavour point of view?

Mr Ridgway—That is not an issue that we have considered to date, but it is certainly an issue that we can consider.

Senator ALLISON—I understand that, in 1989, smokeless cigarettes were banned for that reason. Is that correct?

Mr Ridgway—There was a ban on smokeless cigarettes, as I understand it, in the broad. I would have to check the details of that. Indeed that ban was undertaken prior to the function moving to the ACCC.

Senator ALLISON—Does that make a difference?

Mr Ridgway—Only insofar as I do not have the immediate rationale for that ban at my fingertips.

Senator ALLISON—Perhaps you could take that on notice, Mr Ridgway. Mr Samuel, do you have any comments to make about what the ACCC might do about fruity and sweet flavoured cigarettes?

Mr Samuel—At this stage I do not have any more information than I have already discussed with you on that.

Senator ALLISON—I want to go to the question of the $8 million and how it is to be utilised. I notice that the agreement talks about overcoming the misleading aspect of those descriptors. Can that $8 million only be spent on explaining why the descriptors were wrong? Are you at liberty to use it for other antismoking messages?

Mr Antich—The funding is primarily related to the antismoking message related to light and mild, but it will be consistent with current federal government health campaigns in relation to smoking. As to exactly what it will say and how it will be spent to say what it will say is an issue we have yet to fully work out.

Senator ALLISON—What do you mean by consistent?

Mr Antich—If you are asking me for details as to what exactly the advertising campaign will say, I cannot give you those details right now. But I am saying that the money is there to address the issue and the representations of concern to the commission, which were about the light and mild descriptors and how they related to lower yield cigarettes being ostensibly healthier for you than higher yield. The message will be related (1) to the fact that they are not and (2) that every cigarette is doing you damage, as per the health department's current and previous campaigns.

Senator ALLISON—So it will be a combo of the current message with why the descriptors were wrong. Is that correct?

Mr Antich—It will not focus specifically on a particular type of descriptor, but it will be focusing on those types of descriptors when they are used in relation to low-yield or high-yield cigarettes. It is irrelevant in terms of the health benefits or otherwise. As I said, I cannot elaborate on exactly what it will say because that is a campaign that is yet to be fully developed.

Senator ALLISON—What is the process for arriving at what the message will be?

Mr Antich—What do you mean by that—who is to be consulted et cetera?

Senator ALLISON—Who determines what is in the ads, how many there are, what period of time they are spread over and whether they are on commercial radio or not? Who determines these things?

Mr Cassidy—It is ultimately our decision. One of the features of the undertakings we have from the tobacco companies is that we are completely at arms length from them, so they have no say in the way we utilise that money. We are obviously planning to consult with the department of health because we want what we do to dovetail with broader antitobacco advertising. I envisage that we will also be consulting with some of the community groups that have an interest in tobacco issues to get their ideas on what sort of advertising we should be undertaking, which media we should use and so forth. So there will be a process of consultation, particularly with the Commonwealth department of health but also with other interested parties.

Senator ALLISON—Who in the department will have principal responsibility?

Mr Cassidy—This will be done out of Mr Antich's branch.

Senator ALLISON—It is a process of generally consulting various groups? You have not honed that down to something more precise?

Mr Cassidy—Not yet. At this stage we do not have the $8 million, because one of the companies has already made its payment and the other company is yet to make its payment and we are still within the time provided in the undertaking. And of course we still have the Imperial matter to resolve. So we have not yet embarked on planning the use of the $8 million.

Senator ALLISON—Will you be engaging people with expertise in advertising tobacco related messages? Who will you go to?

Mr Cassidy—That decision is yet to be made. In these sorts of matters we seek to use a professional advertising agency, ideally one that has experience in this area. That will be our approach this time around. We are of course bound by certain requirements of the tender process we need to go through, but we will certainly be trying to obtain the services of a professional advertising agency that has some experience in tobacco advertising.

Senator ALLISON—You would leave it to the advertising agency to get the required advice, should they need it?

Mr Cassidy—No. Sorry, I misunderstood you. We would certainly do the consulting. We intend to say to the advertising agency: 'Here are the particular messages we want to convey in this advertising. You decide which is the best way of conveying them.' We certainly would not give an advertising agency a blank page and say, 'Go away and decide what ought to be done.'

Senator ALLISON—I am sorry to press this point, but I think it is important. You will talk with the health department about this, but who will you speak with who has expertise in antitobacco messages?

Mr Antich—We are aware of recent antitobacco campaigns not only by the federal health department but also by the state health departments. We are already scoping the people who have been involved. We have obviously had expressions of interest from people who want to be part of the process. At the moment we are keeping an open mind. We do not yet have a fixed group. We are keeping an open mind on people who have expressed some level of interest and who have said they have a level of expertise. A few have come to us already. So we are aware of that.

Senator ALLISON—Over what time frame do you expect the $8 million to be spent?

Mr Cassidy—We would expect it to be over the next 12 months. We have not put a more specific time frame on it, but that is the sort of time frame.

Senator ALLISON—So over one year?

Mr Cassidy—Yes, over the next year.

Senator ALLISON—What will you do at the end of that year? Will you evaluate the effectiveness of that campaign then or will you evaluate it as you go along? What is the approach?

Mr Cassidy—We would be evaluating as we go along, simply because I suppose that if we wait until the end of the year when the money has probably largely been spent then the evaluation would not really achieve all that much. So we would want to be evaluating as we are rolling out the campaign to make sure it is having the effect that we were after.

Senator ALLISON—Will that evaluation be a public one? Will it be released publicly?

Mr Cassidy—We really had not thought about that. In one sense I suppose it could be but, on the other hand, that is probably something we would want to talk about with the advertising agency, and indeed the other people who were consulting us, as to whether that was something that we should be doing or whether that potentially might somehow be undermining the effectiveness of the advertising itself.

Mr Samuel—In one sense having spent the bulk of the money it may well be regarded as more beneficial to spend money on the advertising campaign itself than evaluating ex post facto the effectiveness of the campaign.

Senator ALLISON—On the basis that the money is spent and there is no more money to fix it up?

Mr Samuel—If you have got $8 million to spend and it is going to cost you $1 million to evaluate the effectiveness of the campaign, it might be better to spend the $8 million on the campaign than to spend $7 million on the campaign and spend $1 million trying to evaluate whether or not you have done a good job.

Senator ALLISON—So if you have still got 55 per cent of the population who think that ‘fresh’ and ‘smooth’ make for a healthier cigarette, will we be any better off?

Mr Samuel—I think that is going to depend on the effectiveness of our campaign.

Senator ALLISON—Yes, but if it is not evaluated, Mr Samuel, how do we know?

Mr Antich—If we evaluate at the end of the process it will not be terribly beneficial. There will be others who will be able to do that. I guess my sense of it is that we if we have got $8 million to spend on trying to educate consumers as to the lack of benefit of smoking cigarettes and, in particular, smoking cigarettes that used to have or might even continue to have these ‘light’ and ‘mild’ descriptors on them, then that is probably the most beneficial way of spending the $8 million.

Senator ALLISON—I wish to press the point about what the ACCC is aiming for. It has struck an agreement with the companies to fund a program which many people have criticised on the basis that, had we taken this to litigation, then a great deal more money might have been extracted from the tobacco industry. To some extent the $8 million is an arbitrary figure, so one can assume the ACCC has thought long and hard about what it would do by way of overcoming this misleading practice. Is it not fair enough to expect that?

Mr Samuel—I have noticed some of those comments. Let me make one observation. By the process we have undertaken we have extracted $8 million more than we could have extracted had we gone to litigation. There was one critical comment which suggested we should have got $250 million out of the tobacco companies—they have not even read the act to understand that the ability to obtain penalties, and even corrective advertising, is very limited by our powers under part V of the Trade Practices Act. If I might say so, we have actually achieved significantly more by this process of negotiation with the companies than we could have achieved by litigation. The only issue of litigation is the one you raised before. If we had achieved a determination that the companies have engaged in misleading and deceptive conduct, that may have made it easier for third parties to undertake their own third-party actions. Our process has been to achieve a result, which has resulted in $8 million that will go into a campaign. The campaign will be designed to educate consumers on the impact, or lack of impacts, of smoking light and mild cigarettes and on other anti-smoking information and education advertising campaigns.

Senator ALLISON—But we have just established that you will not know if you have done that or not at the end of the process.

Mr Samuel—No. Clearly, through the course of this process we will be engaging with professionals to ensure that the money is being wisely spent. We do not hand $8 million to an advertising agency and say, ‘Go and spend it as you see fit, and we will have a look at the end.’ I was indicating that, in my view, if in a hypothetical case an agency said to us, ‘We can spend the whole $8 million working in conjunction with you and with other interested stakeholders in trying to produce the most effective campaign that we can,’ that would be preferable to reaching an agreement in which we spend $7 million on a campaign and $1 million at the end to conduct an extensive survey to try and find out if the campaign was effective.

Senator ALLISON—Yes, you said that. In establishing the $8 million figure with the tobacco companies did you seek advice from any advertising agency as to what that would buy and how effective it could be—or is it totally arbitrary? Is the $8 million all you could get out of the tobacco companies or is there some science behind all this?

Mr Samuel—No.

Mr Cassidy—There are two things. Firstly, we are not at this stage resting on the fact that it is $8 million. It is $8 million plus whatever settlement we reach with Imperial Tobacco, so we are not regarding it as $8 million.

Senator ALLISON—They are only 20 per cent of the market, so what does that add to the budget?

Mr Cassidy—In straight proportions, that would be, say, another couple of million dollars.

Senator ALLISON—So we are not talking about a substantial amount.

Mr Cassidy—The $8 million is not going to become $250 million, but it could become $10 million, for argument’s sake. We consulted with the department of health who in turn spoke with the agency they use for the tobacco advertising campaigns. The advice we got back was that something in the order of $10 million would be an adequate amount to run a campaign which would have some impact. We did not actually map out the proposed campaign.

Senator ALLISON—Mr Cassidy, you just said ‘some impact’. Can you indicate what that is? Are we going to improve the 55 per cent rate to 45 per cent, or bring it down to zero?

Mr Samuel—There is a point at which, according to the best professional advice we could obtain, you reach a saturation point in providing information to consumers where they turn off. For example, the $250 million that was suggested by one party, on any sort of analysis that we could take, would probably take about 20 years to spend because you just reach a saturation point where you cannot provide any more information without consumers turning off and not getting the message.

Senator ALLISON—I am not advocating $250 million.

Mr Samuel—No. I was only using that amount as a side reference.

Senator ALLISON—Commonwealth-state/territory television advertising campaigns run between 1997 and 2000 cost $36 million, or $12 million a year—more than the $8 million we are talking about here. That advertising was evaluated. It was determined that the shifts in

attitude were, at best, in the order of 10 per cent. Is that your aim? Would you expect that, after $8 million has been spent on this, we will shift that 55 per cent down to 45 per cent?

Mr Samuel—I would not like to put it in such specific terms. We have consulted with the department of health. They have provided information to us from their own advertising agency, and they have expressed the view that $8 million to $10 million—that is the figure we are talking about after Imperial Tobacco have been brought into the loop—is the sort of expenditure that would reasonably expect to be required to conduct a satisfactory campaign over a 12-month period.

Senator ALLISON—Did they recommend television advertising?

Mr Samuel—That is part of the total advertising mix that would be involved here.

Senator ALLISON—Could you give the committee the advice you received from the health department on this project?

Mr Antich—We made some inquiries, we got some feedback and that was factored into the settlement discussions.

Senator ALLISON—Was that tapping out emails to one another, phone calls or what?

Mr Antich—I think it was emails and some phone calls. Really, given the stage we were at and where we are now, that was adequate. We wanted to know what an adequate figure was. We got the adequate figure and we are working from there.

Senator ALLISON—What was the question you asked?

Mr Samuel—We asked: what sum of money would provide for a satisfactory campaign to deal with the sorts of issues that we have identified in the undertaking document? The sum of money that was identified is the sum that we have been talking about today. Without getting down to a tight dollar amount, I can tell you that something in the order of $8 million to $10 million was identified as an appropriate sum for a campaign over a period of 12 months. Remember that in March next year will be dealing with a totally different packaging regime with the new regulations that come into place at that time.

Senator ALLISON—In asking the health department for an estimate of a satisfactory campaign, you did not go beyond that and say that you wanted most people to understand this, only an extra 10 per cent or whatever? That was not quantified?

Mr Antich—No.

Senator ALLISON—I think that is what you are saying, Mr Samuel. I want to get it on the record if you would not mind.

Mr Samuel—Yes, that is right.

Mr Antich—The last thing we want to do is spend $5 million out of the $8 million or $10 million reinventing the wheel in terms of the messages that have gone out in the past and what people have used. The last thing we want to do is spend an awful lot of time creating a completely new campaign. That is why we want to make sure it is consistent with what has been done in the past, on which some feedback has been obtained. We do not want to spend the money re-engineering the issue; we want to spend the money getting the message out as best we can.

Senator ALLISON—But the question is: what message? I know this is going around in circles, but the point is that this is for a specific purpose, and it is not clear to me whether this money will be used for a general campaign or whether it has a real objective. I will leave it at that. It is clear to me that not a great deal of thought has gone into the objectives and measuring them.

Senator Boswell interjecting—

Senator ALLISON—It may be unfair, Senator Boswell, but it seems pretty accurate to me.

Mr Samuel—I am not sure it is very accurate. You are seeking the identification of very specific objectives. We have a general objective in mind. We have received advice as to the sum of money that would be required to achieve that general objective. We will, of course, consult with and rely upon the advice of professionals to achieve some very specific objectives that will be identified over the next short while as the money comes in to fund this campaign.

Senator ALLISON—Why will British Tobacco be allowed to continue to use, publish or display average levels of machine-tested tar—which is in the agreement—nicotine and/or carbon monoxide? Philip Morris's agreement says that Philip Morris will cease using, publishing or displaying this type of yield information on cigarette packages imported or manufactured for supply in Australia—presumably in recognition of its potential to mislead and deceive consumers. Why the difference?

Mr Antich—Philip Morris took a decision that they did not want to have any sort of reference to yield rating on their pack. That was a point of distinction between them and BAT. BAT, on the other hand, wanted to have the distinction of the yield rating on their pack. The difference between that and the current yield rating is that the totality of representation—being light and mild, and other descriptors, and the numbers on the pack given with the current yield ratings—was of concern to the commission and we have got that removed. So the issue then becomes whether there should be any form of yield rating available under ISO measures on the side of the pack. BAT took the view that they wanted to leave them on there. Philip Morris took the view that they wanted to take them off altogether. That is the point of distinction.

Senator ALLISON—And the ACCC doesn't have a view?

Mr Samuel—There will be new regulations in force from March next year that will leave it entirely optional. There is not a prohibition in the regulations on the inclusion of yield ratings on the packs. They are purely factual statements. They do not make a statement to those that smoke those cigarettes as to whether or not they are safer, less safe or whatever might be the case. They are purely factual statements. The regulations that will apply from March next year will not ban the inclusion of yield ratings. They will simply make it optional, whereas at the current time it is mandatory.

Mr Antich—One further point that I should clarify is that the current version of the yield rating that is on the BAT packs will go. It will be replaced by one directly referring to the ISO measures only, so that is a point of difference.

Senator ALLISON—I was curious about the provision in the agreement that if cigarette manufacturers imported cigarettes into the country before 31 May they would be entitled to continue selling those for however long it took. Does the agreement or do your discussions attempt to stop hoarding that might see these cigarettes continuing to be sold and promoted for a longer period of time than the agreement might suggest?

Mr Antich—Yes. I think the words are ‘in the ordinary course of business’ in terms of imports that occur before the cut-off date. Those were to specifically address that issue of hoarding.

Senator ALLISON—Sorry, how is it addressed?

Mr Antich—Which undertaking are you referring to? That might assist me.

Senator ALLISON—It is undertaking 19a:

... selling Cigarettes bearing Descriptors after 31 May, provided the Cigarettes were manufactured or imported by the Company in the ordinary course of its business before 31 May 2005:

Mr Antich—The term ‘in the ordinary course of business’ is specifically there to address that issue that you have raised.

Senator ALLISON—So if they were to suddenly import millions that would not be in the ordinary course of business?

Mr Antich—That is right. It has to be in by today.

Senator ALLISON—I could not find reference to annexure B in the agreement that I have just referred to. This page shows the front of packets which have ‘classic’, ‘rich’, ‘smooth’, ‘subtle’ or ‘fine’ on them. Can you indicate where this fits into the agreement and what that represents?

Mr Antich—It represents an insert that is put into the cigarette packaging to advise consumers that the brands that were previously known as variations of the light and mild types of brands are going to be changing to smooth, classic or fine. It is telling them that there can no longer be such a thing as a light and mild type of cigarette.

Senator ALLISON—But these are acceptable—is that right?

Mr Antich—These descriptors are acceptable.

Senator ALLISON—Can you explain why annexure B is not referred to in the agreement itself? I could not find it when I was trying to see what was in and what was out. It seemed to be either in or out, but there was no reference to it.

Mr Antich—Clause 19c refers to annexure B. The reference is on the first line.

Senator ALLISON—It is likely, is it not, that as a result of this education campaign—at least we hope—there will be people who might have otherwise quit smoking, but who did not because they thought they were smoking healthy cigarettes, who will now say, ‘We had better stop smoking,’ and ring up Quitline? Have you had talks with the health department on boosting Quitline’s budget for dealing with what we hope will be a flood of people?

Mr Antich—The funding that we have, the $8 million or the $10 million, depending on a certain third company, is split up into (a) advertising and (b)—if you look at 23(b), for example, it says:

... to new or existing programs delivered or endorsed by the Australian Government related to health issues associated with the use of low-yield cigarettes.

It still has not quite been determined by us as to how much of our funding will be spent on advertising. Our strong view would be that the overwhelming majority of funding we get will go on the advertising campaign, but there may well be an allocation towards the Quitline issues, if you like, that people see in the advertising. There may be an increased use of the phone lines—people calling Quit, et cetera—so there may well be an allocation of funding to those numbers.

Senator ALLISON—Is someone doing an assessment of this or will it be another arbitrary figure?

Mr Antich—An assessment of what?

Senator ALLISON—How do you determine what percentage of the $8 million will be spent on Quitline?

Mr Antich—We have not worked through the detail of that yet.

Senator ALLISON—I am asking how you will do that; I am not suggesting you have. I am saying: how will you get there? How will you determine it?

Mr Antich—I cannot answer that at the moment.

Senator ALLISON—Will you take into account the likely number of converts to quit, if I can put it that way?

Mr Antich—Yes, we will.

Mr Ridgway—Under the new labelling requirements as of 1 March next year, there will also be a reference to Quitline, and those regulations have been in train for some time. The department of health may already have put some thought into the impact on Quitline and perhaps the impacts of the advertising effort will also need to be considered in that context by the ACCC.

Senator ALLISON—But the health department has made it clear, has it, that the $8 million will need to cover whatever increase there is as a result of this advertising?

Mr Antich—I do not think we have had that detailed discussion yet. The issues we are addressing are fundamentally around what was a generally appropriate figure. As to the detail, that is not something that we were going to be able to work out ahead of time in the absence of an agreement. You have got to start with a figure and then work your way through that.

Senator ALLISON—And see what fits into it.

Mr Antich—It is not that simple. I think we did spend a bit of time—

Senator ALLISON—I am not suggesting it is simple, Mr Antich, but I am interested in what sort of thought process went into it. Given that this agreement took some time to negotiate I would have thought there was time to do that, but there was not, obviously.

Mr Antich—No.

Senator ALLISON—I think they are all the questions I have on that program. I have not finished but that is all I have on tobacco.

Senator BOSWELL—I want to talk about the Woolworths, Foodland and Metcash merger of last week. Coles now holds 36 per cent and Woolworths 41 per cent. What is the view of the ACCC on the 19 stores plus the three sites?

Mr Samuel—We are in the very early stages of conducting an examination of those proposed acquisitions. We will look at it in two principal contexts. The first will be to look at each and every acquisition—that is, each site, each supermarket outlet itself—and determine in the context of consumer habits in terms of their travelling and their capacity to seek alternative sources of retail purchases of groceries whether in the foreseeable future the acquisition of any particular site by Woolworths might have the prospect of substantially lessening competition in the retail market concerned.

Take, for example, supermarket A that Woolworths is proposing to acquire. We would look at that particular site and look at the other competitive outlets within a reasonable distance—that is, having regard to what might be dictated by consumer habits in terms of their normal process for seeking out alternative sources of the retail supply of groceries. We would ask ourselves whether the acquisition of that particular site A by Woolworths might be likely to have the effect of substantially lessening competition within the regional or suburban market in which site A is located. That will be the first analysis.

The second analysis will look rather at the wholesale or supply market. Given that the majority of these sites are in Western Australia, it is more likely to focus on the state-wide wholesale level rather than on perhaps New South Wales or Queensland where there are only, I think, one or two sites involved. We would have a look at the impact on the wholesale market for the supply of retail groceries to see whether the acquisition of those 19 sites—that is, supermarkets and/or sites—might have the impact of lessening competition at the wholesale level. These are at the very early stages. We only learnt of the very concept of this agreement, let alone the details, in the past two or three days.

We anticipate that this examination will involve extensive market inquiries of all stakeholders, including potential competitors—that is, independent grocers in the areas concerned, wholesalers, suppliers and governments, obviously. A whole range of views will be put to us and we will look at those. We expect the analysis to take about eight weeks and therefore we expect to be able to reach some form of conclusion on this matter towards the end of July. That is the sort of process we will be dealing with.

Senator BOSWELL—Metcash now has around 18 to 20 per cent, depending on how you look at it. Surely, if they potentially lose 22 stores, that is going to lessen competition. It is going to reduce their buying power and it is going to reduce their ability to extract discounts, advertising dollars and so forth. At what point does a third force come in? In your opinion and in the opinion of the ACCC, what percentage does it have to have?

Mr Samuel—Let me answer that perhaps a little more indirectly. The question you have asked relates to the second analysis. I was talking about the possible impact of the acquisition of those 22 stores at the wholesale level in terms of the buying power of Metcash as the

principal alternative wholesale supplier and potentially on the wholesale level in terms of direct supply by manufacturers, suppliers and producers. If we took it in the national context that you have described, Senator, then we would need to put it into perspective. Twenty-two stores—in fact it is 19 stores and three sites—need to be measured against the total supply line of Metcash of about 4,500 grocery outlets, not all of which are major supermarkets—many are much smaller convenience stores. We are talking about 19-plus three sites out of 4,500 or more outlets that are the customers of Metcash. In that context we would ask ourselves whether the acquisition of 19 plus-three amounted to a substantial lessening of competition—which of course are the words used in the Trade Practices Act—at the wholesale level.

We do not stop at that, though. We look at it in pure percentage terms. Taken on a national basis, there might be a question as to whether 19 plus three amounted to a substantial lessening of competition. We have not examined it to determine what sort of percentage it would amount to in terms of the total grocery market in Australia. That is why I indicated that we would also examine this on a state-by-state basis. Given that the majority of the sites are based in Western Australia, we will want to examine whether the 19 or so stores that have been acquired in Western Australia might result in a substantial lessening of competition at the wholesale level in terms of the Western Australian market for groceries as distinct from the national market.

Senator BOSWELL—I am concerned about creeping acquisitions. Over the last 10 years it amounts to $1.2 billion—120 private stores have been sold. I understand the difficulty of creeping acquisitions: if you do not let the majors buy them, people do not get the best price. We now probably have a genuine third force and if it is attacked continually then we will not have a third force; we will have a bit player. For processors and primary industry to survive they have to have at least three players—probably three is not enough but that is all we are going to get—in the market to sell. Manufacturers also need a third force. My concern is that that third force is going to be eroded away.

Mr Samuel—The first point is that, in this particular case the third force is not being attacked. The third force is actually doing the acquisition itself, and it is the one undertaking a significant growth process as a result of this acquisition. The major part of the acquisition by Woolworths relates to New Zealand; it does not relate to Australia. The Australian acquisitions are in relative terms fairly small in the context of the total market for retail groceries in Australia, although, as I have indicated, at the retail end we will be examining each acquisition on an individual basis.

Having said that, there is also a fourth force that is growing in Australia, the Aldi group, and it is growing at a significant pace, particularly on the eastern seaboard of Australia. It is providing a new competitive dynamic in discounted home brand type selling. We are starting to see some responses potentially to the challenges thrown out by the Aldi group, in the development of home brands by Metcash, Coles and Woolworths, which are appearing on their supermarket shelves.

Without getting into the legal debate as to whether creeping acquisitions as such can be dealt with under section 50 of the Trade Practices Act, it is appropriate to point out that the number of stores being acquired by the majors over the past two or three years is very, very

small indeed in total terms. The amount of growth in their market share that is measurable relating to the acquisition of independent stores is in relative terms very small indeed. It is not a significant part of their growth. Their real growth has tended to be in the development of new stores rather than in the acquisition of existing independent stores.

The primary issue that the Metcash group has raised with us—and this has been the subject of some public discussion—is that they would like at least the opportunity to be able to provide the same terms, if you like—a competitive offering to a seller of an independent store—as Coles or Woolworths. You observed in your question that the acquisition of these independent stores, whether it be by a Coles or a Woolworths or a Metcash, provides an exit path for some of the proprietors of the independent stores concerned. Where the Metcash group has a concern is that sometimes it does not have the ability to provide a competitive tender, a competitive process, for the purchase of those stores.

We are working with the three major players in this area to see if we can reach an arrangement whereby we will give them an equal opportunity to deal with potential sellers of independent stores but, and I emphasise this, not harm the asset, the financial investment of those independent store owners, which is of concern to us in treating them fairly. We are trying to strike that balance which gives the three major players, Coles, Woolworths and Metcash, the ability to competitively tender for any independent store that is up for sale and not to cause harm to the investment that has been made by the independent store owner. I would like to think that we are not far off reaching some resolution.

Senator BOSWELL—That would be very commendable if you could do that. So you would then have to outlaw or restrict Coles, Woolworths, or Metcash from signing a confidentiality agreement?

Mr Samuel—There are a number of arrangements that might militate against the ability of an independent to realise the full value of his or her investment. One would be entering into or being forced to enter into a confidentiality or exclusivity agreement, and that agreement might form part of the sale process, but it also might form part of the original opening process—that is, the process of opening the store in the first place and making an investment in the store. We need to be sure that at no stage in the chain of opening the store, through to developing the store to a successful business, through to selling the store, if that is what the independent chose to do, can the significant power of the three majors—because we have three majors here, in Metcash, Coles and Woolworths—be used in a way to unfairly diminish the investment that has been made in that store by the independent store owner. That is what we are working towards at the moment and I would like to think we are getting close to it.

Senator BOSWELL—Would that require a change to the—

Mr Samuel—No.

Senator BOSWELL—What you would do is then have a notification that that store was on the market?

Mr Samuel—I would prefer not to go into the detail other than to say that I think we are reaching a satisfactory resolution of this particular process, which ought to provide a win all round, but, in particular, ought to protect the independent grocery store owners from the very issue that you raised in your question, which is their ability to make a significant investment

in a business, both financial and over time and resources, and then to be able to exit the business in a manner that does not see their investment diminished in any way.

Senator BOSWELL—That is terrific, that is good news and I am sure it will be welcomed out there. There is a growing concern in the community about the leveraging up from groceries to petrol, to gambling, to liquor, to office sales. It is all being leveraged up on the basis of the basic commodity, which is food. Does that concern the ACCC? At some stage, there are going to be one or two players in the market and we will have Coles and Woolworths selling agricultural machinery if it keeps going the way it is.

Senator ALLISON—You can get that at Bunnings.

Senator BOSWELL—Bunnings is another player. You are aware of what I am saying?

Mr Samuel—Absolutely aware and we constantly monitor the operations of the three majors in this area, and I emphasise it is three majors and they rank in order. There is a very significant major, and a less significant, and then there is, if you like, a new-found major, and there is the potential for a fourth major force in the Aldi group. We are constantly monitoring their operations to ensure that, not just in the short term—that is, in May or June of 2005, but over a medium term, over the foreseeable future, we are not led in to a position where we might end up with an anticompetitive structure that can ultimately do damage to consumers in terms of reduction of choice. At this point of time, we would have to say that all the information, all the evidence before us, is indicating that we have a very competitive marketplace for retail groceries with an analysis being undertaken by independent consultants for the department of agriculture indicating that retail grocery margins in this country are amongst the lowest in the world—

Senator BOSWELL—Absolutely.

Mr Samuel—which would seem to indicate that there is a fair bit of competitive pressure applying across those three or four majors that we have talked about. So we have got that occurring. We have seen that wherever the shopper docket schemes have been introduced—that is, the alliances of Coles and Shell, or Caltex and Woolworths—wherever they have entered into a marketplace, petrol prices have fallen on average by between 1c and 2c a litre across the board and so, again, consumers have benefited from that.

We have not seen what was raised as a fear when the shopper dockets first hit the marketplace, which I think was towards the end of 2003—so we are almost into our second year. We have not seen a major expansion into retail petroleum by Coles or Woolworths. The original indications they gave were that they would confine their retail outlets to around 500 outlets each, and they do not appear to have gone beyond that. There do not appear to be any arrangements on the horizon that would suggest that they would go beyond that. If they did propose to do that, then they, of course, would need to notify us under the third line forcing notifications.

All the indications to date are that what is happening in this industry, with all the leverage you have talked about, is a very dynamic competitive process which is working to the advantage of consumers, but we do watch for any areas where there may be a problem. One of the areas—that I have just described—is this issue of the potential sale and acquisition of independent outlets. We are watching that and working on trying to achieve a win-win,

satisfactory outcome there, and we are constantly on the watch as to what is happening in this area, because it is obviously an area of some sensitivity.

Senator BOSWELL—It is. You are quite right: we do pay a very competitive price for our food in Australia. It is probably not the retailers who are picking up the Jack and Jill, it is primary industry that is getting it. The prices are going down, and there is no question that we do get a very fair and reasonable price for our fruit and vegetables, but it is the market forces, or the lack of market forces, that are driving those prices down to the point where the growers are getting 15c a kilo for potatoes and the retailers are selling them for $2.50. Because there are no alternative markets to the three major players now, it is more or less 'take it or leave it' for primary industry. That is why I do not want to see that third force eroded by the loss of 22 stores or creeping acquisition. I think three players in a $70 billion grocery market is not that many. You talked about Aldi, but I think Aldi is always going to be a niche marketer which is not going to have much more than three or four per cent.

Mr Samuel—You would have to ask the Aldi management what their aims and objectives are; I cannot comment on that. But the issue you have raised is the price that has been received at the farm gate and the price when, ultimately, it has been sold at the retail level. Again, that department of agriculture analysis with which you are familiar points out that the primary issue there is not at the retail level, where the margins are quite tight; rather, it is in the supply chain. I think that report suggested that the supply chain contains some inefficiencies which might well need addressing in order to enable consumers to continue to receive competitively low prices and at the same time address some of the price issues at the farm gate level.

The ACCC can assist at the farm gate level in a manner that it has been endeavouring to encourage, particularly amongst farmers and other small businesses over recent times—that is, through the authorisation of collective negotiations on the part of growers. We have been doing our level best to introduce the concept of collective negotiations and to inform and educate growers as to the benefits of collective negotiations. A lot of the work that Mr Ridgway and his team have been doing with our outreach program to small business has been focusing on that. Mr Gregson and his team have been working on trying to facilitate the process of authorising collective negotiations and making it easier for groups to come to us for authorisation of collective negotiations. Of course, once the Dawson legislation passes through parliament, the whole process of collective negotiations will become a lot easier and will be greatly facilitated by the provisions of that legislation that allow small businesses to simply notify us that they intend to collectively negotiate. Unless and until we reject that notification, they will be immune from prosecution and we will be able to proceed with a collective negotiation process.

Senator BOSWELL—I am well aware of that, and I think it is going to be helpful, although I think that the Dawson proposal that was looked at by Senator Brandis has some prickles in it—like third line forcing and some of those things. But let me get to that in a minute. There is a push now—and you picked it up in your last remarks—for home brands. Home brands are pretty dangerous to primary industry and to manufacturers or food processors because they lose control of their market and their pricing and become absolute captives of the person that carries the home brand. Coles are stating that they want 30 per cent

of their lines to be home branded. This is saying: 'We can import a tin of peas for $1 from China and we can sell it to a home brand. If you want to sell your home brand you have got to match that tin of peas.'

I understand competition forces forcing the price down, but this lessens competition. It certainly drives the price down. It takes away the brand recognition. A brand is worth a lot of money. People go and pick a brand off the shelf because it has been well advertised, it has been on the market for years, it is acceptable, and people have bought it and tried it and like it. Are you concerned that this will lessen competition? There is great concern out in rural Australia at the moment about the push for these private brands, and they see it as lessening their ability to control their market.

Mr Samuel—At this point in time we are not concerned about the potential to lessen competition. We should point out that this is not a new process.

Senator BOSWELL—I now, but it is being jacked up.

Mr Samuel—Yes. Even with the 'jacking up', as you describe it—the expansion of home brands—it is nowhere near the sorts of levels that, for example, have been adopted in the United Kingdom, where home brands have a significantly greater share of shelf space than is even proposed here. They are talking about 40 or 41 per cent in the United Kingdom compared to, for example, suggestions that one of the majors might move to a level of around 30 per cent here.

We have had home brands for some time in Coles, Woolworths and Metcash and the IGA home brand, the Black and Gold, and Aldi home brands. They are either a response to consumer preference or an anticipation of a response by consumers as to their preference. The anticipation is that consumers would say they prefer a lower price and are less concerned about the specific brand that is placed on the packaging. You say that it can potentially be costly to producers, but of course developing a brand in itself is costly to a producer and forms part of their overheads. If anything will be impacted in the shorter term it will be that cost of production—that is, the promotional development costs of the brand on the product concerned. On the other hand, it may well be that, with lower prices for home branded products and with the cost of the development of the promotion of the home brand now being borne by the retailer, there will be a greater volume of goods sold at lower prices to consumers and thus manufacturers or growers will have an increased demand for their product rather than decreased demand.

Senator BOSWELL—I do not follow that. You can only eat three meals a day and no-one is going to go out and eat four meals because there is a home brand there. The market is X and you are only going to fill that market. You have lost control of your product when you have got a home brand. You do not own the product. You cannot promote it. You cannot advertise it. You are in a very precarious position because you take what is given and you are then competing probably against imports. I know that you have got to export to import—I understand that—but we are getting messages through our structures that people are starting to say, 'We are losing control of those products and we are now having to compete.' It has always been competitive, with discounts and allocations and all those things that you are well aware of, but this is the ultimate, where: 'This is the price and this is what we will pay.' I am

just flagging it to you that it is starting to bite out there. It is something you have got to watch. That report that Warren Truss had, which I have read and you mentioned, is indicating that, while the prices are going down and the processors are losing a bit, the big hit is coming on the primary producers. Wouldn’t you agree with that?

Mr Samuel—The information that has come before us—and we have seen this happen in the dairy industry and in other areas—is that the least powerful in the negotiating process through the supply chain is the individual processor. It is the reason I refer back to the Dawson reforms. The Dawson reforms are going to make it easier for growers to be able to collectively negotiate. The one thing that we would be saying to growers is: get together with your colleagues and talk to us or with your representative groups about collective negotiations. Very often representative groups of very small businesses are saying to us that the real complexity is not gaining the approval or the authorisation of the ACCC to collective negotiations; it is actually getting the small businesses concerned to recognise the value of collective negotiations and encourage them to do their own deals.

Senator BOSWELL—I am sure they do. We have had a cooperative system—it sometimes falls down and sometimes goes well—and that will probably re-emerge now with this collective bargaining. We might have more cooperatives. You mentioned the Dawson report—I was instrumental in trying to get that up, and I can see the advantages of it. Senator Brandis had a look at this and he does a good job for us on these things, but I am concerned about third line forcing. It seems to me to be like the curate’s egg—there is some good and bad in it. We find Coles is involved in third line forcing. Surely third line forcing is anticompetitive. You say, ‘I will lend you the money but you must insure with the Victoria Insurance,’ or, ‘If you clean my building you have got to use XYZ detergent.’ That does seem to me to be very anticompetitive.

Mr Samuel—If a third line forcing transaction is anticompetitive following the passing of the Dawson legislation then it will be dealt with under the legislation, because the legislation will effectively outlaw third line forcing which has a substantial lessening of competition in a market. That is the change that has been made. That is the only change that has been made to third line forcing, which is to require an SLC—a substantial lessening of competition—test to apply to third line forcing—

Senator BOSWELL—You used to have to authorise it. Now it goes on automatically.

Mr Samuel—No. Under the current law a third line forcing proposal is notified to us and we examine it in the context of its benefit as against its detriment, but it does not have to have the likely effect of substantially lessening competition in a market to be outlawed under the current provisions. Under the Dawson legislation it will require to have a substantial anticompetitive impact for it to be outlawed and to be—

Senator BOSWELL—By its very nature third line forcing must be anticompetitive, surely?

Mr Cassidy—Part of the problem is that third line forcing covers such a wide range of conduct. At one end of the spectrum it covers conduct that you refer to as an absolute force, where I might say to you, ‘Look, I won’t sell you my product unless you agree to also buy something from him.’ That is an absolute force. The housing loan and insurance arrangements

of the late 1980s and early 1990s were an absolute force and they can be very detrimental to individual consumers.

On the other hand, third line forcing also covers things like shopper dockets. Some of the shopper dockets are third line forces in that they are saying, ‘If you buy a certain amount of groceries from me then this petrol retailer will sell you petrol at a discounted price.’ However, they do not say, ‘You must go and buy your petrol from this person.’ They give you the option. That sort of third line force firstly is optional and, secondly, is arguably beneficial to consumers.

The problem with third line forcing, and the reason that over the years there have been a number of reports that have made various recommendations in relation to third line forcing, is that it simply covers such a wide range of conduct. It ranges from conduct which can be, as I say, very detrimental to individual consumers to conduct which can be arguably beneficial to consumers.

Senator BOSWELL—The Dawson bill that is going through gives collective bargaining but it allows you to be overridden by the tribunal, which I do not think is in the best interests of anyone in particular, and it allows third line forcing. Anyhow, I suppose that is drifting into a policy area. Senator Brandis did a review on section 46, and he did a very good job.

CHAIR—Senator Brandis did not do a review, a Senate committee did a review. Senator Brandis and Senator Chapman put in a minority report.

Senator BOSWELL—Senator Brandis and Senator Chapman spoke for the coalition. In respect of section 46, after the Boral decision, Senator Brandis asked you if you had won any cases and you said that you had won one case. How many cases have you had to withdraw from—you have run up the white flag and retreated in how many cases?

Mr Samuel—We have withdrawn from one case alone, which is the Qantas Virgin Brisbane-Adelaide route case. We withdrew from that for good reason.

CHAIR—You mean in the last 12 months?

Mr Samuel—Yes.

CHAIR—I think the evidence from Mr Cassidy to the Senate inquiry that Senator Boswell referred to was after the Boral decision. The ACCC discontinued four section 46 cases.

Mr Cassidy—Perhaps I can clarify that. I think there is confusion with the word ‘withdraw’, which means we have actually started legal proceedings and then had to stop. The chairman’s comment is quite right there—in recent times we have had only one of those, which was the Qantas case. We have had a number of situations where we start an investigation into a section 46 issue; the investigation proceeds a certain distance and then, because of the way section 46 currently stands, particularly after the Boral and the Rural Press High Court decisions, we obtain legal advice and the advice we obtain is that, because of the way the law currently stands, we will not have a successful prosecution. We therefore cease the investigation.

Senator BOSWELL—How many of those have you had?

Mr Cassidy—Let me put it this way. Over the last couple of years, since mid-2003, we have started 25 new section 46 investigations. At this point 15 of those have been terminated without getting to court.

Senator BOSWELL—So you have 10 on foot?

Mr Cassidy—We had seven at the start of July 2003. That process gives you a net 10, so currently we have 17 section 46 investigations in total on foot.

CHAIR—How many proceedings on foot?

Mr Cassidy—Three, if you include the Safeways penalty hearing.

CHAIR—Leave that aside because you have already won that.

Mr Cassidy—Leaving that aside, we have two.

Senator BOSWELL—What is happening to those 17? Are you proceeding with them?

Mr Cassidy—At the moment they are still under investigation.

Senator BOSWELL—Have you taken those for legal presentation?

Mr Cassidy—No, they are still going through the stages of our assembling the evidence before we actually go for external legal advice on them.

Senator BOSWELL—So, in essence, since the Boral case you have had one win?

Mr Cassidy—We have actually had two: Safeways and the Northern Territory power matter.

Senator BOSWELL—At a recent COSBOA conference you urged small business to come forward with unconscionable conduct complaints. Have you had any? Would they be under section 51?

Mr Cassidy—Yes, section 51AC, in relation to business.

Senator BOSWELL—What is the score there?

Mr Samuel—In recent times we have had no cases but I think it is fair to say that we are getting some satisfactory outcomes in terms of both administrative settlements and undertakings. We have been endeavouring to explain to small business that the unconscionable conduct provisions are those provisions that they should be focussing their attention on in the context of their dealings with big business. Just last week we issued what I have in my hand—a very good and easy to read explanation for small business groups as to how the unconscionable conduct provisions apply. Some of the examples that we have given are evidence of potential unconscionable conduct. There is also an example of conduct that would not amount to unconscionable conduct; it is no more than tough bargaining. We had the occasion to present, along with the small business minister and the shadow minister for small business, at a recent small business summit in Sydney. We were a bit disappointed to hear one or two representatives of small business indicate that small businesses were concerned about, if not intimidated when, bringing information concerning unconscionable conduct matters to us.

Senator BOSWELL—Surely that is unconscionable in itself.

Mr Samuel—As I indicated, if they were being intimidated by big business that was the smoking gun and that was as sure a sign as any that we would need of unconscionable conduct. They were concerned about two issues. One was potential retribution from the larger businesses concerned. The other was they were concerned about the time and cost involved in bringing these matters to our attention. We did indicate that we made every effort to minimise the involvement of the complainants, although obviously if there were matters of complaint that needed to go before the courts then we would require some time and investment of resources by the small businesses concerned. But in many cases we are able to resolve a matter by approaching the larger business and pointing out that we have received complaints and that the matter ought to be dealt with by court enforceable undertakings without necessarily having to go to court. However, we have very recently instituted proceedings for unconscionable conduct. I think I mentioned a couple of them in my opening comments. Have you got those, Mr Ridgway?

Mr Ridgway—I do not have them to hand.

Mr Samuel—I mentioned in my opening comments that there are matters where either we have received some assistance from the courts or we have been instituting proceedings for unconscionable conduct relating not only to the unconscionable conduct provisions but also to the franchising provisions of the act and the franchising code.

Senator BOSWELL—Your decision on Australian Liquor Holdings concerned me. I think you said that you have two players in the market and that, as long as you have two players, you have competition. I think you said—but you may correct me—that Coles will keep Woolworths honest and Woolworths will keep Coles honest and that, as long as you have two players out there, you have competition.

Mr Samuel—No, I went a lot further than that. We pointed out that in the liquor market we do not have just two players. Metcash itself is a very substantial force with ALM in the liquor market but, more importantly, there are a very large number of independents. Our analysis of the ALH acquisition led us to the conclusion that the independents in the market have a very significant role to play and provide a significant countervailing competitive force to the growth of the majors. There are more than just two major players; there are at least three major players and a vast number of independents who are playing a significant role.

Senator BOSWELL—But you would concede that two major players keeping each other honest is not competition?

Mr Samuel—It depends on the marketplace. We can look at the domestic airline market with Qantas and Virgin.

Senator BOSWELL—I am talking about the retail market.

Mr Samuel—I do not want to be definitive because someone will quote me an example of two major players that are providing a competitive discipline. Our analysis does not focus on a simple statistic that two is bad, three is good, four is better and five is even better. It focuses on the qualitative dynamics of competition in the marketplace. For example, you could have one player with 30 per cent of the market and a plethora of smaller players each with one or two per cent. Even though you have 40 or 50 participants in the market you have a potential

danger sign on competition because the one significant player has such market power that it does not give great scope for the 30 or 40 other smaller players to have a significant presence.

On the other hand, in the case of the liquor market, we expressed the view that we had three major players—Coles, Woolworths and ALM or the Metcash group—and a large number of smaller independent players who, because of the nature of the retail liquor industry, provide a significant competitive dynamic.

Senator BOSWELL—Thank you.

Proceedings suspended from 6.28 pm to 8.01 pm

Senator MURRAY—I want to pick up one last question from Senator Boswell's questioning. The WA Independent Grocers Association have naturally been very concerned with this issue because WA is a big centre of the Foodland chain. Is the ACCC consulting with them with respect to these matters?

Mr Samuel—Yes. We will be making extensive market inquiries from all stakeholders. We do not want to limit that in any way at all. Clearly, WA grocers will be one of the interested stakeholders. They have already expressed some public views. But I think we would be inviting the stakeholder groups to come and consult with us a little more closely, perhaps, in a manner where we can get some real facts rather than some of the emotion that is coming out at the current time. But certainly they will be one of the groups we will be talking to.

Senator MURRAY—I want to address most of my questions tonight to the issue of misleading and deceptive conduct, which I think is actually one of the areas which gives you the greatest leeway to exert pressure on the market or, to use the old saying about the Reserve Bank, moral suasion. In that regard, in passing I should compliment you or the commission on its work on matters such as the airlines and the airline-pricing issue and the eBay GST issue and issues like that. I want to deal with newspaper and magazine circulation rorts, so described. Are you aware of the claims posted by crikey.com.au that major newspapers and magazines in Australia are falsely inflating their audited circulation figures?

Senator CONROY—I thought you had a subscription.

Senator MURRAY—I do.

Senator CONROY—You cannot get two, you know.

Senator MURRAY—I am hoping to share them around. These inflated circulation figures are used to deceive and mislead advertisers. By the bye, as you would have probably picked up, Mr Samuel, they seem to be at least inferring, if at not stating, that the newspaper journalists concerned are not writing about this issue because it is contrary to the interests of their employers, which is rather worrying. What can you tell us about this matter?

Mr Samuel—I am aware of the matters that have been raised in crikey.com.au. I mention the name because, as has been noted, that guarantees me another 12 months subscription. If I mention it twice, I might get two years subscription for free. But that just declares my interest on the matter. I am aware of the issues. The matter has been raised with us in a more specific way than just in the context of the published web site. I need to check with my colleagues, but I think the matter is being investigated. No, it is not. Having been raised with us, I think it is

something that we would examine in due course just to see whether in fact the claims that are made are inappropriate or misleading.

Senator MURRAY—It is a fashion in this place to raise a wry smile when crikey's name is mentioned because of its interactions with people around the room, probably. Nevertheless, they spell this out fairly substantively. It seemed to be well sourced from within their network. When I read this stuff, I did not regard it as a passing fancy. I thought at least there was a prima facie case for an early investigation. In my view, it is market knowledge and, therefore, should be viewed as such by your agency.

Mr Samuel—The point, as I think I have acknowledged, is that we have seen the information on the crikey.com.au site. It has been raised with us. It is a matter that will receive our attention in the appropriate time frame.

Senator MURRAY—In due course, once you have come to a view on it, I ask that you let the market know because there is a great deal of speculation and I think it should be at least put into perspective.

Mr Samuel—Yes.

Senator MURRAY—Another issue has been raised recently in Western Australia. I do not know whether it has been raised elsewhere. It is the issue of fresh fruit and vegetables. The word 'fresh' automatically connotes in a consumer's mind that it subscribes to Australian regulations and laws and so on. But there was a claim run by, amongst others, Paul Murray—no relative—a former editor of the *West Australian*, and I think elsewhere, that foreign fruit and vegetables are coming in. They said that some were from China and were tainted with human faeces and with chemicals that are not permitted in this country. But there was no way of the consumer knowing, in the big spread of fruit and vegetables that is available in the supermarket and the stores that sell them, where those fruit and vegetables come from, which is a complete contrast to bottled or canned goods where the labelling is often very helpful as to origin and content and so on. Has the matter been raised with you? Do you have any comment on it?

Mr Samuel—I am getting a signal from my colleague Mr Antich that the matter has not been raised with us. But, now it has, could we get some information about it? On some of these matters, we do respond to matters being raised with us or complaints being lodged. But I do not think we are aware of the matter.

Mr Cassidy—When you get into the area of food and, for that matter, therapeutic goods, we share administration with Food Standards Australia New Zealand and the Therapeutic Goods Administration. In relation to food, this is an issue that may well have been raised with Food Standards Australia New Zealand, so we would need to just check and make sure whether they were in fact looking into it. If not, it sounds like something one of us should be looking into.

Senator MURRAY—Regardless of the specific allegations, this is a difficult area for you. Major shopping groups will naturally attempt to source the best priced goods. But, if they source clothing or canned goods or bottled goods from elsewhere, the labelling is usually pretty good and is likely to comply with Australian rules, unless somebody is behaving fraudulently. But all you get in a barrow of oranges is a little kind of sign at the front. If some

of those are Australian and some are from some other place, there is no way of the consumer knowing. They might want to discriminate for many reasons, not just those of health and regulation. I think it is an issue for you, frankly, in terms of proper communication to the consumer.

Mr Samuel—To the extent that it relates to food standards, Mr Cassidy has indicated that it would be appropriate for handling by that authority. To the extent that there are misrepresentations that have been made to consumers as to either the source or the quality of the food being offered—for example, if, as you describe, it is being advertised and noted on the display shelves as fresh fruit and produce and in fact it is not fresh but is several weeks old because it has been frozen and brought in from overseas—clearly that would be a matter we would be interested in and which we would want to examine.

Senator MURRAY—Again, I ask you through the chair if you could let the committee know in due course what your attitude on that is.

ACTING CHAIR (Senator Watson)—I have raised this issue in the Senate in the adjournment debate.

Senator MURRAY—Have you?

ACTING CHAIR—Yes.

Senator MURRAY—Perhaps you could forward Mr Antich your speech. The third issue I want to raise with respect to misleading and deceptive conduct is that of airline schedules. It seems to me that airlines sell their flights on the basis that they will pick you up at a certain time and drop you somewhere else at a certain time. I have puzzled about this for a long time because very frequently consumers are not getting what they are buying—namely, delivery at the time that they bought and purchased. It came home to me again this morning. I got up at half past four just so I could come and see you, Mr Samuel, all the way from Perth. The pilot was really cheesed off, frankly. He was delayed for what he regarded as no good reason and made that clear to the passengers. Eventually we took off and we arrived half an hour late into Sydney. There was a scramble for people to get connections, and people were late for lunch and business appointments and so on and so forth.

I think it is a basic part of the contract that if you advertise that you are going to get somebody from some place to some place at a certain time you should comply. I know it is awkward because there are real and genuine reasons why it might be delayed. If the damned engine is crook or there is some mechanical thing, you obviously have to be careful. But I wonder if this has been raised with the commission and whether the commission is interested in it as a matter.

Mr Samuel—It is certainly not raised as a systemic issue because that would be drawn to our attention through our report from the Infocentre which we receive on a weekly basis. I think we all share frustration at delayed flights. I can understand that your own disappointment today would have been exacerbated by what greeted you when you arrived at the Senate estimates hearing this afternoon and you had to deal with that, so that would have been an even greater disappointment. Let me say to you that if we were to receive complaints of a—

Senator CONROY—And happy birthday to you too!

Mr Samuel—If we were to receive evidence of a systemic failure on the part of one or other of the airlines in meeting schedules and that failure did not appear to be explained by factors such as Canberra fog or mechanical breakdowns or whatever but appeared to be evidence of misleading and deceptive conduct, clearly we would be dealing with it. But I would have to say to you that—

Mr Cassidy—I think this issue was raised with us a few years ago. I say a few; it may be even going back before the Ansett collapse. When we looked into it, we found that the two major airlines at the time were scheduling some flights which just could not possibly take off on time because they had no allocated landing slots at their destination. So almost by definition they had to be running late. We took that up with the airlines. As a result, as I recall, their scheduling was changed to basically cut out that practice. As the chairman said, I am not aware that we have had that issue raised with us in more recent times.

Senator CONROY—Claiming frequent flyer seats?

Mr Cassidy—That is a different issue.

Senator MURRAY—I, like many people in this room at all the tables, fly a great deal. I happen to fly principally with Qantas. I find their staff almost universally very polite and helpful and they provide a good service. I have no complaint on that side. But I have personally often noticed delays. Generally speaking, it does not inconvenience me that much. I just accept a half hour here or there. But I heard the mutterings up and down the corridor of the aeroplane today and I thought, 'This is quite serious. This is a lot of consumers who felt put out and stressed because they are running to catch international flights and so on.' And there seemed no reason for it. This is a prime area of consumer interest. My question to you is whether you have a watchful eye or watching brief on behaviour where there is essentially a duopoly on the main routes.

Mr Cassidy—We can certainly take it on board and have another look at the airline scheduling. I suppose the issue we have is that, in terms of the act, if we were to take legislative action we would need to be able to show that the airlines were scheduling flights where they were not able to have a reasonable expectation that they would be able to take off on time. Quite often, with airlines being what they are, delays ripple through the system. Once one flight is late, that makes another one late, and so it goes on. But certainly we can have another look at the scheduling of flights by the airlines if it looks like on an ex ante basis they are scheduling flights or adopting practices which mean that almost inevitably at least some flights are going to be late.

Senator MURRAY—If you do that, you might like to look at the captains' reports. I do not want to dob in our captain, but since he made the announcement to 150 people on the plane it is not exactly a state secret. He complained about what is essentially monopolistic behaviour or anticompetitive behaviour in the sense that the company, the monopolist that runs the airport, said they were doing this, that and the other and it is not uncommon that the company does this, that and the other. It would seem to me that there are practices which are worth you having a look at. That is all I have.

Senator CONROY—And it would be remiss of the committee not to sing you happy birthday, Mr Samuel.

Mr Samuel—Thank you very much.

Senator CONROY—Our apologies for holding you up. I am sure you would much rather be doing anything else, including getting your teeth pulled, than sitting here.

Mr Samuel—There is nothing more pleasurable than having a discussion with you, Senator.

Senator CONROY—What is the penalty for misleading the parliament? There are some actual serious issues about misleading the parliament that I think you are just going to encounter, Mr Samuel. If you are not careful, we will have to actually really sing to you, and that would be the topper for the night. I want to move on to a press release that is not yet up on your site as is neither the report that attaches to it. It goes back to the questions I almost started out with at the beginning about having the ACCC suddenly produce information within days of a Senate estimates hearings. The doozey today is that your two most significant reports in this sector are released at 5.30, probably when you were already hoping to be gone, concerning competitive safeguards and prices paid for telecommunications. But certainly they were released while the process was still going on. The good news is that the minister appears to have had a copy of the report and was able to get her press release out within 20 minutes of your press release going out. But we only received it very late this afternoon and have no copy of the report. Do you often release reports of this significance at five o'clock in the afternoon?

Mr Cassidy—But we did not release it. We report to the government and the government releases the report.

Senator CONROY—Even your press release? The government releases your press release?

Mr Cassidy—The press release goes out when the report goes out. There is not much point it going out beforehand.

Mr Cosgrave—As I understand it, the report was tabled in the House today.

Senator CONROY—While we were holding this meeting.

Mr Samuel—It is not our call. It is not our timing.

Senator CONROY—When was it supplied to the government?

Mr Cosgrave—On 3 March.

Senator CONROY—So we will wait until the Senate estimates hearing is actually on, Minister?

Senator Minchin—I just got my copy in my in-tray today.

Senator CONROY—You have done very well. You have done better than me.

Senator LUNDY—You have done better than the rest of us.

Senator CONROY—I am sure it will have turned up in my office by now. Do you think it is satisfactory to release these sorts of reports and embarrass the commission like this? I am sure they were more than willing to take questions on them today?

Senator Minchin—I do not know whether they are embarrassed or not. I am happy to take on notice your question as to why it took until now to release it. But I have no knowledge of that matter.

Senator CONROY—Again, you might want to chat with another minister's office about their efficiency compared to your own and give them some counselling. I will move on to some of the issues that we were talking about when I finished up. How many third line forcing notifications have there been in this six months compared to previously?

Mr Gregson—I do not have precise figures on the number in the last six months. I can advise you we receive differing numbers each year, roughly around 400 a year. I think we have received perhaps a slight increase in the last six months.

Senator CONROY—A slight increase, you think?

Mr Gregson—I would think so. I do not have those precise figures, but I could certainly take that on board.

Senator CONROY—As you would be aware, the superannuation choice regime is coming into place. It officially starts on 1 July. Are you conscious of any third line forcing issues around the superannuation choice regime?

Mr Gregson—I am not aware of any issues arising from that. We certainly have not received any requests or approaches on that issue.

Senator CONROY—Or you could not yet because the regime has not come into place?

Mr Gregson—It is not uncommon, though, for parties to approach us in advance to talk about issues. I am certainly not aware of those issues.

Senator CONROY—You are not?

Mr Gregson—No.

Senator CONROY—Consider yourself approached. Does anyone else know anything about superannuation choice?

ACTING CHAIR—There are hundreds of examples.

Senator CONROY—I am sure you and I could reel off a hundred. I was just hoping the ACCC had heard of the potential. So no small business groups have expressed concern at this stage?

Mr Gregson—Certainly in the context of third line forcing notifications, I am not aware of that being an issue.

Senator CONROY—How many third line forcing notifications have been knocked back in the last six months compared to previously?

Mr Gregson—There have been none.

Senator CONROY—I want to talk about bank mergers. Do you think there is scope for mergers between the major retail banks?

Mr Samuel—I have not even thought about the matter. It would not come before us, of course, until the four-pillars policy was overridden or changed by the Treasurer. Before a bank merger could come to us, you would need to deal with the provisions of the Bank Shareholdings Act. I am not aware that we have given it any consideration of recent times.

Mr Cassidy—We have not had occasion, really, to look at bank mergers since the Westpac-Bank of Melbourne and Commonwealth Bank-Colonial mergers.

Senator CONROY—Do you think any such mergers could occur without substantially lessening competition?

Mr Samuel—To give any view at all would be so superficial as to I think be of little value. I just do not think we have considered the matter of recent times, so we cannot give you an answer.

Senator CONROY—Three wise monkeys over here—hear no evil, see no evil. We note some recent comments by you about the respective ACCC-ASIC roles in relation to consumer protection in the financial sector. How is the regime going? Are there any changes to try to clear up blurred lines between the regulators?

Mr Samuel—I think the last time we commented, we commented upon the memorandum of understanding that exists between the Australian Securities and Investment Commission and us. I indicated at that time that the process of collaboration and cooperation was working well. I would have to say to you that I think it is working better as we get used to the issues that might arise between us. We are getting a clearer definition or a clearer understanding of the respective jurisdictions identified by the legislation—that is, the breakout between financial services and non-financial services. There will always be an opportunity for some of the smarter operators in the field, particularly some of the fraudsters, to try to gain from the regulatory processes—that is, gain from the fact that financial services are not within the jurisdiction of the ACCC and non-financial services are not within the jurisdiction of ASIC—but I think it is appropriate to focus on the two regulatory bodies. We ourselves are focusing on that ability to cooperate and collaborate to ensure that the fraudsters do not gain any advantage by that process.

Senator CONROY—Can you give us an update on the ACCC's role in relation to the payment system. Do you support the way the RBA has sought to reduce interchange fees and deal with credit cards and EFTPOS et cetera?

Mr Gregson—The commission has had some role in relation to payment systems reform, particularly in relation to the application for authorisation regarding EFTPOS. That has pretty much moved on. Certainly the majority of issues are now with the Reserve Bank.

Senator CONROY—Under the RBA standards, are the payments made on interchange systems between financial service providers for credit card and EFTPOS services based on the marginal cost of providing these services?

Mr Gregson—I do not have information on that. Certainly one of my colleagues may. But I am not familiar with that issue to the extent that I can help you tonight.

Senator CONROY—I was just wondering if you had considered how a regulator would proceed to implement a marginal cost pricing model. You guys have had some experience in trying to do this in other fields.

Mr Gregson—I am certainly not in a position to comment.

Mr Samuel—I think the proper inquiries ought to be directed to the Reserve Bank.

Senator CONROY—The new energy regulator is up and running?

Mr Samuel—Not formally, no. As we understand it, it is scheduled to commence on 1 July.

Senator CONROY—How is it fitting within your framework? You must be having talks with them to make sure it all slots in?

Mr Samuel—Yes. Of course, the chairman of the regulator is on board, having been formally appointed, Mr Steve Edwell. He has taken up his position in his office, which is located within the same building but on a separate floor of the Melbourne office of the ACCC. A CEO has been appointed, Ms Michelle Groves. Two other members of the AER have yet to be formally appointed, but we anticipate that that will occur within the next couple of weeks. The AER personnel—many have come across from the electricity branch of the ACCC while others have come across from NECA in Adelaide—all had the opportunity to meet with other members of the AER, who of course come from the regulation of the gas industry. They all had an opportunity to meet last weekend to start to focus now on the future work of the AER. Perhaps Mr Dimasi can fill you in on some of that.

Mr Dimasi—As Mr Samuel said, the AEC, which was constituted through an amendment to the Trade Practices Act, is up and running. It gets many of its functions when the states approve the rules. They need to be gazetted in the South Australian parliament. That is all due to happen by 1 July. We already have a significant complement of staff ready to go. The initial function of the AER will involve the work that was done by the ACCC in regulating the transmission networks in electricity. It will also take over the functions that were done by NECA in respect of monitoring and enforcing the electricity rules, or the code as it was previously known. It is due to take over the gas transmission functions some time in 2006. By the end of 2006, it is scheduled to take on electricity and gas distribution and retail regulation, other than retail pricing, from the state regulators. So it will be progressively up and running over the next couple of years.

Senator CONROY—Mr Samuel, you often mention the ACCC is looking at around 30 serious cartel cases.

Mr Samuel—That is about the number at the moment. They are serious investigations, yes.

Senator CONROY—Could you tell us what sectors—small or big business, international or domestic—and where the investigations are at?

Mr Samuel—It has been our practice not to identify the particular industry sectors, but I might be able to give you an indication. I do not have a break-up here. We have the number of international cases. Of the in-depth investigations at the moment, seven have an international aspect. I said 30. There are 31, and 24 are domestic only.

Mr Cassidy—When you talk to our colleague agencies overseas about cartels, they often refer to the three Cs of construction, concrete and chemicals. If you use reasonably broad definitions for those, I would have to say a number of the cartels that we are investigating would probably fall within those broad sectors.

Senator CONROY—Senator Brandis may have asked you a question along these lines a little earlier. In relation to section 46, the misuse of market power, how many cases do you have in court? How many are you investigating? Will any of them end up in court?

Mr Cassidy—We have three in court. One of those is basically the Safeway case, which has been decided and is now awaiting a penalty hearing. So it is a question of how you count that. But, if you count that as still being before the courts, we have three in court. As I mentioned earlier, we have 11 section 46 cases under advanced investigation and six under preliminary investigation. How many of those will end up in court is difficult to say because none of them has yet been put to our external counsel for their advice on how strong or otherwise the case is. I did make the point earlier that we are finding in the period since the Boral High Court decision that, despite a number of investigations being commenced, none of them have actually progressed to court because, when we get to external counsel, the advice is that with section 46 as it currently stands we would struggle to prove the case in court.

Senator CONROY—What does the ACCC do generally for victims of, as a start, consumer protection cases? Do you take representative action in both consumer protection and competition cases?

Mr Cassidy—Sometimes we do. We really look at it on a case-by-case basis. Representative actions are not easy, particularly where you have a reasonable number of people who have been adversely affected by the conduct. As we have mentioned on previous occasions, we struggle a bit at the moment because of the situation with being able to obtain court orders for refunds, which is now very difficult since the Medibank Private case, which went to the High Court. As I say, we are taking some representative actions, but representative actions are not easy. As I say, without being able to obtain refunds through the courts, representative action is about the only vehicle we have for directly obtaining redress through the courts.

Senator CONROY—In the case of the leniency policy over competition, does that hamper or even stop damages actions by either the ACCC or private litigants if you give someone a first-in-the-door, as you say?

Mr Cassidy—No, it does not. Leniency is only about immunity or partial immunity from action by us. It in no way impedes third party rights of action.

Senator CONROY—Are you still able to take a representative action in these cases?

Mr Cassidy—No. Because the immunity that we grant is immunity from action by us.

Senator CONROY—Even when you are representing consumers?

Mr Cassidy—In essence, that is right, in the sense that it is immunity.

Senator CONROY—It seems a slightly different role. One is the regulator enforcing the law and the other is helping small battlers that do not have resources themselves to get a case up and help with them. It just seems that there are two different categories.

Mr Cassidy—It is a judgment call. But it is a common feature of most leniency policies, either in word or in practice, that the immunity is not only, if you like, immunity from seeking penalty but also immunity from seeking reimbursement. The reason for that is that quite often the potential reimbursement claim could be almost as significant as the penalty.

Senator CONROY—But it is okay for you to give away, if you like, your punishment money. It is not okay for you to give away the rights of people to seek reimbursement.

Mr Samuel—We do not give away their rights.

Mr Cassidy—No, we are not giving away their rights. We are giving away, if you like, our right to seek it on their behalf.

Senator CONROY—But you have a role to take action on behalf of these people.

Mr Cassidy—Indeed. But we also have a role to break cartels. Our judgment is that the leniency policy offering full immunity is a much more effective weapon for breaking cartels and, therefore, preventing widespread harm to quite a number of consumers if we do not actually leave open the possibility of us seeking some form of reimbursement.

Senator CONROY—How is Amcor going?

Mr Samuel—No comment. That is a brief way of saying that it is not practice to comment upon matters that we may or may not be investigating at any point in time.

Senator CONROY—I understood entirely what you meant, Mr Samuel, don't worry. I took no offence, I assure you. How can you take offence from a bloke on his birthday. I want to return briefly—I am finishing—to this press release from the minister's office. Is it the Treasurer or Senator Coonan that did this to us?

Mr Dimasi—The minister for communications.

Senator CONROY—She has done well. She has managed to go to Peru, release a report and do her own press release. What a remarkable effort that is. Mr Cosgrave, I noted that Mr Willett indicates that the competitive safeguards report revealed that competition in the telecommunications sector had provided positive outcomes over the past seven years but that the positive effects slowed in 2003-04, continuing a trend observed for 2002-03. Does that mean it is becoming less competitive out there?

Mr Cosgrave—There were two reports tabled. One is an assessment of competition. One relates to prices paid by consumers.

Senator CONROY—I was going to come to that.

Mr Cosgrave—One is inevitably influenced by the other in the sense, of course, that your assessment around competition relates in part to what is happening to end users. We identified a trend in last year's report of a slowing of reductions in prices paid by consumers, and that has been ongoing.

Senator CONROY—That means it is less competitive?

Mr Cosgrave—That means, yes, that our concerns about competition continue.

Mr Dimasi—I am not sure that it would be quite correct to conclude that it is less competitive. What the reports found was that—

Senator CONROY—That it is slow?

Mr Dimasi—No. The price decrease has slowed. But overall—

Senator CONROY—Sorry, but I am talking about two different things.

Mr Dimasi—Progress is slowing, but—

Senator CONROY—No. The competitive safeguards report states that positive effects slowed. The second report, which is on the prices paid, indicated average prices paid by residential and small business customers rose by 1.4 per cent and 3.1 per cent. In recent years, average prices paid by residential and small business consumers have been going up while the prices paid by large business consumers are going down. So they are two different reports. I am trying to get an understanding of the words ‘positive effects’. I presume this refers to the level of competition in the market.

Mr Dimasi—In looking at the level of competition in the market, you have to look at the effect, and that is what is happening to prices. You are right: there were different changes in prices in different sectors of the market, as you pointed out. Nevertheless, it is still true that overall prices paid by telecommunications consumers decreased in the year of the report overall.

Senator CONROY—An aggregate in that particular context, Mr Dimasi, is meaningless.

Mr Cassidy—Perhaps you could restate the question, Senator. If you are talking about competition in the market overall—

Senator CONROY—Mr Dimasi is trying to suggest that the aggregates across the small retail and large—

Mr Cassidy—But your question is an aggregate question. You asked a question about the competition in the market overall, I thought.

Senator CONROY—No. I am talking about the positive effects. Have you had a chance to see the press release?

Mr Dimasi—I have seen the report. I have not seen the press release, no.

Senator CONROY—It goes on to show that there are bottlenecks. I am not trying to catch anyone out here. The problem is that the slowing—if I could paraphrase it—of the competitive effect is because of the bottlenecks. That is all I am trying to get to.

Mr Samuel—I think where we had a confusion was that you suggested that the market might be less competitive whereas I do not think that is being suggested. It has not been suggested it is less competitive. But the progress towards a more competitive market has slowed. There is a difference.

Senator CONROY—It is a hair-splitting difference, but I will accept your definition.

Senator Minchin—Just on this report—

Senator CONROY—I am glad you have a copy of it, Senator Minchin. I am pleased to see it has found you.

Senator Minchin—The very helpful introductory letter from the chairman notes that the obligation on the government is to table this report within 15 sitting days of receipt, which is

sort of four sitting weeks. I suspect that it is no more than four sitting weeks since the date of that receipt. So I am sure the tabling does comply with the requirements of the act.

Senator CONROY—The point I would probably make in return, Mr Samuel, is that for positive effects to be slowing it must mean there is a change in the underlying market circumstance. I put to you it probably means the competitive drive and juices are not there. I describe that as a lessening of competition. I accept your technical definition.

Mr Samuel—I think we are talking the same.

Senator CONROY—I think we are going in the same direction. As I said, I am not trying to put words in your mouth. I wanted to come to questions around these bottlenecks which you describe. The report notes encouraging the move towards facilities for basic competition is going to overcome the difficulties posed by Telstra's dominance in the customer access network and the fixed line market. Are you able to take us through that? Unfortunately, I do not have the report. I only have a few lines in a press release.

Mr Cosgrave—I think what we are pointing to is that many of the benefits to date have been in the retail sectors of the market. The point we have made, which we have made consistently, is that for further advances to be made we would expect that there will be a need for either greater facilities or quasi facilities based competition. That is through people either rolling out their own infrastructure or using Telstra's infrastructure—predominantly it is a local access network—to roll out their own services.

Senator CONROY—The press release goes on to say:

> Generally, however, competition on this basis has only allowed alternative providers in a number of markets to compete effectively at the retail level.

I think that is the point you have just made. It continues:

> Given this, further market advances, in terms of higher quality and more keenly priced services, will only be likely if there is an increase in competition further up the value chain in facilities or quasi-facilities-based markets.

I think that is what you were describing in terms of the rollouts and things like that.

Mr Cosgrave—Yes, that is right.

Senator CONROY—Are you surprised to see small business customers getting increasing prices and residential customers getting an increase in prices?

Senator LUNDY—It is actually quite outrageous that in an environment where competition is supposed to be in play that has occurred.

Senator CONROY—Did it actually catch you by surprise?

Mr Cosgrave—I think the answer is no, because it is the continuation of a trend from the previous year. Indeed, in part, it is what militated our recommendation in relation to price caps and the reduction of business prices.

Senator CONROY—Which Senator Minchin opposes totally. Senator Minchin, you were reading the helpful chairman's letter. I invite you to read the rest of it, which goes on to point out that residential and small business prices for phones are going up and that it is a continuation of last year. In recent years, average prices paid by residential and small business

consumers have been going up while the prices paid by larger business consumers have been falling. Does that surprise you, given all that competition you say is out there in the market for Telstra?

Senator Minchin—I have only just received this report myself. I am not here representing the minister for communications.

Senator LUNDY—What else could you say?

Senator Minchin—I am here representing the Treasurer. I am also not here as the Minister for Finance and Administration, so I do not want to get into a dialogue with you in this forum about the extent of competition and its impacts in the telecommunications industry. I am happy to do that in another forum.

ACTING CHAIR—Next question.

Senator CONROY—I give up at that point. I am defeated by Senator Minchin's withering logic.

ACTING CHAIR—Senator Lundy.

Senator LUNDY—Thank you.

Senator CONROY—You might have all night; I don't.

Senator LUNDY—Just pursuing this point about the rise in cost for the average consumer and small business and so forth, can you remind the committee what your report found last year in terms of price rises and the continuing trend that you have just referred to?

Mr Cosgrave—I am not sure I can point you to exact numbers tonight. But, as I say, it is a continuation of a trend that was observed last year that indicated that reductions, where they occurred, were occurring unevenly between residential and small business and what is styled as other business in the report.

Senator LUNDY—Could you take on notice to match the figures referred to in this press release with any percentages that were identified in last year's report?

Mr Cosgrave—Certainly. We are happy to take that on notice. I think it is done in the report itself.

Senator LUNDY—If we had a copy and we had a chance to look at it, I could have framed my question differently. I would also like to go back to earlier comments. I was listening with interest when Senator Conroy was asking his previous questions. In particular, a couple of inconsistencies struck me. It seems one of the reasons the ACCC did not go to court was that the court might have interpreted that the substantial lessening of competition test was not met because Telstra changed its conduct after a competition notice was issued. Later or before—I cannot remember—you also said there was no point going to court to establish any legal precedent because there was nothing to be proven. They strike me as being slightly contradictory. I put to you that it would be very important for the ACCC to establish the court's attitude to the competition test in the first instance on matters like this because I suppose, if it failed, at least the parliament would have the opportunity to try and fix the legislation or sharpen up that competition test. So it seems to me a fundamental weakness that you did not push it to the test.

Mr Samuel—I think there were two separate issues that we were addressing before. The first related to the question raised in our legal advice as to whether short-term transitory anticompetitive conduct would amount to something that would constitute a breach of the provisions of part XI in the context of providing an effect of substantially lessening competition. So the question that was raised was whether the transitory nature of the first 10 days, which were on any analysis, in our view, clear evidence of anticompetitive conduct, would have amounted to a substantial lessening of competition. But the more significant factor, I think, that was taken into account by the commission, after considering all the legal advice, was the combination of factors associated with the difficulties with imputation testing and the level of evidence that could be adduced from market participants that could be subjected to rigorous examination and whether that would provide the necessary evidence to the court to find a breach of the anticompetitive conduct provisions. So, to take that in its totality, the transitory issue, though, is but one small element of what we are dealing with.

I made the comment that if we had gone to court it would not necessarily have created a precedent for future determination in relation to these matters. Leave aside the issue of whether a transitory period of anticompetitive conduct can amount to having the effect of substantially lessening competition in the market. Put that one aside at the moment. If we look at the issues of evidence and imputation testing, each case will depend on the facts and circumstances. Each pricing structure and each scale of pricing, for example, will depend upon the facts and circumstances. The question I was raising is whether if this matter had gone to court it would have provided any valuable precedent for a different set of circumstances, a different set of pricing scales and a different set of pricing conduct that we might have had to deal with on some future occasion.

Senator LUNDY—Two points arise from that. Surely the test for a substantial lessening of competition is something that does not just relate to telecommunications. It is a general provision of the act. It is yet to be tested in that way. The ACCC's handling of this demonstrates with respect to that test, going back to arguably the transitory nature of the pricing, that, by virtue of Telstra in this case responding to the competition notice, that in your interpretation renders the proving of substantial lessening of competition too difficult to try and take on in the courts, too difficult to prove in the courts.

Mr Samuel—I think that is going too far.

Senator LUNDY—That is actually a generic pattern of behaviour that could apply not just to a telco but to everything else under the act. So, by not even testing it in this environment where arguably you probably had the best case scenario, what you have now done is fundamentally remove any perception of threat that the substantial lessening of competition test would otherwise apply under the act. So it has weakened the whole act.

Mr Samuel—I think that is going too far, if I might say so. We are labouring under a difficulty in the context of this forum in endeavouring to discuss the intricacies of legal advice which—

Senator LUNDY—I appreciate that, and I do not want to. I was just keen to try and resolve what I interpreted as a contradiction.

Mr Samuel—Let me just summarise it in this form. The issues that the commission takes into account in relation to any matter of anticompetitive conduct will be the issues of evidence that can be adduced to prove the particular case. There will be the economic factors of the economic analysis that we will undertake to determine whether or not there has been, or is likely to be, a substantial lessening of competition in a marketplace. In relation to telecommunications matters, I think we have discussed in some detail before that that would involve the economic analysis of imputation testing and the market participant evidence that we can gather together and the rigour with which that market participant evidence can be put to the court and can be subjected to examination or cross-examination by other parties.

I do not think we ought to draw any conclusions from what I have put to you there. To draw those conclusions might be to read some wrong messages into the legal advice that we obtained. As I say, we are under some difficulty in our ability to discuss that matter in this open forum because of the issues we talked about before.

Senator LUNDY—As I said, two reasons were described for why it was not proceeded with.

Mr Samuel—I would need to go back on what we actually said. Let me emphasise that we have endeavoured in the discussion we have had today on this subject to try and avoid discussing the specifics of the particular matter that we had at hand because I think some incorrect conclusions could be drawn about the legal advice that we received and about our reasons for proceeding down the course that we particularly followed in this matter.

Senator LUNDY—I am just working from your comments earlier. Just going to this report released today and having reviewed, given the numerous references to it, your speech on competition with compassion—

Mr Samuel—Actually, I do not think we have referred to that speech.

Senator LUNDY—I am sure you did because, otherwise, I would not have gone to find it. It was the Di Yerbury lecture.

Mr Samuel—No. That was different. That had nothing to do with this. I think you have gone to the speech you might have wanted, but that is not the one I was referring to. The one I was referring to was the Henry Mayer lecture at the University of Queensland about a week and a half or 10 days ago.

Senator LUNDY—I will have to read another one of your speeches. Anyway, I could not help being struck by the irony, because the message in your speech was that you were saying to big business, ‘You need to be considerate of the needs of the community,’ yet the report today shows that big business is benefiting out of the current regime in telecommunications competition. Consumers, which is certainly part of my responsibility, seem to be the losing constituency in the trends and developments within telecommunications. The ACCC seems to be not powerless to stop it but not able to function with the full power of the Trade Practices Act to effectively protect the interests of consumers not necessarily using consumer protection measures specifically but competition policy to enhance those outcomes for consumers.

I guess I am looking for a general comment about the trend contained in that report. Like Senator Conroy, I am looking forward to reading it in detail. I think it is appropriate for you to

respond to this quite extraordinary outcome where the prices for the average punter in telecommunications services are going up. They should be coming down. They should have been coming down consistently for many years.

Mr Dimasi—I appreciate you have not yet seen the report. When you do, can I refer you to table 1(a) in the report on price changes. Whilst we have identified that prices for residential consumers have gone up in this report, nevertheless there has been a decline since we have been measuring it from 1997 of 11.3 per cent. So there has been a 1.4 per cent increase to 2003-04, which is when the report does measure.

Senator LUNDY—And your point is?

Mr Dimasi—My point is that I would not be quite as pessimistic as your reading of it, in that there have been still significant benefits to consumers, if you take the longer term trend. But that is not to take away the point that we have seen an upturn. I will go further and identify the source of that upturn, which has come fundamentally from the basic access, the rebalancing. There are issues there that we have certainly been dealing with. But if you look at a range of other services, local calls, international calls and so on—bear in mind that we are talking about the fixed line services, not mobiles, because there the story is a little more positive—there have been decreases to the residential customers in this year for those services as well. I am not taking away from the basic message which was in the chairman's covering letter. But I guess the picture is somewhat more mixed than the way perhaps you had painted it from that very preliminary look at the press release and the comment that came through.

Senator LUNDY—Forgive me for taking into account the interests of perhaps those in our society who cannot afford the more expensive mobile phone services and who do still rely on fixed line services. It is those people whose telecommunications expenses are now rising. Could I also ask, since you are so keen to defend these figures, that—

Mr Dimasi—I am just pointing them out. They are just the figures that have come through.

Senator LUNDY—The PSDN services and the fixed line services represent one of the most obvious and glaring remnants of Telstra's monopoly in the Australian telecommunications market. Would you care to comment on that feature of the structure in the telecommunications market and the corresponding fact that they are the prices that have increased?

Mr Dimasi—We have made no secret that access to the local loop still remains the key bottleneck service. So that is consistent with the messages we have put out on this issue constantly. We are currently dealing with that issue through the unbundled local loop service, which, as you know, has been declared. We are going through a process with Telstra where they have an undertaking before us. You will remember, I am sure, that we rejected the previous undertaking. We considered it was inadequate. It is a very important mechanism for providing this quasi facilities based competition, which could provide alternatives to consumers across the board. That provides a very important response in dealing with this issue overall. We currently have an undertaking from Telstra in front of us which we are in the process of assessing. I guess we have to go through that process.

Senator LUNDY—How much closer are you to declaring on the fibre between RIM units and the exchanges?

Mr Cosgrave—That is not currently a subject that we have under review. If it were going to come about, it would come about as a consequence of a review of the unconditional local loop which, as I think sits behind your question, is copper specific. That is not due for review before next year. I would add two things to Mr Dimasi's comments. We have also within the last month commenced a review around wholesale local calls and are examining whether there is a need for a wholesale line rental service. So that is a current inquiry of the commission.

The second comment in relation to the trends you note and that Mr Dimasi has pointed out in relation to basic access is that that, of course, is a consequence of a rebalancing exercise being undertaken by Telstra. The commission has said in its advice to the minister for communications in relation to price controls that it is of the view that that process is complete. The other point to be made about that is that one of the reasons the commission has recognised a need for rebalancing was fundamentally around alternative investment in infrastructure. If other companies were able to purchase undervalued local access, in effect, that would weaken their incentives to invest in infrastructure. I think that is consistent with the message that we have put in the first part of the report that says we think the benefits we have seen are largely from retail competition. We think that the evidence around price reduction supports that. For that to deepen and move across product enhancement and performance as well as price competition, we need to see either investment in alternative infrastructure or alternatively, as Mr Dimasi has indicated, further quasi facilities based competition by people using the unconditional local loop to provide competition, for instance, on speed in broadband instead of just price.

Senator LUNDY—On that issue of price for broadband services and the efforts consumers go to to try to access a broadband service, to what degree can the ACCC intervene where technology is knowingly being withheld by any telecommunications carrier in a given market? By knowingly withheld, I mean where they can be demonstrated to have rolled out new technologies perhaps in other regional centres but have not even made the effort to market test those areas or have just made a determination not to make the investment. Do you have a role there?

Mr Cosgrave—I struggle a little with the speculative nature of the question.

Senator LUNDY—It is the environment that presupposes that that investment is only going to take place when there is competitive pressure, when the technologies are available and the market at least appears to be of a size and shape that would service some demand. Do you have a role at all? I am asking you on behalf of the people who come to me and say, 'I want to get broadband; why isn't anyone investing in my area?' My response is, 'Well, you have to wait until you get some competition and someone else comes and wants to invest and then you will provoke a response from the big carriers,' et cetera. We all know the pattern, but what can you do to perhaps drive some of that interest in a given market upfront?

Mr Dimasi—The only effect we could have, I think, would be indirectly through the declaration of the relevant services such as ULLS, which provides opportunities for people. But, beyond that, I do not believe we have a direct role. ACA might have a direct role in the standards and the like, but again I would probably struggle to see that it might be relevant in this case.

Mr Samuel—I think our role would tend to be more reactive. We, of course, can take steps if there is evidence of impediments being placed in the way of those who might want to roll out infrastructure in certain areas. We are talking about selective DSLAM roll-out. Let us summarise it. If we saw evidence of impediments being placed in the way of competitive carriers wanting to roll out DSLAMs, particularly in regional Australia, as the case may be, clearly we could take action in relation to that matter. We could examine it—but I am not sure what action we could actually take—in a situation where consistent initiatives were being taken by competitive carriers to, for example, roll out DSLAMs in certain areas, impediments were being placed in the way and then immediately Telstra was stepping in and rolling out its own DSLAM network in that area. That is one of the things we could do. But they tend to be more reactive than proactive.

Senator LUNDY—What about from a consumer perspective as opposed to a competition policy and more reactive perspective?

Mr Samuel—I am not sure we have recognised that there is a significant difference. Competition is promoted or protected, as the case may be, for the welfare of consumers. We would see it as all being directed to that rather than for competition as a means in itself.

Senator LUNDY—So if there are markets where there is no competition—there is one carrier and it is a residual monopoly; there does not seem to be any competitive tension and hence no progress—there is absolutely no role for the ACCC?

Mr Samuel—That is an issue that raises its head in Australia in a whole range of markets, let alone telecommunications, particularly as we move into some of the more remote regional areas. It is a matter of government policy.

Senator LUNDY—Thanks. I have some questions relating to the shifting of focus by the ACCC on enforcement activities away from what you described previously, Mr Samuel, as small consumer protection matters to issues of significant national importance and of significant widespread consumer detriment. I think I am quoting from your opening statement in the last round of Senate estimates. How does the ACCC classify an issue of significant national importance and of significant widespread consumer detriment?

Mr Samuel—I think that that is an attempt to describe in about 10 words what is a broad direction that we follow in our consideration of consumer protection matters. What we have done very deliberately over the past 18 months or so is to build up and to develop our relationships with state consumer affairs bodies and state offices of fair trading. That recognises that they believe and we believe that they have a significant role to play in what might be described as more local consumer affairs matters whereas the ACCC's role will tend to focus on matters that are of a somewhat wider geographic reach, a more national geographic reach, or that might have widespread consumer detriment.

Let me give an example I have given on previous occasions. Let me perhaps outline it here. In the real estate area, some of the states have passed separate legislation dealing with the actions of real estate agents. Local consumer affairs bodies will take action in relation to breaches of that legislation by local real estate agents where it occurs. We have taken a more national approach and have worked with the Real Estate Institute of Australia in developing new codes of conduct that reflect the concerns of the ACCC and the potential for real estate

agents to engage in conduct that might breach the provisions of section 52 of the Trade Practices Act. So we have dealt with it on a more global—that is, an Australian—sense whereas the state consumer affairs bodies will have probably been involved in more specific actions dealing with local agents in their local jurisdiction and dealing with their local laws. That tends to be the difference.

In relation to real estate agents, I think with our significant campaign dealing with the real estate industry, which commenced in September 2003, we actually only instituted one court action, which was against Garry Peer and Associates, which I referred to in the opening statement. In conjunction with state consumer affairs bodies and the offices of fair trading, I think we have managed to achieve a significant change in behaviour on the part of the real estate industry and the real estate agents section of the industry for our work with the Real Estate Institute.

Senator LUNDY—What are the small consumer protection matters that you have been referring to the states? Can you give examples of what you are flicking across?

Ms Webb—They tend to be matters that might be fairly local, such as where a person is in dispute with a local shop owner but it is just a one-off business rather than a national chain. There is the real estate matter that Mr Samuel referred to, where it was really a matter of one real estate agent’s conduct. They are the sort of matters.

Senator LUNDY—I have that one. What are the others?

Ms Webb—They vary quite widely. It would normally be misleading and deceptive conduct that perhaps is being undertaken by a sole trader or someone who is operating in a local area and is perhaps affecting only consumers in that local area.

Mr Samuel—And dealings with the professions as well. For example, if there was a concern with the behaviour of a lawyer or solicitor, that might well be dealt with by the local regulatory body, be it the local legal professional practice board—

Senator LUNDY—So do you have a list that you use internally of things that you want to flick on to the states?

Ms Webb—No. It is very much based on the nature of the complaint and the circumstances of the particular case. So the fair trading acts mirror a lot of the Trade Practices Act.

Senator LUNDY—I know. So you have a bit of a choice, haven’t you?

Ms Webb—We have a bit of a choice there. Therefore, we are really looking at the circumstances of the particular case and whether they can offer a more effective, quick remedy, perhaps.

Senator LUNDY—‘Quick’ is probably the key term.

Mr Samuel—What it will also reflect is the nature of the developing relationship between our local regional office and the local office of fair trading, the ability of that local office of fair trading to deal with the matter in terms of its own resources and its willingness to deal with the matter. It is a matter that is developing as an iterative process.

Senator LUNDY—Could I ask you about those relationships. How has the ACCC gone about developing that relationship with the states and the process of collaboration with the

states on these day-to-day issues? I presume you have met with officers and come to an arrangement. Can you describe what those arrangements are in detail.

Ms Webb—There are some quite formal arrangements. There is a standing committee of consumer affairs officials, which meets twice a year. That has a working party of the fair trading office’s advisory committee that also meets twice a year in person but has a monthly phone hook-up. So they are the sorts of formal structures that are in place. There are various working groups and working parties operating with representatives of all the state fair trading offices and the ACCC into various consumer issues.

Senator LUNDY—What are the working parties under SCOCA?

Ms Webb—There is one on false billing at the moment and one on price advertising.

Mr Antich—It cascades down from the Ministerial Council on Consumer Affairs.

Senator LUNDY—Yes, I know that.

Mr Antich—From that, are you asking how many working parties there are under SCOCA?

Senator LUNDY—Under SCOCA.

Mr Antich—There are quite a few. FTOAC is one of them. It is a standing working party underneath that. That is the fair trading one that Ms Webb is referring to. But there are working parties on issues such as unfair contracts and property investment advisers, to name two at least. I can give you the rest on notice if you require that.

Senator LUNDY—I certainly do.

Mr Antich—That is fine.

Senator LUNDY—And the working groups under the Ministerial Council on Consumer Affairs.

Mr Antich—The way it works is you generally have the ministerial council and SCOCA would be the consumer affairs commissioners. We are represented through the deputy chair, Louise Sylvan. They do not, if you like, head up working parties themselves. Beneath SCOCA there are working parties usually made up of officials that will report back to SCOCA at the SCOCA meetings.

Senator LUNDY—So is it those working parties that determine the way in which the ACCC and the offices of fair trading or consumer affairs communicate these issues?

Ms Webb—That is the formal mechanism. That ensures that regular contact happens because there are the monthly hook-ups. But each of the ACCC’s regional offices has a very close relationship with its local fair trading office. The typical pattern would be for them to have regular liaison meetings but also, I would expect, weekly contact on specific issues that come up. That is a very close ongoing working relationship that deals with specific matters.

Senator LUNDY—So what does that involve day to day? Does it involve the ACCC receiving a complaint, having a look at it, writing a brief and then passing it on to the Office of Fair Trading?

Ms Webb—We receive quite a lot of our initial complaints via our Infocentre, where people are ringing us. Our call centre has a general sort of process that if it identified straightaway that the issue the person was raising was one more suitable for the fair trading offices it might advise the caller at that point to contact Fair Trading, and it would supply the contact details.

Senator LUNDY—So you do not even process the complaint?

Ms Webb—That might be one that is very obvious on the face of it that would be more appropriate to be dealt with through the fair trading procedures. Other ones that come in may be assessed by the ACCC. We would then contact the Office of Fair Trading first of all to just identify whether they might already be looking at that complaint—often people complain to both bodies—and to identify whether it is one suitable to transfer.

Senator LUNDY—So the answer to the question of whether the ACCC Infocentre passes calls on to the state consumer affairs and fair trading bodies is yes?

Mr Ridgway—My understanding is that we will take more of a step than simply referring individuals to the relevant fair trading agency. We will sometimes contact the fair trading agency ourselves. In addition, the ACCC participates in a national complaints database with the other fair trading agencies. This was launched on 22 April. It is called Auzshare. Currently, there is an increasing volume of consumer protection complaints data that is put into that shared database that various agencies can identify and pick up issues on. In addition to that function, there is an alerts function with Auzshare, where individual agencies such as the ACCC can alert other fair trading agencies to issues to really make sure that the communication between the various agencies is functioning as best it can.

Senator LUNDY—Thank you, Mr Ridgway. How many of the 43,500—that was the number in the 2003-04 annual report—calls on the info database are passed on to the states?

Mr Ridgway—We may have to take that particular question on notice.

Senator LUNDY—If you could take it on notice for the calls for the current financial year to date as well as financial year 2003-04.

Mr Ridgway—Yes.

Senator LUNDY—And what proportion of those calls are passed on in the first instance—that is, the caller is told immediately that the state authority or state consumer affairs body is the better one to lodge their complaint with? Given in many cases both the federal Trade Practices Act and state legislation cover these issues—you have mentioned a number of them already that are subject to the SCOCA working parties—how do you justify making the decision to make those referrals if in fact there is federal jurisdiction for those issues?

Ms Webb—In some cases, even though it is the same legislation, we do not have any jurisdiction because it is a sole trader, not a corporation, involved; therefore, there is no choice but to rely on the state jurisdiction. The states have the small claims courts types of procedures which the ACCC does not have. So sometimes it is more appropriate to refer a person who has essentially a contractual dispute with a particular trader to perhaps try and seek a remedy there that the ACCC would not be able to obtain on their behalf because we cannot take action in relation to people’s contractual disputes. As I say, it might be that a local

trader is conducting, say, a misleading advertising campaign and because the fair trading offices have regional offices throughout the state, they can take some more effective action in relation to someone in a regional area perhaps. It just really does depend on the particular case.

Senator LUNDY—Obviously these new arrangements have evolved at least to a degree over time. Can you pinpoint, I guess, a point in time where this new approach by the ACCC was initiated and the states, perhaps through the ministerial council, were first approached? I am really trying to find out whether it was a direction the ACCC received from the government to take this approach or whether it was your initiative, Mr Samuel, to try to relieve yourself of some of the burden of these consumer issues.

Mr Samuel—No. It is neither. It is an evolving process of increasing cooperation. It reflects, I think, a collective view around SCOCA that this was a desirable way to deal more effectively with consumer affairs matters. It evolved. It certainly was not a direction from government. I think what you got in either the last Senate estimates or the Senate estimates before was a summation of a position that had been evolving over a period of time.

Senator LUNDY—On 22 April this year, Chris Pearce said on behalf of the government:

The increasing importance of interstate and international transactions heightens the need for a consolidated national approach to consumer affairs.

How does that clear statement by the parliamentary secretary sit with the approach taken by the ACCC?

Mr Samuel—I do not think there is any contradiction or conflict. It is totally consistent with the position we are taking. I do not think we should overstate the impact of what is occurring. It is an evolving process of working in closer cooperation—this is an important element of what is involved—with state offices of fair trading and ensuring that we do not have any gaps and that the resources we collectively have between us to do with consumer affairs matters are properly allocated and properly applied to dealing with those matters across the board. There is a limit to what state consumer affairs bodies can deal with and there is a limit to what the ACCC can deal with. This is just a process of a proper allocation of resources to ensure that consumers are protected across the board.

Senator LUNDY—Have you had any discussions about the resource implications of this arrangement with the states?

Mr Samuel—What I can say is that Mr Cassidy and I have met with every Premier throughout the states over the past 12 or 18 months. We have discussed in very open form the issues that we have been discussing here this evening. We have not met any resistance or any suggestion at all that might contradict the approach that is being adopted. In fact, as we have moved around the states and talked at both Premier and Treasurer level, there has been an overwhelming response of support of the degree of cooperation that is now being developed between the ACCC and state offices of fair trading.

Senator LUNDY—This has allowed the ACCC to focus its resources more effectively on the things it wants to take up. Is that correct?

Mr Samuel—It is not a question of focusing on things that we more want to take up. It is rather enabling us to focus our resources on areas where we think we can better utilise the resources to deal with significant harm that is being done to consumers not only in respect of part V of the Trade Practices Act but also, of course, in respect of part IV, where the investigations and the issues can be many times far more complex than other matters we might deal with.

Mr Cassidy—To put this in perspective, there are certain things which only the ACCC can do. Any international consumer protection issue falls to the ACCC, as do any national or cross-border consumer protection issues. The international side in particular has grown quite rapidly. We are in the fortunate position in Australia of having, if you like, the state fair trading agencies that we can, in a sense, share the burden with. A number of our colleague agencies overseas are basically having to make decisions along the lines of not pursuing smaller domestic issues simply because they have to concentrate on the bigger national and international issues. So it is a trend which is not only happening here but happening internationally as well. As I say, we perhaps have the good fortune to have the state fair trading agencies that we can in a sense be sharing and coordinating the overall enforcement task with.

Senator LUNDY—This is a general point. I am not sure if it is best answered by the minister. It strikes me as not necessarily the most efficient way where you have each of the states potentially handling common issues, albeit disconnected, whereas the ACCC has the opportunity to pursue issues as one body and provide advice to the states as it develops. It might be more efficient for you but not necessarily more efficient for the state fair trading bodies.

Mr Cassidy—When we talk about matters with national implications, if we see a trader in this industry in this state which is doing something which looks to be in breach of the act, another trader in the same industry in another state is doing the same thing, we would regard that as a systemic issue. That would be therefore the sort of issue we would pursue rather than leaving two or three or four individual state fair trading offices to be pursuing that same issue.

Senator LUNDY—With all due respect, Mr Cassidy, except when you choose not to. I will come back to that point.

Mr Cassidy—I am trying to explain that we choose what we choose because we are trying to achieve the best outcome for consumers between us and the state fair trading agencies. So it is to maximise the impact which we both have.

Senator LUNDY—To what degree are those choices by the ACCC informed by government policy?

Mr Samuel—It is not an issue of government policy.

Senator LUNDY—Keep going.

Mr Samuel—I think that is it: it is not an issue of government policy. It is a determination we make absolutely independently within the commission.

Mr Cassidy—There is in the act a general power of direction for the government in relation to our enforcement activities on the consumer protection side, which does not relate

to individual cases but which relates to, if you like, general direction. Certainly in my time at the commission, I cannot recall a direction from the government in relation to consumer protection matters.

Senator LUNDY—That is interesting in itself. Can I ask you whether the issue of unfair contracts, not just in telecommunications but other sectors as well, affects the jurisdiction of more than one state.

Mr Samuel—We have discussed this issue on previous hearings.

Senator LUNDY—Would you consider that the consumer detriment is widespread on that issue?

Mr Samuel—I could refer you back to the previous discussion we have had on this very issue.

Senator LUNDY—I would rather you just answered my question.

Mr Samuel—Sure. The issue of unfair contracts has been a matter of some debate within the commission for some time. Of course, it is being debated around SCOCA and the SCOCA table. The view that is taken by the commission on this matter is that unfair contracts or unfair contract terms in some instances need to be and can be dealt with by the unconscionable conduct provisions of the Trade Practices Act. We deal with them. We have put proposals to government, and government has in principle accepted the proposals that, for example, the use of unilateral variation clauses in contracts ought to be the subject of at least prima facie evidence or a prima facie suggestion that that in itself amounts to unconscionable conduct and ought to be taken into account to that extent.

But there are other unfair contract terms where the commission's view is that a proper economic impact analysis needs to be undertaken before a conclusion is reached that they ought to be subject to a prohibition or to provisions of the law that might render contracts void if those terms were to be included. This is an economic debate that we have had throughout the commission over a period of time. The commission has formed a view on that matter. That has guided its position as it has put it to SCOCA and other parties.

Senator LUNDY—I appreciate that.

Proceedings suspended from 9.36 pm to 9.45 pm

Senator LUNDY—I will kick off where I left off with respect to unfair contracts. I note that on 18 May this year the parliamentary secretary Mr Pearce told the *Financial Review* that the federal government had no plans to initiate any legislation, stating:

> The case for intervening in the market to regulate unfair contract terms has not been made. Existing unconscionable conduct provisions of the Trade Practices Act are sufficient to respond to unfair contracts …

Now from what you have said, Mr Samuel, is he just parroting your words, or did it come the other way around, with a ministerial directive to the ACCC to butt out of unfair contracts?

Mr Samuel—No. There has been no ministerial directive at all. This is a matter that has been debated at the commission table since long before Mr Pearce was appointed Parliamentary Secretary to the Treasurer. It was debated in some of the earliest days of my

role as chairman of the commission, I think towards the end of 2003 and early into 2004. It has been the long-held view of the ACCC. It is a matter of policy, though. Those matters of policy are ultimately dealt with by government. The only way in which it came before us was a question of whether or not it was appropriate for us to be putting material or the views of the ACCC before SCOCA when it was examining these matters. I have already expressed the views of the ACCC on this matter.

Senator LUNDY—I presume you are also aware that the ministerial council has recently agreed to advance a national regulatory system on unfair contracts as a matter of urgency. How do you reconcile the ACCC's view on unfair contracts with what is obviously a view of the ministerial council that more needs to be done on a national basis?

Mr Samuel—I do not think the ACCC has to reconcile its view, because this is a matter of government policy. If the government chooses to implement legislation and to require the—

Senator LUNDY—You just said you advised the government—

Mr Samuel—No. I do not think I said that.

Senator LUNDY—and the government was reflecting a view of the ACCC.

Mr Samuel—I did not advise the government at all. I said that the issue arose in connection with a question of whether the ACCC felt it appropriate to be putting material before SCOCA on this matter. We actually did not put any material before SCOCA at all. We had internal debates on the matter. The view formed by the commission was that it would not be putting material to SCOCA on this matter. We have received no directions from the federal government on it. We have not put our views to the federal government on this matter other than through discussions or to answer your questions before Senate estimates and other committees.

Senator LUNDY—So how is it that Mr Pearce can, if not match your words, certainly directly reflect the view of the commission in his statement about the federal government's view on unfair contracts? Is that just serendipity?

Mr Samuel—Well, I suggest you put that matter to Mr Pearce.

Senator LUNDY—I am asking you to find out what—

Mr Samuel—I cannot answer for Mr Pearce. I read the report that you have referred to in the *Financial Review*. You might want to ask the author of that report, who I think is sitting behind us here, and he might be able to give you a better view than I can.

Senator LUNDY—I do not think I have the power to call him to the table.

Mr Samuel—Well, you might ask him. He might volunteer.

Mr Antich—I want to respond to a question you raised about MCCA and what the ministerial council actually agreed to do. The only thing they have agreed to do as a body is to put forward the regulation impact statement on the issue of unfair contracts. That is the only position they have put forward. MCCA has not agreed to anything else beyond that.

Senator LUNDY—In the liaison the ACCC has had with the states, what if any involvement has the ACCC had in relation to advising the states on appropriate legislation at a state level that may control unfair contract terms?

Mr Samuel—I do not believe we have formally put any material at all before the states on that matter.

Senator LUNDY—What is the nature of the communication that the ACCC received from the Ministerial Council on Consumer Affairs?

Mr Antich—I am sorry, but I do not understand that question.

Senator LUNDY—Do you receive any communication, formal or informal, from the Ministerial Council on Consumer Affairs?

Mr Antich—The ministerial council is the ministers, one of whom is our minister, Mr Pearce. They issue a communique at the end of MCCA, which is a communique that is agreed by all of the representatives who attend the MCCA meeting. There is no formal, if you like, communique or process that they communicate with the commission beyond the formal communique that is issued to the general public. In terms of the relationship, our relationship is with our minister.

Senator LUNDY—Do you prepare a brief for your minister prior to those meetings?

Mr Antich—Yes, we do. Sorry; I will rephrase that: no, we do not. It is a simple question; I just messed it up.

Senator LUNDY—'Let me rephrase that: no, we do not.' I love it!

Mr Cassidy—Treasury is the one who advises the minister.

Senator LUNDY—So the answer is—

Mr Antich—The answer is no.

Senator LUNDY—So when I ask whether the ACCC provides a brief to the minister in advance of the ministerial council, the answer is now no?

Mr Antich—No.

Senator LUNDY—So Treasury would provide that advice?

Mr Antich—Yes.

Senator LUNDY—So the ACCC is not involved?

Mr Antich—No.

Senator LUNDY—What is the ACCC's understanding of government policy on this matter? What do you think government policy is? I am not asking you to comment on it.

Mr Samuel—I have to say to you I do not know. I have not discussed it, to the best of my knowledge, with the minister other than to summarise the views that I have just expressed to you here as to the discussion that has taken place at the ACCC. I think my most informed information on this particular matter is the article in the *Financial Review* that you referred to earlier.

Senator LUNDY—Perhaps I can only ask this question of the minister—and he will not be able to answer it, so you could take it on notice. What is the federal government's policy on unfair contracts?

Senator Minchin—I am not the responsible minister, as you know. I am happy to take that on notice. If I can get you a formal answer tomorrow, I will.

Senator LUNDY—Do you think you have one?

Senator Minchin—I am not across this area. It has nothing to do with my ministry. It is not an issue I deal with at all so I cannot help you tonight.

Mr Cassidy—You could ask Treasury when they appear. The parliamentary secretary announced at a MCCA meeting on 22 April that the federal government would not be amending the Trade Practices Act to include unfair contract provisions. The first we knew of that was when we heard of the minister's announcement. So I think it is either Treasury or the parliamentary secretary that has to answer that question.

Senator LUNDY—Given you have taken the opportunity, in response to my questions, to express a view of the ACCC on the issue of unfair contracts, can you describe what happens next as far as progressing your view on unfair contracts given the ongoing discussion, the Victorian legislation and the activity at SCOCA? What happens next? Are you going to sit back and ignore it?

Mr Samuel—I emphasise this is not a matter that we would deal with in the ordinary course, because it is a matter that is for government policy. If the government determines to adopt a particular policy course on this matter that involves the ACCC, of course we will get involved. But it is not a matter that is the subject of ongoing debate or discussion. I think I referred to the fact that this was debated and discussed around the ACCC table many, many months ago. It has not been the subject of further debate since.

Senator LUNDY—But you have said, Mr Samuel, that the ACCC's role is to gauge whether in these consumer issues detriment is widespread. You look at national issues. This is one where a state has legislated. There is ongoing discussion. It affects more than one industry sector. It has the potential to affect a large number of consumers both in false and misleading advertising and unconscionable conduct et cetera. Certainly the state of Victoria has legislated beyond what the Trade Practices Act provides for. I find it quite extraordinary that the attitude of the ACCC is, 'Well, we're just not choosing to pursue this issue.'

Mr Samuel—Forgive me, Senator. Let us draw a line or distinction between our roles. Our role is to enforce the Trade Practices Act. If there is any matter that comes before us that is a breach of the Trade Practices Act that is not part of that cooperative protocol that we have developed with the state offices of fair trading—is not a matter that would normally be referred to the local office of fair trading—we will enforce the act and we will do so with all the enforcement tools that are at our disposal. So, if there is an issue of unconscionable conduct under 51AB so far as it affects consumers, then obviously we will enforce it and there will be no hesitation in doing so. The questions you are asking us, though, relate to issues of government policy. I have simply indicated—

Senator LUNDY—I know you cannot answer those questions so I am not trying to ask you a question that I know you cannot answer. Has the ACCC provided advice to Treasury on the issue of unfair contracts?

Mr Samuel—I do not believe that we have provided advice to Treasury. I do not believe so.

Senator LUNDY—Have you received any correspondence or communication from Treasury about this issue—'you' being the ACCC?

Mr Samuel—I would have to take that on notice. I am not aware of any. The only course during which it might have been received would have been in relation to SCOCA meetings. But other than in that context, I am not aware of the matter having come before us.

Senator LUNDY—Would you at some point have advised Treasury of your internal discussions in order to advise them on the process of SCOCA meetings, if that would be the context that you would have communication with them?

Mr Samuel—It is possible in the context of SCOCA and in the sense of the debate that occurred, as I say, many months ago about whether or not it was appropriate for us to be putting in information or a submission to SCOCA on this particular matter.

Senator LUNDY—To what degree have you received complaints in your Infocentre about unfair contracts?

Ms Webb—Can you ask the question again.

Senator LUNDY—Have you received complaints about unfair contracts in your Infocentre? If so, what would be your policy or process of dealing with those complaints?

Ms Webb—I guess most generally they would not be characterised in those terms by the consumer. But the gist of what the consumer would be saying to us would be that they thought a term was unfair. We would explain to them that our jurisdiction was limited to breaches of the Trade Practices Act and that in that case it did not sound like it was a breach of the act so it was not something we could pursue on their behalf.

Senator LUNDY—Have the terms of any contracts that have been brought to you in the form of a complaint been deemed unconscionable under the act?

Ms Webb—I do not think we can actually answer in terms of all the complaints we have received.

Senator LUNDY—Well, one would think that if you got one and it was unconscionable that you would take action.

Mr Samuel—I can give you an example where we have dealt with a general form of contract term. I mentioned before that it is unilateral variation clauses. We had concern about them. I indicated before that in our submission to the Senate references committee dealing with the application of the Trade Practices Act to small business we took a view that unilateral variation clauses in contracts ought to be one of the factors taken into account by a court in determining whether or not unconscionable conduct had taken place in negotiations between big and small business. That particular recommendation has been taken up by government as a result of that committee's work. But in the context of unilateral variation clauses, we were concerned about them in relation to telephone contracts and contracts with the telecommunications carriers, and we engaged with Telstra on that particular issue. I think it is

fair to say we achieved what proved to be a very satisfactory outcome in that engagement process.

Senator LUNDY—So you acknowledge quite openly that there are unconscionable contracts out there because you have acted on them?

Mr Samuel—But that is part of our law. Our law relates to unconscionable dealings between business and consumers and bigger business and smaller business. That is contained in section 51AB and section 51AC of the act. Where we consider that those laws are breached or have a potential to be breached, we will take that up with the business that might be involved. This was a case where we took it up with the business corporation involved.

Senator LUNDY—Going back to the complaints when they are first received, does the ACCC formally test each complaint as to whether it constitutes unconscionable conduct under the TPA?

Mr Ridgway—The Infocentre staff are well briefed to consider a range of potential breaches that information received may indicate. So the short answer is: to the extent that the factual scenario related to our Infocentre staff might indicate unconscionable conduct, we identify and consider that potential.

Senator LUNDY—And in considering that potential, how clear-cut a case does it have to be before you flick it to the states?

Mr Antich—There are two issues here. In terms of unconscionable conduct, there is also a disadvantaged and vulnerable consumer campaign that the commission is part of that also looks at conduct related to disadvantaged and vulnerable consumers. The conduct will be looked at carefully through that as well to determine whether it is unconscionable or not.

Senator LUNDY—Is that like a higher level test?

Mr Antich—It is an internal working party that looks at those issues and sees whether it fulfils the criteria for the sorts of things we would want to look at.

Senator LUNDY—Just to get the process in my mind: a complaint comes in and you have a look at it for general unconscionable conduct impact; you then pass all of those complaints on to the vulnerable—

Mr Antich—No.

Mr Samuel—No.

Senator LUNDY—and disadvantaged consumers campaign? That was the implication of what you just said.

Mr Antich—Well, that is a literal—

Senator LUNDY—Excuse me; you learn to operate quite literally on this committee.

CHAIR—Senator Lundy, just let the witnesses finish their answer. Mr Antich, did you want to say anything more?

Mr Antich—Yes. Thank you. The Infocentre is the first point of contact for the majority of complaints and inquiries et cetera. They are dealt with by people who do this all day every day. They look at the complaint as it comes in and they deal with it. They will deal with it in

terms of what it represents in terms of a complaint, what sections of the act it may or may not relate to and whether it relates to us at all. Once it goes past that threshold issue, there will be a threshold determination of whether it falls within something that is under our act—and therefore, in a pure unfair contract term sense, if you like, it will not—or it will be something else like potentially unconscionable conduct. Once it is there, it is a question of where it will go within the commission and whether it goes within the system to be escalated to a project officer or dealt with in that sense. If you like, that is a bare bones summary of the process at the front end.

Senator LUNDY—So how many complaints of this nature relating to unfair contracts have you received?

Ms Webb—We do our statistics based on breaches of the Trade Practices Act. Then we would have a general category of complaints that did not meet a breach of the Trade Practices Act. Where something involved purely unfair contract terms and had no element of unconscionability in it, that would go in that 'not a breach of the act' category. I do not think we could then distil it down from there.

Senator LUNDY—So out of the 63,000-odd complaints you received in, say, the 2003-04 year, of the 43,000 that go into the Infocentre, you will be able to identify the number of that group that related to claims for unfairness in contracts and then be able to provide further information about which of those complaints were actually progressed to project officer level or not?

Ms Webb—We would be able to indicate which ones were a potential breach of the unconscionable conduct sections because every section of the act we would be able to give you a statistic on. If something was an unfair contract term, it would be categorised as not a breach of the Trade Practices Act.

Senator LUNDY—Certainly.

Ms Webb—There would be many matters in that category on a whole lot of different issues.

Senator LUNDY—But does your database record them as complaints about unfair contracts?

Ms Webb—No.

Senator LUNDY—Why not?

Ms Webb—It just records it as an issue that was not a breach of the Trade Practices Act.

Senator LUNDY—So how on earth do you monitor—going back to Mr Samuel's statement—what constitutes whether the consumer detriment is widespread if you do not gauge at that level the nature of the complaints you are receiving whether or not they are actually found to be a technical breach of the act?

Mr Samuel—Can we just separate out two separate things, because I think there is a bit of confusion occurring in the process of the dialogue that is occurring at the moment. We look at matters that fall within the jurisdiction of the ACCC, within the jurisdiction of the Trade Practices Act. When we look at those matters, we then make a number of determinations. The

first is at the Infocentre level. Then every one is database recorded. It will proceed potentially to an initial investigation or to a second investigation. But in the context of every one of them, we will make a number of assessments at a number of levels as to whether or not they are matters that ought to be dealt with by the ACCC or whether they ought to be dealt with by local offices of fair trading. They will much more relate to issues of the locality or the local nature of the complaint as distinct from the more widespread nature or the national nature of the complaint. We have talked about some of those issues before.

Let us assume, then, that it falls within the jurisdiction of the ACCC and the Trade Practices Act. Then it will be dealt with in the normal form of a matter being dealt with over the telephone with an explanation being given to the person raising the complaint and a solution being provided over the telephone. It may be a reference to another party, another body or a regulatory body that can deal with the matter, leaving aside state consumer affairs bodies. There may be some other solution that can be found on the issue or it may then be referred into our database and then the subject of either an initial investigation or in due course elevated to a serious investigation, an in-depth investigation.

For those matters that are not matters that fall within the jurisdiction of the ACCC, it is not appropriate for us to be applying the sorts of principles you talked about. I refer you back to the opening comments when you raised your question with me. Those principles of national impact and of widespread consumer detriment relate to the enforcement powers of the ACCC and the exercise of those enforcement powers within the ACCC's jurisdiction under the Trade Practices Act. They do not relate to a whole range of other things that have nothing to do with this; otherwise we could find ourselves analysing matters that come to us that are more appropriate for the Australian Securities and Investment Commission or that might be appropriate for dealing with by the local police or by the Federal Police or a whole range of other regulatory bodies with which we have no connection at all in the context of the Trade Practices Act.

Senator LUNDY—I take your point in part. But does not that in itself point to areas where the law is weak and where there is a case for enhanced consumer protection? Shouldn't you be using this critical data to inform the ACCC's view on where the consumer protection law is weakest? Otherwise, these consumer complaints fall into a black hole and all that intelligence is lost. You have this system of filtering through these complaints. If they are state based, they are referred off and then you have no way of capturing that data in your database. If they are within the ACCC's jurisdiction, there is some hope that it will actually get to the database ultimately if you choose to progress a complaint. In the meantime, a vast amount of critical consumer information about what is going on out there in the real world is being lost into the ether. Don't you have a responsibility to capture that data, that intelligence, from the broader population and process it and analyse it and use it to inform your priorities?

Mr Samuel—Can we put this in perspective. We receive 65,000 complaints and inquiries each year. To use the statistics you quoted before, 22,000 of them do not even fall within the range of being a complaint and inquiry. So there is 22,000 phone calls that we receive each year that we could not categorise as something that even contemplated falling within the purview of a complaint under the Trade Practices Act. I am not sure how we categorise them. They may well be issues that relate to private contractual disputes that ought to be dealt with

by small claims tribunals. They may well be issues that relate to the behaviour of professionals that are dealt with by local or professional practice boards or whatever might be the case. In those cases—I have only given you two examples of the many, many—we have automatically a process of referral to appropriate bodies. Infocentre staff are trained to detect what those matters are and to refer them on.

Now let us move down to the 43,000. Of the 43,000, around 1,000 move to an initial investigation. That suggests that 42,000 are resolved by some other process. We can say according to our database that about half of those—20,000-odd—are resolved in the initial phone call because we are able to resolve the matter, we are able to assist, we are able to give some explanations and we are able to provide some free advice as to how the matter might best be resolved. It may be a suggestion that it be taken to the complainant's lawyer, whatever might be the case. Of the 43,000 that we classify as complaints in respect to matters under the Trade Practices Act, less than 1,000 get to the stage of an initial investigation and less than 300 get to the stage of an in-depth investigation each year. That is the nature of the way that we have operated for many, many years, not the past year.

Senator LUNDY—Isn't that largely resource driven?

Mr Samuel—No. As I was saying just in the answer before, this has been the practice and the statistical trend that we have had for the past umpteen years in relation to the operation of the ACCC.

Senator LUNDY—I think I can find a quote in your former annual report or something that I have read in the last 24 hours. It is your concern that you do not have the resources to pursue all the complaints that you would like and for that reason you have to be really picky to make sure you pick the ones that you win. So you are contradicting yourself again.

Mr Samuel—No, I am not, if I might say so. Any regulator would love to be able to deal with everything that comes before it. But it is not appropriate and it is not possible for us—

Senator LUNDY—But you just said that this system is not resource constrained and that the 300 you pursue are the only 300 that you could pursue.

Mr Samuel—That is right.

Senator LUNDY—You stand by that?

Mr Samuel—Yes, I stand by that.

Mr Cassidy—The comment you are going to find is a comment in our 2003-04 report which related to the period when we were running deficits and had a fairly severe funding problem. The comment related not only to consumer protection matters but to issues across the board. We received a significant increase in our funding in the 2004-05 budget, so that particular comment no longer applies. But that does not in any way detract from what Mr Samuel has been saying, which is that the process he has outlined is one that has stood for quite a number of years. It is not related to resources.

Senator LUNDY—Going back to the use of the intelligence from this database, on what topic do you receive the highest volume of consumer complaints?

Mr Samuel—Numerically?

Senator LUNDY—Yes.

Mr Samuel—Probably on the two areas where there is the highest number of consumer involvement, and that would be in the area of telecommunications and sometimes the area of airline services and sometimes the area of major retail services. But numerically you would expect that to occur because of the high number of consumers involved.

Senator LUNDY—So telcos are at the top of the list?

Mr Samuel—Not always, but generally they will be at the top of the list.

Senator LUNDY—At what point in the flow of complaints through this system are you actually doing that analysis on it? Are you doing it on the database complaints?

Mr Samuel—On the database, yes.

Senator LUNDY—Even though a telco generally—and I appreciate there are many issues; I am sure you get lots of pair gains complaints as well—is up there, I still find it difficult to understand why the ACCC have not found it within their purview to pursue the issue of unfair contracts to the extent of arguing for a greater regulatory strength around that issue, particularly because they actually have a really good reputation for doing that. Not everyone is happy with it, but there have been several reports and statements by the ACCC where the ACCC have said the regulations are not strong enough in this area and this is where we need to regulate. Why is it that with this issue they are just choosing not to?

Mr Samuel—It is not a question of choosing. I think I have indicated that the matter has been debated long and in some depth around the commission table. We have formed a view around the commission table on this matter. That view is that this is not a matter that we wish to pursue in the context I have described to you this evening and I know on many previous occasions.

Senator LUNDY—I will put some more questions on notice about it. I want to ask you a general question about telecommunications and consumer focus. As you know, there is a Senate inquiry proceeding on telecommunications regulations. The focus of many of the issues has, of course, been competition policy. But there is also a substantive body of issues in consumer related telecommunications problems. Why have the ACCC chosen specifically to ignore the consumer focus of telecommunications in their submission to that inquiry?

Mr Samuel—I am not sure—

Senator LUNDY—Sorry; I know that competition is related to consumer outcomes.

Mr Samuel—You have already answered part of the question.

Senator LUNDY—But there are still many issues that relate to straight-up consumer protection, including issues like unfair contracts, that could have been addressed in the context of that submission.

Mr Samuel—I think that the purpose of our submission was to deal with some regulatory issues that relate to competition and the progress of competition or the slowing of progress of competition in the telecommunications sector generally. In relation to consumer protection—I stand to be corrected—I am not sure that we have any issues of deficiencies in the current

regulatory regime that relate to consumer protection issues in telecommunications. But Mr Cosgrave may want to add to that.

Mr Cosgrave—The only point I would make is that the consumer protection provisions we apply in relation to the telecommunications sector are the general provisions under the act. So there is no telco-specific consumer protection issues that I would have thought we would want to highlight in a submission of that sort relating to possible amendments to the law.

Senator LUNDY—Can you give me an update on the status of the vulnerable and disadvantaged consumer campaign?

Mr Antich—It is an ongoing campaign. As I said before, the data that comes through the Infocentre that could be potentially relating to disadvantaged and vulnerable consumers is looked at through an internal working party. It then becomes an issue for the regional office in which that complaint might originate. They will also treat it as any other complaint; it will be followed up, investigated and considered. I guess part of the process and part of the work of that campaign is shown in some immediate benefits through the National Maths Academy case, where there was a very good outcome in relation to disadvantaged and vulnerable consumers and a company preying on Indigenous communities by getting them to sign up bank accounts. More recently, I think there was another case—the Lux matter. So it is an ongoing campaign. It has been about two years since it has been launched. It is just part of the commission's ongoing work and commitment to consumers.

Senator LUNDY—Does that campaign have a specific funding allocation within the ACCC's budget?

Mr Antich—No. It is within the funding allocation that we are given generally under the budget.

Senator LUNDY—And how does that working party establish its agenda? Does it use data directly from the Infocentre? I think that is what you said earlier. That is certainly how I interpreted it.

Mr Antich—I guess the issue really is that it fits within the normal commission priorities in the way in which the commission will choose to take on any cases. So it fits within those normal priorities—level of detriment, blatancy of the conduct and the scale of the conduct. It will fit within those parameters, but it has a specific focus on those types of consumers that might be preyed on.

Senator LUNDY—So consumers of certain constituencies, say, non-English-speaking consumers—

Mr Antich—Yes. The aged, elderly and the Indigenous.

Senator LUNDY—Illiterate consumers et cetera would be ones that you would be particularly sensitive to?

Mr Antich—Yes.

Senator LUNDY—Has unfair contracts ever popped up on the agenda?

Mr Antich—In the sense that it is not a breach of our act, no, it has not.

Senator LUNDY—It might be if it represents unconscionable conduct?

Mr Antich—In that sense it would, yes. That is right.

Senator LUNDY—So has it?

Mr Antich—I cannot go and refer to each complaint because I do not have that material in front of me.

Senator LUNDY—I am referring to the agenda of the working group for the vulnerable and disadvantaged consumers campaign.

Mr Antich—The way it would be dealt with is that you would look at the complaint. If the complaint related to contractual issues and they were potentially unconscionable or dealt with unconscionable conduct under 51AB, they would be considered, yes.

Senator LUNDY—Regardless of the technical nature of the unconscionableness of the contract and the fact that many of these contracts are extremely long and in very fine print, are you paying contracts per se any attention because of the detriment it can cause consumers who cannot read or have difficulty reading or comprehending such information or indeed understanding the language?

Mr Antich—That goes back to the point I made earlier. Unless it is a breach of the current provisions of the act, we have to frame a complaint and deal with the complaint as a potential breach. If we do not do that, we do not have an action we can bring. So that is the frame of reference—section 52, section 51AB and section 51AC.

Senator LUNDY—I do not understand how a working group on vulnerable and disadvantaged consumers campaign has any real effect because you cannot take up issues unless a breach of the act is already proven, in which case it would be pursued whether they were vulnerable or disadvantaged anyway, surely. I do not see how this group can initiate any activity. Stuff only gets referred to it that is already a breach of the act. How does it work?

Mr Antich—It is an alleged breach of the act. The issue—

Senator LUNDY—Oh, alleged breach.

Mr Antich—That is usually the way it works until the court determines otherwise. So it is an alleged breach until the court will determine that it is a breach.

Senator LUNDY—You said before that the unfair contracts would only be referred to you if they were a breach. So doesn't that mean alleged breaches?

Mr Antich—An alleged breach.

Senator LUNDY—So you would get a few, I would imagine, on contracts.

Mr Antich—Would you like to rephrase that question because I am trying to understand what it is you are asking.

Senator LUNDY—We have now established that it does not have to be a breach of the act before the complaint comes to you as the vulnerable and disadvantaged consumers campaign working group.

Mr Antich—It will never be a breach of the act until the court determines that it is a breach of the act. So it will always be alleged. If I did not use the word 'alleged', that is clearly what the issue is. It is always going to be an allegation that we have to investigate, run a case on

and then get a court to determine. Until that happens, it will not be anything other than an alleged breach.

Senator LUNDY—Thank you for that technical point.

Mr Antich—It is the basis upon which we have our jurisdiction. It is not just a technical point.

Senator LUNDY—Thank you for that, but I want to know how you get a complaint from the database to your group and who makes the determination that it is potentially an alleged breach of the act in order to get it in front of you. Who makes that decision?

Mr Antich—People who are experienced investigators that understand what a potential breach of the act is and whether it is going to be a potential breach of sections 52, 51AB or 51AC. They will not be looking for an unfair type provision in the sense of it being unfair because (a) we do not have a provision of the act that deals with that, (b) 'unfair' is a very subjective concept and (c) the only state that has enacted unfair contracts legislation is Victoria. All the other states do not have a view about it yet. Therefore, you are looking at one state that has instituted one lot of legislation. It is not going to determine how we look at anything, particularly given we have no jurisdiction in the first place.

Senator LUNDY—So, if a complaint comes that is an alleged breach of the act and it relates to an unconscionable provision of a contract, do you test it against the Victorian legislation for the purposes of referring it to that jurisdiction?

Mr Antich—No.

Senator LUNDY—You do not, do you?

Mr Antich—No. We would not do that. We would only look at what we have jurisdiction for. The only way we can act—

Senator LUNDY—That is not very good state-federal cooperation, is it? It makes it a mockery.

Senator Minchin—They are not there to enforce a state law.

Mr Samuel—I think we ought to also point out that section 51AB, which deals with the relationship between business and consumers, does not deal with specific terms of contracts as unconscionable conduct. It deals with conduct itself in the process of dealings between business and consumers. Our Infocentre staff in particular are trained to determine whether or not matters that come before them are appropriate to be dealt with under the act. If they are, they will be dealt with through the process of investigation.

Senator LUNDY—Thank you, Mr Samuel. I go back to the point I made earlier. If there is an alleged breach, it is going to be dealt with whether it goes to the vulnerable or disadvantaged group or not anyway, isn't it? So what is different about this group?

Mr Antich—It is an internal mechanism by which we can at least try and see whether there are systemic issues relating to those sorts of complaints that fall within the terms of our act as it currently is drafted. So it will look at it and see whether there are ongoing issues, such as in the National Maths Academy case, whether there are ongoing problems in not just the Northern Territory or WA or whatever. It is just a process internally to look at those issues and

give them a bit more of an internal focus to see whether there is something more that could be done in terms of the current act. It will not be looked at through any other prism other than our current laws.

Senator LUNDY—I think you have confirmed my point, which is this group does not do anything that would not otherwise occur except perhaps to analyse the data later to see whether there is a trend worth identifying.

Mr Samuel—It would also focus attention in terms of information campaigns on those who may be disadvantaged or vulnerable and alert them to the capacity of the ACCC to be able to assist them and take action on their behalf.

Senator LUNDY—So what action has this committee taken apart from that one case you have mentioned? What other things do you do?

Mr Antich—This group of people that are part of this, they do not take action or they do not direct action of their own. As I said before, all complaints that are investigated are dealt with through the enforcement committee and probably the litigation committee as well. Ultimately, if a decision is made, it is run through the full commission for a decision. That is at one level. The other point that the chairman has made relates to the Consumer Consultative Committee, which is a committee that meets four times a year and is made up of consumer representatives, which we chair. That committee has also been instrumental in the vulnerable and disadvantaged consumer campaign and has provided a lot of feedback in terms of what it is they are finding out at the grassroots level and through the various consumer organisations that are there. They give us feedback about what is going on in terms of complaints. Not all of these complaints are actionable, but they also provide us with trend data as to what is going on out there.

Senator LUNDY—How come you call it a campaign when it is just a working group that looks at stuff?

Mr Antich—It depends how you define ‘campaign’.

Senator LUNDY—It does, doesn’t it.

Mr Antich—When we say campaign, we do involve external parties. We involve these other groups that are all external to the commission that attend these meetings four times a year. We involve a whole lot of other people. We have a specific complaints form that hopefully enables people who have trouble filling in forms to fill in the details of a complaint along those lines. We are issuing guides to business in relation to disadvantaged and vulnerable consumers. So it is in a sense a campaign in terms of a focus on a particular disadvantaged and vulnerable group of people in the community about whom we are trying to educate and inform the business community and the wider community regarding their rights and obligations. So it is a campaign in that sense.

CHAIR—Senator Lundy, Senator Allison has up to 20 minutes of questions. If you are not finished by twenty to 11 I am going to give the call to Senator Allison for the rest of the evening and we will finish at 11.

Senator LUNDY—That is fine, Chair. Can you take on notice to provide the committee with the agenda documents, minutes of these meetings and any campaign material that you have produced since its inception.

Mr Antich—I do not know how much of that we are able to give you.

Senator LUNDY—I suspect all of it, given you are a publicly funded agency through the budget. Has the ACCC received any complaints about telemarketers?

Mr Cassidy—Just to clarify what Mr Antich was saying, we will not be giving you information in relation to individual complaints even though we are budget funded. We are not going to reveal that sort of information.

Senator LUNDY—I did not ask for the individual complaints. I asked for the agenda items and records of meeting.

Mr Cassidy—Just to be clear, Mr Antich was saying that we will give you what we can but there will be certain information we cannot give you.

Senator LUNDY—Sure. I understand that you would in fact respect privacy provisions and things like that. There has been a rise recently—I do not know if you have noticed—in recorded messages on home phones and message machines that are not interactive, and also in telemarketers targeting mobile phone numbers. Have you seen an increase in complaints relating to these two things?

Mr Antich—I think the issue you are referring to was raised as a matter of concern at the last SCOCA and MCCA meeting in late April. It was referred to FTOAC to consider the matter further. So it is an issue that has been raised. I think it was WA that raised the issue. It is of concern and we are looking at it.

Senator LUNDY—What would be the scope of the Trade Practices Act to address complaints relating to telemarketing?

Mr Antich—It would be usual provisions of the act in terms of whether misleading or deceptive representations were made. That is obviously the primary provision we would look at within that context. That is the first point of call. But I have to say it has not been considered in depth yet. So that is, I guess, the initial response I can give you.

Senator LUNDY—And what about the next step—no cooling-off periods? Again, it relates to unconscionable contracts or clauses in contracts. Is that part of it?

Mr Antich—It might be, but I do not think the working party has had its first meeting yet.

Senator LUNDY—I will place some questions on notice in relation to telemarketers. Essentially what I am hearing is that you would flick those complaints on to the states?

Mr Antich—I do not think that is what I said.

Senator LUNDY—You said it goes to that committee under SCOCA.

Mr Antich—Of which we are a member. All that has happened is that it has been raised as an issue to be considered by all of the members of SCOCA through that FTOAC working party. It has not been flicked anywhere other than to be considered by that working party.

Senator LUNDY—So would that working party decide where complaints of that nature should be referred to? Is that their job?

Mr Antich—No. It is to scope the issue and see what the potential regulatory response might be in terms of the current laws we have. The whole point—it goes back to some of the questions you were raising earlier—is that these processes, such as FTOAC, SCOCA and MCCA, are formal. But there is an awful lot of informal networking and discussion that goes on between regulators to discuss these sorts of issues. So it is not just limited to those processes to discuss how and whether matters are dealt with.

Senator LUNDY—Once that group discusses and resolves anything, can the ACCC provide information to this committee?

Mr Antich—In terms of the outcome?

Senator LUNDY—Yes.

Mr Antich—Okay.

Senator LUNDY—Is the ACCC aware of Stores Online and has it received any complaints about it?

Ms Webb—Yes. We are aware of it.

Senator LUNDY—Have you received any complaints?

Ms Webb—We have received some complaints.

Senator LUNDY—What are you able to do in response to these complaints? Has there been a technical breach of the TPA?

Ms Webb—I will have to repeat the chairman's previous comment in relation to current investigations. We do not comment on the detail.

Senator LUNDY—Does the ACCC have a policy of only publicly naming businesses after charges have been laid?

Mr Samuel—Yes.

Ms Webb—Or proceedings have commenced.

Mr Samuel—Yes—the institution of proceedings. That is where that course of action is taken. If there are alternative processes adopted—either court enforceable undertakings or administrative settlements—then that is the point of time at which namings will occur.

Senator LUNDY—Are you able to confirm that you are investigating Stores Online?

Mr Samuel—No. We do not offer any comment on matters that we may or may not be investigating.

Senator LUNDY—With respect to petrol, is the ACCC concerned about the fact that there are considerable variations in the level of petrol prices across regional towns? I should say that I appreciate finally getting some correspondence from the ACCC. I find it a tad frustrating. It is dated 25 May, but I only received this correspondence today. I have not been able to digest all the attachments as fully as I would like before proceeding with these questions. Because I am running short of time, I will place some specific questions on notice

for the ACCC about this, including the fact that you have noted in correspondence delivered to me that the levels of competition are affected by a wide range of factors. Doesn't this virtually ensure that it is impossible to discern manipulation of petrol pricing, particularly in regional areas, by having such—

Mr Samuel—Is that on notice, or do you want an answer now?

Senator LUNDY—We have a few minutes. If you can keep your answer really short, because there are a few other things I want to place on notice. I know the Chair is very strict in his timing, and I accept that tonight.

Mr Samuel—I note your admonition about the length of my answers.

Senator LUNDY—They are becoming legendary, Mr Samuel.

Mr Samuel—In terms of the manipulation of prices which would normally occur as a result of collusion, you would be aware of the matter I referred to earlier, which is the Ballarat price fixing. You would also be aware of the proceedings we have instituted in respect of alleged price fixing in the Geelong region of Victoria. You would probably also be aware of proceedings that were instituted just last week in relation to alleged price fixing in Queensland. So to that extent we are able to detect and deal with price fixing manipulation.

Senator LUNDY—You have anticipated my next question. There are 13 factors that you have identified in your letter. To me, that makes it inevitable that the only way the ACCC is able to take the sort of action you have described is if someone dobs in price fixing. There is not any other mechanism to be able to conduct an investigation and find a breach. Is that a fair reflection of the situation?

Mr Cassidy—I have the letter sitting in front of me. Those factors are factors about the level of competition and any specific location. Whether there is collusion going on in any specific location is, if you like, quite a different issue. Those factors really do not have any bearing on whether there is collusion occurring.

Senator LUNDY—I appreciate that.

Mr Cassidy—I thought that was your question.

Senator LUNDY—My point is that because there is such a wide range of factors that can impact upon petrol pricing—I am not challenging their legitimacy; I am sure they all have a role to play—it means you would never be able to drill down within all those variables and uncover collusion in any other way other than have someone dob it in? Have you ever uncovered collusion without having someone dobbing in?

Mr Samuel—Again, you would be asking us to comment upon matters that we may or may not be investigating at the present time.

Senator LUNDY—I do not want to do that.

Mr Samuel—And I would not do it. Let me simply say that there may be occasions where there is not a dobbing in, as you described it, by a party that is a co-conspirator in a price fixing cartel, but there may be evidence of market manipulation of prices and there may be evidence of consistently of high and non-volatile pricing that would be inconsistent with

normal market cycles in petrol pricing in certain regions that would be drawn to our attention, not dobbed in, by local traders and the like. We would look at those issues.

Senator LUNDY—Thank you, Mr Samuels, for talking quickly. Doesn't this scrutiny of petrol pricing as a deterrent for collusion rise in the list of important activities undertaken to prevent anticompetitive behaviour? To that end, why won't the ACCC publish the full amount of information that I know you collect on city, metropolitan, regional and rural petrol prices on your web site to improve transparency of petrol pricing around the country? Why don't you publish it on your web site?

Mr Cassidy—Much of that information is obtained from commercial sources. We are restricted in the use we can make of it. That is the condition under which we get it.

Senator LUNDY—I understand that you do some of your own surveys as well. Why don't you put your own survey material on the web site to improve scrutiny of petrol pricing, particularly for regional areas?

Mr Cassidy—I think I am right in saying that all our information comes from commercial sources of one form or another. We do not have people out there doing our own surveys.

Senator LUNDY—Why can't you negotiate a commercial arrangement where you can put that information on your web site in the public interest?

Mr Cassidy—Maybe we could, but for the commercial businesses we get the information from, if you like, that is their business, that is their livelihood. If we publish all that information ourselves, that is going to destroy their business. So I suspect our chances of being able to negotiate that are fairly minimal.

Senator LUNDY—I suggest then it would be a matter of policy for the government, and I put the same question to you, Minister, to take on notice. Finally, a graph was provided in answers to questions on notice. I think I had asked for a graph indicating the prices in the regional centres compared to the international benchmark. The ACCC, I am sure not deliberately, provided an aggregated average of all those prices right across the country. I was actually after separate graphs for each of the regional centres where you do collate the information. I place that question again on notice.

Mr Cassidy—You can do that. I am not quite sure whether we can provide it. If you go back to the last *Hansard*, that is certainly not what you asked for.

Senator LUNDY—As I said, that is what I thought I asked for.

Mr Cassidy—We will make a point about the limited use we can make of the information. We will take that on notice and see whether we can provide that information.

Senator LUNDY—Thank you, Mr Cassidy. The purpose of asking was to actually look at those differentials within regional areas. That was the context of the conversation. So if I have been misinterpreted that is unfortunate. You have the opportunity to fix it.

Mr Cassidy—I thought the context of the conversation was the previous graph we held up—

CHAIR—Perhaps the fault is not Mr Cassidy's.

Senator LUNDY—I have conceded that my question may have been misinterpreted.

CHAIR—Is that everything?

Senator LUNDY—No. I will be placing some questions on notice.

CHAIR—Very good.

Senator ALLISON—My questions surround the ACCC's joint initiative with the Consumer Consultative Committee on vulnerable and disadvantaged consumers. Mr Antich, you are looking bemused.

Mr Antich—No.

Senator ALLISON—Can we have a brief report on how that initiative is progressing and what projects have been considered?

Mr Cassidy—While you were out of the room, Senator Lundy asked us a whole series of questions on it.

Senator ALLISON—I should have started with an apology about not being in the room and not knowing what Senator Lundy had asked you. If that has been comprehensively covered, I am happy not to proceed.

CHAIR—Senator Allison, the *Hansard* should be up—

Senator ALLISON—Within about six weeks, yes.

CHAIR—No. It has been up within a day or two at the outside. If you want to pursue that, why not read the *Hansard*.

Senator ALLISON—I will do that.

CHAIR—If there are issues that Senator Lundy had that do not completely cover your issues, you could put your further questions on notice.

Senator ALLISON—I am happy to do that. It is probably even more likely that Senator Lundy has covered unfair contracts laws.

Mr Samuel—Has she ever.

Senator ALLISON—Then I have no questions.

Senator LUNDY—Then I have more time!

CHAIR—No. You have said your piece.

Senator LUNDY—I said I would put my questions on notice.

CHAIR—You have already done so. Thank you very much, Minister. Mr Samuel, happy birthday.

Committee adjourned at 10.42 pm