
The *New Bitter?* Price Exploitation under Part VB of the Trade Practices Act

Brent Fisse, Gina Cass-Gottlieb and Madura Wijewardena

*Gilbert and Tobin
Lawyers, Sydney*

This article reviews the main provisions of Part VB of the Trade Practices Act 1974 (Cth). After comparing Part VB with various forms of price regulation in Australia and elsewhere, attention is drawn to a range of key issues and their treatment under the ACCC's Price Exploitation and the New Tax System Guidelines of 9 March 2000, including compliance and evasion.

Introduction — pass through or pass out?

Price controls and prices justification measures are often dismissed by some critics as secondary or antithetical to the functioning of markets. However, their focus on market failure has always raised intriguing issues and practical challenges.¹ The same is true of the New Tax System price exploitation provisions under Part VB of the *Trade Practices Act 1974* (Cth).

The purpose of this article is to outline the main provisions of Part VB and to canvass some major features of their application.

Our approach is intended to be constructive. While Part VB raises many issues, and while much depends on how the provisions are administered by the ACCC in practice, there is no ground at this stage for dismissing the provisions as unworkable, much less as draconian. We disagree with the following allegation:

"If the proposed Goods and Services Tax legislation goes through, however, we will find competition principles and price control principles in direct conflict. Under its A New Tax System (Trade Practices Amendment) Bill, the Government intends to give the ACCC the

power to issue Guidelines as to prices which should be charged and the power to specify prices which are to be charged by individual market entities. All of this heralds in an era of price control of the most draconian kind — allegedly to ensure that the new Goods and Services Tax, if enacted, is not 'exploited'. The future, in the writer's view, will not be the 'light handed' price surveillance of the past but a reversion to World War II price control. The ACCC thus may have the philosophically inconsistent tasks of both enforcing market competition and, at the same time, price controlling industry participants."²

New Tax System price exploitation and its control under Part VB

Background to the introduction of Part VB

A New Tax System (Trade Practices) Amendment Act 1999 (Cth) amended the *Trade Practices Act* by inserting Part VB.³ The amendments prohibit price exploitation and seek to ensure that the benefits of changes to the taxation regime under the New Tax

¹ See generally Rockoff, *Price Controls* (1992); Ogus, *Regulation* (1994), ch 14; Breyer, *Regulation and Its Reform* (1982), chs 2-3; Fels, *The British Prices and Incomes Board* (1972). Economists who have taken an active interest in price controls include Taussig, Galbraith, Schultz and Fels.

² Pengilly, "Who Administers our Competition and Consumer Protection Laws?" (1999) 6 CCLJ 258 at 259. Note also, "Crack down on GST profiteers", *The Age*, 31 January 1999.

³ Complementary legislation applying the price exploitation provisions to all businesses has been enacted in the States and the Northern Territory.

System are passed on to consumers.⁴ Part VB gives additional enforcement powers to the ACCC. New remedies are provided.

Extra funding has been given to the ACCC to carry out the functions conferred under Part VB. This funding initially amounted to \$27 million over three financial years from 1999/2000 to 2001/2002. An additional \$22 million over two years has been provided under the 2000-2001 Commonwealth budget.

Competition alone has not been seen as a sufficient constraint to control the risk of profiteering from the New Tax System.⁵ By contrast, in other jurisdictions, including New Zealand, where GST or similar indirect taxes have been introduced, and where suppliers have been in a position to retain new tax savings, it has not been thought necessary to introduce special legislative protections against price gouging. Moreover, the ACCC has acknowledged that well informed, competitive markets operating in a low inflationary environment and good corporate citizenship will ensure that most businesses will act fairly and pass on new tax savings.⁶ Nonetheless, the political position taken has been that Part VB is warranted by:

- community concerns about the risk of price exploitation;
- the need to secure the co-operation of the States to a new tax regime which displaces major sources of State indirect taxation revenue;
- the high risk of price "gouging" in a context where the level of indirect tax on many goods is substantially reduced; and
- the ease with which information about new tax savings may easily be concealed from consumers.

Part VB came into effect on 8 July 1999 and applies until 30 June 2002 (the New Tax System transition period).

Key elements of Part VB

Section 75(2)AU of the *Trade Practices Act* provides that a corporation engages in price exploitation where it:

- makes a regulated supply;⁷ and
- the price of supply is unreasonably high, having regard alone to the changes under the New Tax System (whether the supply took place before or after these changes); and
- the unreasonably high price is not attributable to the supplier's costs, supply and demand conditions or any other relevant matter.⁸

The term "supplier's costs" is undefined. The Explanatory Memorandum gives this explanation:

"It is accepted that the costs faced by a supplier will vary enormously, and an all inclusive definition would be virtually impossible. A non-exclusive list of possible costs such as:

- (a) inputs into a production process such as raw materials, capital equipment, wages, and service inputs; and
- (b) costs of maintaining the place of production or service delivery such as rent, electricity and telephone charges,

is provided as examples of what might fall within the definition."⁹

The Explanatory Memorandum notes that the concept of "supply and demand conditions" is not capable of precise definition but includes supply and demand conditions in input markets as well as in the immediate market.¹⁰

The concept of "any other relevant matter" covers a potentially very wide range of considerations, including the effect of price regulation and non-reviewable long term contracts.¹¹

The ACCC is given the following new enforcement powers:

- the ACCC may issue a notice where it considers that a corporation has breached the prohibition on price exploitation, and in any proceedings by the ACCC seeking penalties or

⁴ A New Tax System (Trade Practices Amendment) Bill 1998, *Explanatory Memorandum*, p 2.

⁵ See further the critique in "Let's not waste time trying to gauge GST impacts", *Australian Financial Review*, 20 March 2000, p 21.

⁶ ACCC, Press Release, "ACCC Issues Preliminary Draft GST Pricing Guidelines for Consultation", 23 April 1999, p 1

⁷ Under s 75AT "regulated supply" means:

- (a) for the period prior to the introduction of the GST, the goods on which the rate of sales tax will be reduced on 1 July 1999; or
- (b) for the period after the introduction of the GST, the supply is a taxable supply for the purposes of the GST or would have been a taxable supply for the purposes of the GST had it not been GST-free or input taxed for the purposes of the GST.

⁸ Section 75AU(2).

⁹ A New Tax System (Trade Practices Amendment) Bill 1998, *Explanatory Memorandum*, p 5.

¹⁰ *Ibid.*, p 6.

¹¹ See further Guidelines, paras 2.55-2.56.

injunctions, such a notice will constitute prima facie evidence that price exploitation has occurred;¹²

- the ACCC may issue a notice where it considers that issuing such a notice will prevent price exploitation (the ACCC may specify the maximum price that, in its opinion, may be charged for supplies of a specified kind, made in specified circumstances, and during a specified period) — this form of notice has no evidentiary value other than to give an indication of the benchmark price for price exploitation;¹³
- the ACCC can publish guidelines as to when regulated supplies may be considered as being subject to price exploitation — these guidelines are to be published and the courts may have regard to them in proceedings brought by the ACCC¹⁴ (the first edition of the ACCC's Guidelines on Price Exploitation and the New Tax System was released on 14 July 1999, the second edition on 9 March 2000); and
- the ACCC may compel the production of information or documents relating to prices or the setting of prices¹⁵ and prices may be monitored.

Breaches of s 75AU are subject to a penalty of up to \$10 million for a body corporate, and \$500 000 for a person other than a body corporate.

Price freezing orders can be made by a court under s 80B(a). Section 80B(b) provides that a court may make an order requiring money to be refunded to victims specified in the order.

Comparison with other price control measures

The Part VB price control regime has a limited objective. It differs significantly from other well-known forms of price control (for example, wartime price controls; the former *Prices Justification Act* 1974 (Cth); the *Prices Regulation Act* 1948 (NSW); and the *Prices Surveillance Act* 1983 (Cth))¹⁶ in that the objective is not necessarily to prevent increases

in price but merely to promote the pass through of savings resulting from lower indirect taxes under the New Tax System. While the ACCC has the power under s 75AX to issue a notice specifying a maximum price, this power does not reflect a general objective of freezing prices but the much more limited objective of constraining the conduct of a company that is otherwise likely to breach the obligation to pass through new tax cost savings.

Part VB cannot sensibly be likened to general price controls of the kind relied upon in wartime to help guard against profiteering in the context of war-induced shortages. Such price controls gave rise to numerous problems, including empty shelves, rationing, evasion, black markets, costly administrative bureaucracies, prolix regulations¹⁷ and barriers to investment and innovation.¹⁸ That experience, including the lessons learned about evasive tactics, is instructive when fashioning a workable approach under Part VB. However, the extent of price control under Part VB is relatively limited and most unlikely to create shortages of the type that led to black markets, rationing and other major difficulties under general wartime price control regimes.

The limited objective of Part VB may also be compared with the much broader objectives of the *Prices Surveillance Act* 1983 (Cth). Section 17 of the *Prices Surveillance Act* empowers the ACCC to monitor prices, costs and profits in any industry or business for the purpose of reporting to the Minister. Under s 17(3) the ACCC must have regard to:

- the need to have investment and employment and the influence of profitability on investment and employment;
- the need to discourage a person in a position to substantially influence the market for goods or services from taking advantage of that power in setting prices; and
- the need to discourage cost increases from wage increases.

In further comparison, the Part VB pass through requirement differs from price cap regulation as often used in industries to constrain the prices

¹² Section 75AW. Unlike the competition notice provisions under Part XIB, the dispute-prone word "particulars" is not used.

¹³ Section 75AX.

¹⁴ Section 75AV.

¹⁵ Section 75AY.

¹⁶ Rockoff, op cit, n 1; Scott, *Prices Justification in Australia* (1975), ch 1.

¹⁷ Rockoff, op cit, n 1, gives the example from the US in World War II of a six-page regulation describing the official contents of a fruit cake — attempts to reduce the quality of fruitcakes required that the government have a precise definition in order to determine if a baker was violating the regulations.

¹⁸ See generally Rockoff, op cit, n 1.

charged by incumbents with dominant or substantial market power. The main objective of CPI-X forms of price cap regulation¹⁹ is to contain prices while also to provide a specific incentive to reduce costs through improvements in efficiency. Part VB seeks neither to impose a price ceiling nor to spur increased efficiency (for example, the required pass through of tax savings under Part VB could be achieved by a company that increased prices as a result of increased costs flowing from lower efficiency).

Pass through pricing principle and ACCC Price Exploitation Guidelines under Part VB

Statutory principle of pass through of New Tax System cost savings or new imposts

The fundamental pricing principle underpinning Part VB is that prices are not to exploit cost savings that result from the introduction of the GST and must be set so as to pass through those cost savings. Where the GST does not replace sales tax but is an additional cost, the parallel principle is that prices should not increase by more than the amount of the GST. The ACCC Guidelines of 9 March 2000 state that:

“prices should not increase by more than the amount of a tax rise and should fall by at least the amount of any tax fall in any market.”²⁰

Pricing assessment guidelines under ACCC Preliminary Draft Guidelines

The ACCC Preliminary Draft Guidelines of 23 April 1999 advanced several guidelines for the assessment of prices under Part VB. The two main guidelines were:

1. The net profit margin implied by prices and costs incurred in the supply of a particular good or service should not increase as a result of the New Tax System changes alone. The price and net profit margin of a particular good or service applying immediately before the date of introduction of the GST will generally be taken

as the pre-GST price and margin for the purpose of assessing the price on the introduction of the GST.

2. If the net profit margin is changed, the reasonableness of that change will be assessed by applying a competitive market test. Any change should be consistent with what would be expected in a competitive market. Inappropriate advantage is not to be taken by a supplier, or by suppliers together, of a high degree of market power.

As amplified below, these Preliminary Draft Guidelines raised two major issues:

- the consistency or otherwise of the net profit margin guideline advanced in the Guidelines with the concept of price exploitation under s 75AU; and
- the consistency or otherwise of the competitive market guideline proposed in the Guidelines with the concept of price exploitation in s 75AU.

Net profit margin test under ACCC Preliminary Draft Guidelines, as later abandoned under first and second editions of Guidelines

The Preliminary Draft Guidelines stated that:

“The net profit margin implied by prices and costs incurred in the supply of a particular good or service should not increase as a result of the New Tax System changes alone.

The net profit margin will be assessed as a percentage of costs or of sales exclusive of indirect taxes, unless a supplier is able to demonstrate that exceptional circumstances justify a different approach to net profit assessment.

Use of a percentage margin test is consistent with the Government’s modelling of the expected impacts of the New Tax System changes, allows for the impact of changes in working capital as a result of the tax changes, is consistent with the cost impact of volume movements, and is in line with common industry practice.²¹

¹⁹ See further Bishop, Kay and Mayer, *The Regulatory Challenge* (1995), ch 15.

²⁰ Para 1.34.4. Compare Bierce’s more orthodox construct of price, that “price” means value plus a reasonable sum for wear and tear of conscience for demanding it (Bierce, *The Devil’s Dictionary*).

²¹ This claim seems rather doctrinaire; contrast Dolan and Simon, *Power Pricing* (1996) generally and specifically at pp 37-38 where cost-plus pricing is criticised as being inconsistent with profit maximisation and sensible commercial practice.

The price and net profit margin of a particular good or service applying immediately before the date of introduction of the GST will generally be taken as the pre-GST price and margin for the purpose of assessing the price on the introduction of the GST.”²²

It is unclear from the Preliminary Draft Guidelines whether the guidance given above was intended to apply to the application of s 75AU(2)(b) or 2(c)(i)(ii) or (iii), or to each and every one of these provisions. As amplified below, there is no statutory basis for the constancy of net profit test advanced in the Preliminary Draft Guidelines.

Section 75AU(2)(b) requires that the price be unreasonably high “having regard alone to the New Tax System changes whether the supply took place before or after those changes”. The test under this limb requires that the price charged be unreasonably high in that the difference between the price and that before the New Tax System came into effect does not reflect the net cost saving that flows from the application of a lower rate of indirect tax. It is sufficient for this purpose to examine the relative costs of the former indirect tax and the new indirect tax. The fact that the net profit margin may have increased is beside the point under s 75AU(2)(b), as is evident where efficiency savings have emerged since the setting of the old price. Assuming that the efficiency savings result in a higher net profit margin, there is nothing in s 75AU(2)(b) that requires those efficiency savings to be passed through: to have regard to efficiency savings would not be to “have regard *alone* to the New Tax System changes”. (emphasis added)

Section 75AU(2)(c) requires that “the unreasonably high price is not attributable to all or any of the following:

- (i) the supplier’s costs;
- (ii) supply and demand conditions;
- (iii) any other relevant matter.”

The test in relation to (i) is whether the unreasonably high price is attributable to an increase in the cost of supply. It is difficult to understand why the focus of inquiry under this provision should move away from the extent of any increase in the cost of supply to the separate question of constancy of net profit margin (which is not referred to in the section): if the price is

attributable to an increase in cost of supply then it is irrelevant whether or not the net profit margin has remained the same.

The test in relation to (ii) is whether the unreasonably high price is attributable to a change in supply or demand conditions. Constancy of net profit margin in this context is inconclusive. As was recognised in the Preliminary Draft Guidelines themselves, a change in supply or demand conditions may well justify an increase in net profit margin.

The test in relation to (iii) is whether the unreasonably high price is attributable to “any other relevant matter”. Here, a constancy of net profit margin guideline begs the question of whether or not an increase in profit margin can be justified under this provision on various possible commercial grounds other than increased cost of supply or change in supply or demand conditions. These additional possible commercial grounds include the stage of the product in its life cycle and short- and long-run factors on costing and pricing.²³ There is no reason to suppose that such grounds are irrelevant under s 75AU(2)(c)(iii). The limited objective of Part VB is to secure pass through of the cost savings resulting from the introduction of a new indirect tax system. It is not to force companies to adhere to a new regime of constraints on pricing that go beyond the narrow bounds of the statutory pass through principle.

The constancy of net profit margin guideline in the Preliminary Draft Guidelines smacked of a curious assumption that s 75AU is intended to serve as a price justification mechanism akin to that under the former *Prices Justification Act*. Had Parliament intended such a price justification mechanism to be introduced in the transition period of the New Tax System then s 75AU would have been worded differently. The terms of the prohibition would have been cast in a form consistent with the before and after comparison of net profit margins typical of historically-based price regulation.

Moreover, the constant net profit margin test under the Preliminary Draft Guidelines took a simplistic approach to the relationship between

²² At p 4.

²³ On the range of factors that are relevant to pricing see Horngren, Foster, Datar, Black and Gray, *Cost Accounting in Australia* (1996), ch 12; Usry and Hammer, *Cost Accounting* (10th ed. 1991), Pt 5; *Costing and Pricing* (Managing the Small Business Series No 42, AGPS 1990); Dolan and Simon, *Power Pricing* (1996).

prices, marginal costs and profit margin. The relationship is complex. Thus, empirical evidence shows that price movements are generally lethargic or sticky in response to market changes affecting marginal costs.²⁴ This applies to both upward and downward movements in marginal costs and prices.

The constancy of net profit margin guideline has been excised from the first and second editions of the ACCC Price Exploitation Guidelines and has been replaced by a net dollar margin rule and a 10 per cent price increase rate.²⁵ This approach is likely to simplify the application of Part VB and thereby reduce the enforcement burden for the ACCC and corporations.

The net dollar margin rule is that businesses should not increase the net dollar margins on their goods and services as a result of the New Tax System changes alone.²⁶ The net dollar margin rule implies that prices should increase by no more than the dollar rise in costs. If costs fall, prices should at least fall by the same dollar amount.²⁷ No mark up is to be applied to the GST component of price. Examples of the application of the net dollar margin rule are given in Appendix 2 to the Guidelines.²⁸

Businesses need not incur a decrease in net dollar margin as a result of the New Tax System changes alone. Moreover, unlike the position under the net profit margin rule ventured in the Preliminary Draft Guidelines, the effect of the net dollar margin rule will often be to increase the net percentage profit margin.

The price rule is that "no price should rise by more than 10 per cent as a result of the New Tax System changes alone".²⁹ This rule has been the subject of some controversy.³⁰ It is difficult to accept that the 10 per cent price rule reflects the statutory provisions. Prices may increase by more than 10 per cent if justified under s 75AU(2)(c).

The price rule relates to the threshold unreasonably high price test under s 75AU(2)(b) and does not affect the operation of s 75AU(2)(c). The questionable statutory validity of the 10 per cent price rule in this respect invites litigation.

Competitive market test under ACCC Preliminary Draft Guidelines, as largely abandoned under first and second editions of Guidelines

The Preliminary Draft Guidelines stated that:

"Changes in demand may result in margin changes. However, in assessing the reasonableness of margin changes the Commission will apply a competitive market test. That is, the Commission will consider whether any change in margin is consistent with what would be expected to occur in a competitive market. In making this assessment the Commission will assess whether a supplier or suppliers together are likely to possess a high degree of market power which may allow them to take inappropriate advantage of the New Tax System changes."³¹

This interpretation introduced a test of reasonableness of margin change, based on the benchmark of a competitive market. Such a test is inconsistent with s 75AU. The test of price exploitation under s 75AU has two elements, both of which must be satisfied before there is any breach of the section. As discussed below, neither element embodies a test of reasonableness of margin change or a competitive market benchmark:

The first requisite element (under s 75AU(2)(b)) is that the price is unreasonably high "having regard alone to the New Tax System changes". The test under this limb requires that the price charged be unreasonably high in that the difference between the price and that before the New Tax System took effect does not reflect the net cost saving that flows from the application of a lower rate of indirect tax. Such a test does not entail an examination of the reasonableness of otherwise of margin changes.

The second requisite element is that the unreasonably high price is not attributable to all or any of the following:

²⁴ Blinder, Canetti, Lebow and Rudd, *Asking About Prices: A New Approach to Price Stickiness* (1998).

²⁵ Profit margins remain relevant in the context of prices monitoring: see Guidelines, paras 2.40, 2.41. Margins are also relevant when assessing the effect of supply and demand conditions under s 75AU(2)(c): Guidelines, para 2.54.

²⁶ Guidelines, para 2.14.

²⁷ Guidelines, para 2.15.

²⁸ These examples are not exhaustive. For instance, Example 7 sets out one way of treating refunds and hardly precludes alternative approaches that are consistent with the net dollar margin rule.

²⁹ Guidelines, para 2.20.

³⁰ See, for example, "Business at odds with GST", *Australian Financial Review*, 17 January 2000, p 1.

³¹ At p 5.

- (i) the supplier's costs;
- (ii) supply and demand conditions;
- (iii) any other relevant matter.

This limb of s 75AU(2) does not entail an examination of the reasonableness or otherwise of margin changes. Thus, the test in the context of supply and demand conditions under (ii) excludes liability where the cause of the unreasonably high price as determined under the first requisite element (s 75AU(2)(b)) is a change in supply or demand conditions, as distinct from an attempt by a company simply to ramp up its prices in order to exploit the cost savings that flow from a change in the rate of indirect taxation. Provided that a company does pass through the reduction in indirect taxation by including that component in its pricing, s 75AU does not prevent it from using its market power to extract a profit margin that it would be unable to extract in a competitive market. It is clear from the Explanatory Memorandum, as well as from the wording and context of s 75AU, that the new price exploitation provisions are not aimed broadly at controlling excessive prices but serve the much more limited objective of requiring the pass through of savings resulting from lower indirect taxes under the New Tax System.

The competitive market test advanced in the Preliminary Draft Guidelines seemed to reflect an assumption that s 75AU is intended to serve as a price justification mechanism akin to that under the former *Prices Justification Act*. Any such assumption would be misguided. Had parliament intended such a price justification mechanism to be introduced in the transition period of the New Tax System, then s 75AU would have been worded very differently. The prohibition would have been couched in terms of excessive pricing attributable to market power or to exploitation of sudden major shifts in demand and supply conditions (for example, as experienced for repairs in the wake of the Sydney hailstorm in April 1999).

The competitive market test guideline under the Preliminary Draft Guidelines has been revised and heavily downgraded by the ACCC in the first and second editions of the Guidelines.³² Competitive market comparisons remain relevant under the Guidelines in limited contexts, including prices

monitoring³³ and when assessing supply and demand conditions and other matters under s 75AU(2)(c). This approach is likely to simplify the application of Part VB and thereby reduce the enforcement burden for the ACCC and corporations. This is particularly so given the chequered history of attempts to apply a competitive market benchmark in the context of price controls and the well known difficulty that has been experienced in applying much the same concept in the context of misuse of market power under s 46 of the *Trade Practices Act*.

Compliance Issues

Costing and pricing methodology

The efficacy or otherwise of Part VB will much depend on the compliance efforts of corporations, especially the extent to which costing and pricing methodology is modified in the way necessary for any given company to achieve compliance with the statutory pass through principle. The design and application of Part VB raise various practical issues as signalled in the comments below.

What is the ACCC's expectation in terms of compliance measures?

The ACCC Guidelines of 9 March 2000 state that: "The ACCC expects that businesses will be able to justify in specific terms any change in prices resulting from the New Tax System changes."

The Guidelines add that it would be prudent for businesses to retain records of the basis on which pricing decisions were made during the transition period, as well as the impact the New Tax System changes had on those decisions.

This focus on the need for justification seems to understate the difficulties that are likely to arise in practice.

Assume that a company has had an inexact costing and pricing methodology and has relied on "seat of the pants" or "peanut-butter" techniques.³⁴ Relying on such techniques once Part VB takes effect will make the company vulnerable to liability for breach of s 75AU. Unless the new tax cost savings are computed exactly and reflected in the prices charged for each particular product subject to

³² But see the hangover apparent in Guidelines, para 4.9.

³³ See Guidelines, paras 4.12-4.13

³⁴ See Horngren et al. op cit n 23, ch 4.

indirect tax under the old tax system, there is an almost inevitable risk of breaching the statutory pass through requirement.

Do companies, especially smaller companies, fully understand what Part VB will mean for their cost accounting and pricing methods? There should be no illusion that, if Part VB is to be taken as seriously as is plainly intended by the government, the pass through principle means that all companies will require precise techniques of measurement and the systems required to charge prices that reflect the new tax savings component. For most companies this will require significant changes to accounting processes and a dependency on costing data from suppliers who also need to modify their accounting processes.

It is worth recollecting the experience under the former s 49 price discrimination prohibition under the *Trade Practices Act*. The costing required for the cost justification defence under s 49(2)(a) was found to be impractical because companies typically adopted a rough and ready approach that fell well short of the exactitude of cost accounting required to get home under the defence.³⁵ Section 49 laid an ambush for all but the more assiduous of "bean counters" and was abolished partly for this reason. While cost justification under s 49 was more complex than new tax cost saving pass through under s 75AU, the s 49 experience highlights the gap that can exist between economic theories of pricing and actual pricing practices in commerce and the need to manage expectations accordingly.³⁶

Given the above realities, it is questionable whether the ACCC Guidelines send a sufficiently clear and emphatic signal about the need for modifications to cost accounting and pricing methodologies. Emphasis needs to be given to the systems or procedural dimension of compliance, and in particular the need for actual implementation of costing and pricing methodologies and software capable of delivering the pricing changes required under Part VB.

The need for changes in cost accounting and pricing methodologies imposes significant compliance costs on companies. The Treasurer

expressed the view that the compliance costs for businesses under a GST will be marginal on the basis that the compliance requirements are the same as the existing income tax and accounting requirements.³⁷ This proposition is difficult to reconcile with the views often voiced by the business community.³⁸

The Guidelines envisage that businesses will seek to recover "reasonably incurred, net additional compliance costs directly related to the New Tax System changes".³⁹ Compliance costs are to be allocated to specific goods and services in accordance with existing cost allocations methods.⁴⁰ However, inflation of compliance costs is strongly discouraged. The Guidelines state that no price may increase by more than 10 per cent as a result of the New Tax System changes, "including the effect of any net compliance costs".⁴¹ This edict has been the subject of some heated debate.⁴² It is difficult to understand how s 75AU precludes a price increase of more than 10 per cent by reason of additional compliance costs *if* it can be shown that the price increase is justifiable. However, as the Guidelines point out, additional compliance costs may be offset partly or wholly by New Tax System benefits to business, including cash flow benefits from monies collected in advance of payment of GST liability.⁴³

The Guidelines state that protecting customers from excessive price rises partly involves "keeping any costs of compliance with the price oversight regime to a minimum".⁴⁴ This exhortation seems rather schizophrenic given the importance the ACCC rightly attaches to effective compliance initiatives. It also has a price control overtone that lacks apparent statutory justification.

Enforced self-regulation?

A major concern about Part VB is the enforcement effort needed if s 75AU is to have teeth.

³⁵ See Blakeney, *Price Discrimination Law* (1983), ch 8. Taggart, *Cost Justification* (1959) (under the US' *Robinson-Patman Act* 1936).

³⁶ See further Dolan and Simon, *Power Pricing* (1996); Legge, *Pricing Strategy* (1995).

³⁷ Hon P Costello (Department of Treasury), Regulation Impact Statement for the Introduction of a Goods and Services Tax, 1998, p 3.

³⁸ See, for example, "Corporates face \$4bn taxing issue", *Sydney Morning Herald*, 18 January, 2000, p 36.

³⁹ Para 2.28.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² See, for example, "The price is right for Costello" *Australian Financial Review* 21 March 2000, p 19.

⁴³ Para 2.29.

⁴⁴ Para 1.30.

It has been estimated that 1.6 million suppliers at the retail and the wholesale level will be subject to the new taxation regime. While the ACCC has been given considerable additional resources to enforce Part VB, the task ahead is challenging in the extreme.

Faced with this challenge, the ACCC has been quick to stress the importance of self-regulation. The Guidelines set out a voluntary statement of compliance program for businesses with annual turnovers exceeding \$100 million,⁴⁵ and project the need for compliance programs to be in place. Nonetheless, it may be wondered why the ACCC has been given prime responsibility for spurring self-regulation. An alternative and arguably more effective approach would have been to include enforced self-regulation obligations in Part VB, with the backing of penalties for non-compliance with those obligations.

An enforced self-regulation model,⁴⁶ if incorporated in Part VB, would have the following main elements:

- an obligation on the part of all corporations to prepare a compliance statement setting out their plans for achieving timely and effective compliance in accordance with certain prescribed parameters, including any necessary changes proposed to cost accounting and pricing methodology for the purpose of assessing and charging prices that comply with the statutory pass through principle under s 75AU;
- an obligation to produce the compliance statement at short notice to the ACCC if so required;
- an obligation to notify the ACCC of any changes to the plan;
- an obligation to comply with the plan except to the extent notified to the ACCC unless the ACCC disallows the notification within a specified period.

The main potential advantages of an enforced self-regulation approach would be:

- the need for all companies to develop effective compliance systems in advance would be clearly and emphatically projected, consistently

with the government's stated commitment to the pass through principle under s 75AU;

- enforcement by the ACCC would be facilitated given that:
 - the uncertainty and unfair discrimination to which "voluntary" self-regulation is prone would be largely avoided, and the ACCC would have a more effective bargaining chip when dealing with companies than the limp incentive of merely being able to say that "where a company adopts effective compliance strategies there is a reduced risk of legal action";⁴⁷
 - companies would retain flexibility in their approach to pricing while having to commit themselves to specific compliance programs;
 - compliance statements of the kind suggested would generate a wider range of useful examples and information about costing and pricing methodologies for use by the ACCC and by businesses generally.

While the ACCC has the power and can be expected to use s 87B undertakings as an avenue for enforced self-regulation, such an approach is limited in reach and begs the question of why the model of enforced self-regulation should not apply to all corporations or indeed to all businesses that make a regulated supply (see s 75AU(2)).

Substantial compliance and de minimis breaches — any safe harbour?

The concept of price exploitation as defined in s 75AU and as elaborated in the Guidelines requires a level of costing precision that seems to leave little room for error or approximation. There must be a full pass through of the new tax cost savings in relation to each particular product. Limited latitude is allowed under the Guidelines for rounding up and averaging over products or over time.⁴⁸

The ACCC will be expected to exercise its enforcement powers sensibly in instances of de minimis violations of s 75AU. However, is there any safe harbour as a matter of law?

There does not appear to be much force in the argument that the term "unreasonably high" imports

⁴⁵ At p 6.

⁴⁶ See further Ayres and Braithwaite, *Responsive Regulation* (1992).

⁴⁷ Guidelines, para 4.7.

⁴⁸ Paras 2.32-2.36. Query whether more scope is permissible under s 75AU(2)(c).

some margin for error. Nor would it seem wise to assume that the concept of "costs" of supply in s 75AU(2)(c)(i) can be successfully manipulated by the artifice of ensuring that margins for error are specified in a company's internal cost accounting procedures.

In sensitive hands, the catch-all category of "any other relevant matter" in s 75AU(2)(c)(iii) could be interpreted so as to carve out an exemption for minor discrepancies, inevitable accidents, errors stemming from problems beyond a company's control and the like. However, this aspect of s 75AU is not covered in the Guidelines.

Disclosure and misleading statements

The Minister for Financial Services and Regulation has contended that the enforcement regime will have 13 million enforcement officers, namely the consumers of Australia.⁴⁹ However, there are no statutory disclosure obligations in Part VB that require consumers to be given the information they would need to make an informed decision.⁵⁰ Emphasis has been placed on deterring misleading statements about the effect of the New Tax System changes.

Given the importance of disclosure as a regulatory mechanism, especially in a context where the task of enforcement is so huge, it is difficult to fathom why specific disclosure obligations have not been included in Part VB. It is far from obvious that disclosure requirements would be too prescriptive or too inflexible. Such concerns could be managed by adopting an enforced self-regulation model⁵¹ under which companies are required to prepare a plan indicating how they propose to disclose the basis of changes in pricing (or at least before and after prices) to customers, subject to some specified parameters including limitations on the period of permissible dual ticketing.⁵²

The Guidelines focus on misleading statements about GST-related pricing issues, with due reference to the application of ss 52, 53 and 53C of the *Trade Practices Act*. A variety of issues are covered. For example, when prices are displayed

they should be GST inclusive.⁵³ Auction prices may be GST inclusive or GST exclusive as long as the basis of the bidding is made known at the beginning of the auction. If used, dual ticketing (an up until 30 June 2000 price and a price to apply from 1 July 2000) should be removed as soon as possible after 1 July 2000 and in any event within one month.⁵⁴

The guidelines on misleading price claims or price display are not guidelines "about when prices for regulated supplies may be regarded as being in contravention of" the price exploitation prohibition in ss 75AU(2), and hence are not guidelines within the meaning and scope of ss 75AV.

Political concern about misleading GST-related claims, especially those seeking to induce purchases to be made before 1 July 2000, has recently led to the enactment of s 75AYA. This section prohibits false representations about the effect or likely effect of the New Tax System changes and misleading or deceptive conduct about the effect or likely effect of those changes. Breach of s 75AYA is subject to civil penalties on the same scale as for breaches of Part IV. This piecemeal reform reflects the hope that a radical increase in financial penalties will make up for limited enforcement resources.

Evasion?

Price control measures are notorious for inviting feats of attempted evasion⁵⁵ and doubtless some "rogue" companies have Part VB in their sights.

Potential evasive tactics include:

- increasing prices before the prohibition under s 75AU comes into effect so as to elevate the base price against which later changes will be assessed under s 75AU;
- recosting upwards of current products, as by means of revaluation or reallocation of joint or common costs;⁵⁶
- replacing an existing product with a new product or an enhanced product, with a new set

⁴⁹ Para 3.7.

⁵⁴ Para 3.17.

⁵⁵ See generally Rockoff, *op cit.* n 1; Clinard, *The Black Market: A Study in White Collar Crime* (1952); Ogus, *Regulation* (1994), p 302.

⁵⁶ On the arbitrariness of allocation of joint and common costs see Horngren et al. *op cit.* n 23, ch 16; Breyer, *op cit.* n 1, pp 52-56; Fels, *op cit.* n 1, pp 208-210; Sievers and Alberty, "Strategic Allocation of Overhead" (1992) 60 *Antitrust LJ* 757. On creative high costing, see Stubbing, *The Defense Game* (1986), ch 10.

⁴⁹ Minister for Financial Services and Regulation, Press Release, 18 February 1999.

⁵⁰ See generally Ogus, *Regulation* (1994), ch 7.

⁵¹ See further Ayres and Braithwaite, *Responsive Regulation* (1992) and discussion above of relevance of this model in relation to costing and pricing methodologies.

⁵² Compare Guidelines, para 3.17.

- of costings;⁵⁷
- eliminating a product as a separate product and incorporating the item within a new bundle with its own costings;⁵⁸
- unbundling a product and recosting upwards the new separated products;
- reducing quality;⁵⁹
- manipulating underlying costs by means of transfer pricing whereby an Australian business pays higher costs as a result of increases in the price of those inputs by a related offshore entity;⁶⁰
- reducing costs without lowering the price set initially to reflect the pass through of new tax cost savings;
- undergoing a corporate reconstruction resulting in the emergence of different products or similar products with increased profit margins.⁶¹

Not all of the above evasive tactics are necessarily unlawful under s 75AU, as where the recosting of inputs is genuine and hence legitimate under s 75AU(2)(c)(i). However, deviance beckons.

The risk of evasive tactics has been anticipated and countered by an array of controls and disincentives, notably:

- an amendment to s 75AU(2)(b) which now applies whether the supply took place before or after the New Tax System changes;⁶²
- extensive price monitoring powers (s 75AY);
- high penalties (the s 76 maxima apply to a breach of s 75AU, including \$10 million for a corporate breach);
- individuals will be subject to liability for being knowingly concerned in a breach of s 75AU and the ACCC can be expected to target senior management as part of its enforcement

- campaign;
- facilitation of proof of violation by means of a s 75AW notice (such a notice is prima facie evidence of a breach of s 75AU);
- suspected overcharging can be publicised and officially discouraged by means of a s 75AX maximum price notice;
- s 87B undertakings apply and give the ACCC considerable power to fashion preventive and remedial conditions;
- price freezing orders can be made by a court under s 80B(a);
- refund orders can be made by a court under s 80B(b);
- advisers are likely to be cautious, especially given the action taken by the ACCC in 1999 against a lawyer in Perth and the attendant publicity.⁶³

Conclusion — a new rational actor standard?

The price exploitation provisions under Part VB of the *Trade Practices Act* raise many issues of interpretation and application. While the latest ACCC Price Exploitation Guidelines help to settle the dust, they do not resolve all the concerns facing businesses. Those concerns include the difficulty of accounting for costs with the precision apparently expected under Part VB, the challenge of introducing systems capable of achieving effective compliance, and the lack of safe harbours in law for those who take reasonable care yet still slip up. More fundamentally, much of Part VB seems to be built upon a neo-economic precept of rational and meticulous action, a standard of conduct to which few Australians willingly aspire. Sensitive enforcement is therefore all the more necessary.

⁵⁷ Consider Breyer. *Regulation and its Reform* (1982), pp 63-64.

⁵⁸ Consider Breyer, *ibid*, p 68.

⁵⁹ Consider Breyer, *ibid*, pp 68-69.

⁶⁰ Transfer pricing is however subject to the constraint of anti-avoidance measures in Division 13 of Part IVA of the *Income Tax Assessment Act* 1936. Documentation and methodology issues are canvassed in, for example, Taxation Ruling 98/11.

⁶¹ See Rockoff, *op cit*, n 1. (the start up of new enterprises has to be monitored and controlled because of the danger that new enterprises might be sophisticated attempts to circumvent controls).

⁶² Under *A New Tax System (Indirect and Consequential Amendments) Act* 1999.

⁶³ "Fels swoops on lawyer for TPA breach". *Australian Financial Review*, 10 May 1999, p 3. The Guidelines explicitly convey this warning: see para 1.15