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TRANSCRIPT OF PROCEEDINGS

PRODUCTIVITY COMMISSION

DRAFT REPORT ON COST RECOVERY

MRS H. OWENS, Presiding Commissioner
PROF J. SLOAN, Commissioner
DR R. STEWARDSON, Associate Commissioner

TRANSCRIPT OF PROCEEDINGS

AT MELBOURNE ON MONDAY, 4 JUNE 2001, AT 9.32 AM

Continued from 11/12/00

MRS OWENS: Good morning and welcome to the public hearings for the Productivity Commission inquiry into cost recovery by Commonwealth regulatory, administrative and information agencies. These hearings follow the release of the commission's draft report in April. My name is Helen Owens and I'm the presiding commissioner on this inquiry and my fellow commissioners are Judith Sloan on my right and Robin Stewardson on my left.

The purpose of this round of hearings is to facilitate public scrutiny of the commission's work and to get comment and feedback on the draft report. Following these hearings in Melbourne, hearings will be held in Sydney commencing on 7 June, and Canberra commencing 13 June. We will then be working towards completing a final report to government in August having considered all the evidence presented at the hearings, the workshops that we held in mid-May and in submissions, as well as other informal discussions. Participants in the inquiry will automatically receive a copy of the final report once released by government. We'd like to conduct all hearings in a reasonably informal manner, but I remind participants that a full transcript is being taken. For this reason, comments from the floor cannot be taken but at the end of proceedings for the day, I will provide an opportunity for any persons wishing to do so to make a brief presentation, and given we haven't got any other audience here, that may be unlikely today.

Participants are not required to take an oath but should be truthful in their remarks. Participants are welcome to comment on the issues raised in other submissions. The transcript will be made available to participants and will be available from the commission's Web site following the hearings. Copies may also be purchased using an order form available from staff here today. Submissions are also available. Now, I'd like to welcome this morning our first participant which is Avcare. Could you both please give your names and your positions with Avcare for the transcript.

MR SHARPE: Yes, Colin Sharpe. I'm the scientific and regulatory affairs director for crop production with Avcare.

MS STEVENS: Naomi Stevens, I'm public and government affairs manager with a member company of Avcare called Aventis Crop Science.

MRS OWENS: Good, thanks very much, and thanks once again for coming and seeing us and for providing us with another submission. We already received a very full submission from you back in November and we're very pleased to get this follow-up submission because you've actually raised some very useful points for us, particularly relating to cross-subsidisation. I was wondering, would you like to make any opening comments and then we'll ask you some questions or have some discussion.

MR SHARPE: What I do have is a short prepared presentation which summarises the points that we made in our submission, if you'd care to hear that, otherwise we're

very happy to just go straight into questions.

MRS OWENS: No, that would be lovely, thanks.

MR SHARPE: All right. We do welcome this opportunity to appear before the committee again, and reading the draft report we fully support the recommendations of the committee and in particular strongly advocate that the government adopt the recommendation to develop a clear policy on cost recovery and implement the recommendations of the committee. In this introduction, I would like to dwell on two matters that are important to Avcare members. The first of those is the exclusive capturable commercial benefit model that's used by ANZFA, and the second is cross-subsidisation that occurs in the NRA model. Firstly, the exclusive capturable commercial benefit, we have no concern with the concept of ECCB being a test for cost recovery, but we do have a problem with the way it's implemented by ANZFA in relation to our members' products and those are both our chemical products and potentially the biotechnology products.

We see that the ECCB in the way ANZFA uses it is a beneficiary pays approach. We note that under the legislation, ECCB applies where the applicant can be defined as deriving financial gain from the adoption of the draft standard or variation of the draft standard, and any other unrelated persons or bodies, including unrelated commercial entities, would require the agreement of the applicant in order to benefit financially from the approval of the application. It's that piece of legislation that we believe gives us the problems because it appears that in order to implement ECCB, the application must pass both tests in the legislation. So first let's look at when ECCB applies to our industry from the point of view of ag and vet chemicals. It applies for the preparation of a draft standard for inclusion into food standards and by that we mean an MRL or a maximum residue limit in food or feed for an agvet chemical.

It applies on the basis that the MRL has already been approved by the NRA and the important thing here is that the NRA has already approved the MRL. The registrant through that approval is legally able to sell the product for which the MRL applies, so there is no obligation on the registrant to do anything more. Up until now, the NRA itself has applied to ANZFA to have the MRL that it has approved included in the food standard. This is as a service to the community to meet the requirement of the state food legislation that MRLs be included in an ANZFA standard.

Next, let's look at deriving financial gain. Our discussions with ANZFA have indicated that ANZFA will impose a fee on agvet chemicals that have not been previously included in the food standard and it will charge the registrant. The registrant is not getting any financial gain from having the MRL in the food standard and hence we believe the first test fails. I'll come back to that in a moment. In the second test, the unrelated persons benefiting from the MRL being in the food standard are in fact not the applicant or the registrant of the agvet chemical but the

farmer and the food processor and others further down the food chain, neither of whom require the agreement of the applicant in order to benefit financially from the draft standard. Hence, we believe the second test fails.

It is Avcare's contention that in the case of ANZFA cost recovery for these certain MRLs, the government is in fact double dipping and implementing cost recovery that cannot be justified. We believe that the same issue will arise for products of biotechnology that go through the ANZFA process - and I'm talking here about the genetically modified draft food standards, and in a moment, Naomi will expand a little on that aspect. Our second concern is cross-subsidisation that occurs in the NRA model. Avcare supports the concept of a mix of application fees, re-registration fees and a levy on sales, the so-called NRA model, and this approach has the very important benefit of providing a stable and predictable revenue stream. However, the downside of the way the NRA implements this model is that it leads to cross-subsidisation.

A few users of the regulatory system who have products with high sales subsidise all the others. Most of the NRA activity is focused around assessment of applications. However, only 17 per cent of its annual income is derived from cost recovery; the rest is from re-registration fees and mostly from levies, about 56 per cent of its income. Using levies to spread assessment cost over time is favourable; however, the way the NRA model operates, given the nature of the agvet chemical, this leads to most of the assessment costs not being recovered from future sales of the product that's been approved. This is because about 70 per cent of the almost 7000 registered agvet products have sales less than 100,000 a year and don't attract a levy. Furthermore, about 90 per cent have sales less than a million dollars.

On the other hand, costs are more than recovered from the few products - about 3 per cent - which have sales over $3 million a year and it does not take too many years to pay back the assessment cost from those higher selling products. A commercial life of more than 30 years is not uncommon, so as you can see, once the cost recovery has been paid or the assessment costs have been paid, those higher selling products continue to subsidise those that don't pay their way. We believe that care needs to be taken that what appears to be a reasonable scheme to spread costs over time does not become an ability to pay scheme like that practised by NICNAS and which Avcare does not support, and we've explained that in previous submissions. To further increase subsidisation, there is a move by the signatories to the national registration scheme to remove the cap altogether. It is interesting to note that 5 per cent of registrants who have only 20 per cent of the registered products pay 80 per cent of the NRA's costs. It's not hard to guess that they are in fact members of our association.

So Avcare believes that the NRA model needs to be amended to remove the cross-subsidisation inequity and that if it is government policy for socioeconomic reasons to encourage companies to sell products that have small sales volumes in an industry that has high regulatory costs, then the government should directly subsidise

those regulatory costs. We've explained that in previous submissions and we note that the commission has supported this approach in its draft report.

I'm happy to stop here and answer further questions from the commission, unless you'd like us to comment on the answers we gave to the questions that you raised throughout the report, and we endeavoured to answer most of those questions.

MRS OWENS: I think we might stop here unless Ms Stevens wants to make any further comment.

MS STEVENS: I guess just to fill in - probably it's appropriate just to fill in where Colin had prompted on those two key issues for chemicals where they might apply to biotechnology, and they are indeed of concern to the biotechnology side of things as well in dealing with ANZFA. We have 20 products already that have been through various stages of review and from now on any new application would be subject to the cost recovery model that's been implemented by ANZFA and that's a big concern for industry as it's currently operating, for very much the same reasons as the chemical industry have outlined, as well as the cross-subsidisation inequities is a big concern. Just to give some examples, where it's important for each particular aspect of it, the way the biotechnology industry is structured is that we have both imported products of biotechnology and obviously the home-grown products of biotechnology. As I said, there are at least 20 products for which the larger multinational companies have been responsible for gaining clearances for import into this country and have been assessed. Now, those products are being imported not necessarily by the companies that have developed them, but obviously by the food industry, so again the beneficiaries example is another one that gets very complicated very easily with application to biotechnology - but even back at the seed situation where a company may develop the technology and almost immediately pass that on to a different entity which is then adding the benefit to or the value further down the line to the seed and there won't necessarily be any connection thereafter to any benefit derived from that seed. So it becomes very hard to identify who should be paying for the further ongoing cost of a regulatory model that wants to look at beneficiaries.

In the case of the products that are being home grown, we have at the moment three approved for growing in Australia that potentially could be supporting quite a large infrastructure and an unknown system for regulation through the Office of Gene Technology Regulator. It's a big concern for us that again there are only a few companies involved as applicants. But, for example, our company, Aventis, have been working in Australia for the last six years. We have probably 33 trial permits in the system currently but we expect to commercialise one. So that ratio I think will be important, considering what sort of cost recovery model and cost subsidy inequity is going to have an impact. I think that sort of covers most of it. Again, we would see the combination of levy as one part of a scheme to reduce application costs is not unacceptable to us, but getting it at the right end and the right quantity and to the right people is the important part of it. So we would certainly want to see a reduced up-front cost, given the time frame and the likelihood of getting a product to market

in biotechnology that is obviously supported by a spread levy system, so that wouldn't concern us as a basic principle. I think that's probably enough to start off with.

MRS OWENS: Good, thanks very much. You've raised two significant issues; one is the application of the exclusive capturable commercial benefit through ANZFA and the other is this issue of cross-subsidies through NRA and we'd probably like to go through both sets of issues with you. Maybe we should start with the first one because that was the first one raised in the submission. There is this question about whether the registrants are the beneficiaries or not. As I understand it from the submission and your opening comments - and you can correct me if this is incorrect - the registrants can't sell those products through state laws unless these MRLs are approved through ANZFA as well as NRA. Is that correct?

MR SHARPE: No, we can legally sell the products once they have been approved by the NRA. Under the legislation that applies to our products, that's all that's required, to get an NRA approval. So we can go and sell them, but the issue then arises that from the point of view of ministering state food law, those MRLs have to be incorporated in a draft standard or an ANZFA draft standard which then gets adopted into state food law which is completely separate and operates completely separate from the national registration scheme.

MRS OWENS: So is it conceivable - or it could go through the NRA but then something happens through ANZFA where it's not accepted into a standard?

MR SHARPE: And we have examples of that because - - -

MRS OWENS: So that it couldn't be sold then?

MR SHARPE: Yes, it can be sold.

MRS OWENS: Even if you don't have that - - -

MR SHARPE: That's correct. The chemical itself can be. The problem comes when you try to sell the food that may or may not have residues in it.

PROF SLOAN: We're just going to try and tease it out. Is it a criticism of regulatory duplication and perhaps silliness, as well as the issue of trying to double cost recovery?

MR SHARPE: That's correct. There's two issues here. There's the issue of two pieces of legislation that don't harmonise and we've tried to put that aside. That's a separate issue.

PROF SLOAN: Yes, but the feeling is, that's an important issue for you too.

MR SHARPE: That's an important issue for us as well. However, when you get into ANZFA itself, if we took the approach that to ensure that our products are fit for the purpose under Trade Practices legislation, then there is some obligation from the supplier to make sure they are incorporated in the food legislation.

PROF SLOAN: But ANZFA really hasn't had a cost recovery regime.

MR SHARPE: No.

PROF SLOAN: It seems that they're trying to fit your case into in fact one of the very early examples of the exclusive capturable commercial benefit.

MR SHARPE: That's correct.

PROF SLOAN: And really what your submission is telling me is that it doesn't seem to meet either A or B.

MR SHARPE: No.

PROF SLOAN: And it has to meet A and B.

MR SHARPE: That's right. So we're talking about a matter of principle here, I think, and raising an issue that if the ANZFA model is put forward as for other regulatory bodies, we're going to run into considerable trouble. At the moment, they're only focusing on very few MRLs because of their definition that if the chemical associated with that MRL has not been listed previously, then they will charge a fee; if it has, they won't. Again, within the industry, there can be a multitude of MRLs for one particular chemical, but it's only the first one that they intend to cost recover on.

PROF SLOAN: Right. So what you're telling me is that there is scope for free riding - - -

MR SHARPE: That there is scope for free riding - - -

PROF SLOAN: - - - after that, which is the whole point, that there shouldn't be scope for free riding with the ECCB test.

MR SHARPE: Free riding - it's a little more complicated I think to try and link it to free riding. I think we would say the bigger issue is using the way they have crafted that legislation to imply that the applicant to ANZFA is actually receiving exclusive commercial benefit, when in fact the people who are receiving that benefit are a long way further down the track and don't require permission from the owner of the chemical to actually obtain that benefit.

DR STEWARDSON: Can I clarify that point please. As I understand it, you're

saying that your members don't need to have the minimum residue level approval in order to sell to a food manufacturer, but that that manufacturer in turn needs the residue level in order to be able to sell the food product.

MR SHARPE: Correct.

DR STEWARDSON: So you're saying that it's not your members but the next level down the chain that gets the capturable benefit, but if in fact that next person down the chain couldn't sell the food containing your chemical without having the minimum residue level, if that minimum residue level isn't approved, then presumably he won't buy the chemical from your member. So isn't your member in fact getting a benefit, even though it's not a legal requirement for your member to have the minimum residue level approved in order to sell? I mean, in commercial reality, I don't see why anyone would buy your member's chemical if in fact it wasn't okay for them then to use it subsequently in making a food product that they could sell.

MR SHARPE: There's merit in that argument and that's what I was referring to with our obligations under the Trade Practices Act, that we should make that application. However, the situation gets more complex because a particular product can have a multitude of uses, some of which require MRLs and some which do not. So therefore we would then run the argument that again you've got the potential to impose a cost across a whole range of users who do not get any benefit from having an MRL associated with that particular product.

MRS OWENS: Is it possible for your member to actually pass on the costs of the regulation to the final user or is there so much competition in the industry that they just have to wear the cost of the regulation?

MR SHARPE: Another good point. You're correct with that answer and also the answer I just gave in relation to that; that there are more uses on a label than just the MRL means it's difficult to pass that cost on equitably. Coming back to your rationale, yes, almost every agricultural and veterinary chemical has, at least at the farming scene, a number of competitors from other chemicals and they actually set the market price. It's interesting to note we run into this issue with data protection which we also referred to in our submission. We've looked at ABARE data that tracks the farm chemical input costs relative to CPI and for the last 10 years or more, farm chemical inputs have been pretty much stable or flat compared to the CPI, so there hasn't been opportunity to recover a lot of additional cost. Even as recently as the last few months where we've had a lot of cost impact from exchange rates, essentially that's been absorbed within the industry.

DR STEWARDSON: Do the prices of your products in fact tend to move in a cycle more with the output of farms with wool prices and beef prices and so on rather than with the CPI?

MR SHARPE: No, I would think the price of the product doesn't move, the sales will change. In other words, you just receive less sales for that product, rather than any change in the price of the product.

PROF SLOAN: It might be worth moving on to the issue of your comments about the NRA cost recovery model. The devil is in the detail with these kinds of arrangements. You say you support the NRA model because it's stable and predictable.

MR SHARPE: The concept of having a three-way split of certain costs being recovered from applications, some costs being recovered from reregistration fees, an annual one, and some costs being recovered from levies.

PROF SLOAN: So that's what you support.

MR SHARPE: That's what we support. But the detail is where you run into difficulties and it's becoming more noticeable as time goes on with the NRA as we get a bigger split between the multitude of small products who are basically free riding on the system, compared to a very few large products which are paying most of the NRA's costs.

PROF SLOAN: Would participants in the industry seek to manipulate that? Is there scope for splitting up products so you're under the threshold to pay the levy or the charge or is that just how the industry pans out?

MR SHARPE: It is how the industry pans out. To manipulate products, you end up complicating it by having to keep a lot of inventory which is probably cutting off your nose to spite your face, I suspect.

PROF SLOAN: So one of your main concerns is that there's a disproportionate bearing of the NRA costs by a small number of participants who have very large sales.

MR SHARPE: Yes - well, not very large scale, but it's relatively small scale on product income when you look at the split. I think we gave you a fair bit of detail in one of our earlier submissions on how it's broken down.

DR STEWARDSON: What would be your solution to that? One solution you mentioned was government subsidy, but setting aside that one, would your solution be to lower the minimum from the $100,000 to something a lot less than that?

MR SHARPE: I think there's a number of solutions that could be put together. One is to capture more at the front end - in other words, increase the cost recovery - to more reflect the costs that are actually put into assessment and use levy to top up the other activities of the NRA; as you say, also to get more recognition of the community service obligations of the NRA which are not recognised at all; also, to

keep a cap on the maximum levies that can be paid. I didn't mention it in my overview, but in the submission we made, we know that the signatories to the national registration scheme are disposed towards removing that cap altogether. At the moment we have a cap, albeit still reasonably high, but their intent is to take it away altogether, which would just further distort the differences. So I think we need to have a mix of things to minimise the amount of cross-subsidisation that is occurring.

DR STEWARDSON: If you put a bigger charge on the initial assessment and didn't have the cross-subsidy from subsequent sales to initial assessment, would that have any adverse effect on the viability of bringing products up for assessment?

MR SHARPE: I don't think so because in the total scheme of things, the data is the expensive part. The actual assessment costs are relatively minor, and because this is such a highly regulated business, those entering it should come in knowing the costs of participating in this business rather than expecting to basically free ride.

MRS OWENS: But if the assessment costs are relatively minor, should we worry too much about these cross-subsidies?

MR SHARPE: If you look at the total proportion of the NRA's activity, most of it is spent on assessments. Albeit the assessment cost for an individual product is relatively minor, we still run into the issue that successful products continue to pay for those that are less successful.

DR STEWARDSON: So why has this system developed, do you know, if in fact the assessment cost is relatively minor in the overall cost of preparing the documentation and all the research and whatnot in getting the product brought up to assessment stage, then why has somebody - presumably the NRA - decided that there was a need for the cross-subsidisation in the first place?

MR SHARPE: Firstly, I don't think it was the NRA who devised this scheme because they're only the administrators. It would be the policy people who are the signatories to the scheme, who are the state people, and AFFA, as it is now. I think the other thing that probably favoured this when it was put together nearly 10 years ago was the need to keep prices to farmers low and therefore the idea was to not have a high up-front cost which would allow more products to come in. However, things have changed considerably over time because the National Registration Authority also picks up a lot of products which are in the small sales category for home owner use, things like swimming pools, companion animals and a whole raft of things which are not related to farming enterprises. So what we're seeing now is that the higher sales products tend to be the ones that the farmers use and so those costs for the whole scheme are being paid by the farming community, when in fact the bulk of those 7000-odd products are non-farm products.

PROF SLOAN: They are quite proud, the NRA, of their consultation procedures

and their governance arrangements. Is that the appropriate vehicle to get this kind of model changed or - can I put it to you, in our draft report, we have recommendations about the CRIS and the RIS. I mean, if the NRA cost recovery model is deficient, are the consultation procedures sufficient to allow some fine tuning, or would you be supportive of what really is a much more disciplined and detailed thing to do through the CRIS?

MR SHARPE: I think you're quite right in that CRIS and RIS need to be carried out and to my knowledge, that has never been done. Those weren't activities done 10 years ago. The NRA has recently consulted on amending the cost recovery approach. They did make some recommendations that have been forwarded to the signatories for their input. We understand there will be no further consultation from the signatories on the matter, so we will have a situation where we're going to have some amendments without the sort of process that you folks have been recommending. The difficulty the NRA has in making its recommendation is the very diverse range of clients. If you do a numbers count, the few who pay most of the costs are the lowest in numbers.

MRS OWENS: Can I just come back to this issue of capping maximum levies. You mentioned that was one of your improvements. They're not capped at the moment?

MR SHARPE: Yes, they are capped at the moment.

MRS OWENS: But you're saying you would have a lower cap?

MR SHARPE: No, we just need to make sure that that cap is realistic and that it is not raised to such an extent that a few products continue to pay a large number of dollars over their 30 to 50-year life span relative to other products who are really not paying the costs that they have taken or imposed on the system.

MRS OWENS: In some ways you could foreshadow a capping arrangement which would actually mean that the smaller companies or other companies are going to be cross-subsidising those companies that benefit from the cap. At some stage in any capping arrangement, there's going to be a beneficiary, isn't there, at the other end? I'm using "beneficiary" in a different way. I'm not suggesting we don't have a cap, I'm saying - - -

MR SHARPE: No, I wouldn't suggest that. If we look at the current cap, it's $25,000 a year per product. The maximum fee or assessment cost within the NRA is $100,000 or thereabouts, the actual cost - not what they charge in fee, their maximum fee is about 20,000, but the maximum actual cost is about $100,000. They have a whole range of different application categories, so it can be from a thousand dollars up to $100,000, depending on what use you are making of the system. So at $25,000 you have recovered that cost within three or four years. Obviously there are other activities that the NRA has as ongoing and we don't mind contributing to those, but

what we see is that these few products, if they continue to pay $25,000 for 30 years, are more than adequately paying their way as opposed to the 60 or 70 per cent who are less than $100,000 sales who basically are paying nothing.

DR STEWARDSON: So basically you want the actual assessment cost charged up-front?

MR SHARPE: I think we should look at that area. We're not sort of saying that you get full cost recovery, but at least look at what the optimum amount should be relative to your levies.

DR STEWARDSON: You do seem to me to be saying full recovery of the assessment cost up-front; that's why I was a little surprised by your qualification then.

MR SHARPE: You could go that way, full cost recovery, but again what you might find is that you then miss out on the opportunity to spread those costs over time which can have some value. $100,000 is still a significant amount of money for some operators. So I think it's creating the balance and it's a fine balance of what should be up-front, what should be recovered over time, but at the same time ensuring that you're not setting the levies to such an extent that very few products are paying for most of the others. I think it's going to depend on each individual regulatory system as to what that balance is. I don't think there's going to be one formula for it. That's why we subscribe to the three-step concept, as long as you get the formula right for the particular regulatory situation.

In another situation, where product sales are all relatively high, then it might not be an issue, but when you've got this diverse range of a few thousand-dollar products, most products being only a few thousand dollars, and then a very few being at the other end is where you'll run into the problem.

MRS OWENS: I think what we're going to be doing in our final report is we will be setting up a series of principles about these things. I don't think we'll be going and looking at every fee structure for every regulatory agency. All we can do is say, "These are the principles," and get those set out quite clearly. I think there was an issue that Ms Stevens raised - it wasn't an issue, you made the comment that there was something like 20 products had gone through ANZFA and I was wondering, were any charges imposed for those products?

MS STEVENS: No, I don't believe so. They've come through just prior to the change to the standard - - -

MRS OWENS: So the issues you're raising in relation to ANZFA are really issues for the future.

MR SHARPE: Yes.

MRS OWENS: Because I was just looking at our table in our appendix relating to ANZFA and all we've got there is 0.8 of a million, 800,000, and most of that was not fees and charges but other costs, royalties and sale of publications, so this is something that's going to appear for the future.

MS STEVENS: It is; as of probably six months ago the fees were applicable. But again, that shows that there may well only be a dribble of products that are requiring the same assessment. At the moment we've caught up to the rest of the world with traded products, imported products particularly, and then it will be relative to new products being commercialised around the world that then set the rate of applications coming through, so they will be much smaller which again impacts a recovery model. If they have geared up to initially review 20 products and suddenly there's only one a year coming through, that has a big impact on how it's paid for.

MRS OWENS: There's nothing coming through the pipeline at the moment where the charging arrangements have been tested?

MS STEVENS: There will be, yes. Our company hasn't as yet put in a submission but we know, for example, in terms of what we've developed globally and will release products, that we do within the next 12 months have to at least submit one product, in the next 12 months have to at least submit one product. I'd imagine there might be one from two to three other companies as well. So, yes, there will be ones but certainly dribbling down to a much slower rate than what we've seen previously.

MRS OWENS: But I would presume when you put these products in for assessment that you will make a case which basically says, "These are your principles for charging and we don't fit into the A or the B." I presume that's the way it would work.

MS STEVENS: I guess we're going to have to. At the moment we're recovering from the up-front costs which is set at a significantly higher up-front rate for ANZFA than it is, for example, for NRA. I think the equivalent costs that we have now to put a food application in is set around 80 to 100 thousand dollars for just a single - a new review. So that's a significant cost for a product that we have no interest in in bringing into the country but some food importer might have an interest in. So that's a big shock for us to try and recover from, considering that we weren't consulted in that becoming a new fee for us. Then, I think, yes, it's further complicated by looking at potentially there's another levy that we're going to have to apply to the cost of maintaining this product. That's very scary.

MRS OWENS: You've got the risk of trying to understand the market for that product and whether it is going to be picked up by the food industry and so you've got a series of unknowns there and risks that you're having to deal with and this is just another factor.

MS STEVENS: Yes, it would make it very difficult then to justify following through a clearance for the product in the country from where we may not be present in the country - or we have no particular interest, say, in a product such as corn, for example, that we're only just covering off the global clearances. But we have no stake in necessarily importing it. It's very difficult to then put the equation in that has a very high cost attached to it and an ongoing cost.

MRS OWENS: So potentially this could influence decisions about what's imported.

MS STEVENS: Yes, I guess following through the logic of that argument. It also, I guess, impacts on what is released back at the country of origin. Certainly that has a big impact at the moment. We have some cases in point with products such as our allergy(?) link soy beans have been ready for the commercial market for some time, been grown out of America. But until we have clearances in the major markets we won't actually release that product. Similarly, we saw the example of star link corn where there were clearances in some markets for some uses but not in the use for food, for example. It was used for feed. So having the full set of clearances in all markets is a key decision point for the person developing the technology. So it can influence what is developed and when it's released.

MRS OWENS: I suppose most of the challenge is understanding the impact of the clearance processes and the compliance costs that you have to incur, vis-a-vis the costs associated with actually going through the regulatory process, paying for the regulation.

MS STEVENS: Yes, and the compliance issue is one that's quite a big one close to home too in terms of developing a product for the Australian market. Now we see quite a disproportionate cost now attributed to our current compliance regime in Australia. Our costs have skyrocketed in the last five years for compliance to well over a million dollars just in the field for our own activities to be compliant with the regulatory regime. That obviously will have a significant bearing on how the regulator factors in its own compliance sector and I think there were some models given in the OGTR, consideration for cost recovery. That's again another area that needs some principles and guidance, I think.

MRS OWENS: Do you monitor how much it's costing you to pay these fees and charges and levies?

MS STEVENS: Yes, we do.

MRS OWENS: Has that gone up over time?

MS STEVENS: Well, in biotechnology I guess it's a tricky area because in a lot of cases we're developing products along with the development of the regulatory systems. Certainly looking across Europe, some of the fee structures that were set up

were indeed a disincentive for companies to work within that country and so they set very high values by having very high up-front fees. In other countries it's been quite a workable system but has matured and has been under constant review and I think that's probably the key principle that it needs to be able to evolve and to be reviewed in a transparent way to take account of what's happening in the marketplace and in the field - you know, what is the range of applications and where are they costing the most. So I think that review phase is what we've seen and obviously that takes a lot of personnel cost but not necessarily a fee cost.

MRS OWENS: Do you support our proposal in our report, in our guidelines, for ongoing review of these charges and monitoring and so on?

MS STEVENS: Yes, definitely.

MRS OWENS: Even though there is a cost to you in being part of that review, but at the same time it keeps the charging arrangements up to date.

MS STEVENS: Yes, the review part of it is essential. Whilst it has not reached a stabilised point of development time frames and costs, I think the review is essential.

MRS OWENS: You don't have any information about the relative fees and charges in different countries that your company is dealing with?

MS STEVENS: Yes, there is a lot of information and I think I recall the submission that came in from - perhaps the OGTR may have put a submission to the Productivity Commission that had an appendix with a bit more information. I remember seeing there was some fee information but we could probably get some - - -

MRS OWENS: We'll check that and maybe talk to you about that later.

MS STEVENS: Yes.

MRS OWENS: That was, I think, a very useful discussion, a very useful submission for us. I'd like to thank you both very much for coming and taking an interest in this inquiry because we really need to talk to organisations like yourself and to companies, as well as talking to the agencies, because we do get a different perspective. So I'd like to thank you very much.

MR SHARPE: Thank you. We do understand that you're only dealing with principles and we've concentrated on the detail but it was really just to amplify some of the issues surrounding the principles.

MRS OWENS: No, but we need the detail, to understand the detail, to develop the principles really.

MR SHARPE: I understand, correct. That's why we've concentrated on the detail for you.

MRS OWENS: Good, thanks very much. We'll now just break for five minutes.

MRS OWENS: The next participant this morning is Cumpston Sarjeant Ltd. Could you please give your name and your position with the company for the transcript.

MR CUMPSTON: I'm Richard Cumpston. I'm a director of Cumpston Sarjeant Pty Ltd, a firm of consulting actuaries in Melbourne.

MRS OWENS: Good, thank you, and thanks once again for appearing before us. So far you've given us I think two submissions and you've just tabled a further submission this morning, so thanks very much for that in taking an interest in the inquiry, and I hear, before we resumed, actually reading our report. Would you like to make any opening comments before we open it up for discussion?

MR CUMPSTON: Yes, thank you. I've written a letter dated 30 May which does no more than agree with recommendation 6.6 and 6.7 and raise a few small details about their application to the Australian Bureau of Statistics. Over the weekend I had time to read the report, and I think nearly all my concerns are taken care of. But if I could go very briefly through, firstly, I know that ABS is concerned about the arrangements they had with other governments that ABS get some money from other Commonwealth and state government agencies and they are concerned that your recommendation would stop them getting that money and that certainly wasn't our intention. We find those struggles very arcane. We want no part of them.

Secondly, 7.6 talks about publications produced for core purposes being priced at marginal cost. We notice that ABS's publications are pretty fully priced and even when they're out of stock and they print off, say, a 40-page publication on their printer as you wait, then you're still paying the full price which may be about $25. We think that's much more a full commercial price rather than a marginal cost. We think ABS's fee per hour rate of about $140 per hour is pretty full by commercial standards and I've noticed that you're now requiring detailed justification of charges as part of your overall recommendations and I think ABS would struggle to justify that rate without including a profit margin or a whole lot of overheads.

ABS have a minimum fee of about $125 for information consultancy. We can see no reason for that. One of the grumbles we hear about ABS a lot is that people like community groups, affected individuals, simply can't afford to pay $125 just to open the bidding, so I can't see a minimum fee is consistent with anything in your report. The most irritating thing about ABS has always been their charges for data cells. I think it is clear that those charges would banish under your report. We were concerned by the concept of competitive neutrality which got mentioned at 6.7, where there's a little rider, "or where relevant, prices in keeping with competitive neutrality principles". We felt a little bit worried about that because ABS has always had a few firms who buy data from ABS and resell and we feel these bastard offspring may complicate the whole process because ABS may argue, "Look how these retailers are selling our data," at such and such a price, "therefore we can't afford to sell it at any price underneath them, otherwise we're undercutting them."

That would be a bizarre application of reverse logic and we hope you'll make it clear that that's not what is intended by your 6.7.

We strongly believe that universities should be treated on the same basis as businesses and that's because these days, universities, as they have the money ripped away from them, have to compete in the open markets. They have to be consultants. We often find we're competing with the universities and I think the current answer is that they get the data cheap and then they can illegitimately on-sell it in various ways; I think your answer is much better, that the data should be very cheap to everybody. That would be a much more socially desirable situation and would probably remove the need for special arrangements.

Finally, we think that a lot of good could come from your recommendations because the ABS at the moment seem to me to be avoiding the problems of providing proper Internet access. They're actually currently using your inquiry as an excuse for not setting up a decent system. But I think if they really bend their minds to it - and I ask the question, how can we satisfy all our needs, internal, core or other needs, in the most efficient way - then they may become a much more efficient organisation, as ABARE apparently has. They apparently have saved about 10 per cent on all their costs by trying to find more efficient ways to do things, and I think ABS needs to go through that process. The small addendum I've added, would you like me to deal with that now?

MRS OWENS: Yes, please.

MR CUMPSTON: This was as a result of reading the report. I noticed a reference - I think it's on page 111 of the draft report - to information becoming increasingly available from APRA, and they have always guarded their general insurance information very closely and we see no sign of that changing. Their argument has always been that to release figures on the premiums written in different classes by general insurers and on their outstanding claims might expose those insurers to critical analysis and start a run on them. The argument that we have been as actuaries putting to them unsuccessfully for over 20 years is that if that data was available, as indeed it is in the USA and the UK, then there would be a whole range of external analyses, and it could be done by brokers, by rating agencies like Standard and Poors, by investment analysts and by insurance buyers themselves. If that data had been available, then the HIH collapse might not have occurred because the public would have become suspicious of them much earlier, or if it had occurred, it would have been much less costly. We think data confidentiality has resulted in a quite misplaced reliance on one single agency, and patently APRA were not up to the job and some backups would have been helpful.

There are also some problems with ABS. They have both confidentiality restrictions and high data costs and both of those restrict some potentially very valuable analyses. As an example, traditional sheep dips are now recognised as major health threats to farmers. One wonders what was going on all those years

when they weren't recognised. But there may be other industrial hazards out there, and one proposal I've seriously discussed with lawyers is looking at the patterns of regional mortality as against the patterns of regional industry. Are there particular areas where a certain industry is concentrated and a certain disease is occurring? To my knowledge, no-one does that sort of work. If any private organisation wanted to do it, it would be virtually impossible because the data is masked by the confidentiality restrictions; you can't get less than five deaths or five firms in a cell. Secondly, the costs at the moment would be pretty high. This problem applies to a lot of regional issues, disease, poverty, land degradation. They're all issues where the public may have something to contribute - in fact certainly do - but are barred from getting the data.

I think Australians are underrated by governments. I think these days we're well educated, we have good computer skills, many of us have analysis skills and many individuals at non-government organisations are unwilling to rely solely on government agencies because so many of them have been defunded or even discredited. We believe data is essential to a healthy democracy. Thank you for your time.

MRS OWENS: Thank you very much, Mr Cumpston. I think you've raised a few really interesting points. The point you made about recommendation 6.6, I think we will be taking that on board because what we didn't do very well in our draft report was really looking at the inter-governmental issues at all. It was neglected. I have no excuse for that, except that we're running short of time, and it is something we are now working on and I'll take on board what you've suggested for the recommendation and in the surrounding discussion.

I think you've also made a useful point about pricing at marginal cost and feeling that that's probably not what the ABS is currently doing. It's all very well having that principle, but then you need to actually implement that, and I suppose any evidence we get that the charges are above marginal costs would be useful, but it's very hard for you or for anybody else to actually work out what their marginal costs are. But it is one of those issues that we will continue to think about and it is an important principle.

We had a workshop of information agencies two or three weeks back in Canberra and one of the issues that was raised at that workshop which you may wish to think about today is how you define what an agency's core is, and non-core services, and we've suggested in our draft report that anything in the core should be of zero charge and non-core could be charged at marginal cost or higher if there were competitive neutrality issues at stake. I take your point about when that may or may not be appropriate to consider it as a competitive neutrality constraint. But I don't know whether you've got any views as to whether anything in what would be defined as a core should be charged at incremental or marginal cost or whether you were happy with the way we had set it out.

MR CUMPSTON: I thought your report was fine, and I think ABS's view appears to be that everything they hold is core, and I think that's right, that all that data they have painfully collected is core data and all we're arguing about is how access to that data can be obtained for a whole range of purposes and your answer about marginal costs seems to be perfect. We certainly think that if people cause extra costs to ABS, they should pay for that extra cost.

MRS OWENS: We're saying that the costs of dissemination, some of that could be in the core, and some dissemination - if you as an individual want something special done and get access to that additional information - then you pay for that. This is one of the issues we're still working through at the moment.

MR CUMPSTON: Most of what you say I think ABS would agree with anyway. I think the one place where there's going to be friction I think is on the CDATA product, which they currently charge 12,000 for. I think 80 per cent of the sales are to government agencies anyway. So is that a core product or not? How does 12,000 compare with $US65 which you quote in the back of your report as the price of a CD-ROM from the US agency? $65 would be a great price and we'd happily pay.

PROF SLOAN: Obviously it isn't very difficult to assess what the marginal costs of dissemination are, but I don't know what your reaction to their net pricing policy is which basically is they have a policy which says that effectively the cost of the "publication" - in inverted commas - will be the same, irrespective of the media. So if you want to download a publication off the Net, it's the same cost as it would be had you ordered the paper publication.

MR CUMPSTON: That's quite inconsistent with what you're saying.

PROF SLOAN: Yes. I mean, it seems implausible that the marginal costs of those two things would just happen to be identical.

MR CUMPSTON: That's right - it's clearly not, and I think they will need to continue their printed publications. There are obviously places where print is essential, like libraries. But they have simply got to use much more electronic dissemination and make it much easier to get at as well.

PROF SLOAN: This is a very leading question for you, but in America, as you would know, the data is much more freely available, to the point that they basically provide - most of the big data sets are there on the Net to be accessed by whoever for nothing or for very little.

MR CUMPSTON: Yes, and I understand some of that data is even used for Australia, because the comparable data in Australia is unavailable or unaffordable.

PROF SLOAN: But what they say to us is that, "Well, of course then you have to have a kind of sub-industry," which are those people who are capable of

manipulating raw data and that adds to the ultimate cost, compared with what they're saying, that that sub-industry is held within the ABS.

MR CUMPSTON: No, that's a gratuitous and patronising approach if you're quoting them accurately because I think that there's a huge range of people out in the community with analysis skills. They're growing every day. Almost everybody who comes out of university has got some analysis skills. To say that the ABS could not only do it better but they can anticipate people's needs is just absurd.

PROF SLOAN: I did say it was a leading question.

MR CUMPSTON: Yes.

MRS OWENS: I think that was a leading answer actually. The other interesting issue you raised was charging industry or companies - if they have special contractual arrangements with the ABS, charging them in the same way as the universities are charged now. Can you actually see that happening?

MR CUMPSTON: I think I may have said that wrong. Ideally, the data should be so cheap, everybody can afford it, so there shouldn't be any special need for universities. I'm not aware of any companies with special arrangements with ABS. I've never even heard the suggestion.

MRS OWENS: No, just in your submission you said, "We consider universities should be treated on the same basis as businesses."

MR CUMPSTON: That's right. I mean, if you lower the price, we can all afford the same price.

MRS OWENS: Okay. You could turn that around the other way and say that universities have currently got contractual arrangements with the ABS and that businesses should be able to enter into similar contractual arrangements.

MR CUMPSTON: No, I - - -

MRS OWENS: What you're really saying is let it all be cheaper than it is now, then anybody can do whatever they want with the data and analyse it and so on.

MR CUMPSTON: I think those present university arrangements are unsound because there's no way of quarantining commercial from research uses by universities.

MRS OWENS: And it also raises problems for university researchers who may want to do their own legitimate university research where they need to get additional information from the ABS, but then can't afford those minimum charges which you're saying are too high, and their research grants often don't extend to data

collection, so they just don't have the money to do it.

MR CUMPSTON: Yes. I'm struck by how poor the quality of public research is in Australia.

MRS OWENS: Do you think it's got worse or it's hard to judge?

MR CUMPSTON: To give you this weekend as an example, I was looking at the analysis of mortality in the last hundred years in Australia, and there's one analysis that was done in about 1966, Christobel and Young or someone, and the AIHW did some in 1989 and 1993 and they're all extremely superficial, and that's about it for a hundred years of mortality analysis. In those areas where there's no commercial gain to be made and there's no exciting piece of academic theory to be put into practice, I think Australian public research is pretty awful and it has got worse, because there was some very detailed stuff done in the 20s and 30s when the Department of Health was established, and I'm not aware of anything of comparable quality since the Second World War.

MRS OWENS: I suppose the question is, is that because of the constraints that are imposed on researchers by not being able to get access to cheap data through the ABS and other sources like the AIHW - although that's a bit of a different situation - or is it because there's a bit of deterioration and there's fewer people staying in those positions to do the work? I mean, I don't think we can answer today. It's a big question.

MR CUMPSTON: No, it's a combination of everything.

MRS OWENS: It's probably a combination of a lot of factors.

MR CUMPSTON: Yes.

MRS OWENS: But what you're suggesting is this is a contributor.

MR CUMPSTON: Yes.

PROF SLOAN: Are there any circumstances where you think the principle of competitive neutrality might apply in the case of the ABS? Can I paraphrase what you're saying, that because they're basically in a sense the beginning of the chain and the monopoly part of the chain, indeed, the idea that they would be in competition with someone else is a bit of a funny idea.

MR CUMPSTON: Yes, that's right.

PROF SLOAN: But are there instances where - - -

MR CUMPSTON: It could happen down the track, where some clever firm might

buy ABS's data very cheaply, at the prices you recommend, and do some clever analysis and come up with some very exciting products for commerce and I would see that as right and proper. But then what I don't want to see is ABS turning round and saying, "Look, this firm is selling this sort of analysis at this price, therefore if we go into that area, we've got to charge at least that price."

MRS OWENS: But that raises the question of whether they should be going into that area at all - - -

MR CUMPSTON: They probably shouldn't.

MRS OWENS: - - - if there are others out there doing the work.

MR CUMPSTON: Yes. Competitive neutrality shouldn't arise because they shouldn't be competing with the private sector anyway.

PROF SLOAN: No. I mean, it has to be at the sort of same spot in the chain, that there are private sector enterprises engaged in essentially the same activity.

MRS OWENS: Or else competitive neutrality doesn't really apply. It's got to be competitively neutral for the same activity.

PROF SLOAN: So what you're really saying is that you can't - - -

MR CUMPSTON: I'm unfamiliar with the concepts, so - - -

PROF SLOAN: Yes, but you can't actually imagine too many circumstances, if any, where the ABS would be seen to be in competition.

MR CUMPSTON: No, I think their job is to be a data source to everyone, the public, business, government, and then what happens after that is another issue.

MRS OWENS: What about the issue of royalties? You mentioned that in your submission very briefly.

MR CUMPSTON: Yes, that would vanish again too, because if you could buy their CDs for $120 rather than 12,000, then that data altered would have no market value, so the issue of resale in an unaltered form would not arise; it would be the added value on which they don't charge royalties anyway.

PROF SLOAN: Can I just also raise that issue of your opposition to data cell charges. I mean, this is where you ask for a four by three cross-tab and they basically charge you - - -

MR CUMPSTON: They count up the number of cells and charge you accordingly, yes.

PROF SLOAN: What you're saying is that it's very hard to think of that being a cost-reflective charging policy.

MR CUMPSTON: Yes, and they don't; they call it an infrastructure charge and it's designed to recover their whole costs.

PROF SLOAN: Right. So when you ask for the four by three cross-tab and then you get all stars - - -

MR CUMPSTON: Because of the confidentiality restrictions, you're really - - -

PROF SLOAN: You're still charged though, aren't you?

MR CUMPSTON: Yes, you're up for at least $125.

PROF SLOAN: Yes.

MR CUMPSTON: You don't get a discount. If you bought 50,000 cells and 40,000 are stars, you don't get a discount.

DR STEWARDSON: What alternative charging method would you advocate for that?

MR CUMPSTON: I'm very strongly in favour of what you're saying. The marginal costs of those extra cells is nothing. If they have to give you a CD to put them on, they could charge you for that, but it literally costs nothing to produce a huge volume of cells. What is expensive is the time of setting up and that's where they're entitled to charge, but equally your principle is that they should be efficient in their charges, so that they should spend money on software and systems so they can efficiently respond to a request, whether they be internal or external.

MRS OWENS: To spend the money on the software and the systems, you could conceivably see that as being a core activity that they should be doing anyway - - -

MR CUMPSTON: I think so, yes.

MRS OWENS: - - - rather than charging for the establishment and the setting up of systems on the Web. For example, that could be seen as being core, no charge, and only marginal costs which would be very small afterwards.

MR CUMPSTON: Yes.

MRS OWENS: So you're talking about something that's going to be quite cheap.

MR CUMPSTON: Yes. They might have to spend 4 or 5 million on it, but it's

cheap in relation to their total activities and I would think would have big productivity benefits down the track on their core activities.

PROF SLOAN: I suppose one of the issues for the ABS is that it is a large organisation with a $200 million budget and that they do have to have rules in respect of cost recovering that are relatively simple and are consistently applied. I think there has been criticism in the past that you can make a few phone calls to the ABS and get different quotes.

MR CUMPSTON: We have never been that lucky.

PROF SLOAN: So I suppose the question I'm asking you is that presumably you would accept that there are some compromises that sometimes need to be made.

MR CUMPSTON: Yes, but it's the principles that you're advocating and we're strongly supporting. We don't mind if they get the times a little bit wrong and they charge us. That can happen to anybody.

MRS OWENS: Can we switch over to APRA for a minute because that's quite timely at the moment to talk about APRA. You've suggested in your submission you tabled today that there is insufficient information made publicly available relating to general insurers and so on and that there's a case for greater transparency. You suggest that detailed data on individual insurers are available in the USA and UK. When you made your comments, you said that you were referring to page 111. I don't know whether this was the correct page, but on page 111, we say that:

> In February 2000, the Australian Prudential Regulation Authority initiated a statistics project which should result -

should result -

> in electronic lodgment and consultation of financial information being available by the middle of 2001.

Is that going to overcome these problems?

MR CUMPSTON: No, they have always been firmly of the view that they shouldn't release it on the grounds that - well, two grounds. One is that someone with a competitive advantage in some little insurance niche doesn't want his competitors to know about it; secondly, if people were aware that a particular insurer was slightly marginal, they might avoid it, so the insurer might collapse. That is not the approach adopted in the USA and the UK. There, there's much more detailed data very readily available.

MRS OWENS: Would that have an impact in terms of what information the companies gave to APRA in the first place or don't they have any choice about it?

MR CUMPSTON: No option at all. They are compelled to provide this very detailed information in a standard format which is very suitable for analysis by statistical packages. For example, you get Standard and Poors in America analysing every insurance company automatically. That's a service to insurance buyers, so every company gets a statistical rating. It's not an in-depth rating which they do by going and looking at the company itself, but it's at least an initial rating which the public can use.

MRS OWENS: That's not necessarily going to avoid the collapse of a company but what possibly you're inferring is that the more information that's out there in the public domain, the more scrutiny on these companies, the more likely you are to pick up on problems earlier.

MR CUMPSTON: Exactly, yes.

DR STEWARDSON: What sort of information is available about insurance companies at the moment and what more is it that you're suggesting should be available?

MR CUMPSTON: There is some that is available by paying small fees; things like the total premiums, the total assets, where the assets are invested and I think possibly how much reinsurance. But to analyse a company, you need to know whether they're in motor insurance, which is short term and fairly safe, or professional indemnity which is long term and really risky, or an overseas inwards reinsurance which is even worse. There are a whole lot of people in the industry and around it who can make those analyses, so you get much better informed comment and I think much less opportunity for people like HIH to go totally berserk.

MRS OWENS: So there is nothing to your knowledge that's happened in the US or UK as a result of that data being in the public domain that hasn't affected the way the insurance market works?

MR CUMPSTON: That's been the case since the 70s in both countries. I mean, both markets seem to flourish. They don't seem to fall apart in any way different to the - in fact it's hard to think of anything quite as spectacular as HIH overseas. They have made some awful mistakes but they haven't sort of grown so quickly and collapsed so spectacularly. In fact, if you thought about the size of our market, there's been nothing that's come anywhere near it overseas in relative size for the market.

PROF SLOAN: What you're really making out a case for is the very strong public interest there is in data collection and dissemination.

MR CUMPSTON: Yes, and the great expertise that's not necessarily in the government sector agencies.

DR STEWARDSON: The issue you're raising here is really one of the release policy of APRA; it's not that it's too expensive for anyone to buy, it's just that they won't sell it at any price.

MR CUMPSTON: Yes, you can't get it at all, which is increasingly starting to be a problem. Somewhere in here, I think the CSIRO man referred to the fact that some data sets are no longer available; that people have realised they have got commercial data and so they're no longer available even within government, let alone outside.

MRS OWENS: In the context of the royal commission, this should be an issue that should arise there as well presumably.

MR CUMPSTON: Yes. Actually we've already made the same point to Treasury who are having an internal investigation.

MRS OWENS: Because to me, it sounds like quite an important point to be discussed in the public domain, rather than just in the context of a cost recovery inquiry.

MR CUMPSTON: Yes, exactly.

MRS OWENS: Have you finished?

PROF SLOAN: I think that's very useful.

MRS OWENS: I think we liked both of your submissions; they're to the point, and your closing line on your submission dated 30 May, where you say:

> Can Australia afford first-class information access or are we a third world country -

I thought that was a nice way to finish it.

MR CUMPSTON: Thank you very much.

MRS OWENS: Thank you, Mr Cumpston.

MR CUMPSTON: Thank you very much.

MRS OWENS: We will now close this morning and we'll resume after lunch at 1.30.

(Luncheon adjournment)

MRS OWENS: The next participant this afternoon is Dr Max Bessell from the University of South Australia. Could you please give your name and your affiliation with the university for the transcript.

DR BESSELL: Yes, certainly. My name is Dr Max Bessell. I'm with the University of South Australia and in this capacity, I'm a research fellow with the school of accounting and information systems**.**

MRS OWENS: Good, thanks very much and thank you very much for your submission. We appreciate getting it, even though it's come later in our processes. It's still very timely for us when we're thinking about these issues, so thanks for putting all that effort into it. As we discussed before, you may like to make just a few opening comments based on your submission.

DR BESSELL: Yes, if you don't mind. The submission I've just broken into three general areas, dealing with the definition of taxation, the fee for service issue and also something that's a little bit wider, as in what is cost and what the commission may or may not have to consider or like to consider in what is cost, because in reading the draft report, I haven't quite been able to get a handle on what that is.

If you like, I'll just perhaps treat these individually and then deal with one and then move on to the other. The definition of "tax", this is something close to my heart, having done my PhD on this. The draft report refers to the definition of tax by Latham as being "the" definition of taxation and I think that's probably an error. Latham's comments were made in the context of the facts of that case, and in fact myself and Prof Scott Henderson from the University of Adelaide, and a person no longer with the University of Adelaide but is a tax specialist with a major pharmaceutical company, Karen Burford, wrote a paper and had that published, dealing with that issue, what Latham exactly said. It doesn't mean his definition is not valuable, it certainly is, and it is a definition that I've certainly used and a lot of other people use, but the danger in relying upon it as "the" definition is that an organisation may well overlook a set of facts that do not satisfy Latham's definition but may indeed be taxation. That's the point there. Mind you, one of the justices in the recent Airservices case I think was quite careful in the way they used their terms when referring to Latham's definition. Certainly there have been a lot of commentators though the years who have referred to it as "the" definition of taxation, but I think it would be a brave court that would absolutely define the definition of taxation.

MRS OWENS: Rather than you go through each of the issues and then we come back, it might be good to just talk about each of these points as we go. How do you feel about that?

DR BESSELL: Yes, absolutely, that's fine.

MRS OWENS: In terms of the definition that you've got in the paper you've

attached and we've got it in our report:

> A compulsory exaction of money by a public authority for public purposes, enforceable by law and is not a payment for services rendered -

what sort of things would be excluded from that definition? What is it missing?

DR BESSELL: I don't know.

MRS OWENS: Well, you said that there could be facts where they may be taxation but would not be embraced - I mean, it is a very general definition.

DR BESSELL: It's a list of positive and negative attributes that related to the position of the Chicory v Matthews case. Certainly there are other negative attributes like a fine that you could slot in there instead of a fee for service. An absolute absurd extreme example would be what happens if the Commonwealth government required its citizens to pay $100 each direct to the Zimbabwean relief fund, if there was such a catastrophe? Would that be or not be taxation? It's certainly not a fee for service. The danger I think of having an absolute definition is that people or politicians then look outside it to avoid that label of taxation.

MRS OWENS: With that example, I mean, that would be compulsory exaction of money by a public authority because the government could do it through a public authority and - - -

DR BESSELL: Does it have to be a public authority?

MRS OWENS: - - - enforceable by law.

DR BESSELL: Does it have to be for public purposes? His comments, rather than look at what his comments don't cover, I'd prefer to relate to what his comments do cover, and his comments cover the terms of that case. When you look at what he said there, he wasn't saying the definition of taxation, he was referring to it as, "This is" - referring to the facts of the case - "a compulsory exaction of money," et cetera et cetera.

MRS OWENS: The Airservices case didn't address that particular issue. You just say they were very careful in how they dealt with that.

DR BESSELL: Yes, one of the justices were. I've had to get my mind around that case very quickly in the last week, being 153 pages long. A couple of justices delivered joint judgments - I think Kirby and one of his colleagues delivered a joint judgment - and they weren't as careful as McHugh, or perhaps they were. You know, Kirby is a very careful person and perhaps he is now saying that that is the definition of tax. But certainly against McHugh's comments, it's not - a lot of commentators have said, "This is the definition of taxation," and when you go back and have a look

at Latham's comments and the antecedent cases in that article, we came to the conclusion that he was only reciting what was already there.

PROF SLOAN: Is this some kind of intellectual and also practical vacuum that exists? In fact the cases that we've been considering are probably more the variety where the fee for service on the face of it doesn't look very closely related to the actual costs of providing that service - in other words, quite significant over-recovery. So what we have been saying is, "That looks like taxation therefore," but are you telling us that there are even problems with that sort of flow of logic?

DR BESSELL: No, not necessarily. One of my pet things is any time I see fee for service or cost recovery and taxation mentioned, the first thing I do is head into, "Now, are they saying Latham is the definition or a definition?" and so it's just a point of note, a point of clarity. Certainly I think your commission is on the right track by using his definition because it is supported by the law, by the courts, but it is worthwhile thinking, "Gee, well, there might be something else that could be created by another department that avoids this definition but it still may be taxation," whatever taxation is.

PROF SLOAN: But the practical point that's been raised by a number of participants is that if it's a fee for service and there isn't over-cost recovery, that's fine; it can be promulgated through regulation or in the legislation of the agency. But what we've been told is that where it can't be sustained is a fee for service, particularly because of over-cost recovery, that would have to be enacted in separate taxation legislation, which is why some of the agencies really are not very keen on that idea because that's more kind of parliamentary scrutiny and the like.

DR BESSELL: It sort of depends. If we're using Latham's definition as a base, it depends what then happens I think to the extra revenue that the authority receives. If it stays within the authority, then is it, within the terms of Latham's definition, for public purposes? Now, public purposes have been shown to be pretty well flowing into consolidated revenue, but I know on the other hand that Treasury doesn't like its departments or any Commonwealth authorities building up hollow logs, as they call them. I'm not quite sure - Airservices Australia, hypothetically, or the old Telecom - if they charged as much as they like and none flowed back to the Commonwealth to consolidated revenue, whether that is or is not taxation.

MRS OWENS: There's been no test of that particular issue. That's another really interesting point, isn't it?

DR BESSELL: It is. The reality is if an authority did continually overcharge for goodness knows whatever reason - - -

MRS OWENS: To get revenue.

DR BESSELL: But if they weren't spending it, why would they do that? It's an

unlikely scenario.

MRS OWENS: Build up reserves?

DR BESSELL: To do what? But in the end, what are they going to do with it?

MRS OWENS: Pay their staff more eventually. I don't know.

DR BESSELL: I suppose. You're absolutely correct - inflate their own cost levels.

MRS OWENS: Is that a public purpose?

DR BESSELL: Don't know. That's why I think an over-reliance on Latham can be dangerous.

DR STEWARDSON: So what is your definition of taxation?

DR BESSELL: I'm a humble academic and chartered accountant. In the article we wrote, it's a compulsory exaction of money.

DR STEWARDSON: Like if I come at you with a gun?

DR BESSELL: Enforceable by law, and I'm not sure a lot else. I don't know. It's one of those things that I don't think you could ever put an all-embracing definition. You'd need to look at the set of facts in front of you and look at the history of how tax arose and why it's so important, and why it has been given preference within the Australian constitution because it's a preferred law against any other law. The Senate can't start a tax bill, can't change a tax bill. Why is that? That goes back to the Magna Carta actually. It all started then. But getting your knowledge around what is an absolute tax, an all-embracing definition, I'm not sure it's actually worth the effort, again, because as soon as you think, "This is it," with all due respect to my lawyer friends, the lawyers will be out there, and the politicians, saying, "Well, that doesn't cover this, so we'll do that."

MRS OWENS: I suppose coming back to what we're trying to do in this report, I think it's just acknowledging that there is that uncertainty and for agencies to be aware of that in the context of what they are doing and make sure they have got it clear in their minds that there may be a degree of uncertainty is about as far as we can go. But I thought your point about it, the Latham definition not being the definition but possibly a definition, is a very good point.

DR BESSELL: I think if agencies stay within the spirit of Latham, you'd like to think they'd be okay. If they stayed within the spirit of not building up hollow logs, they would be okay. It's just an interesting point, I think.

MRS OWENS: Yes, okay. Your second point was about fee for service. Do you

want to get on to that one?

DR BESSELL: Yes, certainly. I'm just refreshing my memory. That's right, yes, the definition of "cost" and what is a cost is an issue, I think. In fact I think this and the last point I mentioned are closely tied up, dealing with what costs are to be included. Economists have had a big hand in this and rightly so. But in the end, economic decisions have to be turned into accounting numbers, and the notion of having some sort of rate of return for the authority in an environment where you use some other cost measure - as against the definition of cost, cost measure - other than historical cost accounting does provide a few problems, does provide a compounding effect because if your revenue is based upon some level of return on assets or whatever, in subsequent years with asset revaluation you will create extra revenue through doing nothing else, just through an asset revaluation. As a side issue I'm not even sure that asset revaluation is under deprival value, CCA, COCO, whatever method you want to adopt.

PROF SLOAN: Don't we call it DORK?

DR BESSELL: Is that deprival value, is it?

MRS OWENS: Yes.

DR BESSELL: I'm not even sure they were supported by the courts. You look at terminology used by the courts with reference to cost and they keep talking about actual, real, and the inference that Scott Henderson and I have put on those terms is that they actually mean historical costs. They mean hard cash, not some sort of manufactured amount. I'm not a lawyer but the courts seem to be genuinely interested in specifically quantifiable amounts and not amounts that this glasses case by one meant historical cost might be worth $100; by CCA might be worth 150; by deprival might be worth 120. I'm more interested in the actual dollar amounts. So as I said before, when you use some sort of asset revaluation method, you do create a revenue stream, a fee stream, on-cost recovery, but there's no extra fee for service.

MRS OWENS: I suppose there's a question of how the courts view the world and whether they would in fact see if there were decent arguments put to them for some other measure of cost that's not historical costs, whether they might accept that. For example, in the Airservices case they did accept the arguments about network costs so they did take a fairly broad, lateral view in that instance. Why wouldn't they take that broader view in terms of the types of costs to be applied?

DR BESSELL: Because my understanding of the Airservices case - my very limited understanding - is that the courts didn't have to rule on this issue. They weren't asked to decide whether those costs in fact created a compounding effect on the revenue base, and it would have been quite interesting if the plaintiff's solicitors had followed that line through. I don't think anyone has actually thought about it, that, "Gee, well, if we revalue our assets by 50 per cent or 100 per cent or

150 per cent under whatever" - well, if it's going to be deprival value, that's a variety of different methods. Generally it's either replacement cost or one of the other minor ones. That all of a sudden gives a bit of flexibility in what your fee revenue base might be. My limited knowledge of the courts is they tend not to have liked that.

I don't think there's anything wrong, as I said in my letter, with the authorities having an ability to be able to raise funds that they're going to use in the future. That to me would be commonsense, as long as they're going to be used in the future and they don't build up these hollow logs. That gets back to what we were talking about before. It would be prudent commercial practice. I don't think that would be a tax. I know with a compulsory exaction of money it talks about - sorry, fee for service, talks about some cases about delivering an identifiable specific fee to the requestor of the service.

The courts, especially in Airservices Australia, have looked at the collective users and the collective services which is common sense. As I go along to one of the government authorities, I'm really not saying to them - or with Australia Post, "Give me this stamp and I will use your specific services, pay you the money and you will do this for me." I'm really saying, "I'm using your entire organisation to have this letter delivered for me." So I think the collective approach is fine and that allows for some sort of extra revenue, some rate of return, whatever. But it's when it's coupled with asset revaluation that they suddenly get a rate of return on their rate of return.

MRS OWENS: If you've revalued the asset, is it the same service that you're getting?

DR BESSELL: You don't get anything extra.

MRS OWENS: You're not getting something that's more valuable?

DR BESSELL: I suppose it comes down to the tangibility of the service that you're getting. If Australia Post revalues all their assets it makes no difference to me.

MRS OWENS: Another cost is your labour cost. Suppose there's a wage increase, sustain labour.

DR BESSELL: That's a real outflow. There's no outflow.

PROF SLOAN: It's quite an interesting issue, I think, isn't it, because it's one of those cases where arguably what's done for a private organisation shouldn't be done for a public organisation. In other words, the historic costs are the costs which is what you're trying to recover. In the case of a private firm, I mean, they're revaluing assets, not for so much the point of view of resetting prices, because after all, prices are probably most influenced by demand than what they can get away with - - -

DR BESSELL: Absolutely correct.

PROF SLOAN: - - - is for the purposes of accounting for the value of the organisation.

DR BESSELL: Absolutely correct.

PROF SLOAN: The trouble is in the public organisation they will actually be revaluing assets and if they have a rate of return rule with their pricing - and they're monopolists not facing demand curve - you know, the kind of implications are quite different, aren't they?

DR BESSELL: Absolutely correct. In the private sector the marketplace generally sets the price. In the public sector, where they're a monopoly, it cannot be.

PROF SLOAN: You see, we've got a case where the TGA, which is the Therapeutic Goods Administration - so it's people under the FDA in America - and they own their building, including their laboratory and they actually want to sell it and they have decided it's a good idea to revalue the building - - -

DR BESSELL: Why?

PROF SLOAN: Well, whatever - in order to charge their customers higher charges because of the imputed rents or whatever in the charges, is that a kind of an example which - - -

DR BESSELL: That is. In fact I can give you a real world one without mentioning government departments. I know a government department - not a Commonwealth one, a state one - that was being supported by its government funding, like many of the utilities were, and some still are, and the government wanted to withdraw its level of funding. So to do that they needed a reason to increase prices. "Well, the cost of the services has gone up." How did they do that? They revalued the assets and increased the depreciation charge, increased the revenue flow. There's justification, "Oh, our costs have gone up whatever per cent."

DR STEWARDSON: I understand your point quite clearly but the issue does seem to be very much, "What are the courts going to do?" and there are obviously some arguments with the courts to take a different view. I'm sure I don't need to rehearse them to you.

DR BESSELL: You might have to; I'm not a lawyer.

DR STEWARDSON: No, well, I mean, they're just simply accounting arguments, commonsense ones. If the assets aren't revalued, I mean, (a) you are putting whoever the appropriate authority is or the appropriate person is, putting their name to an inaccurate balance sheet of some sort that the organisation has and (b) at some stage in the future the fixed asset is going to wear out and is going to have to be replaced

and if historical cost has been used all the time - maybe for 50 years - then there's going to be an enormous increase in the value of the fixed asset when it's replaced, an enormous increase all in one hit in the charge. Those would both seem to me to be arguments for accepting the revaluation, as indeed - which is just a normal reason for revaluing assets for accounting purposes.

DR BESSELL: I understand. It is a very common fallacy that increased depreciation as a function of asset revaluation provides the asset replacement; it does not. It is not there for that. It is there to represent the true cost of the provision of the asset. In fact when I was doing my PhD I went around to a lot of Commonwealth departments getting a feeling for all this, and I'd asked people - these are senior finance managers - what is the definition of depreciation, and they said it's an allocation of cost, and that's what it is, whether on a revalued asset or whatever. I said, "Do you think you should revalue assets?" "Yes." "Why?" "So we can provide for the replacement." Asset revaluation is not there to provide for replacement and it's there to provide the current level of costs of the organisation.

Now, I can see the arguments mounting up against me on that comment, and those arguments are true for the private sector but not for the Commonwealth, I don't think. I'm not saying I'm denying organisations the ability to provide some sort of financing facility for asset replacement. Sure you can do that by increased pricing. That's what the justices are talking about in the Airservices case, some sort of level that they can build in for future financing issues of asset replacement. It's nothing to do with accounting. It is true - absolutely true - that when you revalue assets, charge depreciation, have a rate of return and that double compounding effect, that you do get a cash build-up, and all the accounting theorists that I've ever read haven't been able to explain what to do with that.

So there is a lot of common sense in what you say but they will say that in fact what you're doing is demonstrating your true cost - what they call your true cost - and if you don't recover those, then you're not recovering your true cost. It's not an argument I have a lot of time for, mind you, that's why I'm a bit of a heretic; I sort of like historical cost.

PROF SLOAN: Is it an area though, as economists - as we are - is there a case for arguing with you in saying, "What we should really be thinking about is the opportunity costs of the asset"? because really what we've got to ask is what would otherwise be done with the money rather than have it invested in this particular activity.

DR BESSELL: I think so, but as I said earlier, in the end, they have to be converted to accounting numbers.

PROF SLOAN: Yes, exactly.

DR BESSELL: And what that then means to the definition of tax - if it wasn't for

the definition of tax, there wouldn't be a lot to talk about, I don't think. I think what you say makes eminent sense, that we are steeped in this tradition that all government revenues should be classified as tax or non-tax. If I may lead on to the third point, it is compounded further when you decide, well, what is a cost? It might be a relevant time to bring that in.

I know one of the appendices in the report talks about output-driven cost, but still I don't quite see a definition of cost somewhere. I see types of costs and how they're going to be measured. If we talk about the output, are we talking about the output of this glasses case, from specifically this glasses case, or the ability for the whole entity to operate to produce this glasses case? Then that creates some other revenue outflows that certainly have not been considered before, other than my PhD and what Scott and I did, and that is, the flow of income tax and dividends back to the government. Are they a cost to the organisation?

PROF SLOAN: It's the double counting that's the problem, isn't it? Is that what you're really saying? If you have a rate of return as well as rebutting any assets, they're double counting.

DR BESSELL: There is that, like a double dipping, if you like, but let's leave that for the time being. Let's just concentrate on: is a payment, say, of income tax and/or dividends by a government instrumentality to the government a cost to the instrumentality, especially income tax?

PROF SLOAN: It probably would be accounted thus, would it not?

DR BESSELL: I don't know. It'd be depending on what you define as cost. I mean, the organisation - and let's say Australia Post - and in this paper I've provided, I'm not picking on Australia Post, not at all, it's just a good way to demonstrate it - - -

MRS OWENS: I'm just wondering whether this is an issue that we have to worry so much about in this inquiry because we're looking at government agencies, not GBEs, and most of your paper that you've attached is really relating to GBEs, isn't it, who - - -

DR BESSELL: It is, but certainly I think the line between what is a GBE and what isn't is getting significantly grey. It's just a matter of semantics, isn't it?

MRS OWENS: We may accept that, but we're basically looking at a group of agencies that are either information agencies or regulatory agencies, and I think that they basically do have a reasonable definition. You know, we've selected the agencies that we're looking at.

DR BESSELL: Excuse my ignorance, but are they paying income tax or dividends to the government?

MRS OWENS: I don't think so.

DR BESSELL: What happens if they do?

MRS OWENS: But I don't think they are.

DR BESSELL: What happens if they will? Australia Post never used to; Telstra never used to.

MRS OWENS: But these are not GBEs. This is not Telstra, it's not Australia Post. These are regulatory agencies doing the work of government.

DR BESSELL: Yes. I'm just saying that's how they all started out, and even the GBE status, I would like to remove that point from the discussion because that's where governments are heading, I think, to make their agencies more accountable - and I don't have a problem with that - but certainly the inclusion of income tax and dividends. What about GST?

PROF SLOAN: No, I think some of these do include GST, so that's certainly in.

DR BESSELL: That's a flow-back - - -

PROF SLOAN: Yes, these are organisations that by and large don't recover a hundred per cent of their costs, so they're not actually in the game of making a profit and therefore there are no dividends from it. Some of their activities are subject to competitive neutrality, so there's that issue of income tax equivalents in their pricing, but I'm not sure they actually pay that.

DR BESSELL: See, some state governments - - -

MRS OWENS: No, I don't think they actually - - -

DR BESSELL: - - - require their agencies to pay nominal income tax, nominal taxation. It's a nice way of getting around it.

DR STEWARDSON: I don't think they do that, but I don't know about the GST.

MRS OWENS: We think quite a few of the fees are subject to GST.

DR STEWARDSON: So let's assume that some of them do pay GST; what would you say about that?

DR BESSELL: It's not much different - the reason I concentrated on income tax and dividends is you can see them come out of the P and L or what used to be called the P and L. There were taxes built into there. It's not quite as clear. If a government agency is a monopoly and has an essential service, you have to go there,

you pay $110 for a service, $10 is going to go back to the government. What's the nature of that $10? Certainly it's a tax, but have you paid $110 fee for service, or have you paid $100 plus a $10 tax?

PROF SLOAN: I think they would argue the latter very strongly.

DR BESSELL: But I think with the point of dividend and income tax - and I accept GBE is different - that I think the argument is a lot, lot stronger, especially where Australia Post was forced by the Commonwealth government to provide for a special dividend, which is something new in the terminology of the world, so the organisation was being used a bit like a conduit. That's the point I want to get to, I suppose, that are some instrumentalities being used as a conduit, where the revenue they receive is a nice, warm and fuzzy and politically correct user-pay fee for service revenue, but in fact the organisation is being used as a conduit for money into consolidated revenue. The Air Caledonie case was predicated on a similar argument - you're probably familiar with it - where the airlines were being used as a conduit. That was probably a little bit more plain sailing than my argument, I think.

MRS OWENS: I suppose it all comes back to intent, what was the government's intent in having a particular charge. Was it to provide additional revenue back to government or was it for some other purpose?

DR BESSELL: Certainly in the Air Caledonie case, that's quite relevant because the government shot themselves in the foot with their third reading speech when they said it wasn't intended to cover the revenue and it was purely revenue raising. The intent line is you can still have a revenue flow that's taxation, even though the intent was not to have taxation. I think the Homebush Flour Mills case - did you come across that case at all, Homebush Flour Mills back in the 1930s? Do you want me to tell you about it?

MRS OWENS: Yes.

DR BESSELL: It's a state based case, New South Wales, where the New South Wales government had a nice thought that any flour miller - as soon as they milled flour, the flour would vest immediately in the hands of the government for which they would pay the miller 4 pound 10. The miller would have to store the flour, be at risk at the miller, if I remember correctly, and if the miller ever wanted to use the flour again to make bread or whatever, they would then have to pay 10 pound to the New South Wales government to do so; in other words, it was costing them 1 pound 10 in the old currency - quite a genius. They argued that it was a tax, and the court looked at what were the options of the miller, and the options of the miller was to keep producing flour of course and get their 8 pound 10 but they'd have to keep storing that and that's of course untenable in the long term; one is if they wanted to do something with the flour, they had to pay it back, and the third one is to go out of business. So the court decided that there was really only one option available and that's to buy it back from the government and they said that's a compulsory exaction,

the point being that I don't think it was the government's intent to create a tax, it was the government's intent to create a revenue flow, but they hadn't thought about it being taxation. So here, you know, the user pay et cetera is nice, but surreptitiously, it could well create a taxation flow.

PROF SLOAN: It would violate our principle of course, because we're saying in our report that cost recovery should not be undertaken for the purpose of revenue raising.

DR BESSELL: A lot of statutes say that.

PROF SLOAN: Yes. But what you're saying is that even unwittingly, particularly in the context of revaluing assets, you can move quite quickly from fee for service to revenue raising which calls it a taxation, and then of course it has to be embedded in taxation legislation if that is so.

DR STEWARDSON: Have there not been any recent court cases in relation to depreciation or valuation of assets at least, where courts or even tribunals, for example, may be hearing appeals from some of the state regulator-generals about pricing by privatised utilities? Have there not been any cases that - - -

DR BESSELL: Not that I'm aware of, but I have to say I've been out of it for a year or so, doing other things at the university, hence my ignorance of this commission until relatively recently. The tax cases with state governments are few and far between these days that I've been able to pick up. I know in one government, where I've talked about what I think to some people, they are hopeful it doesn't get raised. That's not saying I'm right by any stretch of the imagination. I'm just - - -

DR STEWARDSON: Going back to the Prices Justification Tribunal, this surely must have been an issue there, mustn't it? Basically they ended up taking - under the base case with the people that they were assessing and then looking at increases - but even the base case or the increase, if there was a revaluation, surely must have raised the issue you're talking about?

DR BESSELL: No, I don't know. I know when I was going around the country and I was doing my PhD and I was putting these notions and ideas to people, certainly the Australian National Audit Office told me that, "The government can do anything it likes, can't it?" and, "It can make its own laws." This notion of being subordinate to the constitution wasn't quite filtering through. So long as it was in the act, that's all they were concerned with.

DR STEWARDSON: Because basically the PJT would have been operating for BHP Steel when it was still using FAVA.

DR BESSELL: I spoke to the old PSA and they hadn't really considered it, but I wasn't out expounding it too much. I was out asking if anything had been done. I

wasn't there to create the debate and I was just seeking evidence. It's certainly a debate that needs to be had, I would have thought.

MRS OWENS: If we come back to this issue about the courts and what they may or may not do about the valuation of assets; there are other areas in which courts get involved, like the payment of damages. In those cases, they're not using a historical cost basis for damages, it will be based on the real value of the assets, wouldn't they?

DR BESSELL: I started looking through some of those cases many years ago and I came up with one about a council somewhere in Australia and a block of toilets. I can't remember the details of the case, but compensation had to be worked out somewhere along the line 10 or 15 years after the event for these toilets and it was worked out on the basis of the historical cost of the toilets and then some opportunity cost factor, financing factor, whatever discount rate applied to it for the forgone amount since then. So it wasn't, "What is the toilet cost as at today?" it was what did it cost back then and uplift it. I don't know what happens in injury cases and damages claims these days because you need to of course look at those cases where the event and the judgment are significantly separated by time, so, no, I don't know what courts are doing.

MRS OWENS: There's a lot of interesting issues here. The other is, one of the approaches we've adopted in our report is not to look at cost recovery - or we're saying that cost recovery shouldn't be applying on an agency basis but on an activity basis - this comes back to this whole issue about taxation - and whether it would be legitimate then to over-recover on particular activities to cross-subsidise other activities, but the agency itself may not be recovering more than the overall costs of the agency but some activities may be over-recovering and others may not be. Would that be interpreted as being taxes on those particular activities where it's over-recovered?

DR BESSELL: I'd like to think not. I thought that was what some of the justices were getting at in the Airservices case in 1999, that it's a collective organisation rather than the individual parts of it. So my concern would be, okay, activity based costing is a way of allocating cost and some might argue a way of measuring it, but it doesn't say what costs, so that gets back to my point again.

MRS OWENS: That goes back to what costs.

DR BESSELL: So what costs are recoverable and then what measurement of those costs are we allowed to recover? I think any arguments about what the private sector does are futile. Time skips by; over 10 years ago, I spent a lot of time looking at the debates about why government is going to accrual accounting and everything the private sector does. Don't get me wrong, I'm not against accrual accounting. It seemed to be that the governments around the place were generally in a bit of a mess for whatever reason and, "Well, we'd better follow what the private sector does because they do it best," or better, without any specific logic, and there were lots of

significant people going around at the time, leaders of major accounting firms, saying, "The government ought to be doing this," completely ignoring the debate about whether (1) they're allowed to do it and (2) whether it's taxation, which of course is a subgroup if they're allowed to do it.

One of those people that was asking lots and lots of questions was Prof Max Aiken from La Trobe University, now emeritus professor. He was at one time assistant auditor-general for the Commonwealth. Max once wrote in a paper that the Australian National Audit Office - no, he wasn't talking about the audit office - as audits for Commonwealth agencies was going outside the audit office into the private sector world, did those private sector auditors need to consider not only were the agencies adhering to their pieces of legislation and accounting, but did they have a greater role for the constitution? Not a lot of people wanted to listen to that because they think it's too far off the planet, I've got to say, but I think he's exactly on the button. These issues have not been considered. It might well be that they are considered and the great minds around the country decide, "No, that's all right, that's not taxation," and so be it, but it's just that the debate has never been had.

PROF SLOAN: So what you're saying is that the role of an auditor of a public sector organisation should probably extend to asking the question about whether the charges that are levied actually are fee for service or whether they constitute taxation and as far as you know, that's not really a question that's generally asked by - - -

DR BESSELL: I'm sure it's not at all. Before I got involved with the university, I was a chartered accountant in a public practice and did my fair share of audit work and my responsibilities on an audit report would be, "Has this organisation complied with the law?" If it's a company, it's what was in the Corporations Law form, whatever the antecedent acts were, and that's as far as it went; if you were the auditor - and I know it's a GBE - of Australia Post, it's the Australian Postal Corporations Act, but what about the constitution, because the points rightly pointed out by the Australian Government Solicitor is that the penalty for an act that imposes taxation and other things is really harsh. It doesn't say the tax is legal or invalid, it says that's okay, but the rest of it is invalid. So if you've got a statutory authority - let's say Australia Post, and I apologise again, I know it's a GBE - if that's imposing an invalid tax, where does that leave the entity, the construction of the entity?

In the Air Caledonie case, all it meant was that the tax would stand but the rest of the amendment couldn't stand and therefore the amendment couldn't attach itself to the principal act, if my understanding is right. You'd probably know. So therefore, it's sort of lying round here in cyberspace; it's useless. But if you've got a statutory authority - and I don't know whether any of the agencies you're looking at are statutory authorities - they are imposing taxation, so they are going to be left with a tax. What about the authority? Does that still exist, because the statute created it?

MRS OWENS: I think there's a whole lot of other issues there that almost mean another inquiry.

PROF SLOAN: A fundamental issue there.

MRS OWENS: Very fundamental.

PROF SLOAN: What you're saying is that if the statute that underpins the authority is invalid, it's not a statutory authority.

DR BESSELL: Probably, but I don't know.

PROF SLOAN: It sounds logical.

DR BESSELL: I'm sure they could pass legislation retrospectively to - - -

PROF SLOAN: I'm sure, yes.

DR BESSELL: It's a bit like the excise case.

PROF SLOAN: It's certainly true I think that our inquiry has at least created in the minds of some of the managers of the agencies to ask themselves these questions and to feel a little bit worried. I mean, others have I think taken - particularly in the telecommunications area, they have gone straight for taxation legislation to be certain, but there are I think a lot of cases in the middle where the precise definition of what's going on is a bit unfair and therefore the constitutionality of it.

DR BESSELL: I suspect the reason would be political, and rightly so. Politicians don't want to be tagged with the idea of imposing new taxes, even though the imposition of that tax might be totally legitimate to make the organisation run properly; it's just unfortunate that most citizens are cynical about the term "taxation". From what I've read of the report, I think it's just terrific that these issues are now coming out.

MRS OWENS: All we can do is raise some of the issues and I think what you've raised are some quite tricky issues and we can't answer them obviously, but just make it clear that it is unclear, so long as agencies understand that and think about the issues when they are deciding how they're going to approach this, and it's also the government departments making these decisions as well.

DR BESSELL: Because, as sure as night follows day, if agencies start to make a bit of money, all above board, non-taxation, governments will then start to say, "Okay, they're operating commercially now, I think we'll get them to pay income tax or dividends."

MRS OWENS: We'll have to wait and see.

DR BESSELL: They have certainly done it in the past.

MRS OWENS: I think my colleagues have both finished with their questions. Max, would you like to make any other comments before we close?

DR BESSELL: No, I think the discussion has been terrific.

MRS OWENS: Yes, it's been a good discussion.

DR BESSELL: Yes, thanks very much.

MRS OWENS: So thanks very much for coming and making your way from the airport with great difficulty today. That concludes today's scheduled proceedings. There's no-one else here that wishes to appear, unless Laurence would like to get up and talk about taxation, so I adjourn the proceedings and we're resuming in Sydney on 7 June at 10 am.

AT 2.42 PM THE INQUIRY WAS ADJOURNED UNTIL
THURSDAY, 7 JUNE 2001

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