



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS LEGISLATION COMMITTEE

Reference: A New Tax System (Trade Practices Amendment) Bill 2000

MONDAY, 1 MAY 2000

CANBERRA

BY AUTHORITY OF THE SENATE

WITNESSES

**FAULKNER, Mr James Richard, Assistant Secretary, Constitutional Policy Unit,
Attorney-General's Department..... 1**

**COUSINS, Dr David Charles, Commissioner, Special Responsibility for GST,
Australian Competition and Consumer Commission..... 1**

FELS, Professor Allan, Chairman, Australian Competition and Consumer Commission1

**GRANT, Mr John, Executive General Manager, GST Operations, Australian
Competition and Consumer Commission..... 1**

**SPIER, Mr Hank, Chief Executive Officer, Australian Competition and Consumer
Commission 1**

**JEPSEN, Mr John Stephen, General Manager, Structural Reform Division, Department
of the Treasury 1**

**McKISSACK, Mr Adam, Manager, Trade Practices Unit, Department of the
Treasury 1**

SENATE
ECONOMICS LEGISLATION COMMITTEE
Monday, 1 May 2000

Members: Senator Gibson (Chair), Senator Murphy (Deputy Chair), Senators George Campbell, Chapman, Murray and Watson

Participating members: Senators Abetz, Boswell, Brown, Brownhill, Calvert, Conroy, Cook, Coonan, Crane, Eggleston, Faulkner, Ferguson, Ferris, Harradine, Knowles, Lightfoot, Lundy, Mason, McGauran, Payne, Quirke, Ridgeway, Schacht, Sherry, Tchen and Tierney

Senators in attendance: Senators Conroy, Gibson, Murphy, Watson and Sherry

Terms of reference for the inquiry:

A New Tax System (Trade Practices Amendment) Bill 2000.

Committee met at 4.02 p.m.

FAULKNER, Mr James Richard, Assistant Secretary, Constitutional Policy Unit, Attorney-General's Department

COUSINS, Dr David Charles, Commissioner, Special Responsibility for GST, Australian Competition and Consumer Commission

FELS, Professor Allan, Chairman, Australian Competition and Consumer Commission

GRANT, Mr John, Executive General Manager, GST Operations, Australian Competition and Consumer Commission

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JEPSEN, Mr John Stephen, General Manager, Structural Reform Division, Department of the Treasury

McKISSACK, Mr Adam, Manager, Trade Practices Unit, Department of the Treasury

CHAIR—Today the committee is considering **A New Tax System (Trade Practices Amendment) Bill 2000**. The committee's scheduled reporting date is 9 May 2000. This is a public hearing and as such all members of the public are welcome to attend. Today we will be taking evidence from the Australian Competition and Consumer Commission and the Department of the Treasury. I understand an officer from the Attorney-General's Department is accompanying the Treasury officers. I have been advised that there is probably going to be an overlap of questions between the different agencies and, accordingly, the committee will invite everyone to the table at the one time.

Before we commence taking evidence, I wish to state for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evi-

dence provided. Parliamentary privilege refers to the special rights and immunities attached to the parliament or to its members and others necessary for the discharge of parliamentary functions without obstruction and fear of prosecution. Any act by any person which operates to the disadvantage of a witness on account of evidence given by him or her before the Senate or any of its committees is treated as a breach of privilege.

I also remind committee members that, under parliamentary privilege resolutions agreed to by the Senate, officers of a department of the Commonwealth or of a state shall not be asked to give opinions on matters of policy. Officers shall also be given a reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. I welcome all the officers appearing today. Professor Fels, do you wish to make an opening statement?

Prof. Fels—No.

CHAIR—Okay. We will go straight to questions.

Senator WATSON—A breach of privilege of course will cost them a lot less than a breach under this act, which might cost them over \$500,000. Is that right?

Prof. Fels—I think that is a very good point, Senator.

Senator WATSON—Professor Fels, do you read the *Hansards* of the debates that take place in the House of Representatives or the Senate?

Prof. Fels—I do sometimes, but not always.

Senator WATSON—Not always, but sometimes?

Prof. Fels—Yes. For example, I read the House of Representatives debate.

Senator WATSON—So you would have read the debate in relation to the House of Representatives' passage of this bill?

Prof. Fels—Yes.

Senator WATSON—You would have seen the comments made by Mrs May, the member for McPherson? She spoke to the bill.

Prof. Fels—I cannot remember exactly what she said.

Senator WATSON—She drew attention to some misleading information supplied by a certain senator from Queensland. I was going to ask you whether those comments would technically be in breach of this legislation?

Prof. Fels—I would start from the position that the bill applies to persons engaged in trade or commerce. It is therefore unlikely to apply to members of parliament who make speeches, and there would be further protections—

Senator WATSON—She referred to some pamphlets or letters that were distributed by a certain senator, which did not really contain the full gamut of information that one would have expected in relation to a fair presentation of the GST. I was wondering if you had had a look at that, because the matter was referred to by Mrs May, the member for McPherson, in the House of Representatives.

Senator MURPHY—Perhaps Professor Fels ought to look at the whole ANTS package in that respect.

Senator WATSON—No, it was just in relation to the bill before us.

Senator MURPHY—But he could if you were talking about a misrepresentation. You could look at the whole ANTS package.

Prof. Fels—If it is a pamphlet issued by a politician, it is most unlikely to be covered by the Trade Practices Act because they are not engaged in trade and commerce.

Senator WATSON—So people who are not engaged in trade and commerce can make outrageous, wilfully negligent and misrepresentative type statements, can they?

Senator MURPHY—Like the Treasurer!

CHAIR—Senator Murphy, please!

Prof. Fels—They are not covered by the Trade Practices Act in general. That is the law. I believe there was a parliamentary inquiry on this not so long ago where that approach was upheld by parliament.

Senator WATSON—Thank you.

Senator SHERRY—In the same vein, you would not be proposing to investigate the Prime Minister for his misleading comments about beer prices, would you? By way of example, he referred to packaged beer during the election. It appears that he misleadingly indicated or at least gave the impression that this was to be the general price rise for all beer, including beer sold in a glass over the bar. That was misleading, but you would not be interested in pursuing that, would you?

Senator WATSON—Mr Chairman, on a point of order: there was no legislation or pending legislation around at that time.

CHAIR—It is not relevant to the legislation before us, Senator Sherry.

Senator WATSON—It is a question of relevance.

Senator MURPHY—I would suggest, Mr Chairman, with the greatest of respect, nor was the line of questioning being pursued by Senator Watson.

CHAIR—We did find out from Senator Watson's questioning about the relevance of the Trade Practices Act as it applies to others than people in trade. That was cleared up.

Senator SHERRY—On the issue, though, of the relevance of the amendments to the legislation we are considering, it clearly does not apply to politicians making misleading statements, does it?

Prof. Fels—It applies only to persons engaged in trade and commerce. It does not cover politicians making statements.

CHAIR—Are there any further questions regarding this bill?

Senator SHERRY—In the beginning, I want to thank Professor Fels for being here today. I would assume, Professor Fels, that you have read that there have been some critical comments about your non-attendance at previous Senate committee hearings. Have you read those criticisms?

Prof. Fels—This is my third appearance before a Senate committee in several weeks, and I do not know how many hundreds of times I have appeared before Senate committees. However, it was the view of the ministers of the previous government and of this government that it is not necessarily productive to appear before another committee, the Senate estimates. I have tended not to go to those. I thought their comments were quite inappropriate.

Senator SHERRY—I have read your letter to the secretary of the Senate Economics Committee. It states:

In view of comments made by some Senate estimates committee members I can advise that I expect to be available for the budget hearings—

Senator WATSON—On a point of order, Mr Chairman: this is a Senate estimates question. We have the opportunity to ask this question on Thursday. We are looking at the moment at a bill in relation to trade practices. It has to be relevant to the bill. We are not at Senate estimates.

Senator SHERRY—My questioning went to the general attendance of Professor Fels at Senate committees, and he is here. I would like to take the opportunity since he is here to ask him about attendance at Senate committees.

CHAIR—The matter which Senator Watson has raised is not relevant to this bill. You have asked the question. The professor has responded. I think we should get on with the bill.

Senator SHERRY—I have a couple more questions. Professor Fels is here, and I am no doubt sure that he would want to make absolutely clear his record of attendance at this committee.

CHAIR—Senator, I want to remind you that under the standing orders of the Senate we are here to look at this particular bill. We are looking at this particular bill and nothing else.

Senator WATSON—That is right. Hear, hear! That is a good ruling.

Senator CONROY—He is entitled to follow up a statement that he made. He has just made a statement, and we are responding to his statement. Are you telling us that we cannot question a witness on what he says before a committee? You ruled Professor Fels out when he answered the question in the way he just did.

CHAIR—No, I did not. I gave you latitude and let him comment. I remind senators and the committee that we are here to deal with a bill and your questions have to be pertinent to the bill, not to general issues.

Senator CONROY—So we are not allowed to respond to anything that is put up to us from the table?

CHAIR—Questions about the bill, please.

Senator SHERRY—I will go on with my questioning. You have advised that you will be available for budget hearings, which I understand will be later this month. That is the comment in your letter. You state:

I would also like to state that the appearance will be my fifth or sixth appearance before a Senate committee—

and that is not a reference to estimates committees—

in the April-May period and all together I have appeared countless times before Senate in-house committees over many years.

That is a correct quote from your letter of 28 April, isn't it?

Prof. Fels—I dictated it. I did not see what came out, but that is roughly what I said, yes.

Senator SHERRY—It is signed by your secretary, Helen Ritson. My only concern with the letter is that, when I did check on your record of attendance at committee hearings and we went back through the *Hansard* records to have a look at your attendance since 1995, according to the *Hansard* records—

CHAIR—I ruled before that we are here to deal with this bill and not what has happened with estimates in the past.

Senator SHERRY—But I am not referring to estimates; I am referring to Professor Fels's attendance in general, following on from his statement about attendance at committee meetings of the Senate. He is here today at this committee meeting, and I am questioning him about his attendance here today.

CHAIR—He kindly offered to come here today, and we were notified of that in writing—

Senator WATSON—To discuss this bill.

CHAIR—That is right. He came to discuss this bill.

Senator SHERRY—But we are entitled to ask why officers are here and why officers are not here.

CHAIR—I just remind you that we are here to discuss the bill, not to go into other matters.

Senator SHERRY—And I am anxious to get on to it. We would have got on to it by now if we had been allowed to complete our questioning on this matter. Mr Fels, just to go into your record of attendance before Senate committees and your statement in your letter that you appeared in the April-May period, I got the misleading impression that you had been to Senate estimates committees in this April-May period.

Prof. Fels—Senate estimates?

Senator SHERRY—Senate estimates committees.

Prof. Fels—No. We have never been to Senate estimates—with one exception, I think.

Senator SHERRY—In the last five years?

Prof. Fels—Yes.

Senator SHERRY—Don't you consider that your letter to the Senate Economics Committee is misleading in that regard?

Prof. Fels—It did not say Senate estimates, did it?

Senator SHERRY—No. But I would have thought, certainly under section 52 of the Trade Practices Act, this correspondence was likely to mislead.

Prof. Fels—No.

Senator SHERRY—It does not differentiate between estimates and other Senate committees. But it gives the impression that you have been to estimates committees.

Prof. Fels—No.

CHAIR—Senator Sherry, please. Professor Fels is here at the invitation of this committee. We were asked to do that, requested by the selection of bills committee.

Senator CONROY—But Professor Fels now agrees that it is five years since he last attended a Senate estimates committee.

Prof. Fels—No. Incorrect.

CHAIR—That has nothing to do with this bill, and I say to senators: let us get on to questions to do with the bill.

Senator CONROY—But you—

CHAIR—Senator Conroy, please be quiet.

Senator SHERRY—Thank you, Chair, for bringing us back. This is my last question on this. Professor Fels, you do not consider that your correspondence to the committee is misleading?

Prof. Fels—No.

Senator SHERRY—And that it does not clearly indicate that it was not Senate estimates—

CHAIR—Senator Sherry, this has nothing to do with the bill. I have already ruled on that point. Let us get on to the bill.

Senator SHERRY—I just want Professor Fels—

CHAIR—No. It does not matter what you want.

Senator WATSON—He does not have to answer that.

CHAIR—Let us get on with questions about the bill.

Senator SHERRY—I saw a nod from Professor Fels, and I just want to know what the nod means on the record.

CHAIR—It does not matter what you saw. We are here to discuss the bill. Please, let us get on with questions about the bill.

Senator SHERRY—Just concluding on this point, I just wanted to know why Professor Fels nodded.

CHAIR—I rule your point irrelevant.

Senator CONROY—‘Irrelevant’ is not a ruling. You can rule ‘out of order’ but not ‘irrelevant’.

CHAIR—It is out of order with regard to this bill.

Senator CONROY—I think your ruling is irrelevant, but you’re not going to do anything about it.

Senator SHERRY—I do think, Professor Fels, your correspondence is misleading. You should have a good look at it. I think it gives the impression that you have been to Senate estimate hearings in the last five years and, having checked the records, you have not.

Prof. Fels—It does not give that impression. You are incorrect on that point.

Senator SHERRY—I am sorry, Professor Fels—

Senator CONROY—You have it in front of you now?

CHAIR—Senators, please.

Senator WATSON—This is outrageous, Mr Chair.

CHAIR—Senator Sherry and Senator Conroy, order! The committee will come to order.

Senator CONROY—So even though you have not seen the letter—

CHAIR—Senator Conroy, please, otherwise we will adjourn until you agree to come to order.

Senator SHERRY—I just think the letter could have been more accurately worded, Professor Fels.

CHAIR—Senator Sherry, this has nothing to do with the bill.

Senator WATSON—This is a character assassination, Mr Chairman. We cannot allow it.

CHAIR—If you have questions about the bill, let us get on with the bill.

Senator SHERRY—I notice in an appearance on *Meet the Press* on 16 April, Professor Fels, you said that you—the ACCC—could cope with 10,000 or 20,000 consumers complaining that in Bourke, Townsville, Newcastle or the suburbs of Melbourne prices had gone up. You said, ‘We are having a hotline. We’ve got a huge number of operators on it.’ You referred to the number as ‘huge’. What number is ‘huge’?

Prof. Fels—On the hotline?

Senator SHERRY—Yes.

Prof. Fels—We have about 45 at present—and they are not overstretched at present—and we have about 174 planned.

Senator SHERRY—Sorry, did you say that you are overstretched?

Prof. Fels—No. I said the opposite. I said that we have 45 at present, they are not overstretched and we plan to have about 174.

Senator SHERRY—When will the remaining officers be appointed?

Prof. Fels—It is continuously occurring at present.

Senator SHERRY—When will the process be completed?

Mr Spier—It is gradual, and it is happening now. But there is also a core group of people on the hotline and, if there is overflow, it moves—at various, gradual levels—to other commission staff.

Senator SHERRY—How are the staff who are staffing the hotline dealing with the complaints? What is their process of dealing with those complaints?

Mr Grant—The process is that they receive calls. We have a recording system. They take details of all calls. Where they can answer the question or provide the information, they do that. Where they cannot, it is referred for response. We aim to give all responses within 24 hours. Sometimes additional information is required, in which case that information is sent to the ACCC, and then we review it.

Senator MURPHY—You say that you have 45 at the moment. They are additional for the purposes of that role. You intend to have about 174. Will the 174 be additional or made up of other commission staff? I was not quite sure of the reference. Mr Spier, I thought you said that it goes to other commission staff.

Mr Grant—We will have 45 full-time call centre operatives. Our system allows us to scale that out, where we are not meeting our answer time requirements, to go out to existing ACCC officers.

Senator MURPHY—To make it that 174?

Mr Grant—That is right.

Mr Spier—And it could be more, if need be.

Senator MURPHY—So you have the capacity to do that?

Mr Spier—Yes.

Senator SHERRY—In terms of investigating complaints, if the officers on the hotline cannot answer instantly or with ready reference, are they then forwarded on and a response sent back?

Mr Grant—Senator, there are two types of questions: one is a complaint and one is an inquiry. An inquiry is usually dealt with. With complaints, as you would be aware, we do need to get some additional information, so what we do is look at trends in complaints that are coming in. In some cases, when the complainant wishes to carry their complaint forward, they send in additional information. We then have a central area which has a look at the complaints and allocates them out to the relevant states or areas, depending on the nature of the complaint. It is reviewed then to see whether an investigation should take place. An investigation can commence with either a telephone call or a letter requiring information. Based on the response, we then decide whether or not to take it further.

Senator SHERRY—Is the follow-up on the ground done by the officers in capitals and in regional centres? I have seen a list of people, I think—

Mr Grant—Yes, we have officers in every region.

Senator SHERRY—And are they the same officers that are regularly monitoring prices in the various capitals and regional areas?

Mr Grant—No, they are not. We have engaged specialist firms to check prices for us. They provide information to a price monitoring group. The officers in each of the regions are enforcement officers. Their functions range from enforcement to also education and awareness. They often give presentations to small groups of business, consumer and other interested parties.

Senator SHERRY—I note, Professor Fels, your comments—I think it was on *Meet the Press*— when you said you were satisfied about your resources. They were your words. Are you still satisfied with the ACCC's resources?

Prof. Fels—Yes, I am satisfied with them. I think it is traditional for people like me when they appear here to say that they would always welcome more, but I am satisfied with the resources at present.

Senator SHERRY—In that same interview you said you had an invitation whereby, if you had resource concerns, you could discuss them with the Prime Minister and the Treasurer: have you taken up that invitation?

Prof. Fels—I have had ongoing discussions with the Treasurer about this.

Senator SHERRY—About the resourcing issue?

Prof. Fels—Yes.

Senator SHERRY—Have additional resources been allocated as a result of those meetings?

Prof. Fels—I think we have to wait till the budget on this.

Senator SHERRY—Just before we go on, what is your time availability?

Prof. Fels—I was hoping to leave at 5.30.

Senator SHERRY—You were hoping to leave, but you are available for longer if necessary?

Prof. Fels—I am trying to catch a plane at 6.15. I have a booking on a plane.

Senator SHERRY—But if there were questions that took us beyond 6.15 you are available?

Prof. Fels—We have several people here who will stay.

Senator SHERRY—But not you?

Prof. Fels—No.

Senator SHERRY—That is unfortunate because we do love to have you here, Professor Fels.

Senator WATSON—Sounds like it.

Senator SHERRY—We have been looking forward to your attendance. We have a lot of questions. But we will keep going on the questions. I have a letter dated 11 November 1999 from a Nick Ellis, Director of Compliance Enforcement with the ACCC, who writes:

The Commission receives in excess of 60,000 complaints each year. Commission staff Australia wide number approximately 350 persons. These limited resources and budgetary constraints mean the Commission is unable to pursue all matters that are brought to its attention.

Is that an accurate assessment of the abilities of the ACCC, Professor?

Prof. Fels—I believe this question has been answered before, and I would not mind Mr Spier having the first go at it if possible.

Mr Spier—It looks like that same letter keeps being recycled, Senator, at various hearings. I think Senator Conroy probably remembers it.

Senator CONROY—It has been fortunately recycled to the public.

Mr Spier—Our letters are written to a complainant and if that person wished to make it public that is fine. Of course, we set the priorities. Letters like that about resources are simply not our normal style. In fact, staff have been told not to write those because, in that instance, the reason for not pursuing the matter was not an issue of resources. There was probably not a breach of the law there. But we have always found that we have sufficient resources to pursue matters that we should pursue. But, of the 60,000 matters, a lot of issues are mere inquiries, a lot are not breaches of the Trade Practices Act. Any public agency sets its priorities.

Senator SHERRY—You said, Mr Spier, that staff have been told not to write letters like that?

Mr Spier—Like that.

Senator SHERRY—Why?

Mr Spier—It gives resources as a reason for not doing something. That is not a proper reason.

Senator SHERRY—You are saying this is not an accurate letter?

Mr Spier—No. It is not an accurate reflection of our policy.

Senator SHERRY—Who has given that instruction to staff?

Mr Spier—Me.

Senator SHERRY—Is it because you have been embarrassed by the correspondence?

Mr Spier—It has been raised that it is not our normal style. You will note that each one of the letters that have come up has been signed by the same person, and you have not had them from other officers or other parts of the commission.

Senator SHERRY—That does not mean they have not been written, though, does it?

Mr Spier—I think you would get them from elsewhere too.

Senator SHERRY—Could you table all the correspondence your officers have written?

Mr Spier—No, it would be quite inappropriate.

Senator SHERRY—So you can guarantee that other officers have not written these letters?

Mr Spier—No, I cannot guarantee that, but that is not the normal letter.

Senator WATSON—He cannot table all his correspondence.

Senator SHERRY—I only asked the question seriously because we are receiving an assurance from Mr Spier, and we would like evidence to that effect.

Mr Spier—My point, Senator, is that I have made that assurance a number of times. It was first raised in Senate estimates some time ago.

Senator SHERRY—Just going back to the resource issue, Professor Fels, can you assure this committee that all GST related complaints will be investigated?

Mr Spier—They are all being dealt with. It depends what you mean by ‘investigation’. Some may not require investigation. Some may simply give information or they are wrong.

Senator SHERRY—I understand that, but at least investigate it to the normal satisfactory standard that you would expect.

Mr Spier—We get a daily print-out of all the GST complaints, as to what has happened with them and their status—that is a reasonable bundle every day—and they are all pursued if their warrant being pursued. That happens to all complaints.

Senator SHERRY—Thank you for giving me that guarantee or undertaking

Senator CONROY—Proposed section 75AYA, paragraph (c) states:

(c) falsely represents (whether expressly or impliedly) the effect, or likely effect, of all or any of the New Tax System changes ...

I was wondering whether you could tell me what ‘all or any of the tax changes’ are. Can you give me a list?

Mr Jepsen—Certainly 5AYA is intended to cover the policy which the government has implemented through the new tax system changes. As paragraph (c) implies, it is all or any of those changes that have been included in the legislation.

Senator CONROY—Paragraph (d) states:

misleads or deceives, or is likely to mislead or deceive, a person about the effect, or likely effect, of all or any of the New Tax System changes.

Can you tell me what the effects or likely effects of the new tax system changes are?

Mr Jepsen—I think the government has gone to a lot of effort to explain the new tax system changes and why they are being enforced—

Senator CONROY—I did not ask why they are being enforced. This is a clause to do with the effects, not the reasons why changes are being put in place. This is going to the effects or the likely effects. Can you tell me what the effects or likely effects of the new tax system changes will be?

Mr Jepsen—The effect or likely effect of the new tax system changes is to bring about a substantial improvement in our tax system.

Senator CONROY—No, that is the government's rhetoric. You are not—

CHAIR—Senator Conroy.

Mr Jepsen—You asked me what the effects were.

Senator CONROY—No, I am asking you what the effects are in terms of prices. Has the government given you a new list of anticipated price changes?

Mr Jepsen—No, Senator.

Senator CONROY—Has anybody given you a list from the government? No-one at all has given you the price changes?

Mr Jepsen—Not to me, Senator.

Senator CONROY—When it says 'the effect, or likely effect' of the new tax system changes, how are you determining what those effects or likely effects are?

Mr Jepsen—It would not be for me to determine them.

Senator CONROY—Who is to determine them?

Mr Jepsen—In the first instance it would be for the ACCC to take a view about what a corporation or a person might do in relation to information it provides to other people, and ultimately it would be determined by a court.

Senator CONROY—So you have not received a mandate from the government to determine what those effects are?

Mr Jepsen—I have not, no.

Senator CONROY—There is nothing in the legislation, Professor Fels, that says the ACCC will determine what the effects or likely effects of the changes are?

Prof. Fels—I think I understand the question and, if so, I do not think we have had that from the government—if I understand your question.

Senator CONROY—You have had no direction from the government?

Prof. Fels—As to the likely effect of the changes that would be used in relation to carrying out our responsibility under section 75AYA, I think the answer is no.

Mr Spier—The effect is not simply what you are saying but whether or not the GST is payable and those types of things—for example, misleading claims that something is subject to GST when that is not the case, which is a question of fact.

Senator CONROY—The overwhelming majority of goods and services are subject to the GST.

Mr Spier—There are some important areas where they are not.

Senator CONROY—No, and they are getting bigger every day. This is a clause that we will be asked to vote on in the Senate in the very near future which asks the ACCC to police the clause 'likely to mislead or deceive a person about the effect, or likely effect, of all or any of the new tax system changes', and I am trying to come to an understanding of what you think they are.

Mr Spier—It depends what happens out in the marketplace in terms of claims. This law is not that different from what is in part 5 of the Trade Practices Act now, except that it extends the jurisdiction.

Senator CONROY—Mr Hockey has been quoted—and I think everyone saw it at the time in January or February—as saying that he has directed you that no price is to increase by more than 10 per cent. Professor Fels, that is not accurate, is it?

Prof. Fels—He made a statement something like that.

Senator CONROY—He put out a press statement—I have it here somewhere—that he had directed you to that effect.

Prof. Fels—I think he made a press statement to that effect, yes.

Senator CONROY—That is not correct, is it? He has not directed you that no price is to increase?

Prof. Fels—Not in terms of a direction under the Trade Practices Act, no.

Senator CONROY—He is required to put that in writing, isn't he?

Prof. Fels—Yes.

Senator CONROY—And he has not put that in writing?

Prof. Fels—No.

Senator CONROY—Has any other member of the government given you a directive that 10 per cent is the price limit?

Prof. Fels—No.

Senator CONROY—In the price guidelines which were issued in March 2000, it says in 2.12:

In any event, no price should increase by more than 10 per cent as a result of the New Tax System changes ...

The so-called 'price rule'. Could you show me in the legislation where it says that?

Prof. Fels—It does not say it.

Senator CONROY—So on what power do you base that directive?

Prof. Fels—It is our interpretation of the requirements.

Senator CONROY—Can you show me where in the act it talks about a price cap of any sort—a limit—and that there is a maximum price increase?

Prof. Fels—By the way, I do not know what this has to do with this bill that we are discussing today.

Senator SHERRY—This issue is referred to in at least one of the submissions.

Senator CONROY—This is about 'misleading or deceiving about the effect or likely effect'. I am trying to gain an understanding of how a business can make sure it does not break the law if it does not know what the law is—if a business picks up the legislation, reads through it and gets to this section and says, 'I cannot find where I cannot increase my price by 10 per cent.' What I am trying to gain an understanding of—if you have not received a direction from the government—is why you think you can write 'no price should increase by more than 10 per cent'. I am trying to match that with the legislation.

Prof. Fels—First of all, just for one minute let us get this 75AU into context, and then I will get to your point. Proposed section 75AYA is about misleading or deceptive conduct or false representations and so on. It is about the same sort of thing that section 52A of the Trade Practices Act is about. It is about when someone makes a statement that is fairly clearly, blatantly, misleading people about how their prices relate to changes in the tax system—when someone says my prices have gone up on account of the GST when perhaps they do not pay the GST or where there is a very substantial mismatch between the statement and the reality.

Senator CONROY—How does someone know what the reality is?

Prof. Fels—You deal with things on a case by case basis. That is the way this works.

Senator CONROY—But ‘no price should increase by more than 10 per cent’ is not a case by case basis.

Prof. Fels—That is about the guidelines. We are talking about this act, aren’t we? I am saying that a case may come up and the commission would look at it. If there is a mismatch between the reality and the statement, then it would be the kind of thing that would be picked up by this part of the act. That is how I see it. That is what I see this as being about.

Senator CONROY—But you have to make some assessment about the effect. That is what it says. It says ‘mislead or deceive a person about the effect’. So you must know what the effect is if you are going to make some assessment of it. I am asking: what is the effect?

Prof. Fels—That sort of case could be, for example, if there was a reduction in the wholesale sales tax that was quite substantial. Let us say it matched the impact of the rise in the GST; if someone said, ‘My prices will have to go up by 10 per cent on account of the new tax system,’ that would be an example of the kind of matter that would come up here.

Senator CONROY—But how would you know they were wrong? I am trying to get to your body of expertise from which you are making this assessment.

Prof. Fels—You would go into the details of the case and see whether it is a reasonable statement or not. Obviously in this case, if it is a long way off—

Senator CONROY—There is nowhere in the legislation that sets down a cost structure for you to work from, is there? It does not say, ‘You shall use this methodology.’

Prof. Fels—Not in the legislation, nor in part 5. It is not that kind of law.

Mr Spier—But we would clearly ask the person making the claims about the basis on which they were making those claims.

Senator SHERRY—If a person has put up their prices by more than 10 per cent because they argue their net compliance cost and the impact of the GST is greater than 10 per cent, how do you enforce your guideline if it is greater than 10 per cent?

Prof. Fels—That is the guideline. We are talking about misleading and deceptive conduct, which is another issue.

Senator SHERRY—But where does not misleading or deceptive conduct—

Prof. Fels—I do not think that is before us today. I think we are just looking at misleading and deceptive conduct.

Senator CONROY—No. The person who makes the statement, as Senator Sherry described, would be—according to you—misleading and deceptive because you have said no price can go up.

Prof. Fels—The statement might not accord with the guidelines, but any question about misrepresentation would be looked at under this provision on its merits—in all the circumstances.

Senator CONROY—But you have already made a general assessment as to the effect. I am sorry, but that is what this is. Your price guidelines state that ‘no price should increase by more than 10 per cent as a result of the new tax system changes.’ This is a bill and a clause that talk about the ‘effect, or likely effect, of all or any of the new tax system changes’. So on what are you basing that you are going to prosecute people?

Senator WATSON—It is quite clear—

Senator CONROY—Senator Watson, if you would like to join Professor Fels on that side of the table—

Senator WATSON—If you read outline No. 1 you will see the purpose of these powers was to prevent the possibility of consumer exploitation and excessive profit-taking—which you have not taken into account—in the transaction, which means that you take the pluses and the minuses.

Senator CONROY—You are welcome to go and sit next to Mr Grant. Mr Chair, is Senator Watson allowed to answer the question as if he were Professor Fels?

Senator WATSON—So the overall effect is that it cannot increase by more than 10 per cent.

Senator CONROY—It cannot be more. Sorry, Professor Fels, would you like to answer now that Senator Watson has finished?

Prof. Fels—The guidelines are the commission’s view of what the prices should be. This is the topic about the effect—

Senator CONROY—Or the likely effect. That is a ‘should be’, isn’t it? The likely effect is what a price should be.

Prof. Fels—Right, it is about the ‘likely effect’. So we would look at this law and we would look at what is their answer on the effect or likely effect.

Senator CONROY—Given that you have a statement—

Prof. Fels—The guidelines are a slightly different topic, to my mind.

Senator CONROY—I am sorry, but if I am a businessman and I come up with the situation that Senator Sherry has described and I then tell a customer that and he phones you, you are coming to visit me and I want to know what my defence is. I want to know from you that I am not misleading or going to be subject to the provisions of this bill. At the moment if I made that statement that Senator Sherry has just made and I was engaged in trade or commerce, you would come to visit me and threaten me with \$10 million.

Senator WATSON—Because of excessive profit making. It is as simple as that.

Senator CONROY—I do not think you are helping Professor Fels, Senator Watson. I know the chair has not managed to utter a word about it.

Senator WATSON—I am just reading the legislation, which is quite clear.

Senator CONROY—But you do not seem to be helping Professor Fels. He keeps waiting until you finish without getting a chance to answer my questions.

CHAIR—Professor Fels, it is back to you.

Prof. Fels—As I said, this is about the effect. The guidelines are about the price exploitation provisions.

Senator WATSON—That is right.

Senator CONROY—The guidelines are about the effect, or likely effect, of all or any of the new tax system changes. That is what the clause says, Professor Fels.

Prof. Fels—Are you talking about 75AYA?

Senator CONROY—Yes—‘misleads or deceives, or is likely to mislead or deceive’ a person about the effect—

Prof. Fels—Yes.

Senator CONROY—So I am trying to gain an understanding.

Prof. Fels—We will just look at a case and if there is—

Senator CONROY—We have just given you a case.

Prof. Fels—And I am saying that it would depend on all the circumstances. You would look at the circumstances of the cases.

Senator CONROY—In all cases, in any event, no price should increase by more than 10 per cent as a result of the new tax system changes—10 per cent is 10 per cent. We will not play you the video, but we have the transcript—10 per cent is 10 per cent is 10 per cent. That is all encompassing, not what you have just described as looking at all the individual cases.

Prof. Fels—This is a different issue. This is about misrepresentation.

Senator CONROY—It is not. I am a business that is worried that I am going to be in breach of 75AYA(d) because I may be deceiving somebody about the effect of the GST or the new tax system changes.

Prof. Fels—We would obviously look at the matter, yes.

Senator CONROY—But what is there to look at? You have ruled in your price guidelines that I have breached your price guidelines. Are you now saying that they are not firm? If a case was put to you—

Prof. Fels—I am just saying that breaches of the price exploitation provisions have to be looked at and also there is a separate issue about misrepresentation. If someone said that their prices went up by more than 10 per cent on account of the new tax system, that would have to be looked at under this provision. But I would want to hear their story. That is what I would want to do.

Senator SHERRY—Having heard their story and they have not been involved in misleading or deceptive conduct and they have increased their price by more than 10 per cent—there is no misleading conduct and they have a legitimate case for increasing their price by more than 10 per cent—

Senator WATSON—Such as?

Senator SHERRY—It can include net compliance costs, Senator Watson. We have already referred to that. How do you enforce the guideline that you have issued that 10 per cent is 10 per cent?

Prof. Fels—Do you mean on the price exploitation provisions?

Senator SHERRY—Yes.

Prof. Fels—We are not talking about price exploitation provisions today; we are talking about misleading conduct. I am just saying that we would look at it under the misleading conduct provisions. You have to be a little careful sometimes.

Senator CONROY—No, you are just being evasive. But we will be here in three weeks and you will not be able to run and hide.

CHAIR—Senator—

Senator CONROY—10 will still be 10 will still be 10.

CHAIR—Senator—

Senator CONROY—Would you mind not striking me?

CHAIR—That is quite out of order.

Senator CONROY—I would appreciate an apology for being hit twice.

CHAIR—Cut it out.

Senator WATSON—Who by?

Senator CONROY—Well, control yourself. Senator Gibson has just struck me twice. If this were the AFL, you would be on report.

CHAIR—Senator Conroy, cut it out. You have been abusive of public servants here and please behave yourself.

Senator WATSON—Mr Chairman, I think that comment about senior public servants hiding is quite inappropriate at a hearing such as this and I ask that that be withdrawn.

Senator CONROY—I am asking in terms of the false and misleading—

Senator WATSON—I ask that that comment about senior public servants hiding or something be withdrawn because it is quite inappropriate.

CHAIR—I think—

Senator CONROY—Is it in breach of standing orders? Do you want to get the Clerk in to check this and have to be humiliated again like you were last time you tried to gag me?

Senator WATSON—That is quite inappropriate.

Senator CONROY—Then rule against his point of order. Either rule against him or get the Clerk.

CHAIR—Just go on with it.

Senator CONROY—Thank you. I am talking about this clause in this bill which we are being asked to vote on.

Senator WATSON—I think I will ask the clerks to give us a reference on that anyway.

CHAIR—Go and do so.

Senator WATSON—I think it is quite inappropriate for people appearing before committees such as this to be humiliated in such a way.

Senator CONROY—The sooner we get your preselection over in Tasmania and you see yourself as having to be the tough man of the committee, Senator Watson, the better for everybody.

CHAIR—Please, Senator Conroy.

Senator WATSON—Relevance.

CHAIR—We have to get back on the bill.

Senator CONROY—I am trying to but Senator Watson keeps interjecting and you have not struck him yet.

CHAIR—Can you please be quiet? I have.

Senator CONROY—You have not. You have struck me twice.

CHAIR—Cut it out.

Senator MURPHY—With regard to the current section 52 of the Trade Practices Act, do you have any role with respect to the matters that it covers in terms of misrepresentation or deception?

Prof. Fels—Yes.

Senator MURPHY—You do.

Mr Spier—But the constitutional power is limited. Part V of the Trade Practices Act, which includes section—sorry, it is a bit hard to talk when others are talking.

Senator MURPHY—I just want to know what role you have had in respect of section 52 in terms of prosecution.

Mr Spier—In the GST area or generally?

Senator MURPHY—Generally.

Mr Spier—We have had jurisdiction in terms of Part V which includes section 52 since 1974. However, in the Part V area, which is to do with protection, there are some constitutional gaps. We do not pick up the unincorporated and we do not pick up state business enterprises; it enhances the legislation.

CHAIR—Can we get back to questions on the bill, please?

Senator MURPHY—Are you addressing that remark to me?

CHAIR—We are addressing the bill that is before us, not the Trade Practices Act.

Senator CONROY—It is an amendment to the Trade Practices Act, but do not think that that involves the bill.

Senator MURPHY—Mr Chair, I was trying to understand this in the context of 75AYA and its association with section 52. That is why I was asking about section 52. I have to say, with the greatest of respect to you as chair, that I was endeavouring to actually be relevant to the bill, and I will endeavour to keep relevant to the bill.

CHAIR—Thank you.

Senator CONROY—I have received a letter from the Law Council. I am not sure whether Professor Fels or the commission has also received it.

Mr Spier—We have seen drafts of various letters. I am not sure what that letter is.

Senator CONROY—It is from Mr Peter Levy. I just want to table it. I have had some copies made to enable circulation. Even though it is late, the Law Council has asked me whether I could submit it as a late submission. There is nothing else in it.

CHAIR—The committee is prepared to accept it.

Senator CONROY—Thank you.

Senator WATSON—Mr Chairman, there are some problems with that letter.

Senator CONROY—I am happy just to table it. The Law Council has asked me to see whether it can be accepted as a late submission, but I am happy just to table it.

Senator WATSON—That letter can be tabled, but I would like to make the comment that I have some problems with it.

Prof. Fels—Can I just go back to the previous question? I have been thinking about it: it is not one I have given a lot of thought to. I have to say that you look at all cases on their merits, the full facts, and you have to be a little careful about prejudging particular hypotheticals and so on. That would be our general approach to areas of the law.

Senator CONROY—Which part of the law says 10 per cent is 10 per cent is 10 per cent? That is what I keep asking about.

Prof. Fels—I am saying that, under this provision, that statement would have to be looked at. It could have the potential to be misleading.

Senator CONROY—That is my point.

Prof. Fels—It could have that potential.

Senator CONROY—If I said, ‘My costs have increased and net compliance costs and rounding take me past 10 per cent,’ potentially I am in breach of this section. Other people keep trying to distract you from this point, but that is the point I am trying to get to—that I could be in breach if I were in trade and commerce and said that.

Mr Spier—You are potentially in breach of section 52 now.

Senator CONROY—But unfortunately Professor Fels keeps pointing out that I cannot ask you about that and the chair keeps doing the same, so I am asking you about this. But yes, I actually agree with you—

Mr Spier—Senator Murphy’s question would be relevant, yes.

Senator CONROY—and I am quite happy to incorporate that part of the discussion. So my question continues to be: you are making comments about ‘prejudged’. I have never seen a worse prejudgment that in any event no price should increase by more than 10 per cent.

Prof. Fels—I think you are asking whether we would prosecute and all that kind of thing. We look at cases on a case by case basis.

Senator SHERRY—And, if it were a justified increase above 10 per cent, would you prosecute?

Prof. Fels—As I have said, we look at matters on a case by case basis.

Senator SHERRY—But that is not answering my question. I asked: if it were a justified increase above 10 per cent, would you prosecute?

Prof. Fels—I have difficulty seeing how that kind of case could arise, so I would want to look at the circumstances.

Senator CONROY—But if you satisfied yourself—

CHAIR—No, no, just one moment.

Senator CONROY—Stop trying to cut the witness off.

CHAIR—You have had an answer from Professor Fels, and I do not think we should be putting—

Senator CONROY—So we are ruling out repetitive questions now?

CHAIR—No, hypothetical questions.

Senator WATSON—He has answered the question.

Senator CONROY—Actually, he did not answer the question. He just said that he would like to look at it, which is not answering the question.

Senator WATSON—But in the nature of a hypothetical, he answered.

Senator SHERRY—Professor, on *Meet the Press* on 16 April you said that business ‘can get back net additional compliance costs’ and that ‘if businesses have increased compliance costs, they can include them in price’. You said that, didn’t you?

Prof. Fels—Yes.

Senator SHERRY—You also said on *Sunday Sunrise* on 30 January 2000 that ‘ten is the limit for price rises due to GST—10 is 10 is 10’. Can’t you see a circumstance where there is a 10 per cent price rise, or very close to it, plus net additional compliance costs taking the price increase above 10 per cent?

Prof. Fels—I have difficulty in seeing cases like that, but I am always willing to look.

Senator SHERRY—If it happened, would you prosecute?

Prof. Fels—I would want to see the circumstances; that is all.

Senator SHERRY—Do you believe that you have the legal power to prosecute in those circumstances?

Prof. Fels—If it is in breach of the law, if it is misleading.

Senator SHERRY—If it is not misleading, do you believe that you have that legal power?

Prof. Fels—We can only take actions in terms of it being misleading or falsely representing.

Senator SHERRY—So, if it is a justified increase above 10 per cent and it is not misleading, it is not deceptive, you cannot prosecute, can you?

Prof. Fels—I have difficulty imagining this case. I would want to see it.

Senator SHERRY—But, if that happens, you cannot prosecute, can you?

Senator WATSON—That is a hypothetical.

Senator SHERRY—You have just admitted that you cannot prosecute.

Prof. Fels—I did not admit that. I just said that we would look at it.

Senator SHERRY—So, where there is no misleading conduct, nothing is deceptive and they do increase their price by more than 10 per cent because of net compliance costs and the GST, are you saying that you will prosecute them?

Prof. Fels—No.

Senator SHERRY—When they are not engaged in misleading or deceptive conduct, you will prosecute them. Is that what you are saying?

Prof. Fels—No. I am saying that if there were any prosecutions they would be in terms of these provisions of the law that are set out in section 75AYA. That is what I would look to.

Senator SHERRY—So effectively you are admitting that, if there is a justified increase above 10 per cent, you cannot do anything about it.

Prof. Fels—No, I have not admitted that.

Senator SHERRY—But how can you prosecute someone who has not breached the law? If they are not engaged in misleading or deceptive conduct, how can you prosecute them?

Prof. Fels—I did not say that we would prosecute anyone not in breach of the law.

Dr Cousins—If someone represented in a misleading or deceptive way that an increase above 10 per cent was consistent with the price exploitation guidelines, then that would be a breach.

Senator SHERRY—But I am not referring to misleading or deceptive conduct; I am referring to a legitimate price rise of about 10 per cent.

Dr Cousins—I thought that was what this bill was about in 75AYA. It is not about 75AU, which is the price exploitation provision.

Senator MURPHY—It is still relevant in terms of if there is a legitimate reason for the price increase that may be claimed to misrepresent the circumstances if it is proven that the price increase is justified. I think Holden has been one company that has set out circumstances where it may have a view that the price might not decrease in one case to the tune of 8.3 per cent but might be less. If it is the case where a price has gone up by more than 10 per cent at the end of the day, as Senator Sherry is saying, because of a number of factors that can be quite clearly identified—whether it be associated with costs of implementation or buying computer equipment and/or till equipment, et cetera—would it be fair to say that you would not prosecute somebody if they had a justifiable reason for actually raising the price by more than 10 per cent? I would have thought that was a reasonable statement. It does not come under price exploitation. We are not talking about price exploitation either. You are talking about justification for increasing a price. If the justification is there, how could you prosecute someone?

Dr Cousins—You are talking about a non-tax related matter which produces a price rise in excess of 10 per cent.

Senator MURPHY—Whether it is tax or non-tax it would not matter. Providing that all of the components forming a price increase of more than 10 per cent were legitimate, I would not think the ACCC would be in a position to prosecute the person or company that had increased a particular commodity by more than 10 per cent.

Dr Cousins—The price rule is explicitly related to the tax changes. The 10 per cent relates to tax changes.

Senator MURPHY—But there are other factors that go to the potential for a price to increase, are there not?

Dr Cousins—There may be. As the chairman said, it depends entirely on the circumstances.

Senator MURPHY—I understand that. I accept that. The question is: if it happened to go up by more than 10 per cent overall and there were legitimate reasons for that, you would not prosecute them?

Senator WATSON—I think you are misleading the point of this bill.

Senator CONROY—It is like the three monkeys trying to pretend that 10 per cent is a legal cap.

Senator WATSON—But that is not the subject of this bill.

Senator SHERRY—Professor, have you had a chance to look at the letter from the Law Council that Senator Conroy has tabled?

Mr Spier—We were supplied with it only five minutes ago.

Senator SHERRY—I draw your attention to page 5. This is a letter written by Warren Pengilley. He is a distinguished lawyer. Are you aware of his background?

Mr Spier—Yes.

Senator SHERRY—He is very distinguished, as I understand.

Senator CONROY—He is a former commissioner of the Australian Trade Practices Commission—I think that is an accurate statement.

Senator SHERRY—That is correct, is it not?

Mr Spier—Yes.

Senator SHERRY—This has been signed off by the Law Council's Trade Practices Committee.

Mr Spier—That is interesting because we are observers to that committee and we have not seen this letter.

Senator SHERRY—The letter is signed by a member of the Law Council.

Senator CONROY—Peter Levy, Secretary-General.

Senator SHERRY—Unless it is a forgery.

Mr Spier—I do not think it is a forgery.

Senator SHERRY—There are eminent lawyers and QCs. On page 5 of that letter, Mr Pengilley says:

Similarly, the ACCC Guidelines say that no price may increase more than 10 per cent.

And it goes on:

But it is not the law and the ACCC is misleading in its Guideline in saying that it is. If a corporation's increased tax, purchase and compliance costs exceed 10 per cent, there is no reason at all, as the writer sees it, why prices cannot increase to cover these.

What is your response to that criticism?

Mr Spier—I think the words are 'as the writer sees it'.

Senator SHERRY—You do not agree with the writer?

Mr Spier—No.

Senator SHERRY—This is a writer and it has been endorsed by the Law Council's Trade Practices Committee.

Mr Spier—I do not think it is worth getting into a debate about personalities or those things.

Senator MURPHY—We should not deal with matters of opinion. Where you had to deal with a case where there was a legitimate reason for the price of a commodity or product increasing by more than 10 per cent, then the ACCC would not be able to prosecute those peo-

ple. Despite the fact that I accept what Professor Fels says, you would look at it on a case by case basis and take into account that, if at the end of the day you found, after looking at this case, that there were totally legitimate reasons for the price going up by more than 10 per cent, you would not prosecute them. In fact, I cannot see how you could.

Prof. Fels—As I said, we find it hard to envisage such a case, and it is hard to talk about a case which is hard to envisage.

Senator MURPHY—With respect, Professor Fels, you might find it hard to envisage. I am actually finding it hard to envisage that, if there were a case—

Senator WATSON—You have not given us a practical example yet. That would help.

Senator MURPHY—We are not past 1 July yet. I am finding it hard to envisage how you would prosecute somebody. What is being put to you at the moment is hypothetical. Hypothetically, if there were a case, I am finding it difficult to envisage how you would prosecute such a case, if it were proven that there were legitimate reasons for the price increases occurring. I guess that is it, if it was. It is just a matter of law, I would have thought, that if it is legitimate and can be proven to be so then I am trying to understand how you could prosecute such a case.

Senator SHERRY—Professor Fels, do you have a response to Mr Pengilley's view on page 5, that I have read out?

Prof. Fels—About his opinion?

Senator SHERRY—Yes.

Prof. Fels—I thought I had given it already: that I have difficulty envisaging such a case, and it is difficult to talk about such a hypothetical case in that situation.

Senator SHERRY—Why has there been all the media coverage of these supposedly hypothetical cases, then. There has been extensive comment in the media. There was supposed to have been a directive from the minister to you, which apparently turns out to be false. You have the guideline of a 10 per cent cap and Mr Pengilley is saying that it is not enforceable in law.

Senator WATSON—Mr Chairman, I take a point of order. That is not the subject of the bill before the committee.

Mr Spier—This is Mr Pengilley's opinion. It is not the first time he has written this. We have seen a similar view before. We obviously disagree.

Senator SHERRY—Have you got a legal opinion of your own that says you can enforce a cap of 10 per cent? Have you got legal opinion?

Senator WATSON—Mr Chairman, this is not the subject of the bill. It might be referred to in this particular submission that has been tabled, but it is not the subject of the bill.

Senator SHERRY—Do you have legal opinion of your own, Mr Spier or Professor Fels, that you can enforce a cap of 10 per cent?

Prof. Fels—We have not had any cases on it.

Mr Spier—We do not have legal opinion to say it is unlawful: is that what you are asking?

Senator SHERRY—Do you have opinion that says it is lawful?

Mr Spier—No, we do not have opinion to say it is unlawful.

Senator CONROY—You just have your own opinion?

Mr Spier—Yes.

Senator SHERRY—So you do not agree with Mr Pengilley's view?

Mr Spier—No, we do not. We clearly do not.

Senator CONROY—Is it within the federal government's power to introduce a price cap?

Mr Spier—I am not a constitutional lawyer, Senator.

Senator CONROY—I thought there had been a referendum on it and that it is fairly clear that the federal Commonwealth parliament does not have the power to limit prices.

Mr Spier—But these are our own guidelines in 75AU on how we will enforce a piece of legislation.

Senator CONROY—Could you point to where you have been given the power to introduce a price cap?

Dr Cousins—It is the corporations power, and various other Commonwealth powers.

Mr Spier—We have been given power to issue guidelines.

Senator CONROY—Could you show where the ACCC have been directed that they have the power to do something that the federal government does not have? They are referring a power to you that they do not have.

Mr Spier—No. The power is to issue—

Senator CONROY—You have just tried to suggest that they have referred it to you under Corporations Law, Dr Cousins. You are not suggesting that the Corporations Law empowers you as the ACCC to set a price cap, are you?

Dr Cousins—I was not talking about the ACCC. I was talking about the Commonwealth.

Mr Spier—Senator, these are guidelines—

Senator CONROY—Do you think the Corporations Law empowers you to—I am asking Dr Cousins a question.

CHAIR—Mr Spier was trying to answer, so let him answer.

Senator CONROY—I am just responding to Dr Cousins's answer. You are not suggesting that the Corporations Law powers entitle the Commonwealth to enforce a price cap, are you, Dr Cousins?

Dr Cousins—The price exploitation powers are based on the Corporations—

Senator CONROY—No; I said a price cap. You are not suggesting for a moment that the Commonwealth has constitutional power under Corporations Law to enforce a price cap, are you?

Dr Cousins—I do not think there is a price cap as such.

Senator SHERRY—Oh, so there is not a 10 per cent limit?

Dr Cousins—There is a 10 per cent limit in relation to any tax related price change.

Senator CONROY—Is that a price cap or not?

Mr Spier—No.

Dr Cousins—Well, there is no cap, in the sense that other factors may still operate.

Senator CONROY—So 10 per cent is not a price cap?

Mr Spier—Not on the ultimate price, no. It is a price rule on change as a result of the tax changes.

Senator SHERRY—So it is okay for people to call a price rise or to give a reason other than the GST and compliance costs and get away with increasing the price by more than 10 per cent— if they call it something different?

Mr Spier—No. That is just misleading, then, isn't it.

Senator SHERRY—Would you be able to prove it?

Mr Spier—If it is a fact. It is a question of fact every time. In every case we look at, it is a question of fact.

Senator CONROY—So, if I increase my price by 11 per cent and say that it is GST and other issues, that is okay, isn't it?

Mr Spier—No.

Senator CONROY—Why not?

Mr Spier—It depends. Again, it goes back to case by case. We are looking at a wider change. If it is purely tax related, then no.

Senator CONROY—But I just specifically said that if I say that it is GST and other issues—

Senator MURPHY—And extra profits.

Mr Spier—We would like to see those other issues. Not extra profits.

Senator CONROY—I am now completely confused. Where does it say you have a capacity to rule on issues other than the new tax system changes?

Mr Spier—In any price change we have under 75A a power to look at the basis of those changes and whether there are other factors, supply and demand conditions, and any other relevant matter.

Senator SHERRY—Professor Fels, just to come back to the letter and this quote, does it concern you that Mr Pengilley is saying that the ACCC guidelines that say that no price may increase by more than 10 per cent is not the law, and that the ACCC is misleading in its guideline? Does it concern you that he says that?

Senator WATSON—Mr Chairman, page 5, which the senator is referring to, is not the subject of this legislation. He has referred to something that has already passed the parliament and is appropriately the province of Senate estimates, if you want to pursue that. The fact that somebody has put something in a submission through the Law Council does not mean to say that it has relevance to this particular bill. Most of page 5 has little relevance to this bill.

CHAIR—Senator, you have to demonstrate the relevance to the clauses of this bill.

Senator SHERRY—Can I respond? Are you ruling or can I make a comment about Senator Watson's comment?

CHAIR—Please make a comment.

Senator SHERRY—Thank you. I would argue that, under the guidelines by which this committee is operating today, and has always operated by, we are dealing with amendments to the Trade Practices Act and this is a highly relevant question. If you are to rule in favour of Senator Watson, you will incredibly limit not just this hearing but a whole range of Senate committee hearings. I know it is not estimates and we are not—

Senator CONROY—Where are the terms of reference?

CHAIR—Senator, the terms of reference basically, I remind you, are that the Senate Selection of Bills Committee has asked the committee to examine and report on the provisions of the bill, in particular the extent of behaviour with regard to the necessity for proposed powers and penalties—

Senator SHERRY—Exactly.

CHAIR—adequacy of the resources, and constitutional grounds of the legislation.

Senator SHERRY—That is right.

CHAIR—You have spent a lot of time on the guidelines which, as Senator Watson pointed out, were part of previous legislation which has passed the parliament. You have had adequate answers from the officers.

Senator CONROY—You do not think there is any interaction between this amendment and the existing bill?

CHAIR—Could you please keep quiet? I know it is difficult.

Senator CONROY—You are having trouble keeping Senator Watson quiet. I am sitting here waiting for you to keep going.

Senator SHERRY—What is your ruling?

CHAIR—I am basically saying that we have spent a lot of time on the guidelines. I am ruling that, unless you can demonstrate the relevance of the guidelines to the particular clauses in the bill which is before us, I would ask you to get on with other questions.

Senator SHERRY—Having asked probably 10 or a dozen questions and my colleague Senator Conroy the same, I believe it is relevant. I believe the terms of reference you have read out clearly indicate it is relevant.

Senator CONROY—Absolutely.

Senator SHERRY—I do not have any further questions on the 10 per cent guidelines at this point in time. I am sure my colleagues have other questions in respect of the correspondence and other matters.

Senator CONROY—I want to go back to section (d) 'likely to mislead or deceive a person about the effect'. I am trying to understand what you think the effect is so I am not in breach. I would like to find out before you send me a notice or ring me up and say, 'We think you're in breach.' I would like to know in advance if you are going to be letting the Australian public know what you believe the effects are, so that I do not have to risk misleading and deceiving the public. You have suggested a price calculator may be available. Is that any nearer completion?

Prof. Fels—Yes, we are expecting to announce that fairly soon.

Senator CONROY—Is that going to be released?

Prof. Fels—It will be released quite soon—within two weeks at the most. We are expecting it within about a week.

Senator CONROY—Come back to the Senator Sherry example where I argue that I have an eight per cent increase plus compliance cost plus rounding and it takes me past 10. You would say you would consider this on a case by case basis. How can you consider it on a case by case basis when you have already made a statement in another document that no price

should increase by more than 10 per cent? Why aren't you saying to me, 'No, that will not happen, Senator Conroy, because I will not be considering it on a case by case basis'? There is nowhere in this dot point in your pricing guidelines that protects me from misleading conduct. You simply say that in any event no price should increase by more than 10 per cent. So why are you considering my case? Why are you not saying, 'Senator Conroy, that is not right and I am going to prosecute you for false and misleading conduct'?

Prof. Fels—Because this is a different provision. It is about a misrepresentation, so we would be looking at—

Senator CONROY—I am only misrepresenting if I am wrong. I am saying to you that I am right, Professor Fels.

Prof. Fels—If there is a misrepresentation, that is where we would be likely to take action; but we look at cases on a case by case basis.

Senator CONROY—How can you be taking this case I am putting to you, where I am saying to you that I am in business—and you do not know that I am not, so I might be a business as well as a senator—

Prof. Fels—As I said, we would take it up, ask for an explanation, and we would consider the circumstances.

Senator CONROY—How can you look at the circumstances when you have said that in any event no price should increase by more than 10 per cent. That rules out a case by case basis. So I must be guilty of misrepresenting, because no price should go past 10 per cent, and I am saying to you that I have a price that does. I am in business: I sell widgets. I am telling you that my cost structure on my analysis takes me past 10 per cent. And you are saying I am guilty of false and misleading conduct because you have said that no price should go past 10 per cent.

Prof. Fels—We would look at all the circumstances, including those ones, in terms of whether there has been a misrepresentation of the effect. The guideline is about other sections of the Trade Practices Act, and that would certainly be highly relevant to this and that is—

Senator CONROY—That is what I am talking about. It is highly relevant. Thank you. Professor Fels has just admitted that the guidelines are highly relevant to this section. Wow—an hour and a half!

Senator MURPHY—And if you found no misrepresentation?

Prof. Fels—This section is about misrepresentation.

Senator CONROY—About the effect. This is a statement of yours on the effect. So as you say they are highly relevant.

Senator MURPHY—If you found in your case no misrepresentation, what then?

Prof. Fels—I find it hard to envisage a case of this kind, and I would want to see it before coming to a conclusion. That is the way generally you apply the Trade Practices Act.

Senator MURPHY—I understand what you say, that you—

Senator CONROY—But either I am guilty of false or misleading conduct or I can increase my prices by 11 per cent. It has got to be one of the two; there is not a lot of area in between there, Professor Fels.

Prof. Fels—I would want to look at the circumstances.

Senator CONROY—But the circumstances are that you are not allowed to look at them. I am breaching the 10 per cent which you have ruled out.

Prof. Fels—As Mr Spier just said to me, there may be other reasons that are advanced as to it, so we could look at that.

Senator CONROY—What other reasons, Mr Spier, would you accept?

Mr Spier—Exchange rate variations, wages, costs—ones that are non-tax related.

Senator CONROY—That is what I am looking for. It says about the effect. I am saying to you they are all GST and ANTS related costs.

Mr Spier—The guideline you keep referring to talks about tax related changes.

Senator CONROY—That is what I am talking about. I am saying to you, ‘No, there’s nothing else. My widget company is about eight to 8½ per cent compliance costs because I was not computerised before’—

Mr Spier—We would not accept that the compliance costs would be that high.

Senator SHERRY—Professor Fels, the letter from the Law Council signed by Peter Levy—and I do not know whether you or your colleagues have read it—says:

The Law Council’s Trade Practices Committee has considered this Bill and has received a submission from Dr Warren Pengilley in relation to it. A copy of Dr Pengilley’s submission is enclosed.

The Law Council is strongly opposed to this Bill—

I will say that again: ‘is strongly opposed to this Bill’. It continues:

which represents a radical departure from Competition Policy which cannot be justified for reasons set out in Dr Pengilley’s paper.

Does that concern you?

Mr Spier—A little bit of history: the Law Council was totally opposed to the earlier amendments as well.

Senator CONROY—We would like to talk to you about them but apparently we will get ruled out.

Senator SHERRY—We are talking about the amendments here today.

Mr Spier—What I am saying is that this is a continuum of the same view.

Senator SHERRY—I have not seen previous correspondence from Dr Pengilley, but did he refer in that correspondence to ACCC guidelines saying that no price may increase by more than 10 per cent?

Mr Spier—Obviously, that is more recent because the guidelines are more recent.

Senator SHERRY—Exactly. Thank you.

Mr Spier—But he has expressed this view and the Law Council has expressed this view.

Senator SHERRY—What he is saying, and the Law Council is endorsing it, is that you cannot enforce your cap of 10 per cent. Does that concern you?

Mr Spier—This goes on ad nauseam. We just say that we do not agree with Dr Pengilley.

Senator MURPHY—At the bottom of page 5 and over to page 6 of the letter, he outlines:

The ACCC says in its Guideline that entities have to give an offset for matters such as “savings in not having to deal with the existing tax regime”. Some entities may simply be quite unable to cost this intangible into its various products—

Can you give an opinion or a response to that?

Mr Spier—One is the compliance cost. It is basically compliance cost. We might come back on that because we are doing this on the run of course. We have only just got this letter.

Senator MURPHY—Yes.

Senator CONROY—They have asked that it be taken as a late submission.

Senator MURPHY—Yes, but there is a part of it which goes to this question of how you deal with the liability issue as it relates to the different—

CHAIR—Senators, we have only just tabled this letter. Several of us have not seen it previously.

Senator CONROY—We can read through it, though. We can refer to it.

CHAIR—Sure. The officers have not seen it either. Whilst there has been some discussion of part of it, I would suggest if you have any further questions on that that we consider putting them on notice for response from the ACCC.

Senator CONROY—I would have hoped, with due respect, that every key figure at the ACCC on the GST is here with us today. I would have thought the collective wisdom at that table is pretty substantial.

CHAIR—Thank you, Senator Conroy, for your comments. I remind you that your questions have to be relevant to the bill that is before us—

Senator CONROY—As Professor Fels has indicated, the price guidelines are very relevant. Unless you are suggesting that compliance costs are not included in the effects of the new tax system changes, we are entitled to ask questions about compliance costs. I am happy for you to rule that compliance costs are not part of the effect or likely effects of the new tax system changes.

Senator SHERRY—The Law Council thinks they are relevant. That is a pretty good opinion for me.

Senator CONROY—I am happy to have you rule in that direction. Would you like to rule out any of the other effects of the tax system changes?

Mr Spier—Can I make one comment back to Senator Murphy. Pengilley says there is a potential \$10 million. That is of course up to the court and it would be nothing like \$10 million. The other thing it says is:

This potential liability exists even though the statement is made honestly, innocently and without any intention to mislead anyone.

He has obviously not read the bill because the bill has defences.

Senator MURPHY—In 76A.

Mr Spier—So the eminent lawyer is not that eminent.

Senator SHERRY—Hang on. You accepted he was eminent at the beginning.

Senator CONROY—We will have to invite Professor Pengilley now to come—

Mr Spier—I said, ‘No comment.’

Senator CONROY—No, you just said he is not eminent.

Senator SHERRY—We will check the *Hansard* on that.

Senator CONROY—I would like to invoke the rules of the Senate so that when aspersions are cast we invite the person who has had them cast upon them to come and reply.

Senator SHERRY—It may have to go to Privileges.

Senator CONROY—No.

Senator SHERRY—That is another committee hearing.

Senator CONROY—Mr Pengilley will be invited, presumably, to respond to the comments.

CHAIR—Order! The committee will come to order. Questions?

Senator CONROY—No, I am asking you for a ruling. Is Dr Pengilley entitled to come and respond to Mr Spier's comments?

Senator SHERRY—Yes, he is.

CHAIR—We will be advising him he has the right of reply.

Senator WATSON—He will be given the opportunity to make a written comment.

Senator CONROY—No, will he be invited to the committee? He will not be invited to the committee—

CHAIR—This is the only hearing of the committee—you know that as well as I do.

Senator WATSON—He has the same rights as anybody.

Senator CONROY—Yes, which is to be invited to respond.

Senator SHERRY—I think Mr Spier has fortunately opened up the opportunity for Mr Pengilley to defend himself, along with the Law Council. I think we will probably take that opportunity.

Senator CONROY—We would love to take the opportunity.

CHAIR—Senators, I remind you to get back to the bill, please.

Senator CONROY—I would like to go on. Given you have said, Mr Spier, that this is a continuation of a previous position and therefore you are involved in the discussions and you are aware of them generally, notwithstanding you may have seen this only for the first time, I am sure you would be aware of Mr Pengilley's view on *Vardon v. the Commonwealth* 1943. Does that ring a bell for you, Professor Fels?

Mr Spier—Where are you quoting from?

Senator CONROY—Back page, page 6. Are you familiar with that case, Professor Fels?

Mr Spier—It has been quoted to us before, yes.

Senator CONROY—Yes, that is what I am saying. I am sure it has been quoted to you before so I am sure you have a response.

Mr Spier—We are not constitutional lawyers, Senator.

Senator CONROY—Surely, if you have had this case quoted to you, you have sought some advice as to whether or not there is a constitutional question? You have had constitutional doubt.

Mr Spier—This is Dr Pengilley's view.

Senator CONROY—No, I am asking if you have sought other views?

Mr Spier—No, we have not.

CHAIR—Committee, can I just interrupt for a minute. I want to call a private meeting of the committee to consider the matter which was before us just a few minutes ago.

The committee will resume. Senators, any further questions on the bill? Again I remind you the questions have to be relevant to the bill that is before us.

Senator CONROY—Mr Faulkner, you are from Attorney-General's. Are you familiar with the Vardon v. Commonwealth case?

Mr Faulkner—No, I am not. I have heard of it, but I do not know anything about it. I have never really considered it in detail.

Senator CONROY—Mr McKissack, are you from A-G's?

Mr McKissack—No, I am from Treasury.

Senator CONROY—Treasury, I am sorry. We have not met before. So A-G's have not looked at this and the implication of this?

Mr Faulkner—I am here more in relation to the broader constitutional issues that might have arisen out of the JOCLA bill. I have not really had an involvement with this bill, and I certainly have not looked at Vardon and the Commonwealth in this, or in any other, context in any detail.

Senator SHERRY—We have a few questions for you on matters on which you may have an opinion. Do you believe that there is any doubt about the constitutionality of the ACCC's price exploitation powers?

Mr Faulkner—Could I say before I say anything else that, as I mentioned a moment ago, I am here because I thought senators might be interested in discussing issues relating to the High Court's cross-vesting decision last June in *Re Wakim*, and the [Jurisdiction of Courts Legislation Amendment Bill 2000](#), which responds to that decision. The JOCLA bill, as you would be aware, amends trade practices provisions relating to the national price exploitation code. I am here to provide any information and assistance that I can in relation to these broader constitutional issues but not, as you would appreciate, with legal advice. That is not appropriate for me to do. So I do not think I can really answer your question in any helpful kind of way.

Senator SHERRY—Have you seen the letter from the Law Council of Australia? Have you got a copy of it?

Mr Faulkner—Yes.

Senator SHERRY—Have you had the opportunity to look through it at all?

Mr Faulkner—I have flicked through it.

Senator SHERRY—We have a critical—I could be stronger—submission from Mr Pengilley signed off by the Law Council's Trade Practices Committee about the legislation we are considering. Does that concern you?

Mr Faulkner—I do not really have any comment on that, I am afraid. I do not know anything about the letter and really have not considered the context in a way that would be relevant.

Senator SHERRY—Do you believe that a submission from the Law Council of Australia carries weight?

Mr Faulkner—It carries weight.

Senator SHERRY—Do you know of Mr Pengilley's reputation?

Mr Faulkner—No.

Senator SHERRY—Do you know any of the members of the Law Council's Trade Practices Committee?

Mr Faulkner—No.

Senator SHERRY—You have said correspondence of this type carries weight—

Mr Faulkner—Can I just interrupt there: that may be light; that may be heavy. I do not offer a view on that.

Senator SHERRY—We might have an opportunity to speak to them in due course. I am not a lawyer, by the way, but correspondence from the Law Council of Australia I think would be taken notice of when it is received.

Mr Faulkner—I am sure notice would be taken of correspondence from the Law Council, yes.

Senator SHERRY—It would be given greater weight than, say, correspondence from my local solicitor back home in Devonport, wouldn't it?

Mr Faulkner—I do not know who your solicitor is, I am afraid.

Senator SHERRY—He is not on the Trade Practices Committee; I am sure of that. I would be surprised if anyone in Tasmania was on that committee, and that is not a reflection on my legal friends in Tasmania. You say you have not read this letter. Can you read the correspondence for the committee? I am not suggesting now, because we just do not have time, but can you provide the committee with a response to the opinions of the Law Council of Australia?

Mr Faulkner—Could I perhaps respond to that by saying that, it seems to me, this has arisen in the context of the legislation that we are looking at here, which is obviously a matter for Minister Hockey and the Treasury. I would have assumed that Treasury would have given due consideration to this correspondence and, to the extent that they thought necessary, would have approached their legal advisers—and that may indeed have involved the Attorney-General's Department—for any relevant policy input. I would have thought, as with all other aspects of this bill, it would be a matter for Treasury to deal with as one of the many considerations they take into account. On that basis, I would have assumed also that Treasury would come to A-G's, and certainly could come to me, in particular, if they thought there was something that warranted that kind of consideration. Does that sound reasonable?

Senator SHERRY—I am just a bit puzzled as to why you are here then.

Mr Faulkner—I am sorry about that.

Senator SHERRY—We have got this problem of relevance that is being raised by some people.

Senator CONROY—We would not want you to be ruled irrelevant.

Senator SHERRY—We understand you are a lawyer of some standing in the department. We would appreciate your views; that is why we thought you were here.

Mr Faulkner—I am sorry if there has been a misunderstanding, but as I say I am certainly not here to provide legal advice. It is very kind of you to say that I have some standing; I am not sure if that is true or not. But, as I say, I am more than happy to discuss those things that I have been involved with, which was the [Jurisdiction of Courts Legislation Amendment Bill 2000](#).

Senator CONROY—Does that bill address any ACCC matters?

Mr Faulkner—Yes, insofar as the JOCLA bill, which is the acronym that is used for that, amends Trade Practices Act provisions relating to the national price exploitation code dealing with those elements which were put at risk as a result of the decision in *Re Wakim*. The TPA price exploitation code was merely one of a number of cooperative legislative arrangements between the Commonwealth and the states which were affected by the decision by the High Court in *Re Wakim* last year.

Senator CONROY—That decision—and I am not a lawyer, which will become apparent very quickly—stops the ACCC prosecuting a state in the Federal Court?

Mr Faulkner—Not quite. Would it be worth me going back a step and just expanding a little bit on what *Re Wakim* said?

Senator CONROY—Yes.

Mr Faulkner—*Re Wakim* was last year in the High Court. It considered the cross-vesting schemes established under the general cross-vesting legislation as well as the cross-vesting arrangements established under the corporations scheme between the Commonwealth and the states. What the court decided in the group of matters that it heard, which all involved essentially the same thing, was that the Constitution precluded the vesting of state jurisdiction in federal courts. It said that the Constitution itself established what the limits of federal jurisdiction were in that sense. So it affects any of the cooperative Commonwealth-state arrangements which purported to vest state jurisdiction in federal courts. That jurisdiction was vested in order to allow litigants not to have to worry about whether there was sufficient jurisdiction in any particular court to hear a matter which may have involved all kinds of various and assorted elements. I think it is generally conceded that prior to the cross-vesting arrangements there had been lots in the way of what was often described as ‘arid jurisdictional debate’ before litigants could get on to the matters at issue. Is that sufficient by way of background?

Senator CONROY—Yes, that is fine. That is more than enough. Under the provisions of the price exploitation code, in which court do you now anticipate that the ACCC will commence proceedings against entities other than corporations?

Mr Faulkner—I am not trying to avoid that question, but it might be better if you were to begin with the Treasury officers on the basic operation of the legislation. I would be more than happy to jump in and fill in any gaps.

Mr Jepsen—Is your question about where action would be taken under this bill, or are you talking about the price exploitation code?

CHAIR—It has to be this bill.

Senator CONROY—It was more of an information question.

Mr Jepsen—Perhaps I can make a statement about this bill. First of all, this bill does not actually deal with the jurisdiction of courts. In that sense, Re Wakim is not a problem for us, but our understanding of the Re Wakim case—and I stress that I am not a lawyer either, so I can talk directly to you about it—

Senator CONROY—Thank God there are two of us in the room!

Mr Jepsen—is that because the bill does not purport to vest a jurisdiction in the court there is no issue from Re Wakim in terms of the drafting of the bill. However, as I understand it, the position is that, if a prosecution were taken under the bill or under an act following this bill, there would be a question as to where the action was taken. If it were taken against a corporation, my understanding is that it could be in the Federal Court, but if it were taken against an unincorporated body it would be within a state court.

Senator CONROY—Would that be right, Mr Spier?

Mr Spier—That is my understanding.

Senator CONROY—Are you comfortable with having to run between different courts? Is the ACCC happy that it is now in a situation where it has to shop around?

Mr Spier—It is very much a matter of the reality if that is the effect of some of the High Court judgments.

Senator CONROY—Do you think that will diminish your ability to prevent price exploitation?

Mr Spier—No.

Mr Jepsen—It is the requirement of the Federation, as interpreted by the High Court. We have to live with it.

Senator CONROY—Do you think the state courts have the expertise and resources to deal with ANTS matters?

Mr Spier—Basically, what we are dealing with in this bill is misleading conduct. I am sure state courts can handle those sorts of things.

Senator CONROY—And the price exploitation guidelines?

Mr Spier—That is primarily the Federal Court, in any case.

Senator CONROY—Lots of small businesses have run as trusts, so they are not going to fall in a Federal Court situation. If you have a small business set up as a trust running—

Mr Spier—Most state supreme courts actually have a commercial jurisdiction, so I am sure they are competent to handle those sorts of issues.

Senator CONROY—I am not really trying to drag you into bagging state courts; I am just trying to get to how you are going to cope.

Mr Spier—There was an initial policy many years ago to have everything in the Federal Court, but of course, as Mr Jepsen says, one of the issues of Federation means that that may change.

Senator CONROY—Are you concerned that in the circumstances you could get differing rulings in different states?

Mr Spier—That can happen now in the Federal Court with different judges.

Senator CONROY—But there is a greater degree of consistency, I would have thought, given that you can appeal.

Mr Spier—Agreed. We can appeal, but it is very much up to us to put the case to the judge. I must say that most cases do not end up in court.

Senator SHERRY—Are there consistent penalties between state jurisdictions? Are there the same penalties? Do they differ?

Mr Spier—In price exploitation, of course, there is just one penalty in the Trade Practices Act.

Senator CONROY—But Queensland have not agreed to enforce it.

Mr Spier—That is this bill.

Senator CONROY—They have disagreed and they believe that they have more expertise in this area.

Mr Spier—I am not sure what they have said.

Senator CONROY—Have they changed their position, Mr Jepsen?

Mr Jepsen—Not to my knowledge. I think they are holding their current position.

Senator CONROY—There is another aspect. I am happy for anyone to take it, Mr Faulkner, Mr Jepsen or Mr Spier. In an article written by Graeme Hill in the *Federal Law Review*, it was stated re Wakim:

... the incidental power in these cases suggests that the Commonwealth may only be able to permit a Commonwealth body to perform State administrative functions if the exercise of those *State* functions enables the body more effectively to exercise its *Commonwealth* functions.

I just want to set the scene. When the ACCC is enforcing state legislation under the price exploitation code, it presumably will be exercising no Commonwealth functions but entirely state functions.

Mr Jepsen—It could be operating under state price exploitation code.

Senator CONROY—Does the ACCC see any risk that the enforcement regimes of the states will have to be dissipated and dismantled—that is, that the ACCC does not have the power to administer and enforce those parts of the price exploitation code which rely on state legislative powers?

Mr Jepsen—That would depend on the outcome of the case that is still with the High Court.

Senator CONROY—Has the ACCC sought advice on this?

Mr Spier—As Mr Jepsen said, there is currently a case before the High Court, so we will wait and see on that one.

Mr Faulkner—Can I just go back to the Re Wakim point, which I think is central to the question you raise. Re Wakim was concerned with the jurisdiction that can be invested in federal courts, as I said. It did not purport to rule out Commonwealth-state schemes under which Commonwealth bodies like the ACCC exercise powers under state laws, which would be the situation you would have where the ACCC is administering the state law, the state code—that is, the schedules set out in the TPA as applied in the states. There is High Court authority around to support the proposition that these kinds of Commonwealth-state arrangements are okay. Mr Hill's article is a very lucid discussion of all the details. It is a very good article indeed, and I happen to have a copy here, as luck would have it.

Senator CONROY—You did come for more than the bill.

Mr Faulkner—Mr Hill says that the High Court's discussion of the constitutional propositions that are put suggests that one may want to draw inferences from the reasoning about all kinds of cooperative schemes. It is doing the kind of thing one would expect in a learned article of this kind: exploring the constitutional possibilities. There is no suggestion at all that Re Wakim has any particular effect. It certainly did not rule these kinds of schemes out of bounds. He is simply extrapolating from the reasoning in suggesting that this is one construction you might put on some of the judgments that were delivered. In the next paragraph, he goes on to say that it is possible, however, that the court may take a broader view of the incidental power in the context of administrative powers, which is the situation we are dealing with here. So he is saying, as I understand it, that you might construe Re Wakim to be a problem but, on the other hand, you might not. It will all depend on what the High Court says.

Senator CONROY—You can get paid thousands of dollars for that sort of advice in private practice, you know.

Mr Faulkner—In all seriousness, I think that is what it is saying. It is simply exploring, as one would expect in a lucid discussion of this kind, what certain constructions which might be placed on the reasoning are. It certainly does not, as I read it, make any particular suggestion that Re Wakim has necessary implications for the JOCLA bill.

Senator CONROY—Could I just move on to some other areas about the constitutionality. It will probably be no surprise to you that I want to raise the case of Queen v. Hughes.

Mr Faulkner—Yes.

Senator CONROY—I understand the price exploitation code relies on the corporations power in the Constitution. Accordingly, without a referral of powers from the states or some other system by which the states consent to the ACCC administering and enforcing state legislation, the ACCC is not able to regulate noncorporate entities under the price exploitation code. Is this correct?

Mr Jepsen—There are a couple of issues there. We keep talking about the price exploitation code rather than the bill. You can answer it in terms of either. Under the price exploitation code, state governments have conferred—as distinct from referred—a power on the ACCC which administers the laws which they have passed, which mirror laws which the Commonwealth parliament has passed. They have not actually referred powers; they have conferred a power on the ACCC to implement the state laws.

Senator CONROY—I think we are in agreement that the states have not referred the power to the Commonwealth—that is essentially what you are saying, isn't it?—but that the price exploitation code operates as a national cooperative scheme similar to that which operates in relation to the Corporations Law.

Mr Faulkner—The situation is broadly that part 5B is set out in the schedule to the Trade Practices Act as the schedule form of that part, and participating jurisdictions—that is, the states—then apply that text as state law by means of their state legislation. In effect, you have lots of little state versions of that text applying as state law, and that state law confers functions and powers on the ACCC.

Senator CONROY—So both schemes provide that an offence against a state law be treated as an offence against a Commonwealth law?

Mr Jepsen—It is an offence against a state law, but it is the same offence under the same law.

Mr Faulkner—The substance is the same.

Senator CONROY—I am clearly demonstrating that I am not a lawyer.

Mr Faulkner—It sounds quite clear to me.

Senator CONROY—But a very good lawyer assists me. This provision in the Corporations Law is the subject of the case *Queen v. Hughes* currently before the High Court. If the High Court finds such a provision in the Corporations Law to be invalid, will it necessarily follow that that will invalidate the same provision in the price exploitation code?

Mr Faulkner—Would it perhaps be worth me just going back a step there and broadly outlining what is going on in the *Hughes* case? I think this is vaguely relevant, so perhaps it is worth pursuing.

Senator CONROY—‘Vaguely’ relevant? Can I just correct this? Last time I checked, this was an amendment to the Trade Practices Act 1974, which includes all these things. Once this is passed, there is the question of how it applies and the constitutionality of the whole bill. It is relevant if it is knocked out. It is not ‘vaguely’ relevant. If the High Court rules on the whole bill and we have amended a bit of the bill, it is more than vaguely relevant.

Mr Faulkner—Sorry, I was not meaning to suggest that it was not worth pursuing.

Senator CONROY—I am just worried that the chair might rule you out of order. He will not rule me out, but he might rule you out.

Mr Faulkner—Shall I?

Senator CONROY—Please.

Mr Faulkner—As you say, the case of the *Queen and Hughes* was removed to the High Court and heard in March this year. Judgment is reserved and will be handed down in due course, so any comment as to how the case is likely to go is merely speculation.

Senator CONROY—Sure. That is understood.

Mr Faulkner—Broadly, the Commonwealth DPP instituted a prosecution in the Western Australian district court, alleging contravention of the corporations law of Western Australia, and the Western Australian corporations law prohibited a person other than a public corporation from dealing in prescribed interests. The applicant in the case challenged the validity of the Commonwealth-state legislative scheme under which offences against the corporations law of each state—so it is a similar kind of arrangement to the one we were discussing—are enforced on a national basis as though they were offences against Commonwealth laws.

Under the scheme, prosecutions are undertaken by the Commonwealth DPP. So the case is concerned with the capacity of Commonwealth officers and authorities to exercise powers under a scheme, but it is different in a significant respect from the *Wakim* case, for example, in that the consequences of any particular decision in *Hughes* are not nearly so easy to talk about in advance. In *Wakim*, the whole cross-vesting arrangements were under threat, were being challenged. If they were found to be invalid, which they were, that has a necessary consequence for all the cross-vested arrangements. In this situation, we simply have a particular prosecution that is occurring under a particular part of a state corporations act so, in addition to the fact that a range of possible decisions could arise from the thing being valid to the thing being invalid, there is also the point to be made that the consequences of a decision as to invalidity would remain to be worked out; it will not have the same necessary implications for a wide range of things that we were dealing with in *Wakim*.

Senator CONROY—What is the worst case scenario if *Hughes* wins?

Mr Faulkner—I really would prefer not to speculate, to tell you the truth. Presumably, any decision could arise. The court may decide that there are problems with—

Senator CONROY—I am not asking you to guess what they are going to do; I am asking: what are the implications of the worst case scenario?

Mr Faulkner—It is conceivable that they will say something which leads people to question more broadly whether Commonwealth-state cooperative schemes can work as they were intended to work.

Senator CONROY—That would impact on the ACCC?

Mr Faulkner—It would impact potentially on any arrangement that involved conferral of powers, but it may not impact. It remains to be seen.

Senator CONROY—Do not misunderstand me: we are committed to helping, as I think we have indicated, to fix *Re Wakim* and whatever we have to do on *Re Hughes*, so we are not looking for you to sit there and embarrass your colleagues by saying, ‘You’re finished, fellas’; we are actually just trying to get an understanding of what the worst case scenario would be. We would help save you—it is okay.

Mr Faulkner—I take your point, but I think speculation on my part is not terribly helpful and, as with any case, one can speculate that the court will come to a completely unexpected decision which would create all kinds of problems. This case is no different, so my speculation on the point is just that: purely speculation and really does not add anything.

Senator CONROY—I will press you no further—you are not charging for the advice.

Senator SHERRY—Mr Spier, you looked like you were going to intervene then.

Mr Spier—No.

Senator CONROY—Only to respond to me.

CHAIR—Any further questions relevant to the bill?

Senator CONROY—Can you tell the committee—and I am happy for anyone to field this one—why the ACCC believes the proposed changes to the third-party access regime contained in schedule 2 of the bill before us are necessary?

Mr Jepsen—Senator, it is basically to put something beyond doubt. It is a technical amendment to ensure that powers which the ACCC always intended to have are in fact there. I gather some lawyers have asked questions about the ACCC’s ability to act on conditions it

accepts under part IIIA. The purpose of this amendment is simply to restate clearly that the ACCC does have those powers and that the implementation of part III of the act can proceed as it was intended to do.

Senator CONROY—So you can assure the committee that the proposed section 44ZZA(3A) is not intended to narrow the scope of acceptable undertakings within constitutional bounds?

Mr Jepsen—No, it is not intended to change the position that was envisaged.

Mr Spier—It is to put beyond doubt some of the undertakings which have already been accepted, especially in the energy area.

Senator CONROY—Does the ACCC have some written advice on its concerns over the constitutional basis of its ability to accept these access undertakings? Is it available?

Mr Spier—We have some views from private sector lawyers, but I am not sure what A-G's—

Senator CONROY—Is any of it available just for the committee, just out of interest? It is not especially controversial.

Mr Jepsen—I think our position is based on advice from Attorney-General's Department—or AGS, I am not sure which. I am not aware of any advice.

Mr Spier—We can come back on that issue.

Senator CONROY—What sort of behaviour would be caught by the proposed power in section 75AYA? We have had some discussion of it earlier.

Mr Spier—At the moment, under section 52—for instance, misleading conduct in relation to claims about the GST—we have already taken a number of actions involving building companies or car dealers that say that once the GST happens the price will go up, say, 15 per cent?

Senator CONROY—Have you taken action against people who say 'Beat the GST'?

Mr Spier—If they are wrong—if there will be no impact.

Senator CONROY—Does 'Beat the GST' imply something?

Mr Spier—It may; it depends upon the context. Advertisements are all about marketing. They are about a message. It depends what the message is about. 'Beat the GST' might be meaningless; it may mean a lot. It depends on how the whole ad is structured and what goes with it. We are looking at a lot of issues where there is potentially misleading conduct involving the GST and we are using section 52 and other sections of part V. But there are some gaps in our reach. We cannot touch the unincorporated, we cannot touch state business GBEs. That is up to the various fair trading departments of the states and territories—or the states only, because in the territories we do have jurisdiction. It is just a constitutional quirk.

Senator SHERRY—Briefly, what numbers of businesses are we talking about that are unincorporated?

Mr Spier—Frankly, I would not know the numbers. At the moment it is anyone that is incorporated or anyone in the territories or anyone that is involved in interstate trade that we would have jurisdiction over. Anyone that is not we would not have that jurisdiction over. But in terms of numbers I just would not know.

Senator SHERRY—Potentially some significant areas like professions?

Mr Spier—Professions, landlords, state GBEs—it is not insignificant.

Senator CONROY—There are a lot of small businesses. Senator Watson might even be able to be helpful. What sort of percentage, in your experience, of small businesses are incorporated or are trusts?

Senator WATSON—It is not necessarily trusts. Anybody who is not incorporated goes to the state jurisdiction. Anything that is interstate or is incorporated goes to the federal jurisdiction.

Mr Spier—With sole traders we would not have jurisdiction. With partnerships we would not have jurisdiction.

Senator CONROY—I was hoping you would be helpful and you were. Can silence be misleading and deceptive for the purpose of the Trade Practices Act?

Mr Spier—Yes, it can. Silence that is material—important silence like not disclosing a major defect.

Senator CONROY—Like Professor Fels earlier?

CHAIR—Senator Conroy, you should withdraw that comment.

Senator CONROY—Could silence be ‘misleading and deceptive conduct’ for this proposed section?

Mr Spier—Yes, but it has to be material silence. It is something that is really important. For instance, would you buy a house if there was to be a road going out the front door and the vendor did not disclose that, assuming the vendor knew? It might be a fairly material silence.

Senator CONROY—They could put a freeway through your backyard. If a customer comes into a shop and looks at the price rises and says, ‘Gee, these prices have gone up a lot because of the GST,’ and you say nothing despite the price rise being due to all sorts of things, can you be caught there?

Mr Spier—As the chairman said, it is a case by case issue, but I doubt that situation. It would have to be part of the package of representation where there is something really important left out.

Senator CONROY—Like a video. Trevor Morgan is a baker who was on the *Today* show on 30 March. I wonder if anyone saw that?

Mr Spier—Yes.

Senator CONROY—Transcripts are available from Hansard.

Mr Spier—We saw the transcript.

Senator CONROY—I think Senator Sherry specialised in the Senate debate.

Senator SHERRY—On the buns.

Senator CONROY—He bravely tried to explain how the GST would apply to products in his shop. If a bun was iced, it attracted the GST; if it was not iced, it did not—or it did, depending on its contents. If he made an unreasonable mistake in his explanation, could he have been caught by the proposed offence?

Mr Spier—75AYA has the offences, so if it is an honest mistake—

Senator CONROY—I said ‘if he made an unreasonable mistake’.

Mr Spier—What is unreasonable will depend on the facts. This is not aimed at curbing, say, opinions or free speech. This is where things are made in trade and commerce, in advertising campaigns, and in promotional spiels on it

Senator CONROY—Let us say that that is your opinion, and not shared by many people.

Mr Spier—Sure. He was talking about the trade and commerce.

Senator CONROY—Aren't you lucky about that! Will the fact that a company has entered into a new tax system public compliance commitment protect it from enforcement action under the proposed new power?

Mr Spier—No. Perhaps Dr Cousins can answer.

Dr Cousins—Certainly not if there is a breach of the act. A company having concluded a public compliance commitment with us would not be protected; in fact, if anything, I would have thought it would make the breach a more serious one.

Senator WATSON—Mr Chairman, does the act extend to the baker or the businessman's professional advisers?

CHAIR—It does.

Senator WATSON—I understand that in other areas of corporate law it extends to professional advisers as such, but where advice is given as to what may be in contravention of the bill before us, would an adviser who gave such information be caught up?

Mr Spier—Potentially, yes.

Senator CONROY—It is in the notes.

Mr Spier—The answer under the law now is that they are potentially liable if they are knowingly concerned in a contravention. Simple advice may not mean you are knowingly concerned, but if you have been involved in doing an advertising campaign you probably know it is wrong. There are defences here in terms of honest mistakes.

Senator CONROY—How many companies have given such commitments?

Dr Cousins—We have two public compliance commitments on the public record. We have something like 45 who have indicated a commitment to complete a public compliance with us.

Senator CONROY—The two are Qantas and Ansett?

Dr Cousins—The two airlines. They were obviously first off the rank because they were setting prices well in advance.

Senator CONROY—Who was involved in those negotiations at the time? Was that you?

Dr Cousins—In terms of the public compliance commitment, Mr Grant and I were certainly actively involved in those negotiations.

Senator CONROY—There was never any agreement for them to round up the frequent flyer? No offence, Mr Grant—I am asking about it because people are still very confused.

Mr Spier—That was at issue.

Senator CONROY—I have asked that one before, and you have answered that one before—I was interested in getting that from the horse's mouth, so to speak, because Qantas are still very confused about the whole thing.

Dr Cousins—They have not indicated confusion to us, I must say, but the compliance commitment was primarily in relation to air fares.

Senator SHERRY—I assume you cannot give us an indication of the other 45 that had sought—

Dr Cousins—That have indicated a commitment to proceed?

Senator SHERRY—What industries are they?

Dr Cousins—Right across the board in terms of retailing, transport, manufacturing, banking and communications.

Senator SHERRY—When do you anticipate that those commitments will be finalised?

Dr Cousins—Most of these companies are now in the process of finalising their pricing decisions, so we are reaching a point in the next month, I think, where we would be looking to have many of these concluded.

Senator SHERRY—Will they be available for the public to peruse?

Dr Cousins—We have indicated we will put those on a public register and they are on our web site—the two that we referred to.

Senator CONROY—Professor Fels said in the *Australian Financial Review* of 14 March that many of the costs associated with the GST, such as technology upgrades, are not even compliance costs. He stated:

The provisions in relation to the compliance costs clarify that where businesses use the opportunity provided by the new tax system changes to introduce and improve accounting operation and management systems that these should be treated as general business costs.

Is that consistent with your understanding?

Dr Cousins—Yes.

Senator CONROY—Have you got a list of compliance costs for the purposes of the GST? Have you got a defined list that says that this is a GST compliance cost and this is a general business cost? If so, could we have a copy, please?

Dr Cousins—We have stated a broad principle in relation to compliance costs that we think is reasonable for firms to cover within the 10 per cent limit. We talk about net incremental compliance costs, we talk about capital costs being amortised over time, and so on.

Senator CONROY—I am asking: can we have a copy?

Dr Cousins—Applying that very broad principle, it will vary on a case by case basis. For example, in our public compliance commitments we are reviewing what companies are putting to us in terms of compliance costs for the compliance with those principles.

Senator CONROY—You must have some idea what you think the difference is between them. All I am asking for is a copy of the difference between a GST tax system change compliance cost and a general business cost. You cannot honestly say to every single business in the country, 'Come and ask me.' They have to operate on the basis of some degree of certainty—like, here is the list of costs that the ACCC says are general business costs, and here is the list that are ANTS related costs. Surely you do not expect every business in the country to come to you and ask you about each individual cost?

Dr Cousins—No, we do not. It will vary in each case though. The point we are making there is that we have had a lot of wildly exaggerated claims about what are compliance costs associated with the new tax system changes. Some of those are related to the fact that it is a convenient time for some businesses to do a whole lot of business development—to put in new systems or new hardware and so on—which is not strictly necessary in order to comply with the tax changes.

Senator CONROY—How could you possibly prosecute a company for something it does not know it is breaching if you have not articulated it beforehand? How on earth could a company mount a defence to something it does not know?

Dr Cousins—Mr Grant has referred me to the guidelines.

Senator CONROY—We are not allowed to refer to them, I am sorry. You will be ruled irrelevant.

Dr Cousins—Am I being ruled out of order?

Senator CONROY—Not by me.

Dr Cousins—In 2.28, 2.29, 2.30 and 2.31, we do outline in some detail the compliance costs issue.

Senator WATSON—Mr Chairman, where, for example, there is an outright deduction, even though there might be a technological improvement in terms of bringing in a new technology to make sure that you comply even better with the GST—even though, for example, that might be written off for taxation purposes in one year—for example, you surely would not allow that price to be affected in the first year because you would have an abnormally high apportionment in terms of a pricing decision. Surely, for your purposes, you would apportion that cost for pricing purposes over the life of the asset rather than a particular situation of income tax, of just being able to write it off after one year; otherwise you will get an abnormal situation that perhaps my colleague was referring to.

Senator CONROY—As informative as ever, but I am not sure whether that was the question.

Dr Cousins—We have clearly indicated in the guideline here that, if it is of a capital nature, it will be amortised using normal accounting depreciation rules.

Senator WATSON—Even though in this particular case it might be written off for tax purposes in one year.

Senator CONROY—Can I have a list? You have said ‘where compliance costs are of a capital nature, such as for new computer equipment’. Can I have a list of the rest of them?

Mr Grant—We do not have such a list.

Senator CONROY—How can any business be prosecuted in the future for an offence when you are not prepared to tell them in advance what the criteria for breaching the law are? Perhaps I can clarify that: it is not the law; it is your guideline.

Mr Grant—You are predeciding that a business will be prosecuted for—

Senator CONROY—No. Unless you expect every single business to come to you to ask you on every single cost, how can a business have any certainty that it will not be prosecuted? Businesses like to know that they are not breaking the law, just as I do. I like to know that I am not breaking the law when I walk down the street. Where am I entitled to have a list of things: ‘if you do this, you have broken the law’? Where is that list?

Mr Grant—What you are asking for is very prescriptive regulation or legislation.

Senator CONROY—Ten million dollars is a very prescriptive threat.

Mr Grant—This is not prescriptive regulation. It is there to allow businesses—

Senator CONROY—Can we clear this up? It is not a regulation. It has never been passed by parliament; it is your guideline.

Mr Grant—It is not a regulation; it is a guideline. This is not a prescriptive guideline. It is a guideline that is there to give business some certainty about how the commission will interpret a contravention of this law.

Senator CONROY—That is what I am saying. We are asking you to provide certainty on what you believe a contravention is. You have an opportunity to outline that to business today or by Wednesday—when, hopefully, you will all be back—and to provide a list so that business has some certainty.

Mr Grant—No, we do not have a list, because each business may have different compliance costs. All businesses face some form of compliance costs; they should know what they are. We have a basic rule which says—

Senator CONROY—You want to stand up in front of a judge and tell a judge—

CHAIR—Senator, let him continue.

Senator CONROY—that they should have known what they were.

CHAIR—Senator, please let him continue.

Mr Grant—We have a basic guideline which says ‘net additional reasonably incurred compliance costs’ and businesses should be able to work that out. If they cannot, then they can come to us, and some have. But most businesses understand what that means, and they do understand their compliance costs.

Mr Spier—With these guidelines, there was extensive consultation with business.

Senator CONROY—No, with business groups.

Mr Spier—Well, business groups.

Senator CONROY—I am talking about the poor little small businesses that might get caught.

CHAIR—Just one moment. Let Mr Spier continue.

Mr Spier—No. All facets of a business—and they are groups, I agree—

Senator CONROY—Yes, but they are not happy. Small businesses are continually complaining about compliance issues.

CHAIR—Senator Conroy!

Mr Spier—We tested that issue, and they thought that was enough advice for business advisers who can then work out what are the issues for particular business. We are not going to be totally prescriptive on that.

Senator CONROY—Have you met the Wheatleys yet? Apparently they met with some tax officials recently. They have been in the media recently, and that is why I am asking. You have seen the media on their case, I am presuming, at least in passing. They have closed their small business, and I do not blame them in the face of this sort of thing—that is, Mr Grant standing up in court and saying, ‘Well, they should have known.’

CHAIR—Senators, can we resume questions on the bill, please?

Senator CONROY—Compliance costs are part of the effects, or likely effects, of the new tax changes, and we are having a discussion about compliance costs. I am asking for the effects to be detailed by the ACCC, and it is telling me that business should know what the costs are. We have a piece of legislation here.

Senator WATSON—Mr Chairman, perhaps I can help: business statements on profit and loss appear—

Senator CONROY—Are you asking a question or are you giving me your learned opinion, Senator Watson?

Senator WATSON—I am just trying to throw some light on this information.

Senator CONROY—But I am hoping that the ACCC will throw some light on it, not you. It is an independent organisation that will not necessarily agree with your opinion because you are a member of the government.

Senator WATSON—I will give you an accountant's version.

Senator CONROY—Ask the ACCC a question. Mr Chair, can you rule whether he is asking a question or giving me his opinion?

Senator WATSON—Can I ask a question?

CHAIR—Please, Senator Watson.

Senator WATSON—Is it not true that you would rely on statements prepared in accordance with normal accounting principles—and Senator Conroy will be aware of that, having disallowed a standard set the other day.

Senator CONROY—My 15 minutes of fame.

Senator WATSON—Therefore, Senator Conroy, having done that, would be well aware that accounts are prepared in accordance with normal accounting standards which include apportionment of certain overheads according to a proper accounting basis. If firms follow those standards, which have been approved by the institute—and also by this parliament; you disallowed one the other day—there would be no particular problem. That is all there is to it.

Senator CONROY—You take the same view as Mr Grant that businesses should know?

Senator WATSON—Yes, definitely.

Mr Grant—Perhaps I can just make—

Senator CONROY—A judge is going to love this transcript, I have to tell you.

CHAIR—The committee will come to order.

Mr Grant—Perhaps I can make a comment: most businesses do use an accountant and those accounting fees are clearly shown often in their P and L or whatever financial statements they undertake. If they have other business advisers they use those as well. If they are purchasing capital or consumables, they have records of those purchases. Therefore most businesses, unless they are very poorly run, are going to have a fair idea of what their compliance costs are. The guidelines are not meant to be prescriptive; they are meant to be helpful and allow businesses to take the appropriate approach. They are also—I pick up your point—more aimed at the advisers and possibly at the very small businesses who are trying to do it themselves.

Senator CONROY—Small milk bar down at the corner.

Mr Grant—That being the case, as the chairman, Professor Fels, advised before, we are looking at how we can help small businesses to better estimate the cost changes that will be brought about by the new tax system changes. We hope to be able to release that in the next week or two.

Senator CONROY—How long have you been working on that?

Mr Grant—About a year. That was a little flippant, Senator.

Senator CONROY—I have asked you some of these questions before. This is Mr Murphy's work presumably?

Mr Grant—Some of Mr Murphy's work.

Senator CONROY—And Professor Dixon?

Mr Grant—Some of Dixon. It is a range of data.

Senator CONROY—They were all second-year price effects, all of their modelling?

Mr Grant—We have been there.

Senator CONROY—I know but I am just interested in how a price calculator is going to help anyone on 1 July, when it is a price calculator based on estimates that are second-year price effects.

Dr Cousins—That is your presumption.

Senator CONROY—Unfortunately, Dr Cousins, since this is your first visit—and I am looking forward to you coming back regularly—

Dr Cousins—But your presumption is that we will be basing our calculator on second-year—

Senator CONROY—My next question was: what are we basing it on? Given that the Senate has spent \$50,000 to \$60,000 trying to convince somebody in the country to do first-year price effects and was unsuccessful, tell me the expertise you were using to transform second-year price effects into your price calculator as first-year effects?

Dr Cousins—We have not released this calculator yet and I think it would be inappropriate to go into that in great detail.

Senator CONROY—I am not asking for the outcomes; I am asking for your methodology. It is not a secret. What methodology are you applying to first-year price effects?

Dr Cousins—As a general point, I would say that it is appropriate to use methodology which is relevant for first-year price effects if you are talking about first-year effects.

Senator CONROY—What is the relevant methodology? I am hoping you can enlighten me.

Dr Cousins—I do not think it is appropriate to go into the whys and wherefores of econometric models and so on here. But let me assure you that we are taking short-term—

Senator CONROY—Can you point me to econometric models of first-year effects? I would actually like to go and find them. I have spent a long time on the Senate GST committee trying to find one. Please, can you point me in the direction of one without revealing your secret?

Dr Cousins—We have commissioned work along those lines.

Senator CONROY—Mr Grant in the past has actually indicated that you have not commissioned work. You may have done more since. We have not chatted for a while, Mr Grant. You have commissioned first-year price effects?

Dr Cousins—We have that as part of the work that we have commissioned, yes.

Senator CONROY—Who have you commissioned first-year price effects from? Mr Grant is getting very concerned.

Mr Spier—You are talking about 1 July effects?

Senator CONROY—Yes.

Dr Cousins—I am not talking about 1 July effects.

Senator CONROY—I am talking first-year effects. The first year would include 1 July, wouldn't it?

Dr Cousins—Yes.

Senator CONROY—Who have you commissioned to do the first year and when does the first year start if it is not 1 July?

Dr Cousins—I think we should distinguish effects that occur on 1 July from effects that might occur throughout the first year.

Senator CONROY—Who have you commissioned to do the effects through the first year?

Dr Cousins—I think we have indicated previously to Senate committees that we have commissioned Econtech to help us in that way.

Senator CONROY—Last time I asked that question Mr Grant specifically—and I am sure he remembers too—said, 'No, not through the first year—the second year only.' Mr Grant, are we talking about the same work or have you commissioned some new work?

Dr Cousins—We didn't say 1 July.

Senator CONROY—No, through the first year. Murphy does it from only the second year. We paid him a lot of money to try to get the first year and he told us that he could not. So I am going to be fascinated how he could for you but he could not for us. But that is something I will take up in parliament with Mr Murphy. Can I be clear about what you have commissioned?

Dr Cousins—We have commissioned econometric work which does enable us to make some sensible comments on first-year effects.

Senator CONROY—And it is based on whose work? Is it Mr Murphy's work?

Dr Cousins—He has developed his work beyond I think the time that you are talking about.

Senator CONROY—I am happy to be advised that. That is what I am hoping you will tell me.

Dr Cousins—But his work, as I think was said, was one input into the formation of cost and price expectations that the ACCC has made.

Senator CONROY—Was anybody else commissioned to do 1 July through first-year effects?

Mr Grant—As I have explained before, we have taken a range of different information to come up with—

Senator CONROY—I am asking you what the information is.

Mr Grant—The information is: Econtech; we have also engaged Dixon for various elements; we have engaged consultants; we have used information coming out of PCCs to come up with an ACCC view of the expected price change.

Senator CONROY—What about Treasury?

Mr Grant—No, we have not used Treasury as an input to this.

Dr Cousins—The tax office has certainly given us extensive detail on things like wholesale sales tax rates. We have extensive information on retail margins, mark-ups, from a range of sources. These are all inputs into the formation of our expectations on price movements.

Senator CONROY—What about embedded costs? Senator Sherry would like to jump in.

Senator SHERRY—Before we leave compliance—

Senator CONROY—I am not leaving it.

Senator SHERRY—Okay. I have a question in relation to the restrictions you put on what is a legitimate compliance cost. There was an earlier discussion about computer systems, technology software, scanners—those sorts of things—which, from the feedback I have had, a number of small businesses see as a major change to make. I want to be clear: are you ruling those sorts of compliance costs out?

Dr Cousins—The point that I was making was that, in order to comply with the tax legislation, is it necessary for businesses to incur some of the costs that they say they are incurring? A general point is that in many cases it is not, that it would be possible to comply quite well without going to that level of expenditure. That is not to say that the expenditure that has been undertaken is not useful or beneficial for business and so on; it is just not a compliance cost.

Senator SHERRY—I understand that. But how do you treat scanners, a new computerised till or the software for the computer system—you have ruled all of that out; is that what you are saying?

Dr Cousins—It would depend on the circumstances. In the case of a small retailer—let us say the top rating without scanning equipment now—there is no reason why they could not continue in many cases to operate without scanning equipment, depending on the nature of the operation, of course. But in many cases that will be so.

Senator SHERRY—So they cannot claim that as part of their net compliance costs?

Dr Cousins—Again, we would not rule it out. This is the point that was being made. We are not being prescriptive here. We have enunciated a broad principle in relation to the compliance costs.

Senator CONROY—You know you are trying to pretend 10 is 10 is 10 but you are not going to enforce it. That is patently obvious.

CHAIR—Senator Conroy, please let Dr Cousins finish.

Mr Grant—It would be a long bow to draw to say that a totally new operating system has been put in place because of the GST or the new tax system changes, and that is the point we are making. Where business are taking this opportunity to improve the way they go about their business, it should not all be slotted as a compliance cost to the GST.

Senator CONROY—But some of it could be.

Mr Grant—Some of it could be; that is right.

Senator SHERRY—What would you do? Are you going to look at small businesses that have put in new systems and allow them a proportional cost?

Mr Grant—Each business will have a look at how they change their prices and also, I would suspect, at how the new tax system changes impact on their costs. Our view remains that compliance costs are not likely to take any price change because of the new tax system.

Senator CONROY—Sorry, can you say that again?

Mr Grant—Compliance costs are not going to take price changes above 10 per cent in the new tax system changes?

Senator CONROY—That is your opinion.

Mr Grant—That is our opinion, yes, and we have never said it is anything else.

Senator CONROY—Yes, you have.

Senator SHERRY—But just before you get to that issue, do you accept there will be net compliance costs in many businesses?

Mr Grant—Net additional compliance costs?

Senator SHERRY—Yes, do you accept that?

Mr Grant—There may be.

Senator SHERRY—Okay.

Senator MURPHY—You have said that before.

Senator SHERRY—And that will vary from business to business presumably?

Mr Grant—Correct.

Senator SHERRY—Are you ruling out that there is any business in this country where the net total compliance cost plus the GST will exceed 10 per cent?

Mr Grant—We have seen no evidence of that.

Senator SHERRY—And you do not believe it will happen?

Mr Grant—We have seen no evidence of it.

Senator CONROY—You are not going to allow it to happen.

Mr Spier—That has been our experience.

Dr Cousins—The guideline is clear—10 per cent.

Senator CONROY—But the guidelines are not based on your experience. The guidelines are just a statement of—

Mr Spier—No, but we do not pluck that out of the air—

CHAIR—Senator Conroy, let the witnesses respond.

Senator CONROY—From the Hockey experience, you do not pluck them out of the air!

Mr Spier—No.

Senator SHERRY—Doesn't the guideline prevent it happening effectively?

Senator CONROY—No, because they have allowed them to call compliance costs something else.

Senator SHERRY—Can I have an answer to my question: the guideline prohibits it, doesn't it—nothing above 10 per cent?

Dr Cousins—The price rule contained in the guideline, which relates just to the tax changes, says that no price shall increase by more than 10 per cent, including the impact of compliance costs. Let us say someone legitimately had a compliance cost which would otherwise take a price above 10 per cent, that is not to say that over time those compliance costs may not be recovered by a firm. It is just that no price shall rise by more than 10 per cent.

Senator CONROY—Can you point to that in the guidelines? Can you tell me where it says in the guidelines that they can recoup it over time—what page, what dot point?

Dr Cousins—The guidelines do not explicitly refer to that point, but it follows from the logic of the guideline and the way it is drafted that no price shall rise by more than 10 per cent.

Senator SHERRY—This is 1 July, so they could get away with a price increase of greater than 10 per cent if they add it on a bit later on—

Dr Cousins—That is not what I am saying.

Senator SHERRY—It seems to me that that is what you are saying.

Dr Cousins—It is not what I am saying at all. We expect that there will be cost savings achieved over time and maybe productivity gains. For example, firms that are putting in scanners could expect to obtain productivity gains which would offset any costs as a result of, if you like, upfront compliance costs.

Senator SHERRY—Just to go back to the earlier comments you were making, you are conceding that there may be some cases where costs will be greater and price increases could be greater than 10 per cent?

Dr Cousins—No, I am not conceding that at all. That would be inconsistent with our guidelines.

Senator CONROY—You said they could be recouped over time.

Dr Cousins—That might be the case in some instances.

Senator CONROY—So, cumulatively, over a time period it could be greater than 10 per cent?

Dr Cousins—That may be the case.

Senator SHERRY—And if that happens you are not going to be prosecuting?

Dr Cousins—Again, it is very difficult to sort of talk without the context of specific situations.

Senator SHERRY—What is the sense in allowing it if they can do it over time?

Mr Spier—It is based on savings over time.

Senator CONROY—We are going to get to the savings over time bit; do not worry. You will have plenty of time to tell us about them. I am not sure if I misheard one of you, and I want to be sure who it was. Did someone use the words 'retail margins'?

Dr Cousins—I think I referred to retail margins or mark-ups.

Senator CONROY—Have you obtained material on retail margins?

Dr Cousins—Yes, we have material on retail mark-ups.

Senator CONROY—Where did you get them from?

Dr Cousins—We have that material from the Australian Bureau of Statistics. We also have that material from retailers.

Senator CONROY—I did not know the ABS collected that, to be perfectly honest. In fact, I thought they told us that they do not collect that.

Dr Cousins—We do have it from the ABS, and we also have it from some private consulting firms as well. In particular, the University of New England, for example, have—

Senator CONROY—So they have gone out to businesses and collected information on retail margins?

Dr Cousins—Yes.

Senator WATSON—Mr Chairman, it being 6.30 p.m., is it the wish of the witnesses and others to continue?

CHAIR—I think we will just go through until we have finished.

Senator CONROY—We said that we will finish at 8 o'clock.

Senator WATSON—Are the witnesses happy about that?

Senator SHERRY—Professor Fels wasn't.

Senator CONROY—Could we just have it noted that Professor Fels has left. I thought he was still here, but he apparently left at 5.30.

CHAIR—Any further questions on the bill?

Senator CONROY—So you have collected material on retail margins from the ABS and from some private work that you have commissioned from the University of New England.

Mr Grant—The University of New England has been doing this work on small business for quite some time. You might recall we have talked about this before as well.

Senator CONROY—We talked about lots of things. Retail margins are actually new to me. I did not know that you had got work done on retail margins. Has that enabled you to guarantee that every 22 per cent wholesale sales tax decrease to the GST of 10 per cent will lead to a price fall? What is your considered opinion?

Senator WATSON—It depends on the margin.

Senator CONROY—That is a very good answer, but I would like Mr Grant to give the answer.

Mr Grant—There are no guarantees, and the senator is right that it does depend on the margin.

Senator CONROY—So not every single good that is experiencing a wholesale sales tax of 22 per cent, to be decreased to 10 per cent, will actually fall in price?

Mr Grant—That may be the case. I have not got one at hand.

Senator CONROY—But you have had work commissioned. Presumably you have seen it, Dr Cousins or Mr Spier.

Dr Cousins—I think I would distinguish particular firms there because firms in an industry will have a range of mark-ups. So you might do some sums and find that some firms that had a very high mark-up would give you a price increase, but the question is—

Senator CONROY—That has actually answered my next question.

Dr Cousins—But I have not finished the answer.

Senator CONROY—In some cases, notwithstanding the claim or the belief—mistakenly, in my view, and I am glad you have clarified this—of ordinary punters that, just because the WST is dropping from 22 to a 10 per cent GST, this means absolutely a price fall, you have indicated that there will be some circumstances where that could actually lead to a price increase, depending on the size of the margin.

Dr Cousins—I did not finish my answer. If you look at it in terms of an industry context, competition from firms with lower mark-ups is probably going to make it unsustainable for those high mark-up firms perhaps to sustain increases in prices.

Senator CONROY—I accept that argument, but it is the case that you have seen from the work you have commissioned that the 22 per cent down to 10 will not necessarily lead to a price fall and in some cases may lead to a price increase.

Dr Cousins—You can do some straight mathematical sums and you can work that out. The question is whether we accept that. I am saying that it is most unlikely—

Senator CONROY—They might have changed their—

CHAIR—Senator Conroy, let him finish the answer.

Dr Cousins—It is most unlikely that the result that you talk about will apply.

Senator CONROY—But it is possible. I am just trying to save you a lot of phone calls from ordinary Australians who are going to be looking at a good that they have identified as a 22 per cent WST price, and suddenly there is a 10 per cent GST: naturally that sounds like to an ordinary Australian, 'There's a big price fall coming to me there.' I am actually agreeing with you. Mr Grant, you will remember a conversation where we talked about this and I suggested to you this may be the case. I guess that after your study of retail margins I was possibly right.

Mr Grant—I have not looked at the detail, which is why I cannot—

Senator CONROY—Dr Cousins does seem to be agreeing with me, though. Mr Grant and I have had this discussion before, and Mr Grant said he was not aware of any cases like that.

Dr Cousins—I think they would be very rare and—.

Senator CONROY—Certainly a price going up. I actually agree. The price going up a bit is unlikely, but there will be some occasional occurrence. But it is more the ones where people just naturally assume that 22 per cent down to 10 has got to be a price fall. Just because of pure mathematics, that is absolutely not the case. A lot of them could stay static—5c up or down or around or whatever I am not fussed about. But it is that fall from 22 to 10 that does not automatically guarantee a fall in the actual price to a customer—and that is not in breach of a guideline. If someone has put them up, they may be subject to a visit from your good selves. But it is the 22 per cent down to 10, which is basically the static position, about which I am trying to save you a lot of phone calls from a lot of people who are going to be very confused. Hopefully you have now cleared that up and people will not think that just because a good had 22 per cent it is going to have an automatic price decrease.

Mr Grant—If consumers do not see the price of TVs and things like that go down, they should ring us up, because we would think it very highly unlikely that a 22 per cent to 10 per cent wholesale sales tax—

Senator CONROY—I am not asking you to reveal which industries have large margins. I am avoiding that, Mr Grant. But, if you want to blow the whistle on anybody you think has too high a price retail margin, you go for it.

Mr Grant—As I said, Senator, I have not yet seen data that shows the scenario you have painted, but it may be the case.

Senator CONROY—I not trying to push the going up one, but I accept that Dr Cousins was being fair when he said that it is possible—unlikely but possible. But it is that 22 down to 10 that I think is the one that is going to cause you the most grief, because I think people are going to just naturally expect to see a pretty substantial price fall, and that is just not going to be the case, as we have discussed before. I am happy—

Dr Cousins—Equally, we would not like to think that something that had, say, 12 per cent wholesale sales tax would necessarily increase in price with a 10 per cent GST.

Senator CONROY—Sure. I accept that. Fair point. Absolutely.

Senator SHERRY—On the issue of the net compliance cost, I put it to you that I have had a number of small businesses talk about buying scanners and new technology because they see that that is the easiest way to implement the GST. Why should they not be allowed to claim that in total, as part of their net compliance costs when taking into account their price increases, when they see this as being forced on them by a GST?

Mr Grant—Senator, these things are tax deductible anyway. All businesses face compliance costs all the time, of some nature. All we are saying is, 'Do not think that any business can put its price up because of overstated compliance costs.' We are not saying that businesses cannot write off compliance costs. We are saying that, if a business does use the new tax system changes as a mechanism to improve the way that it does business, to upgrade its systems, to change its processes, then recognise that that is actually a normal cost of improving business, and do not slot it to the GST.

Senator SHERRY—But it seems to me—and there have been many small businesses that I think are either doing this or considering it—that they have become tax collectors for the first time, many of them. They are not in the wholesale sales tax system. It is the first experience they have had of collecting a tax in the way that is proposed. It seems to me perfectly legitimate that they would want to include the introduction of hardware or software as part of their compliance costs and adjust their prices accordingly.

Mr Grant—Senator, I really cannot take it much further. Any business that employs is part of the tax system. Most businesses pay licences to government, and a range of other things. So they are already used to dealing with government. I cannot add more than what I have already said.

Senator SHERRY—I do not think they are used to having another tax collection role added to their current responsibilities. If you have not detected the concern amongst small business about that, then you perhaps, with due respect, are not in touch with the world. It is a major concern.

Dr Cousins—That may be an issue, but I would highlight again that it is not all costs that we are talking about. If businesses are putting in new systems, they are doing it for reasons of

benefiting their business. So there are some benefits. We would say that you really have to focus on the net costs here, in terms of your issue of compliance costs.

Senator SHERRY—Okay; but, Dr Cousins, you referred to productivity earlier. There is a whole range of problems in measuring productivity; but how do you, as a sole business operator who does not employ anyone—and there are a lot of people in that category—and how do you, as an ACCC, measure the productivity improvement in those circumstances? How do you do that?

Mr Grant—Senator, I can see very few single-person operator businesses putting in new scanning equipment. I cannot think of one that would do it.

Senator SHERRY—You cannot think of one?

Mr Grant—Not really. Not a single-person operator business.

Senator SHERRY—A corner store.

Mr Grant—But a corner store often has more than one person working in it, including extended family or even wages labour.

Senator SHERRY—I accept that. The example I was thinking of was my local cobbler. He works by himself in his little shop. He does not have any electronic equipment of any description. He repairs and sells shoes.

Mr Spier—Will he be putting in new equipment?

Senator SHERRY—He does not know yet. I do not see why he should not be allowed to claim that as a compliance cost and adjust his prices accordingly. I am sure he would not have done it if it were not for the GST. He would not even be thinking about it. Do you have a response?

Dr Cousins—As I say, in that situation, if that move is undertaken, it is undertaken for reasons of benefiting a business. It may be that it takes less time, if there is scanning equipment or whatever it is, to deal at checkouts and so on. There are obviously going to be some benefits. That is the productivity gain that we were talking about.

Senator SHERRY—Okay. Let us come back to the earlier point I made as a question. How do you measure that productivity improvement as a benefit to the business, particularly in a small business? In a large business with the increased time that the operator has, they may be able to reduce staff; but if they are not able to reduce staff because they are a sole business, a family business, what is the improvement in productivity for them? Is it extra time spent with customers, or extra time to readjust the goods on the shelf? How do you measure that in a realistic way?

Dr Cousins—It may be additional time to deal with more customers. It is just an output-input measure, isn't it, that we are talking about? It may be that the amount of time, et cetera, that an operator has to devote to dealing with the same number of customers is reduced. Alternatively, he can deal with more customers.

Senator CONROY—He does not have to pass them on as part of some cost saving productivity gain in a lower price, does he?

Dr Cousins—What we are talking about is net compliance costs here, and an issue has been raised that there are costs incurred—

Senator CONROY—I got the impression you are suggesting that is an offsetting in the net. You are not serious! A productivity gain is an offsetting compliance cost for the purposes of net compliance?

Dr Cousins—In this context, we would think it quite appropriate that those benefits be considered, and it is not just a one-sided calculation. It is not just a question of costs.

Senator SHERRY—Have you had discussions with small business operators about them taking into account their productivity improvements and measuring their productivity improvements, measuring the average time they spend with a customer each day? Presumably with some small businesses it may be a decrease in sales as a result. With all of those complexities, do you seriously think small businesses are going to be looking at it in that sort of detail, and that it is measurable?

Dr Cousins—We have lots of discussions with small and big business. One of the points that of course we are concerned to get across for business to fully understand is that they should pass on cost savings arising from the tax changes in prices to consumers. That is an important principle.

Senator CONROY—What economic principle are you drawing on, that a productivity gain is a cost saving to be passed on to a consumer?

Dr Cousins—The discussion, I was pointing out, was somewhat one-sided, in that there was an argument that we should factor costs into prices and ignore any benefits. I was suggesting that there should be a balanced view of that taken and that we should be talking about net costs or net benefits.

Senator CONROY—I have to tell you that I am staggered that you would suggest that a productivity gain is part of an offset in the net compliance formula.

Senator SHERRY—How does a small business operator measure a productivity gain, if there is one? How do they do it?

Senator WATSON—With a scanner, for example.

Senator MURPHY—But it should not be part of their offsetting. Why should a non-compliance cost, if it is being put by a—

Senator CONROY—Because they need to keep the cost below 10 per cent, so let them say that anything is an offset!

Senator MURPHY—But you cannot say it is an offset—because the ACCC, I think, has said that it will not allow certain costs that it considers to be non-compliance costs to be counted for the purposes of making a claim on the one hand, and you cannot turn around on the other and say to them, ‘But we want you to use that productivity gain as an offset.’ I do not think you can say that.

Dr Cousins—We are talking about two different things here. What we are talking about in this conversation is costs that we agree are compliance costs. My point is that we should take in net compliance costs. There is a wider discussion that we had earlier, which was whether these were compliance costs at all.

Senator MURPHY—That is right. But I thought I heard you say earlier, and you referred to the scanner in particular, that if there was a productivity gain as a result of that, that could be used as part of the offsetting process. That is what I thought I heard you say.

Dr Cousins—Yes; if that were a compliance cost, that would follow from the way the guidelines specify.

Mr Grant—I think what Dr Cousins is saying—

Senator MURPHY—So you are saying if the scanners were allowed to be part of the compliance claim?

Dr Cousins—Yes; that was the discussion we were having.

Senator MURPHY—Okay.

Senator SHERRY—I put you on notice that I would certainly be interested to see some examples in small business—I think large business and medium sized business employing more than 10 employees is a different issue altogether—of offsetting productivity gains, how you measure it in a small business, how you apply it or how you believe it should be applied. At some point in time, I would like to see that.

Senator CONROY—They must be doing that if they have got a price calculator coming out, because those are the sorts of issues you have presumably addressed in your methodology with your price calculator. Is it a secret? I do not want to sound farcical here, but your methodology is not a secret and we are allowed to ask about it.

Dr Cousins—I am not saying that we have factored that into those calculations of the cost indicators that we have; that is all.

Senator SHERRY—Do you draw a distinction between productivity improvements and efficiency improvements?

Dr Cousins—I have not so far, no.

Senator SHERRY—I just put that on notice to you. There is a difference, I think. You might have a look at that issue.

CHAIR—Are there any further questions on the bill?

Senator SHERRY—This question is to Mr Spier, perhaps. Can you understand why a small business would be sceptical about the argument about offsetting productivity costs?

Mr Spier—This is one for Dr Cousins.

Senator SHERRY—You passed that over very quickly.

Mr Spier—That is more in Dr Cousins's bailiwick than mine actually.

Senator SHERRY—Okay, I will put it to you, Dr Cousins: it seems to me that this is an attempt to define out legitimate cost increases that could be in some circumstances greater than 10 per cent. I would put it to you that you have contrived a position to force some businesses not to go above the 10 per cent barrier that you believe you have set legally.

Dr Cousins—Contrary to that, what I would say is that I think many people have exaggerated compliance costs and clearly they have an interest in doing that if it means getting prices up. Should we accept that automatically? The commission has pointed out that this is not just a matter of increasing costs; there are some benefits here. We have not talked about all those benefits. Cash flow benefits and so on are other benefits that we think should be taken into account. So when we talk about compliance costs, it is net additional compliance costs.

Senator MURPHY—Do you have a list of benefits?

Dr Cousins—The guidelines have referred to these, yes.

Senator SHERRY—Just on that issue you mentioned—that is, cash flow benefits—do you have an average for a small business? I think for large business there is very clearly a cash flow benefit. How do you treat the cash flow benefit for a small business, a family business that at most employs one or two people?

Dr Cousins—I think whether there is a cash flow benefit is a matter of fact in each case. It is likely to vary depending on the situation.

Senator SHERRY—But do you argue that there is a benefit in those circumstances?

Dr Cousins—There may be.

Senator SHERRY—What about accounting advice? This year's accounting bill is double or triple what last year's accounting bill was. Is that a legitimate compliance cost?

Dr Cousins—Certainly, we have accepted that in many situations where we have had people approach us on those sorts of issues. Again, the guidelines talk about reasonable costs. We know there is a whole industry of accountants out there who have been making a lot of money in this area. The question is whether or not some of what business has been persuaded to do is a reasonable cost that we should allow to be factored into price.

Senator SHERRY—So a small business that goes to an accountant—and you have referred to some accountants making a lot of money out of this—and is told that the extra bill they have paid is because of the GST may not be allowed part of that at least as a compliance cost.

Dr Cousins—Again, I go back to the price rule in the guideline which says that no price shall increase by more than 10 per cent as a result of the tax changes, including compliance costs.

Senator SHERRY—We are just looking at accounting costs for the moment. How do you go about that? What if the accountant charges them \$5,000 for this year's advice in the lead-up to the GST and last year they were charged \$1,000 and the accountant says, 'I have spent all this time'—they have noted the time, the hours they have spent—and there is a significant additional bill? The small business has to pay it. Are you saying that part of that will be ruled out as a compliance cost if it takes them over the 10 per cent barrier?

Dr Cousins—I think there is one question about whether the \$5,000 was a reasonable cost to factor into the price anyway, but the 10 per cent cap is something which will limit any price increase as a result of the tax changes including compliance costs. I think that not only provides some certainty for business as to what, if you like, the rule is, it also maybe persuades business to be more rigorous in terms of making sure that the costs that they incur are in fact reasonable.

Senator SHERRY—What if a business increases their prices by 10 per cent and the GST is 10 per cent, aren't you effectively saying there cannot be any compliance costs?

Dr Cousins—No, because there may well be significant cost savings, depending on the situation.

Senator SHERRY—No, I am saying they can legitimately increase the price of their good or service by 10 per cent; effectively there are no compliance costs because you have forced there not to be a compliance cost with a 10 per cent cap.

Dr Cousins—The assumption that you are making is that there are no cost offsets. I think we said before that we have not seen too many situations—in fact no situations—where there are no cost offsets at all.

Senator CONROY—I do not think we have ever said that, but we think the reverse to you—we do not think the cost offsets are as great as you think they are. It is a point for debate, that is all.

Senator SHERRY—Do you have yet across industry sectors or product types some indicative cost offsets?

Dr Cousins—This is the cost estimator that I think Professor Fels talked about.

Senator SHERRY—Which we are yet to see.

Senator CONROY—Mr Grant, I think you used the words—and apologies if you did not; unfortunately, we do not have the ability to find out straightaway—that it would be drawing a long bow to say that this is forcing businesses to upgrade. I think that was roughly what you said. Do you remember that comment? I am not trying to verbal you.

Mr Grant—I remember using ‘the long bow’, but I cannot remember what particular issue.

Senator CONROY—I think you were trying to indicate that businesses were not being forced into these upgrades. The context was that it was about an upgrade of a computer or whatever and you were saying—

Mr Grant—I think I said it was a long bow to draw to believe that where they are taking the opportunity to improve the way they operate that it is all GST related.

Senator CONROY—Can I read to you some comments in a press release today from Mr Len Asprey, who is the Chairman of the Institute for Information Management. They are having their major 2000 global information conference as we speak. He says:

The political firefight over the GST was overshadowing some of the more important reforms it was forcing along in Australian business such as the upgrading of computer systems, electronic data, document interchange, speeding up the introduction of electronic documentation by forcing companies to address their taxation reporting in electronic format.

He has used the word ‘forcing’ twice there. He does not seem to think it is such a long bow that the GST is forcing companies down this path—not that it is optional for them, they can take the opportunity; they are being forced down this path.

Mr Grant—I have not got the document in front of me—

Senator CONROY—It is just a press statement. I am happy to give it to you.

Mr Grant—But, from what I heard you say, it said this has been happening for some time. If you have a look at the way the tax office works and at Customs, you will see that they are moving towards having electronic linkages to speed up and improve the way that they operate and deliver a service back to business.

Senator CONROY—I think Mr Asprey probably agrees to a degree with you—he thinks this is a benefit. The argument here, you are trying to say, is that it is not a compliance cost.

Mr Grant—No, I am not. I am saying the total amount of the compliance is not fully attributable to the new tax system changes; that there are other reasons for it, including an historical wish to move forward into electronic processing.

Senator CONROY—Can I just clarify then. Let us say a price goes up by eight per cent and let us say your—what I would describe as dodgy—definition of compliance costs is only, say, one per cent. So you have got eight per cent and one per cent. But then there are other general business costs, which may be the upgrade, and they are substantial costs for a small

business—buying a computer when you did not have it is a substantial cost. Can they put together the three things and have an increase above 10 per cent?

Mr Grant—I cannot enter into this one. We have been there already.

Senator CONROY—No, we have not.

Mr Grant—What you are saying is—

Senator CONROY—I have just introduced your new other definition. I am saying there are general business costs which are increasing which are not part of your GST exploitation.

Mr Grant—Senator, I am also suggesting that there are already significant ongoing compliance costs. I might add—and I think we might have talked about this last time—

Senator CONROY—I am netting out; this is a net position. Just so you are happy—

Mr Grant—No, I am not going to enter into a hypothetical with you. We have been down that track. I am not going into a hypothetical.

Senator CONROY—There is nothing hypothetical about your guidelines. You state, ‘No, they can’t.’

Mr Grant—The guidelines state: no price increase—I think—beyond 10 per cent as a result of the new tax system changes.

Senator CONROY—And what I am asking about is: let us say there is only nine per cent when you add them together with the GST. Let us say their books—I do not know where you guys have come to, whether you think it is 7.6 or 8.4 per cent; the general industry consensus is it is around eight per cent—are at eight per cent and let us say I accept your argument, which I do not—but let us say for the moment I do—that the compliance costs are only one per cent, so that makes it nine per cent and they are not in breach. But there are these other general business costs that are, say, two per cent.

Mr Grant—We would want to see what they are.

Senator CONROY—They are upgrading computers, scanners and those sorts of things, which you are saying is allowed.

Mr Grant—Senator, we are into hypotheticals again—

Senator CONROY—No, we are not. I am quoting one of your examples. Or are you saying that this is just hypothetical, your guidelines are hypothetical?

Mr Grant—No, our guidelines are stating an approach that will give business some comfort about what is and what is not allowable.

Senator CONROY—And I am asking you: if there is a cost that is defined now as a general business cost under your guidelines that when added to the specific things that you are accepting are compliance costs—and I repeat this will be an argument I guarantee you we will revisit on Wednesday—

Mr Grant—I am sure we will.

Senator CONROY—So, for instance, I run a book company. I used to make widgets, but I have closed down because of the GST and now I am making books. My book company adds about eight per cent tax on books and one per cent on compliance costs, which is under the 10 per cent but, on top of that, there is a whole host of general business costs that take me past the 10 per cent. Am I in breach of your guidelines?

Mr Grant—I would love to see how businesses handle those emergent or even planned changes in their compliance costs. How did they handle Y2K? Did that push up prices? I do not know the answer. I cannot answer your questions, which are hypothetical.

Senator SHERRY—If we looked at the figures for the purchase of business software and relevant hardware—

Senator CONROY—MYOB are now one of the most profitable companies in the country because they are selling GST software.

Senator SHERRY—If we look at the business purchases in that area, including the units purchased over the last six months and in the remainder of the time in the lead-up to the GST—if you graphed it, I bet there has been a significant increase in the number of units purchased. Are you saying that that is just coincidental to the introduction of the GST and that there has not been some effect because of the GST?

Mr Grant—I think that the GST in that sort of instance may have led them to upgrade their software, but they would have had a software upgrade program anyway. So my view would be that it should not all be slotted to the GST.

Senator CONROY—Some accountants are now telling small businesses that they will not accept their business unless they upgrade and get some software. That is what is happening in the real world.

Mr Grant—The guidelines allow for net additional compliance costs.

Senator MURPHY—It says in 2.3 of the guidelines;

In many cases businesses will take the opportunity provided by the new tax system changes to introduce new and improved accounting, operational and management systems. The costs associated with these new systems should be treated as general business costs rather than new tax system compliance costs.

I do not know how in some instances people are going to have to do these things.

Mr Grant—We have been concerned that many businesses and their advisers are overstating the compliance costs.

Senator MURPHY—I recall you said that before and I understand what you are saying—that there is an opportunity for people to do that. I am just curious as to where people might have to do some of these things. You will differentiate between those that might have to and those that might overstate?

Mr Grant—Just to continue: we have that concern. Businesses, if they wish to push the edge, will try to increase their prices in a way that is unreasonable in relation to the law. We are trying to put some boundaries around what is unreasonable. It is up to them to decide if they wish to increase their prices. Do not forget that small businesses are often like consumers in this: their suppliers are trying to push their prices up or the people they supply to are trying to squeeze them. Small businesses have exactly the same problems often that consumers do. We are trying to ensure that where prices should go down, they go down by the right amount, and where they go up, they should not go up by more than could be justified reasonably.

Senator MURPHY—I am thinking about a very small business which may not choose to even register for an ABN.

Mr Grant—If it has not registered for the GST, it is not captured by this legislation.

Senator MURPHY—I know, but there are ads being run at the moment that say that some businesses will not deal with other businesses unless they have an ABN. A lot of those small businesses might think that they really have to have one.

Mr Grant—Isn't that a business to business matter and not a regulation matter?

Senator MURPHY—Yes. It is a business to business decision, but I am curious as to why ads of that nature are being run. They might force a significant cost burden on businesses in the case of their accounting practices, et cetera, and these people may feel that they actually have to have an ABN. Yes, they make a decision, but I tell you there is a fairly significant degree of pressure being placed on people to actually have an ABN. They are being told by ads—I think they are government ads—that if they do not have one, other businesses will not deal with them. I can understand the reasons why, but insofar as your 2.31 is concerned, if they go down that road all of the things cited there would probably be additional costs as a result of the new tax system.

Mr Grant—In many supply line relationships you have different requirements of different suppliers. For example, you might have a manufacturer who requires its suppliers to meet some Australian standard in its processes, the quality of its product and a range of things like that. And, as you know, some companies run their own accreditation.

Senator MURPHY—Yes, but that is a different matter, though, isn't it?

Mr Grant—I do not know. It seems to me that this again is a business to business, almost pre-qualification to deal, matter and not one for regulation.

Senator MURPHY—If you are a business that might be seeking a supply of a service or some goods, and you ring up company ABC, for instance, and they ask what is your ABN, and you say that you do not have an ABN—because you do not want to register for the GST—then they say, sorry, they cannot deal with you or they will not deal with you. That is the inference of the ads: that some companies will not deal with other companies unless they have an ABN.

Mr Grant—It is the inference of the act or a decision by business?

Senator MURPHY—No. I am saying that a business may choose not to register for GST purposes, but these ads that are being run are saying—

Mr Spier—Is that for the ABNs?

Senator MURPHY—Yes, for the ABNs.

Mr Spier—The two are different.

Senator MURPHY—Yes, sorry. They are promoting a view that, if businesses have not got an ABN, other businesses will not do business with them.

Mr Grant—I cannot answer about those ads. I think that is probably for the tax office or the Treasury. I am not sure which.

CHAIR—Can we get back to the bill.

Senator MURPHY—Yes. In terms of the compliance costs for the purposes of all the things, the guidelines state:

In many cases businesses will take the opportunity provided by the new tax system changes to introduce new and improved accounting, operational and management systems.

Some of the businesses that might have chosen not to go down one road will find that they will have to because of others saying, ‘We’re not going to deal with you.’

Mr Grant—But isn’t it the same case as if a business said, ‘I want you to become standards accredited,’ and the business said, ‘No, I won’t’? The other business would not deal with them.

Senator MURPHY—I can understand a business which, you may seek to say, sells a manufacturer’s product saying, ‘You have to meet certain accreditation practices in terms of the sales practices you use, the quality of service you provide, et cetera.’ That is a slightly different set of circumstances.

Mr Grant—I must admit that I am not aware of the ad you are talking about. It is certainly not one that we have put out.

Senator MURPHY—I was curious about why the ACCC had not—

Dr Cousins—Even accepting the point you make, the ACCC would much prefer small businesses to be spending as much energy as they are spending on compliance cost issues on looking for cost savings. Small business tends to ignore that side of the equation. In a way I think we focus excessive attention on this issue of compliance costs.

Senator SHERRY—With due respect to your view, most of the small businesses that have talked to me about this do not see any cost savings. I think that is quite legitimate.

Dr Cousins—We hope to help them to do that.

Senator SHERRY—I hope that you will take up my earlier invitation to give us some specific case studies at an appropriate time of where these productivity and other savings are. I am afraid the anecdotal feedback I get is that small businesses do not see cost savings in the areas of productivity. They just see an additional burden.

Senator MURPHY—Or an accountant.

Senator SHERRY—Or the accountant, yes. I want to touch on the issue of penalties applying under the bill we are considering. What are the monetary penalties applying for misleading and deceptive conduct under section 52 of the Trade Practices Act?

Mr Spier—Zero, because section 52 is not a penalty section. But there are penalties under part V of the Trade Practices Act.

Senator SHERRY—Okay. What about section 53E of the act?

Mr Spier—It is \$200,000 for a corporation or \$40,000 for an individual, but there has long been concern that they are far too low and need to be reviewed.

Senator SHERRY—What about monetary penalties under various state regimes?

Mr Spier—It varies enormously. I would not know that off the top of my head.

Senator SHERRY—Could you take it on notice and provide us with some sort of cross-section analysis state by state?

Mr Spier—I will see what I can do. They are not that dissimilar to the part V penalties, but they do differ.

Senator SHERRY—On the issue of state regimes, are there any penalties approaching the \$10 million figure applying in state jurisdictions?

Mr Spier—No, but in terms of the federal law, in the part IV provisions of the Trade Practices Act, which of course are about anti-competitive conduct, there is a \$10 million penalty for GST price exploitation. The Commonwealth simply has much higher penalty levels than the states.

Senator SHERRY—We are going to get to the alleged rationale for that. Can you confirm that the proposed prohibition on GST related misleading and deceptive conduct will carry a penalty of up to \$10 million for a corporation and half a million dollars for an individual? That is the proposal, isn't it?

Mr Jepsen—Yes, that is the penalty for contravening 75AYA.

Senator SHERRY—What justification does the ACCC see for imposing a penalty of up to \$10 million for GST related misleading and deceptive conduct while no such penalty applies for conduct caught under section 52 and much smaller penalties apply for section 53E conduct and conduct caught under state legislation?

Mr Spier—That is more a question for the Treasury.

Mr Jepsen—The penalties which are included in the bill in relation to the considerations in 75AYA are consistent with the penalties which have been applied under the price exploitation code. It is a matter of consistency. I think the government has said that the penalties in the bill are substantial and that they demonstrate a commitment to address community concerns regarding the possibility of consumer exploitation.

Senator SHERRY—Why is it that GST related misleading and deceptive conduct is worse than other misleading and deceptive conduct?

Mr Jepsen—I would not necessarily say that it is better or worse. The point is that the penalties were put into the price exploitation code at that level, and the same penalties are being applied to this extension of that code.

Senator MURPHY—But what happens when that goes in two years? Do the penalties go with it?

Mr Jepsen—The code will cease in two years time.

Mr Spier—We would like the penalties in part V to be increased.

Mr Jepsen—It is open to the government to consider whether 53 is adequate.

Mr Spier—We have always argued that the current penalties in part V are too low and should be increased, in any case.

Senator SHERRY—So what do you think: a figure of \$10 million for corporations and half a million dollars for individuals?

Mr Spier—As consistent with, say, part IV?

Senator SHERRY—The point I was getting to is that you could have misleading and deceptive conduct that is not related to the GST. It might involve millions. You could have misleading and deceptive conduct by a firm that relates to the GST that might be a few hundred thousand dollars, and yet the penalty for GST related conduct is much greater. Do you see the lack of logic?

Mr Jepsen—At the maximum.

Senator SHERRY—Yes, there is a maximum, but do you see the lack of logic at the maximum?

Mr Jepsen—I see the point you are making. Perhaps the issue is that the 53 penalties need a review or have not been reviewed for some time.

Senator SHERRY—Thank you for accepting that you can see the point we are making. Mr Spier, I put it to you that the new prohibitions that we are considering could be used to stifle legitimate debate over the GST.

Mr Spier—The provisions relate only to conduct in trade or commerce—business dealings, business advertising and other commercial operations—which is consistent with the rest of the Trade Practices Act.

Senator SHERRY—Would you like to see the Commonwealth government, state governments and their agencies bound by the new prohibition and subject to the penalty?

Mr Spier—The government, when in business, is bound now.

Senator SHERRY—What about state governments?

Mr Spier—They are not.

Senator SHERRY—Would you like to see them bound?

Mr Spier—Our view is always that the Trade Practices Act, be it in the anti-competitive provisions or the consumer protection provisions, should have universal application to all who are in business.

Senator SHERRY—What about action against misleading and deceptive advertisements?

Mr Spier—If they are by business entities, we think—

Senator SHERRY—No—by non-business entities.

Mr Spier—That is very much a matter for the government and an issue that has been considered by various governments over many years.

Senator SHERRY—In a media release of 18 April, the ACCC said:

... the ACCC ... will consider the request by the Federal Opposition—

this is in respect of the government's marketing program—

and will reach a final view as soon as possible when it has had an opportunity to consider the matter in more detail.

Have you reached a final view yet?

Mr Spier—Not yet. We have had some oral advice from senior counsel, which we hope to have in written form in the next day or so, that would indicate that the advertisements and the publication of those advertisements by the media are not caught by the Trade Practices Act.

Senator SHERRY—If a corporation made a statement that typical families gain \$40 to \$50 a week from the tax package, would they be caught by the proposed new prohibition in section 75AYA?

Mr Spier—It depends where it came from. It must be misleading, and I am not making any judgment as to whether the conduct is misleading. But, if they are engaged in misleading conduct, the answer is yes.

Mr Jepsen—I hate to use the expression 'drawing a long bow', but the corporation would have to be in trade of commerce in connection with the supply or possible supply of goods or

services or the promotion of any means of the supply or use of goods or services. That is the qualification that is here in 75A YA. Clearly, that is about corporations involved in business.

Senator SHERRY—Yes, I understand that. Let us take a corporation that is running a family retirement home where everything is provided. It advertises that an individual living in this retirement village is going to be \$40 to \$50 a week better off under the tax package. That seems to be something that would need to be legitimately examined. Don't you think so, Mr Jepsen?

Mr Jepsen—It is hypothetical. You would have to look at the circumstances of the case, wouldn't you, and work through it? That is what you would have to do.

Dr Cousins—There may be a defence there if they are reasonably relying on information supplied by another person.

Senator SHERRY—Briefly, back on the calculator, will it be able to tell me whether the price of a very common product, such as coca-cola, will rise or fall and by how much?

Dr Cousins—The cost calculator should enable the business to assess the impact of the tax changes on its costs.

Senator SHERRY—Will it go to individual product, such as something as common as coca-cola, a Big Mac or whatever?

Dr Cousins—Yes, it should do that. Things like tax rates will vary by products, and so on. This calculator will enable business to make an assessment of the impact of the tax changes on their costs. Their pricing decision is something different again, but we think it is important that small business be given some assistance to identify the cost savings that we keep talking about.

Senator SHERRY—Isn't there some difficulty in doing that, though? Let us say that you have an average price for a particular product. You would have a variance in circumstances in small business and big business—their ability to buy in bulk or where they are located. If you are out in the country or in Tasmania, for example, prices tend to be higher across a whole range of goods. Will you be taking those sorts of factors into account?

Dr Cousins—All those factors are relevant in determining the cost impact on an individual firm. The cost calculator that we are putting out is focused on small firms. It is small firms that say to us that they are having the most trouble identifying cost impacts. With this device, if small firms followed some of these estimates, they should feel not unduly concerned about breaching the act.

Senator SHERRY—If they should not feel unduly concerned, wouldn't that be to some extent defeating the purpose of the calculator?

Dr Cousins—The calculator is addressing their uncertainties, their difficulties about identifying cost savings and their concerns about knowing they have to comply with the price exploitation legislation. So we are trying to give small business a degree of comfort but, at the same time, trying to provide them with a device which will enable them to identify a cost saving.

Senator SHERRY—Let us take a small business in Tasmania where a good or a service is more expensive—always has been more expensive than, say, Sydney and Melbourne. This may be true of a whole range of areas in regional Australia, particularly. You are not going to jump on them and say, 'Look you're outside the calculator's indicative cost.'

Dr Cousins—Our focus generally in this is not so much with the level of prices. As you say, that is going to vary across the country. What we are focusing on here is the change in prices or costs as a result of these tax changes. So, despite the fact you may get variations in the level of prices, the changes are unlikely to be that different.

Senator SHERRY—The ACCC's price surveys are collected in 176 locations, cities and towns across Australia: is that information being used for the purpose of GST evaluation—price increases? Is that what it is for?

Dr Cousins—Yes, certainly, that is to help us assess the impact of the tax changes.

Senator SHERRY—Okay, good. I come from the north-west coast of Tasmania, so I am asking a particularly parochial question—legitimately parochial. You have Devonport and Ulverstone listed: why is Burnie not listed? I am just concerned that a major urban area such as Burnie and its environs does not appear to have any price surveys being carried out?

Dr Cousins—The price surveys are obviously not universal; we are not surveying every price in the whole community. But we are making sure we have a selection of various sized cities. We have capital cities, we have larger provincial cities and we have smaller cities. So it is a cross-section, which will enable us to have a good indication, overall, of price movement as a result of the tax change. Coincidentally, that information may well be useful for our enforcement activity, but it is not the only information we are relying on for enforcement purposes.

Senator SHERRY—I will not go into a long geographical description of Tasmania—

Dr Cousins—Having been born in Tasmania myself, Senator, there is no need to do that.

Senator SHERRY—Ulverstone is about 15 minutes from Devonport—tops. It is about another 16 or 17 minutes from Ulverstone to Burnie and then probably another hour to Smithton. I am just intrigued as to why we have Ulverstone and Devonport and not communities a little further west like Burnie and particularly Smithton.

Senator CONROY—It is a parochial issue. You are on your own, I am afraid.

Senator SHERRY—It seems to be a bit of a neglect of this area of the north-west coast of Tasmania. Can you throw any light on this?

Senator CONROY—What have you got against Burnie? Come on.

Dr Cousins—Only that this is the random selection of sites that our expert price monitor has helped us select. I can assure you there is nothing against Burnie or anything like that.

Senator SHERRY—My colleagues are treating this a little lightly. I am concerned about what is happening at the western end of the north-west coast of Tasmania and about making sure we have sufficient price surveys in that area—not just the Ulverstone-Devonport area—for the purposes of GST implantation. Will you take my concerns on board?

Mr Spier—We take your point.

Senator MURPHY—Mr Spier, just going back to page 5 of the letter, you said you would come back to us on, in particular, that aspect that infers that some entities may simply be quite unable to cost this intangible into its various products: in the cases where businesses are finding that difficult, are you going to provide them with assistance in that respect? Do you want to respond to that as part of your overall response?

Mr Spier—That is really going back to the compliance context.

Mr Grant—Senator, I think that the cost calculator will actually help here.

Senator MURPHY—We will save the question.

CHAIR—That completes the committee's hearings tonight. I thank the witnesses for being with us for such a long time and for going through a normal dinner hour. I thank the staff and I thank Hansard.

Committee adjourned at 7.28 p.m.