COMMONWEALTH OF AUSTRALIA

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SENATE

ECONOMICS LEGISLATION COMMITTEE

Reference: Trade Practices Legislation Amendment Bill (No. 1) 2005

MONDAY, 14 MARCH 2005

CANBERRA

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SENATE

ECONOMICS LEGISLATION COMMITTEE

Monday, 14 March 2005

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

Participating members: Senators Abetz, Boswell, Brown, Buckland, George Campbell, Carr, Cherry, Colbeck, Conroy, Cook, Coonan, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Fifield, Forshaw, Harradine, Hogg, Kirk, Knowles, Lightfoot, Ludwig, Lundy, Mackay, Marshall, Mason, McGauran, O'Brien, Payne, Robert Ray, Ridgeway, Sherry, Stott Despoja, Tchen, Tierney and Wong

Senators in attendance: Senator Brandis *(Chair)* Senator Stephens *(Deputy Chair)*, Senators Chapman and Lundy

Terms of reference for the inquiry:

Trade Practices Legialation Amendment Bill (No. 1) 2005

WITNESSES

Committee met at 5.00 p.m.

CHAIR—I call to order this public hearing of the Senate Economics Legislation Committee. We are here this afternoon to take evidence on the provisions of the **Error! No document variable supplied.**. On 9 March 2005 the Senate referred the provisions of the bill to the committee for inquiry and report by tomorrow, 15 March 2005. The issues identified as being of particular interest to committee members included changes to merger authorisation procedures in schedule 1 and the collective bargaining and third line forcing amendments in schedules 3 and 7 respectively. Today the committee will be taking evidence from officers of the Treasury and, after that, from officers of the ACCC.

Before we begin, I remind you that witnesses appearing before the committee are protected by parliamentary privilege—that is, the special rights and immunities necessary for the discharge of parliamentary functions without obstruction or fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by that witness before the committee may be a breach of privilege. Privileges are intended to protect witnesses. I also remind you that giving false or misleading evidence to the committee may constitute a contempt of the Senate.

[5.01 p.m.]

CONTI, Ms Marie, Analyst, Competition and Consumer Division, Department of the Treasury

DOLMAN, Ms Marianne, Analyst, Competition and Consumer Division, Department of the Treasury

JOHNSTON, Mr Gary, Manager, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

LYON, Mr Christopher Graeme, Analyst, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

PATCH, Mrs Sandra Louise, Specialist Adviser, Competition Policy Framework Unit, Competition and Consumer Policy Division, Department of the Treasury

CHAIR—Welcome. The committee prefers all evidence to be given in public, but should you at any stage wish to give any part of your evidence in private, you may ask to do so and the committee will consider your request. I remind you and senators that officers shall not be asked questions in relation to policy. As there is no opening statement, we will proceed to questions.

Senator STEPHENS—The legislation has been referred to the committee for it to consider specific schedules of the bill. I want to pursue a few issues with Treasury. Firstly, can you tell me what consultations there were on the legislation before the government responded to the Dawson report?

Mr Johnston—I will defer to my colleagues on that question, but there was wide consultation, including with the ACCC, the Law Council of Australia and other stakeholders.

Mrs Patch—There is a conduct code agreement requirement that there be consultation for three months with the states and territories, and that happened last year. Once that period is finished, we have to do a further 35-day voting period with the states and territories on the actual text of the bill. All of that has been done. Obviously there has been a heap of consultation by Dawson himself on the Dawson bill. Subsequent to that, we had consultation with the ACCC and the Trade Practices Tribunal, and then came the consultation with the states and territories, which gave us the final format of the bill before the election. There have been minor amendments made since that time, for which we have not—

Mr Lyon—Which were as a result of further consultations we have had with the Australian Competition and Consumer Commission, the Law Council of Australia and the Australian Competition Tribunal.

Senator STEPHENS—Could you go through the minor changes that have been made to this bill, as opposed to the one that came before the parliament in 2004?

Mr Lyon—Yes. There are a number of them. Do you wish me to go through them all or do you wish to specify something that is of particular interest?

Senator STEPHENS—I understand that there are several minor amendments. Could you go through those for me, please?

Mr Lyon—Certainly. In section V of the bill, at item 18, there is a new section 80AC. There was an amendment to paragraph 1(e) of that section to change 'and' to 'or'. There was an error.

Senator STEPHENS—What does it mean? Can you tell me what that related to?

Mr Lyon—Yes, certainly. There is a provision here that enables the Australian Competition and Consumer Commission to obtain an injunction to prevent a merger if information provided to the Australian Competition and Consumer Commission in relation to a merger clearance was false or misleading in a material particular. The provision in question is the power for the court to order an injunction in those circumstances. There is a technical error in the drafting in paragraph 1(e), where we had said 'apart from the clearance and authorisation' and we should have said 'apart from the clearance or authorisation', as it currently reads.

Mr Johnston—There are a number of amendments of this kind, mainly correcting technical oversights or errors.

Senator STEPHENS—What are the other amendments that are not that kind of technical 'and/or' errors and omissions? If you could summarise those for us, that is probably the easiest way to go.

Mr Lyon—Obviously it requires some judgment to distinguish the technical ones from the other ones. There were some important amendments made too on page 12 of the bill in relation to merger clearances. This was an issue raised by the Australian Competition and Consumer Commission with Treasury whereby, in

relation to section 95AC, there was concern that, where a merger clearance was granted to a party and there was a condition that had to be complied with, that commission only had to be complied with after the merger. It was not clear that the immunity from contravening section 50 would no longer exist if you failed to comply with the condition. Moving on, there were some additions to the powers of the tribunal in considering merger authorisations.

So, for example, on page 35 of the bill there is a new subsection 15 that emphasised the powers of the tribunal in considering merger authorisations—that is, that they have the power to set their own procedure, to seek additional information, to consult with persons and to assist the tribunal in relation to a revocation or revocation of substitution of a merger authorisation. In relation to the collective bargaining provisions, there was a clarification of the test, for example, in relation to a revocation of a collective bargaining notification.

On page 52 of the bill, you will see section 93AC and the bottom paragraph of that provision used to read 'then the Commission, if it is satisfied that the likely benefit to the public will not outweigh the likely detriment from the provision, may issue a collective objection notice'. We have now amended the provision so that it is very clear that, in terms of assessing benefit and detriment, we may take account of past conduct, present conduct and future conduct, which was also a matter that was of some interest to the commission in terms of its confidence about being able to address collective bargaining notifications that were anticompetitive.

Senator STEPHENS—Are there any other significant changes between the old legislation and this legislation that you wish to bring to the committee's attention? Are there any additional things? We have talked about the changes in schedule 1 and we have talked about the collective bargaining arrangements. Is there anything else?

Mrs Patch—Yes, there is a difference between the last bill and this bill. In proposed section 93AB(9), a collective bargaining notice will be invalid if it is given by a trade union, by an officer of a trade union or by a person acting on the direction of a trade union.

Senator STEPHENS—Is that in schedule 3?

Mrs Patch—That is in schedule 3, collective bargaining.

Senator STEPHENS—You mentioned the powers of the tribunal. I understand that the recommendation of the BCA and the Law Council in consultations was not to proceed to the tribunal for authorisation—that the option of going to the tribunal for authorisation should be mandatory. Is that right?

Senator LUNDY—We are basically wanting you to provide advice to the committee on what your understanding of the BCA and the Law Council's position was on the tribunal authorisation.

Mr Lyon—We can certainly assist the committee in relation to the Business Council of Australia's submission. The Business Council of Australia made two submissions to the Dawson review. They were both quite extensive. The Business Council of Australia recommended some significant changes in relation to mergers. The two changes relevant to this discussion are that the prohibition on anticompetitive mergers in section 50 be amended and that a public benefits test be added to section 50, essentially to enable economic efficiencies to be taken account of in an assessment of a contravention of section 50. They also proposed being able to go direct to the tribunal in relation to a merger authorisation. In fact, they provided a diagram as to how they envisage the system will work. The important point to recall is that the Dawson review opposed any change to section 50 of the Trade Practices Act. It did not consider it appropriate to bring a public benefits test within section 50. It said that it was inappropriate, ostensibly for practical reasons, although it acknowledged that there might be some theoretical reasons why you might wish to have public benefits or economic efficiencies considered in the context of section 50.

The Dawson review ended up concluding that the competition provisions of the Trade Practices Act are unashamedly about the promotion of competition, and it therefore considered that it was inappropriate to change section 50 in the way proposed by the Business Council of Australia. However, the Dawson review did acknowledge the submissions made to it by a number of parties that the current merger authorisation process was 'commercially unrealistic' for many mergers and cited three primary reasons for this.

The first point was the matter of the time that expires between the Australian Competition and Consumer Commission's consideration of a merger authorisation application and, in some cases at least, the time that the tribunal would require to review such a decision. The second point that the Dawson review noted was the uncertainty created for merger applicants by the prospect of an appeal to the tribunal on the ACCC's decision. It noted that third parties can appeal, people who are not otherwise involved in the transaction—they are not

the party that is being acquired and are not the acquirer or the applicant—and that, because the scope for appeal is broad, that generated significant uncertainty for business. The third point the Dawson review noted was that there is a perception that the Australian Competition and Consumer Commission is not as objective as it could perhaps be in considering the balance of public benefits versus anticompetitive detriment in the merger authorisation process, given that in many cases it would have previously examined the merger under its informal clearance process under section 50, which simply requires an assessment of whether it will substantially lessen competition.

Senator LUNDY—In relating the Dawson review conclusions on this specific point to the committee, why do you think that those recommendations sought specifically to exclude the ACCC from the process?

Mr Lyon—It is not my role to speculate on that. The government took the recommendations of the Dawson review and made a decision. That decision was announced on 16 April 2003 in the Treasurer's press release. The Treasurer's press release was quite clear and explicit that the government wished to adopt the Dawson review recommendation to go directly to the tribunal.

Senator LUNDY—I appreciate that, and I should not ask you policy questions.

Mr Johnston—I think we can be a little more helpful than that.

Senator LUNDY—I am just trying to get to the issue here, which is the view of the BCA and the Law Council in at least advocating for the option to go through the ACCC methodology, or indeed to the tribunal.

Mrs Patch—The ACCC is seen by the tribunal as being much involved with the authorisation consideration.

Senator LUNDY—Perhaps you could relate to me how you understand that would work and what sorts of resources the ACCC would be required to hold.

Mrs Patch—I have a document to table from the President of the Trade Practices Committee, Justice Goldberg. In this document he has indicated how the operation will work. As was said in the second reading speech and in the summing-up speech, and is reiterated here, the ACCC is basically seen as essential to the authorisation process in the sense of providing submissions and considerations and in bringing to the attention of the tribunal the views of third parties—in fact doing everything that it currently does when it presents matters to the members of the commission. When you read this document you will see that Justice Goldberg considers it to be 'completely essential that the ACCC brings before the tribunal relevant evidence and witnesses, as well as making submissions'. To put it briefly: without the active participation, research, collection of evidence and reports to the ACCC, the merger authorisation jurisdiction proposed for the tribunal cannot be administered or exercised effectively. So both the government and Justice Goldberg see this as working hand in hand.

Senator LUNDY—So if what you describe is right, the ACCC will use their expertise and resources to inform the tribunal's decision?

Mrs Patch—That is right, and the tribunal will simply be the decision maker.

Senator LUNDY—At what point does the ACCC get to express a formal view to the tribunal on whether or not the merger should proceed? What degree of formality is associated with the presentation of that view? For example, would it be a matter of public record that the ACCC was able to formally express a view to the tribunal?

Mrs Patch—Apart from giving the tribunal a very wide scope in the use they can make of the ACCC, there is no direction on the tribunal as to how they will get what they need.

Senator LUNDY—That is certainly my understanding. The point being that there is no mechanism to allow for a formal position to be developed by the ACCC and presented to the tribunal. Is that your understanding?

Mr Johnston—But at the end of the day, it is the tribunal that has the role of adjudication, and the commission is seen as acting as a partner in terms of providing advice to the tribunal. But it is the tribunal which has adjudication in these matters.

Mrs Patch—Presumably the commission would make a recommendation to the tribunal, and the tribunal would take—

Senator LUNDY—Sorry, 'presumably' the ACCC would make a recommendation?

Mr Lyon—As you will see if you refer to the schedule that is attached to the material that has been provided to you, the Australian Competition Tribunal has had discussions with the Australian Competition and

Consumer Commission about how this mechanism is intended to work. As is the case now, where submissions are made in relation to an authorisation application, those submissions are often made public.

Senator LUNDY—What would make them be made public? There is no requirement to make any ACCC submission to the ACT open for public consideration.

Mr Lyon—The material would ordinarily be made public unless there were confidentiality concerns in relation to some of the material provided. Some material may not be made public because it contains commercially sensitive information, but other material—

Senator LUNDY—That is the tribunal's decision?

CHAIR—Sorry, Mr Lyon, you were cut off. You were about to say something about other material.

Mr Lyon—Thank you, Chair. Other material would be provided. For example, in relation to an authorisation application as it operates now, when parties make submissions to the ACCC, those submissions are placed on the commission's web site and are available for public scrutiny, other than in relation to material for which confidentiality is sought. We would envisage that submissions made to the Australian Competition Tribunal in relation to a merger authorisation would be publicly available, other than to the extent that confidentiality is sought.

Senator LUNDY—Have you finished your answer?

Mrs Patch—I think so.

Senator LUNDY—So is the nature of the advice that you would seek from the ACCC such that it would arrive in the form of a submission, for which for all intents and purposes one would presume confidentiality would not be sought? Or would it be more in the nature of accessing their expertise and resources for the benefit of the deliberations of the tribunal?

Mr Johnston—The role of the commission is an advisory one. I cannot imagine the ACCC making formal submissions to the tribunal.

Senator LUNDY—No, I cannot either.

Mr Johnston—As this correspondence reflects, this has to be a partnership. The tribunal is not looking to establish its own secretariat. It does not have resources of that kind and it is looking very much to the ACCC to provide it with advice. This is a relationship that will have to evolve over time, but the spirit in which it has been approached is very encouraging and that is reflected in the correspondence from Justice Goldberg.

Senator LUNDY—I have not had the opportunity to read this correspondence, given that it has just been tabled. Could I seek clarification: you do not envisage that the involvement of the ACCC in the tribunal's deliberations would be in the form of a public submission?

Mrs Patch—The provision in 95AZF, 'Commission to assist Tribunal', states:

For the purposes of determining the application, the member of the Tribunal presiding on the application may require the Commission to give such information, make such reports and provide such other assistance to the Tribunal, as the member specifies.

I should think that the member could ask them for their recommendation and for their submission.

Senator LUNDY—Right, and would obviously have the power to determine the public or otherwise nature of that.

Mrs Patch—Yes.

Mr Lyon—That is correct. The schedule attached to the correspondence you have before you notes that on day 10 of the three-month process there would be a directions hearing, a management conference, which would be chaired by the president of the tribunal and at which the ACCC would be present. Directions would be made through the Australian Competition and Consumer Commission to proceed with investigations at that point. As it notes in the schedule, the Competition Tribunal is envisaging that by day 21 there would be a preliminary report to the tribunal of its considerations of the proposed merger. There would be a further management conference on day 30 and further material provided by the applicant by day 35. By day 42, there would be material in response—that is, in response to the material provided by the applicant or other parties. If there were disputes about matters of fact or law, they would be identified by day 50. At day 60, a hearing is envisaged to be held, but it would be a short one focused on the matters in contention. By day 90, the tribunal would be making its decisions and issuing its reasons. Following from the powers that are set out in the legislation and the timetable envisaged by the Australian Competition Tribunal it is fairly evident that the

Australian Competition and Consumer Commission is going to be asked to provide reports on matters connected to the application and as a part of that might well be asked to make a recommendation or to express a view. As we noted earlier, it would be expected that those documents would be available for public scrutiny unless they contained matters that were confidential or particularly sensitive.

Senator LUNDY—Going through those days—is day 10 the point in the tribunal's processes when they would formally ask the ACCC to formally begin their investigations into any proposed merger?

Mr Lyon—Yes, you are quite right. At day 10 they would be formally seeking that the ACCC report on specific matters. They would essentially be identifying issues that the ACCC was to look further into. You would note that between day 1 and day 10 the ACCC has had access to the application and so would be able to form its own views in those first 10 days as to the matters it would need to look further into. It would have a capacity to raise those points at that directions hearing. What I am trying to convey is that the directions hearing is not going to be just a matter of the presidential member of the tribunal issuing orders. It would be a discussion about what matters needed to be pursued, and the Australian Competition and Consumer Commission would be able to inject their views into that.

Senator LUNDY—And then the ACCC would remain engaged in that investigative process right up until day 60—for the hearing, if it were necessary?

Mr Lyon—Yes.

Senator LUNDY—What about beyond that point?

Mr Lyon—Beyond day 60, if there were matters flowing from the hearing, where further questions had been raised as to some factual issue, for example, then there is nothing to prevent the Competition Tribunal from asking the commission to report to it within that time. But, as is envisaged, the period between day 60 and day 90 is primarily one of deliberation and formulation of the reasons for any decision that the Competition Tribunal would make.

Senator LUNDY—So what guarantees are there in the bill that that activity of the ACCC, ostensibly working at the direction of the tribunal, will be available for full public scrutiny and not subject to the discretion of the tribunal?

Mr Lyon—As Mr Johnston made clear earlier, and as I think the president of the tribunal has made clear in the memo provided to you, there is a recognition that the Australian Competition Tribunal does not have the current capacity to do these things themselves and wishes to draw upon the expertise. So I think it is a matter of sheer practicality that the Australian Competition and Consumer Commission will be providing assistance to the tribunal.

Senator LUNDY—Given the current arrangements, in the existing section 50 requirements, the ACCC, in undertaking this kind of work, would come to a view at any rate which could, if the current system were to prevail, perhaps be available to a tribunal to consider. The difficulty I have now is that I want to ask policy related questions, and I do not think you are going to be much help to me in that regard. So there is not a lot of point in looking at the structure, other than to make the observation that—

Mrs Patch—The authorisations register has to have all those things—

Senator LUNDY—I know. I am just getting to it.

Mr Johnston—Could we just clarify this?

Senator LUNDY—Sure.

Mrs Patch—Senator, I think what you were asking about in your question earlier on merger authorisations involved the sorts of things that will be made public. Section 95AZ, which deals with the merger authorisations register, requires the tribunal to keep a register not only of all applications but also of any document given to the tribunal in relation to an application, particularly of any oral submission made to the tribunal, and of the determination of the tribunal on any such application, and a statement of reasons given by the tribunal for that determination. So it is really the same as the current situation in terms of disclosure.

Senator LUNDY—But that clause does not say it has to be made public; it just says, as one would expect within the Australian Public Service, that one should keep all the paperwork associated with a given decision. I think that would be a standard clause.

Mrs Patch—We could perhaps get back to you on the actual details of that. I note that in section 95A 'Why application to be published on the internet' it says:

After receiving a copy of an application for an authorisation, the Commission must:

(a) subject to section 95AZA (confidentiality), put a copy of the application, and accompanying information or documents, on its website; and

(b) by notice on its website, invite submissions in respect of the application to be made to the Tribunal within a period specified by the Tribunal.

So the procedures are not really any different from those that currently apply.

Senator LUNDY—Except that, certainly on my understanding of the bill, under the tribunal there is a far greater degree of discretion from the point of view of the tribunal as to what it considers to be commercially sensitive or otherwise, and that the normal channels under FOI and so forth to pursue the paperwork relating to decisions would of course be available. The other point worth making is that the tribunal does not have a great track record in making decisions or reasons for decisions public in a timely way. I do not think you can comment on that.

Mrs Patch—No, that is government policy.

Senator LUNDY—Will the register that you spoke of contain the ACCC advice?

Mrs Patch—It must include any document given to the tribunal in relation to an application.

Senator LUNDY—That implies the submission, so we get back to the point again about the difference between work commissioned by the tribunal from the ACCC as opposed to submissions sought. I actually do not think there is anything in the bill that clarifies that, hence my concern. There is certainly nothing that makes it clear that any information from the ACCC going to the tribunal must be made public.

CHAIR—You have to ask questions. There is no point in giving your commentary on the bill to these people who cannot even respond on policy. Just ask some questions, would you.

Senator LUNDY—How many members of the tribunal have been appointed by the Treasurer?

Mr Johnston—All of them.

Senator LUNDY—Would you run through the list of those appointed and their dates of appointment.

Senator CHAPMAN—I have a point of order, Chair.

CHAIR—Yes.

Senator CHAPMAN—I ask what relevance that question has to the particular legislation before the committee. It might be an estimates type of question, but I cannot see that it has any relevance.

CHAIR—Senator Lundy, how does your question relate to this?

Senator LUNDY—It relates to the specific structure of the bodies that are the subject of this legislation.

CHAIR—But the legislation does not change the structure of the Australian Competition and Consumer Commission.

Senator LUNDY—No, but I am interested. If you are going to rule it out of order, that is fine. I will get the information another way and will not be pedantic about it. I think the question is entirely reasonable.

CHAIR—I will not call it out of order, but I ask you to limit your questions to the legislation or to matters fairly directly bearing on the legislation itself.

Senator LUNDY—I think the chair has not ruled the question out of order, so you can answer it.

Mrs Patch—We can provide you with a list if that is easier than reading it all out. Would that be easiest?

Senator LUNDY—Does it have the dates of appointment?

Mrs Patch—Yes, and the terms of expiry.

Senator LUNDY—Thank you. Specifically what resources, if any, will the tribunal be provided with to enable it to fulfil the requirements of the bill?

Mrs Patch—Basically that is a budget issue which has not yet been decided, but I understand that sufficient resources are intended to be provided.

Senator LUNDY—Has the minister made any public statement about the nature of, the extent of or the lack of resources that you can point to that might give us greater clarification of that in our consideration of this bill?

Mrs Patch—Not that I am aware of.

Senator LUNDY—Is there a statement saying that the tribunal will be given adequate resources or is that just your assumption?

Mrs Patch—There is the financial impact statement on page 5 of the explanatory memorandum. Paragraph 2.1 says that the financial implications arising from the passage of this bill will be considered in a budget context. These implications relate to the functions of the Australian Competition Tribunal, who may now review merger clearance decisions where parties choose the formal merger clearance system. In addition, the tribunal will be the primary body when considering merger authorisations. So that is what is being considered in the budget context.

Senator LUNDY—Equally, are you aware of any statement by the Treasurer about resources relating to the impact on the ACCC?

Mrs Patch—That is also being considered in the budget context.

Senator LUNDY—Can you outline the specific additional work of the tribunal as a result of this mandatory process for considering mergers?

Mrs Patch—Do you mean just for merger authorisations or for merger clearances, which are different?

Senator LUNDY—For both.

Mrs Patch—I think it is foreseen that there will be a significant additional workload. The government is considering that in the budget context.

Senator LUNDY—Can the same be said with respect to the ACCC's role in clearances and authorisations?

Mrs Patch—I understand that the ACCC's role in the context of clearances and authorisations is being considered in the budget context.

Senator LUNDY—Is that also expected to be a considerable impact?

Mrs Patch—I am not in a position to comment on that.

Senator LUNDY—I know, but you made the comment with respect to the tribunal, that it is anticipated that it would be significant.

Mr Johnston—It is a very significant change for the tribunal, whereas the ACCC presently devotes considerable resources to these sorts of issues.

Senator LUNDY—But I think that is the point: for the ACCC, this is what they currently do but within the current resources.

Mr Johnston—It does have implications which need to be explored in the context of the budget.

Senator LUNDY—But you are not in a position to express the same sentiment, that it will require substantial or at least additional resources?

Mr Johnston—No. I am sure the ACCC will have a view on this. They already have very substantial resources, but with the tribunal it is a very significant change in function.

Senator LUNDY—The bill also relates to the issue of third line forcing. Can you give an outline about the impact from a resources perspective that those changes are likely to make?

Mrs Patch—Not at this stage.

Senator LUNDY—Is that an issue for Treasury per se or is it just a specific question relating to the impact on the ACCC?

Mr Johnston—It is not a policy question as such; it is a question of resourcing that will need to be explored in a budget context and, I suspect, reviewed with the passage of time.

Senator STEPHENS—In relation to this memorandum dated 10 March addressed to Mr Lyons that was tabled today, on page 2 of the schedule called 'The Australian Competition Tribunal' there are six points in that section: Difficulties with the time limits. Mr Johnston, have these six issues that have been specifically identified by Justice Goldberg been considered? Have you had an opportunity to discuss the implications of each of these issues?

Mrs Patch—Yes, Senator.

Senator STEPHENS—Can you explain to me, as someone who is reasonably new to the committee, what difficulties he is suggesting there are with the initial constitution of the tribunal?

Mr Lyon—Yes. The tribunal as it is currently configured is a tribunal of part-time members. Presidential members are judges of the Federal Court of Australia and the other tribunal members, usually a business person or person with business experience and an economist, are people who are appointed to the tribunal on a part-time basis. So what Justice Goldberg is referring to there is that there is an issue that arises at the commencement of any matter that the tribunal is considering as to the constitution of the tribunal and making up an appropriately configured tribunal—that is, consisting of a presidential member, a person with business experience and an economist. There is a pool of people, as is evident from the list that has just been provided to the committee, and any given hearing or application will be dealt with by three people drawn from that pool.

Senator STEPHENS—In trying to get some sense of what the workload for the tribunal might be expected to be under these new arrangements, could you provide us with some indication of how many matters were considered by the ACCC in the past 12 months that would now be referred directly to the tribunal? Have you some sense of what this workload might look like?

Mr Lyon—Yes, although that raises one of the very issues which the Dawson review sought to address, which was that the merger authorisation provisions under the Trade Practices Act have been comparatively little used over the last 10 years or so. But to answer your question, in the last 12 months the Australian Competition and Consumer Commission has made, as far as I am aware, only one merger authorisation decision and that was one that was determined on Friday in relation to the acquisition of St Vincent's Hospital, Launceston by the Little Company of Mary Health Care Ltd. This is essentially a merger between two private hospitals, as I recall. So there has only been one in the last 12 months. But the point that the Dawson review made was that, because of some of the difficulties associated with the current system, people are, in fact, being deterred from seeking merger authorisation and so it would be hoped that more than one application a year would be coming forward to the tribunal.

Senator STEPHENS—The new arrangements might mean that there are others. Can you explain to me what happens if the tribunal's decision is not finalised by day 90?

Mrs Patch—It is deemed to be refused.

Senator STEPHENS—I understand now that the tribunal's assessment is considered final and third party interests will be considered as part of the tribunal's assessment rather than through an appeals process and there is no right of review on the merits from the tribunal's determination. So if the tribunal has not made their determination by day 90 it is deemed to have refused?

Mrs Patch—Yes.

Senator STEPHENS—Okay. So the fact that there is no right of review of that, that there has been no decision made—I am not sure—

Mrs Patch—The Dawson report did identify that as a disadvantage in the new system but it weighed and balanced that against the new speed, efficiency and certainty for the business community in having a relatively quick decision by the tribunal. The concern about third parties is basically that there can be a strategic use made of the provisions by third parties.

Senator STEPHENS—Okay.

Mrs Patch—An example is those who want to keep the process going and going so that you will not have a culmination of the merger. The desire is to remove that. Dawson does say that that is a bit of a disadvantage but you must weigh that against the severe disadvantage that has been around so far of the lack of timeliness, the fact that the ACCC has to be gone to first and make its own complete decision and then the tribunal has to make another complete decision. Submissions made to the Dawson review indicate quite strongly that this ability of third parties to make strategic moves meant that people do not want to use the authorisation provisions. That is basically what Dawson says, and that is what the bill seeks to implement by not having third party review.

Senator STEPHENS—Am I right in saying that there is no right of review on the merits of a tribunal decision?

Mrs Patch—No, there is no right of review on the merits, but there would be judicial review possible to the Federal Court if there was held to be some kind of error of law, as is commonly the case for bodies like that. There would also be administrative review under the Administrative Decisions (Judicial Review) Act. In common with other tribunals or decision-making bodies of that kind, there would be judicial review where

appropriate and administrative review where appropriate, but there would not be another, say, body just waiting for appeals to come up to it.

Senator STEPHENS—Sure, and you cannot go back to the tribunal and ask it to reconsider?

Mrs Patch—No.

Senator STEPHENS—Can we go to the collective bargaining clause briefly. You spoke earlier about the level of consultation that had occurred around the development of this legislation. Was that particular issue canvassed with the states?

Mrs Patch—Do you mean collective bargaining in general?

Senator STEPHENS—The collective bargaining clause.

Mrs Patch—To do with unions or more generally?

Senator STEPHENS—To do with the unions and the exclusion of unions from the workplace.

Mrs Patch—The government, I understand, made the decision that that was a minor amendment and did not need to be sent back to the states and territories. They were, however, notified of this new provision before it was introduced into parliament, and no comments have been received.

Senator STEPHENS—So they were notified but not consulted. Perhaps I am asking you to express an opinion, but certainly from the information that we are receiving from many people in the community it is not a minor change to the act at all.

Mrs Patch—That is a matter of government policy.

Senator STEPHENS—I appreciate that.

Senator LUNDY—Is it government policy to call it a minor change?

Senator STEPHENS—That was my question, exactly. Who determines whether it is a major or a minor determination?

Mr Johnston—It might be useful to put in context the nature of the trade practices legislation. It is a vehicle for dealing with anticompetitive behaviour. It is not a vehicle for dealing with representation of workers, for example. That is a separate jurisdiction, a separate body of legislation.

CHAIR—Your point is that it is not a statute dealing with industrial law; it is a statute dealing with market conduct.

Mr Johnston—That is right.

Mrs Patch—The Dawson report outlines that clear demarcation that should be kept in the Trade Practices Act between industrial legislation and business legislation.

Senator STEPHENS—I understand that point; however, the small businesses that have been represented by union organisations in negotiations with larger businesses have been caught up in this provision, which is the concern that we have with this legislation. Small businesses such as owner-drivers and truck drivers, for example, have been quite outspoken in their concerns about the legislation.

Mrs Patch—That is a matter for government decision.

Senator STEPHENS—Professor Fels made the point in his concerns about the tribunal—and I am quoting here from the *Bills Digest* which summarised his objections—that the tribunal is:

... an unfriendly forum for the consumer and small business, usually knee deep in lawyers.

Has there been discussion about how the tribunal might be made more user-friendly?

Mrs Patch—Basically, the tribunal represents a fairly wide range of community interests. The act requires that it does represent, for example, industry and economic—not just legal—interests. I can go through some of the qualifications of the people who are on it if that would assist.

Mr Johnston—At the end of the day, this is an opinion of Professor Fels.

CHAIR—Professor Fels probably finds lawyers less friendly than economists, but lawyers might find economists less friendly than lawyers.

Senator STEPHENS—This is true. My concern is the expanded role of the tribunal, its anticipated increased workload and its activity in trying to expedite these issues. I am not familiar with the work of the tribunal and whether or not that kind of consumer or user education has been part of its work or vision.

Mr Johnston—The vision that is relevant in this case is the vision of the Dawson committee report. That is a vision that is looking to how can we reduce uncertainty; how can we best advance desirable economic change for the benefit of all Australians?

Senator LUNDY—Has the tribunal provided reasons for the recent decisions concluding the Qantas-Air New Zealand merger?

Mr Lyon—As of this morning, when I checked, there are no reasons provided on their web site.

Senator LUNDY—Should there have been by now?

Mr Lyon—That is a matter of opinion.

Senator LUNDY—That is the point: is it a matter of opinion or are they in breach of—

CHAIR—I think you could fairly ask Mr Lyon whether, according to ordinary criteria as he understands them, such reasons would have been expected to have been provided by now?

Senator LUNDY—Eloquently put, Senator Brandis.

Mr Johnston—Without pre-empting Chris's response, this is a very complex case.

Senator LUNDY—Sure.

Mr Lyon—Casting my eye over the ACCC's decision, as I did today, it is some 200-plus pages. Of course, a decision of that magnitude is going to take some time. The tribunal endeavours to make its decisions and reasons known as quickly as it can.

Senator LUNDY—How long has it been now that we have been waiting for a decision?

Mr Lyon—The tribunal made its determination on 12 October 2004.

Senator LUNDY—That is quite a few months. Is it the expectation that when the tribunal ultimately makes its decision that all of the reasons for its decisions and the submissions to that investigation would be made public?

Mr Lyon—That is the intention, yes.

Senator LUNDY—The point about the tribunal's ability to perform their duties in an efficient way comes back to the point earlier where you said their resources would be the subject for budget considerations. It is an extraordinary circumstance which I think just adds to the concerns about the proposed change arrangements. I have one more question. Can you tell me specifically whether the government followed all of their procedural requirements under COAG in consulting with the states with respect to the collective bargaining amendments in this bill that Senator Stephens was referring to?

Mr Lyon—As Mrs Patch said earlier, the government followed the strict requirements of the conduct code agreements in relation to the bill that was introduced to parliament on 24 June 2004. In relation to the bill that you have before you, the government considered it appropriate to notify states and territories of the reintroduction of the bill prior to its reintroduction and to alert them to the fact that there had been minor amendments. This was partially in consideration of the fact that five states had written to the Commonwealth last year endorsing the legislation and a further three were deemed to support the legislation under the terms of the conduct code agreement.

Senator LUNDY—But that process was not gone through again with respect to the amendment on collective bargaining?

Mrs Patch—No. The extra three months and 35-day voting period would have again taken the bill out—

Senator Lundy—I think the point has been made that you did not abide by those processes once you amended the bill.

Mr Johnston—The government took an explicit decision that it was a minor policy matter and as a matter of courtesy they advised the states of their intentions in this regard.

CHAIR—The government considers it has fully discharged its obligations under the COAG agreement.

Mr Johnston—Yes.

Senator LUNDY—I would suggest that that is a matter of opinion.

CHAIR—Whether the government has an opinion is a question of fact.

Senator LUNDY—It is not a question of fact, because it is obvious that the same processes were not gone through as they were with the original bill. The question of opinion is whether this amendment is a minor matter.

CHAIR—Thank you. The committee receives as tabled documents the memorandum from Justice Goldberg of 10 March 2005 and the membership data for the Australian Competition Tribunal as at 9 February 2005.

[6.03 p.m.]

ANTICH, Mr Robert, General Manager, Policy and Liaison Branch, Australian Competition and Consumer Commission

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

GREGSON, Mr Scott Peter, Acting General Manager, Adjudication Branch, Australian Competition and Consumer Commission

GRIMWADE, Mr Timothy Paul, General Manager, Mergers and Asset Sales Branch, Australian Competition and Consumer Commission

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

CHAIR—Welcome. Mr Samuel, would you like to make an opening statement?

Mr Samuel—No.

CHAIR—We will move to questions.

Senator STEPHENS—Thank you, gentlemen, for accommodating this hearing at short notice. Mr Samuel, you presented your views on the Dawson report in an address to the National Press Club last year. Now that we have the bill before us, albeit with slight amendments that are subject to this discussion and investigation at the moment, could you revisit some of those comments you made about the Dawson report and your response to the proposed merger approval processes that are in the bill we are currently considering?

Mr Samuel—I think they relate to two specific areas. The first is concerned with the informal/formal merger clearance process. At the National Press Club I expressed the view, and have indicated similarly in discussions with senior advisers and businesspeople who are involved in the merger process, that the concept of a voluntary formal process with an informal process sitting, if you like, as a parallel or side by side is not a procedure that has been adopted in any other jurisdiction in the world.

That does not mean to say that we cannot do that here in Australia. I have indicated to the business community that they need to be aware that the pursuit of the informal process, which they openly acknowledge has worked very well indeed. And I think I quoted in the National Press Club speech but have quoted elsewhere comments made by senior advisors that in their view the informal process has worked in about 98 per cent of the cases that are put before them. The cases that do not work well are those where we oppose the mergers. They acknowledge they would like to have a formal process where we are going to oppose the merger but where we are going to approve a merger then they like the informal process.

I have indicated that we cannot at the ACCC guarantee that the informal process will remain in place once a formal process is adopted. That is not to say—let me emphasise this—that we will not use every effort to maintain the presence of the informal process. In part preparation for that we have in more recent times introduced substantial transparency and accountability into the informal process to provide guidelines as to the time frames within which we will make our decisions, as to the matters of concern to us where matters are of concern in relation to competition issues and as to the reasons for our decisions where our decisions might be in any sense complex or might raise issues that could be of interest to the business community at large. The idea is to provide some transparency and accountability in the conduct of the informal process and to provide a body of precedent for the future as to the reasons why we make decisions in the informal process.

However, I have said on many occasions to the business community that there can be a propensity for some advisers to attempt to game the process for the purposes of a short-term gain for their particular clients in relation to a particular transaction. If we find that the use of the informal process by the ACCC, which is a voluntary process that we adopt, is being gamed by the business community or by advisers to lead to a situation where we do not believe that we can administer the clearance process in an effective and proper manner as is required under the law then we will simply cease the informal process.

Recently I gave a speech to the Securities Institute in Melbourne. It was at the time that we launched the informal merger guidelines. One senior practitioner from a leading Melbourne law firm commented that he thought it was a pity that we had adopted these new guidelines, which are guidelines that we now adopt to bring about some transparency and accountability to our informal process, in what was apparently a reaction to a gaming of our informal process by a particular adviser in relation to a particular takeover offer that occurred last year. I said, ‘Don’t berate me for that and don’t berate the ACCC; berate the particular adviser concerned,

because that is what happens when an adviser, a small minority, attempts to game the process to their advantage and cause difficulties for us'—that is, the ACCC—'in our manner of dealing with merger applications and merger clearances and the like.'

I also indicated to this particular group that, if the same circumstance arose in relation to the so-called parallel informal and formal clearance process, then they would have to understand that we would simply withdraw the informal process. We will simply insist on every merger going through a formal process of clearance. I simply indicated that that is the way it will be. It would be necessary to ensure that we do not allow advisers or merger parties who believe that they can game the process to their short-term advantage to do so and that we do not allow that to happen in a way that could render less effective our administration of section 50 of the Trade Practices Act. So that deals with the clearance process, and our views on that have not changed. Let me emphasise that it is not a threat and it is not a promise; it is simply to give an indication, if you like, or a forewarning to advisers: do not game, because if you do game then it will have an adverse impact across the board on all parties that will approach the commission over a period of time for clearance of their mergers.

Without expressing my own views as to the merits of the informal process, I simply repeat the views of those senior advisers in the area of mergers who say that the informal process has worked very well indeed. Indeed, these guidelines that we have adopted to bring about more transparency and accountability are now met with favour from people within the profession as they realise the purpose and the objective of the guidelines and that we can still maintain some flexibility in our merger clearance process while at the same time bring some strict time lines and accountability to the way we handle it and, I might say, accountability and transparency on the part of merger parties.

The authorisation process is a little more complex because the change that has been advocated by the Dawson review and has been adopted in the legislation is that, for authorisations of mergers, parties will bypass the ACCC altogether and proceed directly to the Australian Competition Tribunal. We obviously have some concerns over that because it differentiates mergers from any other form of authorisation process that is available under the Trade Practices Act. Every other authorisation process proceeds first to the ACCC for determination and then, ultimately, if the ACCC reaches a decision that is not in agreement with that of the parties concerned, they take it on appeal to the tribunal. That happened most recently in relation to the Qantas and Air New Zealand strategic alliance authorisation application.

The merger provisions of the Trade Practices Act provide for very strict time lines in relation to authorisation procedures. The time lines are that we must consider an authorisation application with regard to a merger within 30 days. That can be extended to 45 days. Then there is a process for appeal to the tribunal and then the tribunal can consider the appeal in an appropriate period of time. We think that that process has worked well in the past, although I have to say to you that there have been very few applications for authorisation of mergers. Over the period that I have been Chairman of the ACCC, I do not think we have had one application for authorisation. I beg your pardon—there was one, which was approved only on Friday. I am sorry; my short-term memory is failing. There was one we approved on Friday.

That authorisation process, although it has some more formality attached to it, can operate in a manner that is not dissimilar in its outcome to the informal clearance process. If we consider that an authorisation might be appropriate but that it may be necessary to attach certain conditions to the authorisation in order to lessen some concerns we might have—particularly as to the anti-competitive consequence of the merger, which is part of the balance of consideration to be taken into account—we can deal with the merger parties to achieve just that.

In the new process, the ACCC will be bypassed altogether and authorisation applications will go directly to the Australian Competition Tribunal. In that context, the ACCC will establish some protocols for working with the tribunal in the gathering of evidence and the putting of material before the tribunal. However, there is no obligation on the part of the tribunal to consider or to entertain any of the material put by the ACCC to the tribunal. One of our concerns is that it has been our experience, even in the most recent past, that where the ACCC has been appearing before the tribunal—as an amicus—the tribunal has at times taken the view that either it has a limited interest in the views that the ACCC can put before it or it will cut the ACCC short in putting propositions to it. It is reported to me by those who have been present at some tribunal hearings that the ACCC has not been able to present its views in as fulsome a manner as it would otherwise prefer to be the case in order that all the matters can be taken into account.

It is not for me to judge whether the tribunal is right in doing that. It is not for me to judge, either, whether the tribunal, even if we had the opportunity to put all those matters before it, would take account of those

matters. But, suffice to say, we do believe that there has been built up over many years some significant expertise within the ACCC in dealing with both the competition issues of mergers and the public benefit issues of mergers. Therefore, we have some concerns over the fact that the ACCC will be effectively bypassed in respect of the authorisation proposals that are now contained in the merger provisions of the Dawson legislation.

That effectively repeats the information that I provided not last year, and I hesitate to say this, but I think the year before at the National Press Club. It was some time ago. There are some gaming processes and there are some forum shopping processes that now occur as a result of the procedures that are contemplated in the Dawson legislation. Only time will tell whether these will be exercised, although I would have to say to you that, being a former advisor in the area of takeovers and knowing how advisors think today, if they do not exercise some forum shopping and if they do not exercise part of the processes of gaming that are available under the legislation, I would be very surprised indeed.

Senator STEPHENS—Thank you very much. In relation to the relationship between the ACCC and the tribunal, I assume you have seen the memorandum from the president, Justice Goldberg. There is reference here to the active role of the ACCC in the process. Do you think the relationship between the ACCC and the tribunal will be significantly different, given your concerns about the relationship you have with the tribunal now and the evidence that the ACCC provides in the current circumstances?

Mr Samuel—It is too early to tell and I have only just seen this material. I should, in the interests of full disclosure, say to you that I have just spoken to the president of the tribunal, Justice Goldberg, and have raised a concern about one sentence that has appeared—that is, the reference to the suggestion that Mr Cassidy and I had told him that the ACCC had a significant and important role to play in the tribunal's merger authorisation process. I am sorry; this is terribly hard because we are dealing with telephone conversations and trying to remember what has occurred in the past few days. My recollection of the conversation I had with Justice Goldberg was that, in response to a query from him, I had no concern with the relationship between the tribunal and the ACCC but that I certainly did not think it was appropriate for me to comment at this point of time about the significance or importance of the role that the ACCC would play in the tribunal's merger authorisation process. One of the reasons I could not comment on that was that, firstly, it is too early.

CHAIR—That is quite different, isn't it? You say that you said you did not want to comment on it and he says that you and Mr Cassidy acknowledged that the ACCC had a significant and important role to play in the tribunal's merger authorisation process. Do you agree that that is a fairly significant difference?

Mr Samuel—Yes, I would have to say so; I would have to say there is a fairly significant difference.

CHAIR—Go on. You were going to explain why you said that.

Mr Samuel—I am just concerned that we are talking about a phone conversation and I do not have notes of the full contents of the conversation. I have just discussed this with Justice Goldberg. All I would say is that it would be impossible for me to form a view at this point in time as to the significance or importance of the role of the ACCC in the tribunal's merger authorisation processes for two reasons.

The first is that the processes have yet to be established. We are still in the course of discussions with the tribunal, the tribunal officers and the tribunal president in relation to these matters. Secondly, I am very conscious of the reports that have been given to the commission by staff members and indeed fellow commissioners who have attended some tribunal hearings in more recent times and have found that the role of the ACCC as an amicus has been severely curtailed—in the view of those who are reporting to the commission and my fellow commissioners—in that material that they have wanted to put before the tribunal has not been permitted to be put. In the view of those who are reporting to me and my fellow commissioners, the tribunal has not given them or their counsel assisting an appropriate time for material to be put. Therefore there would appear to be some curtailment of the ability of the ACCC to put matters that it believes are important to some of the tribunal's considerations.

Senator LUNDY—With respect to that paragraph in this memorandum provided by Justice Goldberg: that is not an accurate reflection of what you understood the discussion to be about?

Mr Samuel—I have to say that it does not accord with my recollection of the conversation, but I would not want to definitively say that it is not a reflection of what was said. The conversation was brief—I know I interrupted a meeting to discuss this matter with Justice Goldberg—and I do not recall the discussion focusing on the significance or importance of the role. It did focus on whether any difficulties were being encountered

at the moment or whether any difficulties were envisaged in the ACCC's ability to work with the tribunal in authorisation applications.

CHAIR—What about you, Mr Cassidy? You are mentioned too.

Mr Cassidy—I think I draw a distinction between the working relationship between us and the roles of the commission and the tribunal. It is certainly the case, as reflected in the memorandum from Justice Goldberg, that the intention is that the tribunal will use us to do a lot of the evidence gathering, the legwork, in relation to merger authorisations. But I suppose the crucial issue which the chairman is flagging is that we will no longer be making a decision on the basis of the material we gather. We will gather it and present it to the tribunal, but then what use the tribunal makes of it and what weight or otherwise the tribunal accords it is something which simply remains to be seen. It is not an issue of 'We don't get on with the tribunal,' or 'We can't work with them,' or whatever, because we do that already. I think the issue is fundamentally that, as I say, under the bill, we are no longer a decision maker with the tribunal reviewing our decision and the material we use to reach that decision. Rather, we gather the information, the evidence, and—I would think—make some assessment of it, but then it will be entirely up to the tribunal as to what use they make of the work we have done and what weight they place on it. I think that is the distinction between a working relationship as opposed to a significant and important role.

Senator LUNDY—Mr Samuel, were you aware that this conversation with Justice Goldberg was to be the subject of a memorandum tabled at the committee today?

Mr Samuel—No, I was not aware of that.

Senator LUNDY—Also, given the evidence you have just presented to the committee that you believe that the tribunal has not treated the ACCC evidence in previous cases with perhaps the weight and seriousness it deserves, by perhaps prematurely dismissing ACCC officers, does that inform your concerns about the weight the tribunal would give ACCC evidence under the provisions outlined in this bill?

Mr Samuel—As I said before, it is too early to tell. I should emphasise that it has only been in some cases that we have had concerns. I could not name tribunal members who have been involved. Suffice it to say that the reports that have come back to the commission, not only from staff members but from fellow commissioners—and I need to emphasise that—who have attended tribunal hearings, have expressed frustration and dissatisfaction with the ability of the ACCC as an amicus of the tribunal to fully present the matters that the ACCC believes ought to be taken into account by the tribunal in considering matters that are before it, where the ACCC is acting as amicus to the tribunal.

CHAIR—Why is that? Is it because the tribunal defines the issues on which it will permit you to address it?

Mr Samuel—I could not comment; I do not know. The sense that is conveyed—and let me emphasise that it is reports—is that the time provided to the ACCC to present material through its counsel is severely curtailed.

CHAIR—Aren't there written submissions?

Mr Samuel—There will be some written submissions and there will be a body of material that will be submitted as a result of presentation by counsel, and there will be an examination of parties and of submissions that are presented by counsel as well. The ability of the counsel representing the commission to properly examine, or cross-examine, material that has been put before it is again curtailed—as it is reported to me, with a sense of frustration and dissatisfaction.

Senator LUNDY—Are you aware whether under the new provisions the tribunal will be able to attach conditions to a decision relating to an authorisation of a merger?

Mr Grimwade—Yes, that is correct.

Senator LUNDY—Because of the potential for anticompetitive behaviour, are there any risks to the competitiveness of the Australian business sector as a result of these changes, particularly in the case of larger mergers?

Mr Samuel—It depends on the approach taken by the tribunal to the balance of public benefits and interest as against the anticompetitive detriments. It should not be possible for the tribunal to ignore the anticompetitive detriments. It is a matter that needs to be taken into account in determining whether a merger should proceed because it is in the overall public interest that it should be allowed to do so. It does depend upon the approach taken by the tribunal to merger applications. There are different economic philosophies evident amongst members of the tribunal, and they are reflected at times in both their decisions and/or their

public comments, made through speeches and the like. For example, at least one member of the tribunal is on the record as indicating—I do not have the specific words in front of me—that private benefits flowing from a merger may well be regarded as public benefits, even though they are not—

Senator LUNDY—Do you mean something like a share price increase?

Mr Samuel—Efficiency increases in terms of the parties concerned. Efficiency increases, even though they are private benefits accruing to the parties concerned, may well be regarded as public benefits, even if those efficiency benefits or gains are not passed on to the consumers.

Senator LUNDY—Really?

Mr Samuel—That would not be a philosophy that the commission would adopt.

Senator LUNDY—Are you concerned that the competition related issues will be diminished in their stature or weight in consideration of the overall decision by the tribunal?

Mr Samuel—The tribunal will ostensibly be dealing with public benefit issues rather than the competition issues, but the competition issues will need to be taken into account in determining the overall merits of a merger in the context of the public interest. What will occur, I think, is this: if a merger is put before us which has substantial anticompetitive detriments—that is, it is likely to lead to a substantial lessening of competition—then the merger will be rejected under the informal clearance process we have at the moment, and we would express our reasons for that as part of our competition assessment that we issue following that determination. That, for example, was most recently evident in the Boral-Adelaide Brighton cement merger—where an informal clearance application was made to us and we determined that it would be likely to lead to a substantial lessening of competition.

It is possible under the processes provided for in the Dawson legislation for, for example, that particular merger to proceed by a whole series of different routes. One would be to proceed with the informal process until the parties had determined to what extent the commission had concerns and where the concerns might be. Then the proposal might be suddenly converted to a formal process after three or four months and modified in some form to deal with some of the issues we have raised in the informal process. If we did not clear the merger, it would potentially proceed to the tribunal for a review. If the tribunal did not clear the merger then the merger parties could still proceed with the merger and we would have to take injunction proceedings before the Federal Court. So the ACCC deals with it informally; the ACCC deals with it formally; the tribunal deals with it by review and then the Federal Court has to deal with it. So there are four processes that are involved there.

Alternatively, at a point in time the parties might consider that the quickest and easiest route to try to pursue is to go by authorisation application direct to the tribunal and to argue that, to use one economic philosophy that I have just described, there are efficiency benefits flowing from this merger which will benefit the parties concerned and which ought to be regarded as public benefits that should permit the merger to be authorised. The consideration then of to what extent the tribunal would consider matters that we would put before it gleaned from both our informal and formal merger clearance process is a matter yet to be determined.

Senator LUNDY—Treasury was not able to shed much light on that either. The extent to which the tribunal relies on your advice seems to be in the hands of the tribunal.

Mr Samuel—I should mention the time processes because I understand that one of the primary concerns of the business community in relation to the merger authorisation process is the time and the uncertainty associated with the time.

Senator LUNDY—I was going to ask you whether or not you believe the changes you have made to the existing processes—and you mentioned in your opening comments greater transparency, tighter time frames, and establishing a body of precedent—would have satisfied in the broader sense the original concerns held by industry?

Mr Samuel—The first comment to make is that, as best I can glean it—because this is somewhat after the event; it is after I had joined the commission—from talking to advisers, their view is that in around 98 per cent of the cases they were happy with the informal process in any event. It was the two per cent of cases that were complex, difficult and got rejected that they had concerns about as to the informal process. The second comment to make is that the concerns they had would, I think, have been significantly alleviated had the informal merger process guidelines been put in place—because those guidelines do provide for transparency, they keep us up to the mark and they require us to meet time lines. Our time lines are, in almost all merger

clearance applications we have had since the guidelines were put in place, at least met if not beaten—that is, the decisions are made a week or two earlier than was originally proposed.

There is an expectation that that will happen. You often read about this in the *Financial Review*—a particular journalist seems to watch our web site and there is an expectation that on a certain day we will make a decision because he reads in the web site that that is the day on which we are due to issue our formal decision. If there is a delay in that decision-making process then that is put on the web site and the reasons for the delay will be outlined. Most importantly, the publication of a statement of issues at a time when we have some real, serious concerns—concerns which we have not been able to resolved with the merger parties—enables interested parties such as employees, customers, suppliers and competitors to focus on the specific issues we are dealing and tends to draw more information out to us.

In a very recent matter involving Pacific Brands and Joyce, a merger of two foam manufacturing and marketing companies, we adopted that process with the statement of issues, and it drew out a lot more information than we had at that point. The issue of a formal competition assessment then provides a growing body of precedent as to our reasons for making our market decisions and the like. I think that the informal merger guideline process has certainly helped. There have been very few authorisation applications but, interestingly enough, the timelines provided for under the legislation as it currently stands—that is, under the Trade Practices Act at present—provide for a time frame which, in certain instances, would be a shorter time frame than the one provided for under the Dawson legislation. We have 30 to 45 days in which to reach a decision in respect of an authorisation on a merger. There is a 21-day time frame for an appeal on that authorisation decision. Then, I think, the tribunal has a period of three months in which to make its final decision. I think that is right, isn't it?

Mr Grimwade—I think that period can be extended without limit if the tribunal deems it complex. I think that is right.

Senator LUNDY—What is the ACCC's view on how successful the tribunal has been in dealing with merger authorisation appeals, either from the ACCC or, indeed, general observations about the timeliness or success?

Mr Samuel—I cannot remember one—certainly, the last one was not in my time—other than the Qantas-Air New Zealand one.

Mr Grimwade—And that was apart.

Senator LUNDY—Perhaps you can share your views on what is going on there.

Mr Samuel—It is a bit difficult to share our views on it because we do not know the reasons for the decision of the tribunal. The matter was determined by the commission in August 2003. It then went on review to the tribunal and it would have been within 21 days of that.

Mr Grimwade—That is correct. I believe it was August or September that the commission made its decision to deny authorisation. Then there would have been an appeal within 21 days. The tribunal made its decision in October, I think.

Mr Samuel—Of 2004. But that decision was simply to indicate that the tribunal had determined to grant authorisation, but the reasons for that decision were yet to be provided to us, so we do not know where we stand on it.

Mr Grimwade—I should just add that that was not just a merger authorisation. There were two aspects: a section 50 merger aspect, and also a section 45 collaborative arrangement aspect. The parties agreed not to use a section 50 merger authorisation process with the commission. They agreed to adopt a non-merger authorisation process so that both aspects could be heard at the same time and dealt with at the same time by the commission.

Mr Samuel—That points to quite a bizarre position that can arise where, if the same proposal were to occur again in the context of the Dawson legislation, the section 50 application would proceed directly to the tribunal but the section 45 application would be considered by the ACCC. It would then be capable of review by the tribunal but under different time frames—so it is all over the place.

Senator LUNDY—So it could end up even more complicated, complex and unhelpful to the businesses anyway.

Mr Cassidy—Indeed. Both the tribunal and we would have to decide how much public benefit or detriment was associated with the acquisition under section 50 and how much of it was associated with the potentially

anticompetitive agreement under section 45, because, given that they are two different processes under two different sections of the act, it would not be legitimate for either the tribunal or the commission to take into account something which should have been looked at under the other section.

These sorts of split arrangements are not all that common, but nonetheless they do occur. The Qantas-Air New Zealand and, for that matter, the Foxtel-Optus decisions—which people would probably say are two of the biggest mergers we have considered in recent times—were both substantially not mergers, in the sense that the bulk of each proposal was presented to us as a potentially anticompetitive agreement to be looked at under section 45 of the act. Without too much re-engineering they could have been constructed to be a merger under section 50 of the act. As referred to earlier by the chair, this casts some light on the fuzziness of the distinction that is being drawn between the treatment of authorisations under the Dawson bill—that is, what will be considered directly by the tribunal and what will still be considered by us.

Senator LUNDY—So, under the new bill, the Foxtel example could, hypothetically, have been under concurrent consideration by the tribunal, for the merger, and, thorough investigation under section 45, by the ACCC.

Mr Cassidy—Yes, that is right.

Senator LUNDY—That is not very workable for any party—yourselves, the tribunal or the corporations involved—is it?

Mr Cassidy—It certainly has its challenges, if I can put it that way. We are still in the process of trying to think through how the process would work with those sorts of split proposals.

Senator LUNDY—I also have some questions about third line forcing, but do you have any more on mergers?

Senator STEPHENS—Just very briefly, we had a long discussion about the relationship between the ACCC and the tribunal and the resourcing issues that have emerged from the strengthened role of the tribunal. With the evidence that Treasury gave, we were trying to get some clarity about whether or not the role of the ACCC as defined in the memorandum actually ensures that your advice will go on the public record in relation to these mergers—the authorisations. Do you see that as being an issue of concern or have you clarified in your minds the status of the advice that the ACCC gives in relation to those authorisation hearings?

Mr Cassidy—I will certainly answer that question as best I can, but I would prefer not to comment too much on the process that is attached to Justice Goldberg's memorandum in particular, because in further discussions with the tribunal the processes and the timelines have already moved on from those that are outlined here. We would certainly, as is our way, try to operate in as transparent a fashion as we can with all that we do. So in giving a report and associated material to the tribunal we would certainly hope that that would be a public process. But that would ultimately be determined by the tribunal. We cannot say here and now to you, 'Yes, it will be public', because that is beyond our control.

With the merger authorisation process envisaged in the bill, it is a tribunal process: all decisions need to be made by the tribunal. Our only status is as an amicus or assistant to the tribunal. While we would hope and encourage the tribunal to ensure that their process is as transparent and public as possible, nonetheless that would be a decision for the tribunal to make and may well depend, amongst other things, on what submissions were put to the tribunal from the applicant's counsel as to the sensitivity or otherwise of the material we had and the report that we had prepared.

Senator STEPHENS—As someone who has never actually seen the tribunal in action, perhaps you can advise me whether, other than the tribunal, the counsel and I suppose the applicants, any organisation other than your organisation provides evidence for the tribunal's consideration.

Mr Cassidy—Currently in, say, a tribunal review of a merger authorisation we would certainly be there with counsel. But, as I say, our role is one of assisting the tribunal. The applicants would be there with counsel. It is likely that at least some of the other more substantial players who have an interest in the merger would be there with counsel. Those who may not be there are smaller third parties who, I think for fairly obvious reasons, do not find the tribunal processes, which are at least quasi-judicial type processes, particularly friendly, I suppose, for want of a better way of putting it. We have had the experience on more than one occasion of having some quite significant material put to us by third parties in the context of considering an authorisation but then, if our decision is appealed to the tribunal, of those third parties choosing both not to be there themselves and not to have any legal representation at the tribunal hearing. But, depending on the nature

of the issue and the number of particularly significant players involved, you could have quite a number of legal counsel appearing before the tribunal.

Mr Grimwade—I should add that third party representation before the tribunal requires the tribunal's leave to intervene.

Senator STEPHENS—Mr Samuel, I was thinking about your evidence at the beginning about gaming the new process. Are you able to provide me with a hypothetical example of where you see the opportunities for that to happen and how it might happen under the new process?

Mr Samuel—Yes. It is probably giving advice to advisers on how to game us, which I am a bit reluctant to do—

Senator STEPHENS—I appreciate that, but I am interested in hypothetically how it might occur.

CHAIR—Give us an example that did not work.

Mr Samuel—I can give you an example of one that we reacted to. Let me try and give perhaps two obvious examples. First of all, under the formal process what a party can do—and we have seen this happen in the informal one—is hold back on providing information. It is a 40-day time limit and they can hold back on providing information to us and wait until the last few days, then suddenly provide us with a welter of information. Or they can provide us with information that was not quite accurate and then suddenly correct it in the last few days. We would not have time to consider it. Automatically if we do not formally grant clearance under the formal process, at the end of the 40-day period it is deemed that we have rejected. They can then proceed to the tribunal and present the information.

Mr Cassidy—It is automatically before the tribunal in that, the way the bill reads, any information that we have before us in considering a formal clearance application we need to pass on automatically to the tribunal so that the tribunal has it as well. We could get information very late in the piece and not have adequate time to consider it and then that information would have to be available to the tribunal for its consideration.

Mr Samuel—I do not want to go into details of what happened last year in relation to Boral and Adelaide Brighton, but let us assume that, in a hypothetical case, a party was, in the informal process, to run us along—provide information that might or might not be accurate or reliable; gradually run us along and test us as to where the complexities might arise; and then run us right through the informal process to the point at which we are about to say, 'Look, we think this is going to be a problem,' and then suddenly switch over to the formal process.

In putting a formal application in, they take it to the edge; they change the structure of the transaction in a way that deals with some of the worst of our concerns but leaves some of our other concerns to the side, knowing that it is a sudden death. It is a question where either it will be approved and cleared or it will be rejected. If we see that happening so that we can see that the interaction that occurs at the moment between the commission, commission officers and commissioners, including me as chairman and the merger parties, produces a circumstance where the consequence of a difficult informal process is suddenly that there is a movement into a formal process and then discussions that we might have had or that I might have had along with staff members with merger parties are then used back against us in terms of the formal process, then all we will do is close off the informal process. That would be the gaming that we would be concerned about.

Without giving any details at all, just the other day, a chief executive and chairman of a company came in with the financial officer and met Mr Grimwade, one other and me to talk about possible mergers in a particular industry. We discussed four or five different scenarios. In that context, we expressed some very preliminary views as to how certain scenarios might best be dealt with and the sorts of difficulties that might or might not arise. If we went to a formal process, we would be a lot more cautious about some of the things that we would discuss in a formal environment. In the informal environment there is a sense of interaction, of trust, of trying to tease out the issues and trying to help merger parties to reach a satisfactory conclusion that is going to meet the sort of issues that we deal with.

Let me mention a very specific case that became quite public—AGL Loy Yang. In that case, it was well known that we were considering a range of different undertaking type processes that might have perhaps satisfied our concerns. In the event, that matter went before the Federal Court. If we were to do that in an informal manner and then suddenly move into a formal process and have various documents and/or interactions or communications between the commission and merger parties thrown up to us in a formal process, we would find that very difficult indeed. I think the chair will attest that concepts of without prejudice

discussions just do not apply in those sorts of circumstances. I do not want to verbal the chair in terms of his legal knowledge, but I think that is right.

CHAIR—I think that is right.

Senator STEPHENS—Finally, in terms of that process, if you went to a sudden death conversion from an informal process to a formal process, then got caught by the deadline and then it went to the tribunal, do you envisage that the ACCC would be able to give evidence? Obviously they are going to be able to give evidence about some of the informal discussion. Are you able to give evidence as well?

Mr Cassidy—The idea of the review by the tribunal of the formal approval process is that it is basically meant to be on the material that was before the commission except to the extent that the tribunal feels that it needs to seek clarification either from the commission or from the parties involved. How far the tribunal will allow that clarification to go is obviously a matter for the tribunal. A similar provision exists in the gas regulatory arrangements, which are subject to appeal to the tribunal. I would have to say in all fairness that the tribunal has kept a fairly tight rein on the use or attempted use by some in the private sector of that sort of provision to get new material before the tribunal which, if you like, the commission has not seen before. It would be very much up to the tribunal to decide just how far that clarification point ran. But that aside, it is basically meant to be a review of what was before the commission.

I come back to the scenario that the chairman drew earlier. If I was an adviser out there and I had the ability to both control the timetable, in the sense of not agreeing to 40 days being extended, and to put a whole lot of material in front of the commission on day 37 or day 38, I suspect that is the way in which I would be getting my additional material and views in front of the tribunal but virtually without the commission having any ability to consider it.

Senator STEPHENS—Do you anticipate that there could be circumstances in which that occurred and the tribunal did not call the ACCC to provide any clarification, that it just took all the material from your deliberations without any other discussion with you?

Mr Cassidy—Under the bill, that would be entirely up to the tribunal. It would depend on whether the tribunal felt it wanted any clarification of the material. This all sounds a bit self-serving, I suppose, but one of the problems in this area when you get new material—we have had this experience ourselves—is that until you have had a chance to look at it, and analyse it, it is not necessarily obvious that you need to seek clarification in relation to the material. Whether we are asked to help the tribunal to clarify new material which has been presented to us just before day 40 would really be a matter for the judgment of the tribunal itself. Under the bill we do not have any automatic right to do that; it is entirely up to the tribunal.

Senator STEPHENS—In fact, it would be up to the presiding judge?

Mr Cassidy—Yes.

Senator STEPHENS—So that opinion could be different too; the interpretation could be different depending on who is presiding.

Mr Cassidy—Yes.

Mr Samuel—That is why I emphasised before that the circumstances I described where it has been reported to me that the ability of the ACCC to present material before the tribunal has been curtailed have occurred only in some cases. It is certainly not a widespread issue.

Senator LUNDY—Given this memorandum that was received today, I want to know whether or not the ACCC can point to any comparable jurisdictions in modern Western economies where the competition and consumer watchdog specifically has no involvement in consideration or approval of mergers. What the evidence today shows us is that that is possible under the bill before us. Your advice could be ignored or it may not be sought; that is the reality of what we are dealing with here. Is there any other jurisdiction where that watchdog is precluded from being involved in the consideration of mergers?

Mr Cassidy—My immediate reaction would be to say none. I pause a bit on the UK because they used to have a Monopolies and Mergers Commission where mergers could be referred to it by the relevant minister, but in the last few years the UK has had some fairly significant changes to its competition law and I think that can no longer occur without the OFT in the UK considering the merger first. I am a bit rusty on the latest UK arrangements, but I think that is the case.

Mr Grimwade—In any event, in most developed merger regimes there is some form of compulsory pre-merger notification to the relevant competition authority.

Senator LUNDY—Are there any other points the ACCC would like to take this opportunity to raise with respect to the proposed merger processes in this bill?

Mr Samuel—No.

Senator LUNDY—Could I turn to the issue of third line forcing. Not least because of my role in consumer affairs, I am interested in and concerned that the proposals contained in this bill reverse the onus of proof. At the moment, I understand that a notification can be put to the ACCC and effectively it stands on that application and the ACCC can revoke it. But this proposal reverses that onus and those events can occur, and it is really up to the ACCC to go out and try to disprove or prove that there is a disbenefit. Can you explain to me what it means for the ACCC?

Mr Cassidy—The essence of what is in the bill is that third line forcing—which is a particular form of exclusive dealing—is currently a per se offence under the Trade Practices Act, so it means that with third line forcing we do not need to go into any issues of whether there is a substantial lessening of competition, what the relevant market is or whatever. It could be compared with price fixing, which is also a per se offence. It means that the conduct itself is per se or legal. What the bill proposes, following the Dawson recommendations, is that rather than the conduct being per se or legal, it would be subject to a substantial lessening of competition test. That means that if someone gave us a notification—which you can do in relation to exclusive dealing, including third line forcing—and we were worried about the impact of the third line forcing, say, on consumers, rather than simply being able to issue a notice of objection and, in a sense, having very little argument because it is a per se offence, if we were challenged on the notice of objection we would have to be prepared to argue, and be able to show, that the third line forcing actually involved a substantial lessening of competition. So the bill is, if you like, a softer test for third line forcing compared with the current arrangements. It would mean that if we, the commission, wanted to oppose a particular form of third line forcing conduct, we would have a greater task in what we would have to prove ultimately in the court or in the tribunal.

Mr Samuel—We should mention that there are occasions when third line forcing does not involve a substantial lessening of competition—does not have an anticompetitive impact.

Mr Cassidy—It can, nonetheless, have a serious impact on consumers; but because of, say, the size of the particular trader involved, even though particular consumers might be suffering some detriment from the third line forcing, we would be hard pressed to argue that there was a resulting substantial lessening of competition.

Senator LUNDY—That is where my questions go to in the case of where, for example, small retailers are faced with suppliers who refuse to supply product to them if they stock a competitor's products. If that single retailer were to front up to the ACCC and say, 'I have a complaint,' does that qualify for the substantial lessening of competition test—if it is a small retailer making a complaint of that nature for the purposes of the changed third line forcing provisions?

Mr Cassidy—That, as you described it, probably would not come under third line forcing. That is a standard form of excusive dealing, where I say to you, 'I won't supply you with my product if you also stock my competitor's products.' Third line forcing is basically where, in some way or other—

Senator LUNDY—I was trying to avoid a telecommunications analogy, but we can go there if you like.

Mr Samuel—Let us take an example of a supplier of aged care housing that requires that the property settlement services of a particular legal firm must be used.

Senator LUNDY—Okay, let us use that example.

Mr Samuel—That would be third line forcing.

Senator LUNDY—If I were an elderly person in that situation, what chance would I have under the new provisions if I made a complaint to the ACCC? Would you be able to find in that circumstance a substantial lessening of competition? It is hard to envisage.

Mr Cassidy—That is right. If the conduct was widespread and involved a number of players in a particular market then we might be able to argue a substantial lessening of competition. But if it involved an individual trader, unless that trader was a very significant player within the particular market, we would probably be hard-pressed to argue or to be able to establish that a substantial lessening of competition was involved.

Senator LUNDY—Is it reasonable to describe the changes under this bill to potentially, if you have the resources to chase it down, capture the larger systemic types of third line forcing where large players are

involved or you can see a pattern but not protect the one-off consumer who lodges a complaint? Is that a reasonable characterisation?

Mr Cassidy—Certainly with a one-off consumer it would be difficult.

Senator LUNDY—But they are currently protected, aren't they, because it is currently against the law?

Mr Cassidy—It being a per se offence, we only need one instance of the conduct to say that there has been a breach of the law. I think it is hard to draw quanta and say, 'This particular provision has this particular effect in terms of large companies and small companies,' because even with a large company you could still be hard-pressed to establish it as a substantial lessening of competition.

Mr Samuel—If a bank were to say that its mortgagors must acquire the legal services of, for example, one of five legal firms, it would be fairly difficult to show that that was a substantial lessening of competition.

Mr Cassidy—I think a problem with the third line forcing provision—and it is one of these provisions that has been looked at by various committees over a period of time—is that it covers such a wide range of conduct. It covers conduct which can be very pernicious as far as consumers are concerned, particularly that which involves an absolute force in the sense of someone saying, 'I will not sell you my product unless you agree to also purchase from this other person,' and specifying the other person. There is a range of that sort of conduct. At the end of the spectrum is conduct like shopper dockets, for argument's sake, which are at least benign and perhaps even beneficial to consumers.

I think the problem with the provision at the moment—and certainly this is our experience—is that it covers such a broad range of conduct. On the one hand people can argue with quite considerable force that it should be per se, and they are looking at the conduct at the pernicious end of the scale that involves absolute force, if I can call it that. Others can argue that it is almost silly for this to be a breach of law under any circumstances because it is positively beneficial.

To draw a distinction, rather than looking at quanta, size or whatever, if a distinction were to be drawn between what should be per se and what should be treated like other exclusive dealings subject to a competition test, perhaps the focus should be more on whether there is an absolute force and whether a specific party is specified as being a party that you need to purchase the other good from. In our experience the worst forms of third line forcing and the ones that do the most damage to consumers are those that involve an absolute force and a specified particular third party.

Senator LUNDY—Coming back to the provisions of this bill, my understanding of how those clauses operate at the moment is that the current legislation provides the ACCC with the capacity to make those determinations of exceptions to third line forcing as they come and go, so you have the necessary flexibility to, for example, address a potential positive consumer benefit.

Mr Cassidy—That is right.

Senator LUNDY—Okay. Going back to a case we discussed earlier, the Foxtel content-sharing arrangements, there was a third line forcing consideration within that decision as well as the section 45 consideration, from memory. Is that correct?

Mr Cassidy—You are testing me now, on the Foxtel case.

Senator LUNDY—I do not know if it is worth going into here, but it would add to the complexity of that kind of case for the ACCC to be making a determination on a third line forcing application in conjunction with a potential section 45 and a potential section 50 under the new arrangements.

Mr Cassidy—The other comment I would make—the Foxtel-Optus example brings it to mind—is that our position is that we would prefer third line forcing to remain an offence per se under the act.

CHAIR—You submitted to that effect to the Dawson review, didn't you?

Mr Cassidy—That is right. But that is a fairly on-balance judgment, partly for all the considerations that I have already mentioned—the wide range of conduct that is involved—but partly also because we find that we have an unusual situation, where third line forcing is the only form of exclusive dealing which is currently per se. Every other form of exclusive dealing is already subject to a competition test. Because it goes to corporate structures and whether you are selling through a separate third party or through a subsidiary, we find that, for someone who has a proposed third line force that we might take exception to, it is not all that difficult to turn it into a so-called four-line force, which is then subject to a substantial lessening of the competition test.

So, because of that oddity, the split treatment of exclusive dealing that currently exists, it is not all that hard for people to step around the third line forcing per se prohibition if they turn their minds to it. We have recent examples, ones that have come to us as notifications of third line forcing where the parties have said to us, 'Look, if you have any problems with this, we'll go back and rework it so that it's no longer a third line force,' even though the outcome would be exactly the same for consumers. So, while we would prefer, on balance, the third line forcing to remain per se—or at least for the absolute force aspects of third line forcing to remain per se—it is fairly much an on-balance position, because per se third line forcing provisions do not have quite as much bite as you might think in practice.

Senator LUNDY—Refresh my memory: in your submission to the Dawson review did you advocate any changes to or strengthening of the third line forcing laws as a result of that ambiguity?

Mr Cassidy—No, we did not. As I said, on balance we suggested that it stayed the way it is.

Senator LUNDY—Thank you for that. Finally, could I ask a question about the collective bargaining changes. Can the ACCC see any point to any competition related issues that could possibly have underpinned the government's change in policy, the exclusion of unions for the purposes of collective bargaining, under the act? Will it have an impact on the ACCC—if so, how?

Mr Cassidy—I think that is basically a policy decision which the government has made. I do not think that we could say that as far as we are concerned it has any particular competition or other impacts. It is a provision which we think we can administer, in the sense that it is reasonably easy to establish whether or not a body is a trade union. That is purely in the realm of a policy decision that the government has made.

Senator LUNDY—Thank you.

CHAIR—Thank you very much indeed, Mr Samuel, Mr Cassidy, gentlemen. These proceedings are concluded.

Committee adjourned at 7.15 p.m.