

Prices oversight

Background

- 3.1 A second strand to the ACCC's work is its prices oversight responsibilities. Prices oversight encompasses:
- ...a range of instruments used by governments to examine, monitor, influence or control pricing by businesses. The principal instruments for prices oversight... [price control, price notification, price monitoring and inquiries into pricing] vary in their degree of intrusiveness on the operation of businesses.¹
- 3.2 Australia has a long and complex history of prices oversight by both State and Commonwealth governments stemming from government imposition of controls during wartime to prices oversight now being part of competition policy.² In this context prices oversight focuses on pricing by firms with substantial market power in important markets. It is seen as a last resort facility if the market does not operate.
- 3.3 Traditionally there had been doubts about the Commonwealth's constitutional powers to directly control the prices of goods and services but it appears to be now generally recognised that the corporations power in the Constitution is adequate (section 51(xx)).³

1 Productivity Commission. March 2001a. *Review of the Prices Surveillance Act 1983: Draft report*. <http://www.pc.gov.au/inquiry/psa/draftreport/psa.pdf> p 2.

2 For a detailed history see: Productivity Commission. March 2001a, op. cit. pp XV-XVI and 11-31; and ACCC. June 2000. *Submission to the Productivity Commission review of the Prices Surveillance Act 1983*. <http://www.pc.gov.au/inquiry/psa/subs/sub010.pdf> pp 3-27.

3 Productivity Commission. March 2001a, op. cit. p 12.

Current prices oversight powers of the ACCC

- 3.4 The current prices oversight powers of the ACCC mainly are embodied in the *Prices Surveillance Act 1983* (PS Act) - the only general Federal pricing legislation⁴. There are also powers under the *Trade Practices Act 1974*, that is, under Part IIIA in relation to access regimes, Part VB - price exploitation in relation to New Tax System (NTS) and the ACCC's review powers of a range of price controls on Telstra under Parts XIB and XIC - Telecommunications. Informal monitoring of prices also is undertaken by the ACCC.

Prices Surveillance Act 1983

- 3.5 The PS Act :

...enables the ACCC, where the Government declares products or services, to examine prices with the objectives of promoting competitive pricing wherever possible and restraining price rises in markets where competition is less than effective.⁵

- 3.6 The PS Act does not give the ACCC powers of price control rather compliance is voluntary. '...Moral suasion through publicity, and the threat of the minister initiating an inquiry, are the principal enforcement mechanisms under the Act...'⁶

- 3.7 The Productivity Commission (PC) has reviewed the PS Act in association with the reviews of the national access regime and telecommunications competition regulation.⁷ In its draft report on the PS Act the PC found that the Act overlaps with other regulatory regimes and has a number of deficiencies.

...It does not have clearly defined objectives...it is too easy to implement price notification - an indirect form of price control - without proper investigation...inquiries under the Act are not required to consider relevant policy options and there is insufficient guidance as to the role of price monitoring.⁸ [and]

4 ACCC. June 2000, op. cit. p 11.

5 ACCC. May 2000. *Summary of the Trade Practices Act 1974: and additional responsibilities of the Australian Competition and Consumer Commission under other legislation*. Canberra, ACCC, p 75.

6 Productivity Commission. March 2001a, op. cit. pp 3-4; and see also ACCC. June 2000, op. cit. p 16.

7 Productivity Commission. March 2001b. *The access regime: Position paper*. <http://www.pc.gov.au/inquiry/access/positionpaper/access.pdf> 346p; and Productivity Commission. March 2001c. *Telecommunications competition regulation: Draft report*. <http://www.pc.gov.au/inquiry/telecommunications/draftreport/index.html>

8 Productivity Commission. March 2001a, op. cit. p I.

...the regulator is the primary adviser on the need for prices oversight.⁹

- 3.8 In commenting on the review to the committee the ACCC said: the PS Act needs modernisation not abolition; former government business enterprises with monopoly power need some independent regulation of their prices; prices oversight is a 'last resort' where other pro-competitive reforms are not feasible; and it sees a role for price regulation backed by strong powers to ensure compliance.¹⁰
- 3.9 The ACCC's pricing actions under the Act are through declaration, monitoring or inquiry. These areas are discussed below. The PC reported that on a spectrum of prices oversight instruments available to government from direct prices control to light handed price monitoring, the notification and inquiry functions under the PS Act can be seen as intermediate instruments.¹¹

Declarations and the price notification process

- 3.10 Declaration is by the Minister or the ACCC with the approval of the Minister. Under a declaration companies have to notify the ACCC of price increases. Areas where declarations currently exist are: harbour towage, Australia Post ('reserved services' where Australia Post has a legislated monopoly), Airservices Australia and airports (where price regulation is by a price cap).¹²
- 3.11 In addition to the concerns raised above, in its submission to the review of the PS Act the ACCC itself raises the following concerns with the current notification regime:
- reliance on voluntary compliance with ACCC decisions, particularly a concern since 1998 when Waratah Towage Pty Ltd failed to comply with the ACCC's determination - the only occasion on which non-compliance has occurred;
 - the ACCC's information gathering powers are not strong enough to get the information it needs from firms to consider a price notification;
 - the time for assessing price notifications is difficult to achieve (21 days) and the Act does not set out clearly the actions that the ACCC can take in response to a price notification;

9 Productivity Commission. March 2001a, op. cit. p XIX.

10 Evidence p 61 and Submissions p S27 (ACCC)

11 Productivity Commission. March 2001a, op. cit. p XV.

12 ACCC. June 2000, op. cit. pp 11-12.

- the wording of the Act is not in 'plain english' and the criteria to assess notifications and section 20 directions are outdated; and
- the Act is not well structured to enable a range of means of assessing prices that may include CPI-X or rate of return regulation.¹³

Inquiries into pricing

- 3.12 Under the PS Act the Minister can direct the ACCC to hold an inquiry into specified matters and report its findings to the Minister, who then makes decisions on the recommendations. Companies are liable to a penalty if they increase prices during the inquiry without approval from the ACCC. The inquiry body normally has powers to obtain information and summons witnesses. Key examples of inquiries are the numerous government inquiries into the petrol industry over the last decade.¹⁴
- 3.13 Concerns are raised in the PC's review about how inquiries are undertaken. These include: time taken; cost; reporting time; not required to consider relevant policy options; make reasons for recommendations publicly transparent; and difficulties of establishing the efficiency and effectiveness of such inquiries etc.¹⁵

Price monitoring

- 3.14 When directed by the Minister the ACCC also has the power to monitor prices, costs and profits of a company or industry and report to the Minister the results. Monitoring can provide a better understanding of the workings of markets. Industries currently being monitored by the ACCC are container stevedoring companies and airport services (airport services not covered by the price cap where airport operators could be expected to exert significant market power).¹⁶
- 3.15 As well as the general criticism highlighted above, the PC's review also points to the following more specific concerns with the monitoring process: the objectives of monitoring not specified; the indicators for monitoring are not disclosed; the need for more rigorous time limits on monitoring; the need for greater control on who initiates the monitoring; and the danger that monitoring could approach de facto price control; etc.¹⁷

13 ACCC. June 2000, op. cit. pp 28-34.

14 Productivity Commission. March 2001a, op. cit. p 15.

15 Productivity Commission. March 2001a, op. cit. XXIII and 88p.

16 ACCC. June 2000, op. cit. p 12.

17 Productivity Commission. March 2001a, op. cit. XXIII and 88p.

- 3.16 Of particular interest at the committee's hearings was the recent completed monitoring of the leviable milk products.¹⁸ Following dairy deregulation the Minister for Financial Services and Regulation asked the ACCC to formally monitor prices, costs and profits of businesses dealing with market milk product sales. The monitoring was to start on 8 July 2000 and end six months later. The ACCC used financial performance data from milk processors and major supermarket and convenience chains selling milk products as well as commissioning several price surveys.¹⁹
- 3.17 The results indicated that 'Since deregulation, most Australians have access to low-priced milk because of the availability of standard priced generic-labelled milk in the major supermarket chains.'²⁰
- 3.18 At its second hearing with the ACCC the committee, like some milk processors and dairy farmers, questioned the finding that supermarket profit margins on milk had declined.²¹ In response to the many concerns the ACCC looked further into margins and sought further information from processors. The ACCC's review of its findings revealed that:
- ...On the basis of the information available, and a review of the methodology used for monitoring, the ACCC has no reason to doubt its conclusions on the profitability of supermarkets.
- In a limited number of cases, the ACCC discovered rebates of which it was not previously aware. However, the value of those rebates was not significant enough to change the ACCC's aggregate measures of the impact on margins at each level of the industry - the farm gate, processing and retail...²²
- 3.19 The committee also queried whether a process of self-monitoring could be achieved with prices surveillance. The ACCC responded that while self-regulation has a role in certain circumstances, it:
- ...does not consider it to be an appropriate tool for addressing pricing inefficiencies given the current focus of prices surveillance as an instrument of competition policy...firms currently subject to prices surveillance are monopolies...they have a high degree of

18 Evidence pp 41-42 and 73-74.

19 ACCC annual report 1999-2000. 2000. Canberra, ACCC, p 106; and ACCC. April 2001. *Impact of farmgate deregulation on the Australian milk industry: study of prices, costs and profits*. Canberra, ACCC, p xv. (Monitoring report)

20 ACCC. April 2001, op. cit. p xix.

21 Evidence pp 73-74.

22 ACCC. ACCC confirms findings of milk monitoring report. *Media Release MR 172/01*, 27 July 2001, 1p.

market power and little incentive to comply with a system of self-regulation...²³

Trade Practices Act 1974

Part IIIA - The access regime

3.20 Under Part IIIA the ACCC's responsibilities stem from pricing roles in the context of undertakings and arbitrations in relation to facilities of national significance such as gas and electricity infrastructure.²⁴ The ACCC reported that in the utilities area things have moved on from declarations to the '...hard end of setting prices and naturally there is a huge campaign being run by the infrastructure industries whose only interest is in getting prices up as high as possible...'²⁵

Part VB - Price exploitation in relation to NTS

3.21 On 8 July 1999 Part VB was introduced into the TPA. This provided the ACCC with new temporary pricing regulation powers that prohibit price exploitation only in relation to the NTS. These provisions commenced on 1 July 1999 and will expire on 1 July 2002.

3.22 The ACCC reported that its work in this area has been its highest profile work during 1999-2000. It has roles in: educating and informing businesses of their obligations; raising consumer awareness of the effects of the GST on prices; and taking enforcement actions against businesses for misrepresentations and anticipatory price increases.²⁶

3.23 The bulk of the Commission's price survey work is undertaken by specialist price checking companies. The work ranges from visits by price collectors to stores, to expansion of the Commission's existing petrol price monitoring activities. The data collected covers both city and regional areas. The price changes are assessed against the ACCC's expectations of price changes resulting from the NTS.²⁷

3.24 The ACCC reported that in the two years from July 1999 to June 2001, it had made detailed investigations of around 5,000 GST issues. The results of those investigations had been:

23 Submissions pp S27-S28 (ACCC)

24 ACCC. June 2000, op. cit. p 12.

25 Evidence p 5; and some of the concerns in this area are highlighted in the following paper: Cousins, D. Commissioner ACCC. How is the current regulatory regime contributing to further reform and competition in Australia? *Paper presented to the UTLICON 5th Annual National Gas Conference, 24 July 2001, Melbourne Convention Centre*. Unpublished, 14p.

26 ACCC annual report 1999-2000, op. cit. pp 2, 17-27 and 135; and Evidence p 4.

27 ACCC annual report 1999-2000, op. cit. pp 19-20.

- nine Federal Court actions concluded;
- 40 court enforceable undertakings;
- over 600 administrative undertakings (apologies and refunds, corrective advertising, written undertakings, etc); and
- refunds totalling nearly \$9.5 million, to about 528,000 consumers.²⁸

3.25 At the end of the first year of operation (July 2001) the ACCC concluded that: most businesses had fully complied with the pricing guidelines; the net effect on prices had been a 2.5per cent increase, slightly less than most commentators had expected; the main impact had been in the September 2000 quarter with price increases since then being in line with underlying inflation; and there was little evidence of significant anticipatory behaviour by businesses. In undertaking this work the ACCC stressed that it attempted to strike a balance between businesses and consumers.²⁹

3.26 It also noted that the further we get from 1 July 2000 that factors other than the NTS are bearing more heavily on prices.³⁰

3.27 In looking at the way the ACCC had undertaken its role in introducing the NTS, some Committee members were concerned about:

...the heavy-handedness that caused a lot of fear amongst small businesses? They are now saying they have absorbed ... a lot of the price impact of the GST, that we will not really see some of the flow-through of that until next year, and that it has had, in some respects, some negative impact on many small businesses who are going under because they have had to absorb such a lot of the GST load.³¹

3.28 In response Prof Fels said 'What I have always said about the GST is that we were, above all, interested in getting some information into the marketplace that would create the right expectations of the price effects of the GST...' ³² The ACCC was concerned that a number of businesses had self-interest in inflating expectations and it sought to dampen those in an appropriate manner. Information to consumers and to some extent businesses, especially small business, was seen as the key. The emphasis

28 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release MR 152/01*, 3 July 2001, p 1.

29 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release MR 152/01*, 3 July 2001, p 1; and Evidence pp 39 and 61- 63.

30 Evidence p 39.

31 Evidence p 39 and see also p 62.

32 Evidence p 39.

was on small business because the ACCC believed that big business could take care of itself.³³

3.29 For the ACCC this was a balancing act - educating businesses on what sort of price changes were appropriate such that prices didn't go up too much but they were increased by a legitimate amount.³⁴ The watchdogs were consumers and the ACCC.

3.30 The ACCC has acknowledged that 'There has been some criticism from business lobby groups that the ACCC's approach has harmed business'.³⁵ In evidence the ACCC commented that if businesses are suffering hardship because they had not taken account of all the implementation costs then:

...if a business wished to increase its prices and the reason why it wished to increase its prices was that it did not allow enough implementation costs initially, and it can reasonably establish that, there is no reason why they cannot subsequently adjust their prices.³⁶

3.31 The committee remains concerned about the impact of the ACCC's approach on small business. Further comments on this issue are made in the next chapter.

Informal price monitoring

3.32 As well as its formal price monitoring work the ACCC undertakes some informal monitoring. The difference between the two is that with formal monitoring the Commission has powers to require entities monitored to provide the required information. With informal monitoring the Commission has to rely on voluntary cooperation in getting information.³⁷

3.33 In its submission to the PS Act review the ACCC notes that it undertakes informal preliminary inquiries to make recommendations about when monitoring should be conducted.³⁸ This gives the ACCC considerable power. Informal monitoring is occurring in relation to petrol prices, bank fees and charges and sound recordings.

33 Evidence p 39-40.

34 Evidence pp 39-40 and 61-62.

35 ACCC. One year on and most businesses comply with ACCC Price Guidelines. *Media Release MR 152/01*, 3 July 2001, p 1.

36 Evidence p 62.

37 Evidence p 30.

38 ACCC. June 2000, op. cit. p 40.

Petroleum products

- 3.34 Petrol pricing has a long history of price oversight since 1939.³⁹ Concern with this issue has been a recurring theme in the committee's reviews of the ACCC. Although there are both informal and formal aspects of the ACCC responsibilities in this area, all aspects are discussed here so that conclusions can be drawn relevant to the sector as a whole.
- 3.35 Since deregulation of petrol pricing under the PS Act on 1 August 1998 the ACCC's main role has been to monitor petrol prices particularly focusing on 'hot spots'. Under Part VB of the TPA the ACCC has initiated an expanded monitoring program as well as being required by the Treasurer when the fuel sales grant was introduced to monitor the pass through of that grant.⁴⁰ As well in early March 2001 the Government asked the ACCC to examine the feasibility of placing limitations on petrol and diesel retail price fluctuations throughout Australia.⁴¹
- 3.36 As well as its own monitoring work the ACCC uses Informed Sources (Aust) Pty Ltd to undertake some of its monitoring on petrol and gets data from the independent retail price monitoring scheme.⁴²
- 3.37 Some conclusions reached by the ACCC from its monitoring are:
- from July 1999 to June 2000 unleaded retail petrol prices were higher in metropolitan and country areas due to the higher refined product price in Singapore and the decline in the Australian exchange relative to the US dollar;
 - indicative profit margins (difference between retail prices and the Commission's import parity indicator) over most of the financial year were lower in both metropolitan and country areas compared to pre-deregulation;
 - in all capital cities (except Darwin and Hobart) there was greater discounting evident by a comparison of the ACCC's import parity indicator with market prices and there was little discounting evident in country areas;
 - in general terms the gap between petrol prices in city and country areas has not widened; and

39 See Productivity Commission. March 2001a, op. cit. Box 2.1 p 15; and ACCC. June 2000, op. cit. pp 7-8.

40 The fuel sales grant covers 1 or 2 cpl paid to retailers in non-metropolitan areas and remote areas, respectively, for sales of petrol and diesel after 30 June 2000. It aims to ensure that the country/ city differential should not increase with the introduction of the NTS.

41 ACCC. June 2001. *Reducing fuel price variability: Discussion paper*.
http://www.accc.gov.au/petrol/submissions/Reducing_Fuel_Price_Variability.PDF p 3.

42 ACCC annual report 1999-2000, op. cit. pp 103-105.

- only one of the major oil companies appears to post prices which could be considered close to genuine terminal gate prices.⁴³

3.38 At the March 2001 hearing in commenting on the pass through of the fuel sales grant the ACCC reported that '...so far we have not found any evidence to suggest that the individual retailers are not passing the grant on.'⁴⁴ However, the ACCC, like others, had some suspicions that some oil companies were not passing the grant onto retailers in rural areas and it investigated that further. There is a difficulty in this area because the nature of the bill paying arrangements between oil companies and retailers means that individual records of payments are difficult to distinguish.⁴⁵ In June 2001 the ACCC reported that following its investigations of alleged price exploitation by Caltex, Shell, Mobil and BP in relation to the introduction of the grant, the ACCC could find no evidence of this.⁴⁶

3.39 Some key issues raised by the ACCC in its discussion paper on reducing fuel price variability are:

- retail price volatility is generally confined to the major capital cities and some strategically located rural towns on major highways;
- in January to April 2001 the average petrol price increase between the trough and peak of the price cycle was 5.0 cents per litre in Sydney and 6.5 cents per litre in Melbourne and the number of working days between the trough of one cycle and the next is about 5.5 days in both locations;
- a comparison of wholesale petrol prices (deregulated 1 August 1998) data for 2001 and 1998 show that the average petrol price increase between the trough and peak of the price cycle in both Sydney and Melbourne was higher in 2001 than 1998 and this may reflect greater competition in the market;
- retail diesel prices do not display short term price volatility;
- while some consumers are frustrated with price fluctuations, others benefit by being able to purchase petrol at lower prices than average prices at the bottom of the cycle; and
- there are a number of options for limiting price fluctuations but a number of these may lead to higher prices than currently occur etc.⁴⁷

43 ACCC annual report 1999-2000, op. cit. pp 103-104; and Evidence p 19.

44 Evidence p 19.

45 Evidence pp 19-20.

46 ACCC. ACCC finalises fuel investigation. Media Release MR 127/01, 1 June 2001, 1p.

47 ACCC. June 2001, op. cit. p 3; and Submissions pp S22-S23 (ACCC)

- 3.40 Notwithstanding all of the inquiries and research done, the committee remains concerned about the petrol price differential between city and country markets and feels that despite the considerable effort by the ACCC that the situation seems no closer to a solution at present.

Bank fees and charges

- 3.41 An area of critical concern to the community and the committee has always been bank fees and charges. At present the ACCC monitors these informally as it does not have a formal reference from Government. It reported that to date it has not experienced any problems from the banks in getting the information it needs for this purpose. The value of this monitoring is in providing information. However, the ACCC said '...Without further direction from government, it is not within our remit to then act on that information...' ⁴⁸ As the Reserve Bank of Australia (RBA) and others ⁴⁹ currently prepare detailed annual publicly available surveys on bank fees, the committee is not inclined to encourage further work by the ACCC in this area at this time.
- 3.42 The other area of bank fees that the ACCC recently has been involved with is debit and credit cards and interchange fees and access. ⁵⁰ The ACCC as well as the Payments System Board (PSB) of the RBA have regulatory responsibilities in this area. This matter is now being considered under the designation powers of the PSB. The committee has commented on this issue in its June 2001 report on the RBA so readers are referred to that document. ⁵¹ The committee will continue to follow-up this issue through its future biannual hearings with the RBA.

Proposed changes to PS Act

- 3.43 In summary the PC's draft report on the PS Act concluded that the Act should be replaced with provisions for inquiries and price monitoring within the TPA.

48 Evidence p 31 and see also p 64.

49 Reserve Bank of Australia. July 2001. Bank fees in Australia. *RBA Bulletin*, Sydney, RBA, pp 1-6; and Cannex (Aust) Pty Ltd. June 2001. *Deposit account fee analysis*. Hamilton Central, Cannex, 22p.

50 See Reserve Bank of Australia and the Australian Competition and Consumer Commission. Oct 2000. *Debit and credit card schemes in Australia: A study of interchange fees and access*. Sydney, RBA, v 82p.

51 House of Representatives Standing Committee on Economics, Finance and Public Administration. June 2000. *The Centenary of Federation hearing: Review of the Reserve Bank of Australia annual report 1999-2000*. Canberra, CanPrint, pp 29-32.

3.44 More specifically the PC proposed:

...the PS Act be repealed, and that modified inquiry and monitoring functions (but not price notification) be written into a new section of the Trade Practices Act. The proposed section would set time limits for the duration of inquiries and impose threshold tests to rule out unnecessary inquiries.

- Price control (for example, through CPI-X regulation) could be recommended in cases of substantial market power, but only where it could be demonstrated to be superior to lighter handed instruments. Implementation would be through industry-specific legislation.

-The inquiries could also recommend price monitoring, but the form of monitoring would be constrained to ensure that it does not become de facto price control.

Given the increased exposure of Australian markets to competition in recent years, it is anticipated that the new provisions, which are designed to be light handed in application, would be used infrequently.⁵²

3.45 Obviously this curtails some of the powers of the ACCC.

3.46 In contrast to that proposal the ACCC had suggested the PS Act be amended to enable prices oversight functions to focus on monopoly utilities.⁵³ Commenting on the PC draft report the ACCC stated '...the proposal accords with much of the ACCC's submissions...' ⁵⁴ but the ACCC raises the following three major areas of concern:

- it does not include provision for a generic price regulation function;
- it emphasises monopolistic pricing and only provides limited scope for prices oversight of oligopolistic industries; and
- it questions the effectiveness of the proposed monitoring function, in particular:
 - ⇒ the absence of a strong information gathering power to support the monitoring regime;
 - ⇒ that monitoring can only be implemented following a public inquiry;
 - ⇒ that a body independent of the regulator be required to nominate the indicators to be monitored;

52 Productivity Commission. March 2001a, op. cit. p I.

53 ACCC. June 2000, op. cit. pp 3-4 and 34-41.

54 ACCC. May 2001. *Submission to Productivity Commission on Draft report of the Review of the Prices Surveillance Act 1983*. <http://www.pc.gov.au/inquiry/psa/subs/subdr025.pdf> p 2.

- ⇒ the inability of the regulator to make determinations or recommendations using information gathered as part of the monitoring exercise; and
- ⇒ the lack of a review process after the initial monitoring period has passed.⁵⁵

- 3.47 In its final submission to that inquiry the ACCC suggests that a generic prices oversight regime is justified with prices regulation, monitoring and public inquiry functions part of the regime.⁵⁶
- 3.48 On 14 August 2001 the PC forwarded its final report to the Treasurer. The Treasurer has 25 parliamentary sitting days to table the report or release it out of session. The committee has not seen that report, and the related draft report on the access regime and the final report on telecommunications competition regulation have yet to be released. Accordingly, the committee does not consider that it is in a position to comment on the above proposals and counter-proposals other than to say it is conscious of the importance of independent assessment before extending the powers of the ACCC. The committee believes that the Economics Committee should look at this issue again early in the next parliament. The committee encourages the Minister to refer any new legislation on this issue to it for review.

55 ACCC. May 2001, op. cit. pp 2-9.

56 ACCC. May 2001, op. cit. p 10.

