

CHAPTER 7

Petrol Market Regulation

Introduction

7.1 The competition provisions of the *Trade Practices Act 1974* (TPA) provide the competitive framework under which the petrol industry operates, as they do for any other market in Australia. In addition, the Australian Competition and Consumer Commission (ACCC) conducts an informal monitoring regime of certain fuel prices and it disseminates information to the community.

7.2 This chapter commences with a description of the powers, responsibilities and activities of the ACCC in relation to the petrol industry. It then explores whether its powers are sufficient, looks at impending regulatory changes as well as other available options for market intervention and their likelihood of success in achieving lower prices. Finally, it turns to the merits of possible government intervention in the market.

ACCC powers, responsibilities and activities in the petrol market

7.3 From World War II until 1998, the petrol market was subject to continuous forms of monitoring and price control in various guises by the Commonwealth, state and territory governments.¹ Currently, at the Commonwealth level the ACCC is responsible for administering the TPA, which contains prices surveillance powers that the ACCC has used in the past.

7.4 Prior to 1998 regulators used prices surveillance powers to establish petrol prices. These powers originated in the *Prices Surveillance Act 1983* but on 1 March 2004 they were incorporated in the TPA as Part VIIA.

7.5 The object of the price surveillance provisions is to provide regulators with the power to intervene when competitive pressures in an industry are insufficient to achieve efficient prices and protect consumers:

The prices surveillance powers are purely about where there is a concern about the level of prices, but not with that deriving from anticompetitive conduct in any sense, but with that deriving more from the structure of the market and the fact that there is not much competition.²

1 Appendix 1 of BP Australia's submission provides a useful history: BP Australia Pty Ltd, *Submission 34*, Attachment 1, *Regulatory Reform in the Petroleum Products Industry*, pp 15-35.

2 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 3 August 2006, p. 7.

7.6 Accordingly, price surveillance would typically be used in industries for which there is little effective constraint on a business' pricing power.

7.7 There are three broad forms of price surveillance:

- price inquiry;
- price notification; and
- price monitoring.

7.8 For more detail on these various forms of surveillance the Committee refers readers to the ACCC submission to this inquiry.³

7.9 Before 1 August 1998, the ACCC regulated petrol prices using the price notification provisions, which are part of the prices surveillance provisions. The Government had 'declared' the major oil companies under the *Prices Surveillance Act 1983* for sales of all grades of motor spirit (petrol) and automotive distillate (diesel). This meant that these companies were required to notify the regulator of proposals to increase wholesale prices.

7.10 Under the arrangements the ACCC calculated maximum wholesale prices based on import parity. It endorsed proposed prices by the oil companies if these were not in excess of its calculated prices. The price surveillance was directed at wholesale and not retail prices. That is, at the retail level, service station operators were free to set prices as market conditions allowed.

7.11 The ACCC conducted an inquiry into the Petroleum Products Declaration and reported in August 1996. It found that in the capital cities, the maximum endorsed wholesale price acted as a target for prices at the end of a discount cycle and in the country, the maximum endorsed wholesale price acted as a price floor, underwriting the price paid by country consumers. Price notification was having the effect of elevating wholesale prices above where they would have otherwise been.

7.12 The ACCC found that independent operators were increasingly able to access petroleum product so there was a good prospect at that time that the growth and spread of imports could compete with the power of the declared oil companies.⁴

7.13 In July 1998, the Government announced a reform package for the petrol industry which included revoking the Petroleum Products Declaration as recommended by the ACCC. Consequently, from 1 August 1998 the Government deregulated petrol and diesel prices and wholesalers became free to set their own prices. The way that they do this is detailed in Chapter 2 – Sourcing, Refining and Distributing Petrol.

3 ACCC, *Submission 31*, pp 97–100.

4 ACCC, *Inquiry into the Petroleum Products Declaration*, Executive Summary, August 1996, p. 5.

ACCC's current responsibilities

7.14 As part of its role of administering the TPA the ACCC has investigated allegations of price fixing, predatory pricing and other anti-competitive activities in the petroleum industry. The Committee considered these activities in Chapter 4 – Competition or Collusion?

7.15 The ACCC has also considered proposed mergers in the industry and third line forcing notifications relating to shopper docket schemes. It also monitors prices in the petrol market.

Competition powers in the Trade Practices Act

7.16 As the Committee has explored in previous chapters, the underlying drivers of petrol prices are international factors over which governments have no control. However, they can encourage competitive markets to ensure efficient prices to consumers. Part IV of the TPA prohibits corporations from engaging in anti-competitive conduct. The states and territories also have equivalent legislation that prohibits the same conduct by entities other than corporations, such as individuals and partnerships.

7.17 Part IV of the TPA does not regulate price levels. Instead, it sets a framework to promote competitive markets. Competition maximises welfare and increases productivity, benefiting consumers through lower prices and greater choice.⁵ These provisions are generic; they apply to the economy as a whole not just to the petroleum industry.

7.18 The ACCC is empowered to investigate and take action in relation to breaches of the TPA. Among its powers is a capacity to obtain information, documents and evidence relating to a matter that constitutes or may constitute a contravention of the TPA (Section 155). This is the general investigative power of the Act. The ACCC does not require ministerial input to invoke the section 155 powers, which can be used whenever it believes that there may have been a contravention of the Act.

What does the ACCC currently do in relation to the petrol market?

7.19 Since 1 August 1998 when wholesale fuel prices were deregulated, the ACCC has continued to scrutinise the market and monitor prices under what it describes as its 'informal monitoring system'. It gathers price information from around 3 600 of the approximately 6 500 retail fuel sites across Australia (just over 55 per cent). Approximately a quarter of the sites are in rural and regional areas. The information collected relates to:

- the retail prices of petrol, diesel and automotive liquefied petroleum gas in the capital cities and in approximately 110 country towns;

5 Australian Treasury, *Submission 68*, p. 19.

- international crude oil and refined petrol prices;
- published terminal gate prices of the refiner/marketers (BP, Caltex, Mobil and Shell) and some independents; and
- the city–country retail price differential.

7.20 Mr Brian Cassidy, Chief Executive Officer, ACCC told the Committee:

We have moved from, if you like, a more formalised system of monitoring and setting the wholesale prices to now what we call our informal monitoring system where we are monitoring prices in each of the capital cities and in 110 country towns. We do that on a daily basis but we do that on a basis of what is fairly publicly available information at each of the service station sites rather than using any sort of formal information acquisition powers because we cannot use those in relation to the monitoring of prices without a decision by the government.⁶

7.21 On 8 August 2006 the Treasurer announced that the ACCC will also monitor the price of ethanol blended fuel (E10).⁷ It will produce a quarterly report on the price differential between E10 and unleaded petrol in both capital cities and country towns, and display the report on its website.

7.22 The ACCC uses its price monitoring activities to provide information to consumers and to assist it to administer the TPA. It also tries to assist consumers to understand the complexities of the petrol market by maintaining a petrol price cycle website to explain price cycles in the five largest metropolitan cities along with related petrol information. Additionally, the site provides links to other websites that contain information on petrol prices and petrol pricing issues. The ACCC has also produced and distributed pamphlets that explain petrol pricing in Australia:

They are really important, Chair, in endeavouring to explain to motorists the issues affecting petrol pricing in Australia—the petrol price cycles and the international factors affecting petrol pricing. They are designed both to inform motorists as to the issues affecting petrol pricing but, at the same time, to try to cure what we strongly felt was a level of misinformation or disinformation that was being disseminated by particular bodies in Australia that had particular vested interests in doing so to motorists in relation to petrol pricing.⁸

7.23 Along with its regular price monitoring, the ACCC conducts additional random monitoring in remote areas and investigates complaints about price changes. When it is investigating a complaint the nature of the ACCC's monitoring changes:

6 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 3 August 2006, p. 5.

7 The Hon. Peter Costello, MP, Treasurer of the Commonwealth of Australia, 'Australian Competition and Consumer Commission to Monitor Ethanol Blended Fuel (E10) Prices', Press release 082*, 8 August 2006.

8 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 19 October 2006, p. 3.

...if we are in an intensive investigation following a complaint, then our collection of data in the particular area would be entirely different from what has been outlined...⁹

7.24 The Commission also mediates disputes¹⁰ and holds commercial-in-confidence discussions with the oil companies as necessary.¹¹

How useful is the ACCC's website?

7.25 The Committee received some evidence about the usefulness of the ACCC's petrol price cycles website. Some argued that it could provide a wider variety of information:

The ACCC updates information on petrol price cycles in only five cities on its website on a regular basis. There is scope for a great deal more information and analysis to be provided.¹²

7.26 Mr Samuel told the Committee that there are some limitations on the information that can be put on its website because of contractual issues with the information provider.¹³ However, the level of information made available has increased over time:

Certainly since 2003, both under the chairmanship of Professor Fels and more recently under my chairmanship, the level of information that has been made available to motorists has gradually increased. The first thing is that we provide on our website the price cycles. The second is that we took the opportunity, particularly during the high prices that were prevalent following hurricane Katrina last year, to provide a significant increase in information to Thursday, motorists in an endeavour to inform motorists why petrol prices moved through the weekly price cycles and the underlying factors governing petrol pricing in Australia.¹⁴

*ACCC powers in relation to mergers*¹⁵

7.27 Section 50 of the TPA prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in a substantial market in Australia, in a state or territory. The ACCC investigates and reviews mergers that have the potential to raise concerns under section 50.

9 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 3 August 2006, p. 13.

10 Senator George Brandis, Chair, *Committee Hansard*, 27 September 2006, pp 108–109.

11 Mr Gerald Hueston, President, BP Australia, *Committee Hansard*, 27 September 2006, p. 69.

12 AAA, *Submission 29*, p. 8.

13 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 3 August 2006, p. 11.

14 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 19 October 2006, pp 2–3.

15 ACCC, *Submission 31*, pp 102-103.

7.28 The most significant merger in the petroleum industry in recent times was that of the refining and marketing interests in Australia of Ampol and Caltex in 1995. This merger was authorised subject to legally enforceable undertakings that enhanced the position of independents in the industry to the benefit of consumers. These included the divestiture of oil terminals, distributorships, depots and retail sites to ensure supplies to independent retailers.

7.29 The ACCC considered the Coles and Shell arrangements in 2003 and the Caltex and Woolworths joint venture arrangements in 2004 and considered that there would not be a substantial lessening of competition if the alliances proceeded.

Shopper docket schemes

7.30 Section 47 of the TPA prohibits exclusive dealing conduct which, broadly, involves one person trading with another imposing restrictions on the other's freedom to choose with whom, or in what, or where they deal.

7.31 One form of exclusive dealing conduct is known as third line forcing. Businesses can gain immunity from legal action under the third line forcing provisions of the TPA by lodging a notification. The ACCC may remove the immunity provided by a third line forcing notification at any stage if it is satisfied that the likely public benefit from the conduct will not outweigh the likely detriment to the public. Without notification, shopper docket arrangements may raise concerns under the third line forcing provisions of the TPA.

7.32 In February 2004 the ACCC released its shopper docket report. It discussed the ACCC's consideration of a number of petrol and grocery related issues, including allowing a number of third line forcing petrol shopper docket notifications to stand (such as by Coles and Woolworths).

7.33 In the report, the ACCC concluded that the shopper docket petrol discount arrangements were likely to result in a net public benefit arising from lower prices for consumers, generation of a culture of discounting and increased non-price competition.¹⁶

7.34 As at 30 June 2006, more than 500 shopper docket notifications have been lodged with the ACCC covering over 1 000 service stations. The majority of these notifications involve localised arrangements with independently owned major branded sites or independent fuel retailers. Since September 2004 arrangements involving Foodland Associated Limited and independent fuel outlets, and the Servo Saver scheme, have been the subject of a number of the shopper docket notifications.

7.35 The ACCC has also received several notifications on fuel discount arrangements that are alternatives to the shopper docket schemes. For example, these

16 ACCC, *Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors*, February 2004.

arrangements may provide consumers with a discount on fuel when they use credit card or telecommunication services.

7.36 All shopper docket arrangements notified to the ACCC have been allowed to stand.

Are the ACCC's powers sufficient?

7.37 Several submissions called for the ACCC's powers to be strengthened. For example, the Australian Automobile Association (AAA) considered that the ACCC lacks powers to adequately investigate the limited wholesale competition in the market.¹⁷ The NRMA argued that the ACCC lacks sufficient powers to investigate the extent to which regional price differences in automotive fuels reflect increased costs of distribution and marketing as opposed to opportunistic price behaviour.¹⁸

7.38 The Royal Automobile Club of Western Australia (RACWA) suggested that the ACCC should be doing more:

...I think there is a role for [the ACCC] to be more active in this area—to analyse the market and to work out whether the prices being charged are reasonable and whether there is some anticompetitive behaviour. The ACCC should either be doing more with the powers it has at the moment or be given greater powers, if it needs them, to keep a closer eye on the oil industry and the retail industry.¹⁹

7.39 The ACCC stated that it believes it has sufficient powers to adequately perform its functions:

We have, in accordance with the general provisions, our normal investigative powers to investigate any suggestion or evidence of anticompetitive behaviour in the petroleum industry and, insofar as it is raised with us or we detect it, then we have all the investigative powers, including powers to demand documents and to call witnesses before us under section 155, and our other investigative powers to deal with anticompetitive behaviour. The issue of price monitoring, though, is perhaps a separate issue because it does not go to the heart of anticompetitive behaviour, it goes to the question of pricing, the profits, the costs, the margins and the prices that are charged. If there was anticompetitive behaviour that was reflected in the investigations that we currently undertake, informally or otherwise, then we have the capacity to investigate that and, as I indicated in a response to a question from Senator Brandis, we have had a number of investigations.²⁰

17 AAA, *Submission 29*, p. 2.

18 NRMA, *Submission 33*, p. 22.

19 Mr David Moir, RACWA, *Committee Hansard*, 20 September 2006, p. 32.

20 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 3 August 2006, p. 5.

7.40 In relation to its investigatory powers under section 155, Mr Samuel told the Committee:

Suffice to say this, though, that our section 155 powers are very powerful. There are many within the advisory area, that is lawyers, who consider that the section 155 powers are too powerful and that they give us almost draconian powers of investigation, or demand, some would say of fishing expeditions and of interrogation. They are significant. We are cautious in the way that they are used in order that there cannot be an accusation that they are being used capriciously or improperly. But we do use them in any set of circumstances where we think it is necessary in order to be able to effectively administer the act. In terms of production of documentation, they can be very valuable indeed. I would have to say to you in terms of interrogation of witnesses under section 155(1)(c), that depends upon not only the skill of our interrogating counsel but of course also upon any preparatory action that might have been taken by the advisers to the witnesses concerned as to the manner in which they answer questions and the answers they give.²¹

Impending changes to the ACCC's responsibilities

7.41 There are a number of areas in which the ACCC's responsibilities are to be expanded or changed in the future. These include the introduction of an Oilcode and criminal penalties for serious cartel conduct, and foreshadowed amendments to section 46 of the TPA.

Oilcode

7.42 Effective from 1 March 2007, a mandatory industry code, the Oilcode, will be administered and enforced by the ACCC. Along with the repeal of the *Petroleum Retail Marketing Sites Act 1980* (the Sites Act) and the *Petroleum Retail Marketing Franchise Act 1980* (the Franchise Act), the Oilcode forms the Government's Downstream Petroleum Reform Package. The Oilcode will regulate the conduct of suppliers, distributors and retailers in the petroleum marketing industry.

7.43 Key elements of the Oilcode include:

- the establishment of minimum standards for petrol re-selling agreements between retailers and their suppliers;
- the introduction of a nationally consistent approach to terminal gate pricing; and
- the establishment of an independent downstream petroleum dispute resolution scheme.

7.44 The Government believes the Oilcode will remove structural restrictions on competition and enable the oil majors to compete more effectively with supermarket

21 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 3 August 2006, p. 35.

retailers and independent retail chains which have to date not been bound by restrictions in the Sites Acts:

While each of the oil majors will respond differently to the removal of the constraints of the Sites Act, these changes will most likely lead to increased competition with the potential for positive impacts on fuel prices, particularly in rural and regional areas.²²

7.45 The Government expects that maximising conditions to encourage competition will ultimately lead to lower fuel prices for consumers. Furthermore, the Committee is aware of the importance of maintaining the presence of the major oil companies in this country. When the Committee inquired into the Government's Downstream Petroleum Reform Package earlier this year, it found that the refiner/marketers link their future viability to their ability to compete on more equal terms in the retail market.²³ During that inquiry, some contributors argued that the presence of the Sites and Franchise Acts adds to the perception of sovereign risk associated with investing in Australia, and affects their ability to attract investment. BP Australia also advised that the parent company does not refine in countries where it has no retail presence, raising questions about that company's future presence as a refiner, should it be unable to establish what it considers to be a viable retail network.

Criminal penalties for serious cartel conduct

7.46 The Treasury told the Committee that the Government is developing legislation to introduce criminal penalties for serious cartel conduct.²⁴ The criminal cartel offence will prohibit a person from making or giving effect to an agreement between competitors that contains a provision to fix prices, restrict output, divide markets, or rig bids, where the agreement is made or given effect to with the intention of dishonestly obtaining a benefit.

7.47 The maximum penalties for the offence will be:

- for individuals — a term of imprisonment of five years and a fine of \$220,000; and
- for corporations — a fine that is the greater of \$10 million or three times the value of the benefit from the cartel, or where the value cannot be determined, 10 per cent of annual turnover.

22 Department of Industry, Tourism and Resources, *Downstream Petroleum Reform Package and Oilcode*, (accessed November 2006) at: <http://www.industry.gov.au/assets/documents/itrinternet/ReformPackage20060331151615.pdf>

23 Economics Legislation Committee report, *Provisions of the Petroleum Retail Legislation Repeal Bill 2006*, May 2006, p. 11.

24 Australian Treasury, *Submission 68*, pp 22–23.

7.48 The criminal cartel offence will be targeted at serious cartel conduct that causes large scale or significant economic harm. Minor breaches will ordinarily be addressed through civil proceedings.

Section 46 amendments

7.49 Section 46 of the TPA prohibits corporations with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a competitor into the market or deterring or preventing a competitor from engaging in competitive conduct.

7.50 The Economics References Committee concluded in its 2004 inquiry into the TPA that section 46 requires amendment following a High Court decision that raised the threshold for determining that a corporation possesses a substantial degree of market power.²⁵ The Committee made a number of recommendations about suggested amendments and it understands that the Government intends to amend section 46 but the form of those amendments has not yet been released.

Why doesn't the Government set petrol prices?

7.51 The Treasury and the ACCC argued that an efficient, competitive market will deliver the lowest prices to consumers. The Committee agrees. As discussed in Chapter 2 – Sourcing, Refining and Distributing Petrol, import parity pricing largely determines wholesale fuel prices. Prices are not based on local production costs but on international prices and local supply margins in an international commodity market. Even though the fuel is produced in Australia, parity prices fluctuate daily in response to global events, supply and demand, and changes in the United States and Australian dollar exchange rate.

7.52 Import parity pricing is not unique to fuel. It is the pricing mechanism used for most globally traded commodities. Its virtue lies in the fact that regulators do not need to work out long term operating costs of individual companies in order to set a 'fair' price:

... this notion of an import parity price as a tool to assess whether prices are excessive or not is not unreasonable. It is external and it is relatively easy to administer.²⁶

7.53 At the roundtable the Committee conducted with economists as part of its inquiry, the panel acknowledged that import parity pricing was not a perfect mechanism, but was nonetheless useful. Dr Warren Mundy, Director, Bluestone Consulting, told the Committee:

25 Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004.

26 Dr Warren Mundy, Director, Bluestone Consulting, *Committee Hansard*, 26 September 2006, p. 40.

I am actually really happy about import parity pricing because as a regulatory practitioner and someone who has sat through ACCC pricing inquiries I can tell you what is going to happen if the ACCC tries to price petrol refining. There is going to be a massive debate about what these assets that were put in the ground 50 years ago are actually worth. We will then have a debate about what the value of the site of the Mobil refinery in Spotswood is and it will turn into one God-almighty mess.²⁷

7.54 Import parity pricing provides an external benchmark that does not involve an assessment of production costs by regulatory authorities. Oil refining is a capital-intensive industry and in Australia the assets are small and old by world standards. Australia's seven major operating refineries were mostly constructed in the 1950s and 1960s, although they have been extensively modified and upgraded over time. Through import parity pricing, these refineries are competing against newer, larger scale refineries in Asia that can produce at lower costs.

7.55 Mr Richards stressed that for import pricing parity to work effectively it requires liquidity in the market and transparency of costs. He said that while these are apparent for most of the components of the import parity price, the three components which lack transparency are the Australian fuel quality differentials and the terminal and distribution costs.²⁸ He observed that import parity pricing presumes uniformity of product across different countries and regions, and for so long as Australian fuel quality standards differ from the rest of the market, this precondition is not fulfilled:

The processes of change in the national and regional oil markets may have lessened the transparency and effectiveness of current import parity pricing mechanisms over the last three years to the extent that we have less transparency in some of those elements at the present time.²⁹

7.56 The Committee notes that to the extent these areas of illiquidity and lack of transparency have an impact on the import parity price, the effects are transferred into a lack of transparency in the terminal gate price.

7.57 Nevertheless, Australia encourages efficient and competitive markets and the Committee believes that this is the best way to deliver the lowest prices to consumers:

...there is no reason for intervention. If you look at the Singapore reference price against the Australian retail price, you see there is consistency in terms of the relationship. You have four major oil players and it is subject

27 Dr Warren Mundy, Director, Bluestone Consulting, *Committee Hansard*, 26 September 2006, p. 37.

28 Mr Warwick Richards, Director, Economic and Energy Analysis Pty Ltd, *Committee Hansard*, 26 September 2006, pp 20–21.

29 Mr Warwick Richards, Director, Economic and Energy Analysis Pty Ltd, *Committee Hansard*, 26 September 2006, p. 28.

to free entry and exit. There is nothing in terms of restriction of the market which suggests that [the oil companies] are acting in a collusive way.³⁰

What else can be done?

7.58 This section looks at some of the suggestions received by the Committee for market intervention. Firstly it considers reinstating the prices surveillance provisions of the TPA for the oil industry. It then assesses whether or not the ACCC should be doing more monitoring of prices. Finally it turns to the issue of whether a Fuel Ombudsman should be established.

Should the Government reinstate prices surveillance?

7.59 A number of submissions to this inquiry called for the Australian Government to reinstate prices surveillance.³¹ The difference between informal price monitoring and *formal* price monitoring under the prices surveillance provisions of the TPA is that the latter gives the ACCC the power to obtain relevant information or documents, and to impose penalties for non-provision. Consequently, the ACCC is able to get more detailed information about prices, costs or profits. By contrast, under *informal* price monitoring the ACCC relies on companies voluntarily providing information.

7.60 Mr Steve Gibbons MP, Federal Member for Bendigo, suggested that:

There is a major difference between observing the retail price of petrol, and vigorously investigating, using powers to subpoena documents and witnesses, in order to fully understand the pricing process and profit margins within the automotive fuel industry.³²

7.61 Mr Cassidy told the Committee that although prices surveillance may have involved a higher standard of reporting, it did not necessarily involve greater price transparency:

I think these days there is much more information available, including from the ACCC, for the general public on what is happening with petrol prices and what is happening with international petroleum prices than was the case back in the formal monitoring days. While we did get information from the companies, particularly in terms of the amounts that they believed should be allowed for things like transport costs and terminalling costs and so forth, that was information which in a sense came to the then Prices Surveillance Authority and subsequently the Trade Practices Commission but was not made more generally available.³³

30 Mr Craig James, Chief Economist, Commonwealth Securities Ltd, *Committee Hansard*, 26 September 2006, p. 56.

31 See for example, Mr Jim Turnour, *Submission 19*, p. 2.

32 Mr Steve Gibbons, MP, Federal Member for Bendigo, *Submission 49*, p. 5.

33 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 3 August 2006, p. 4.

7.62 Mr Cassidy argued that 'we have a more transparent set of arrangements now'.³⁴ Furthermore, the information that the ACCC collected when prices surveillance was in operation would not have been very useful to consumers:

I think it is fair to say that the information that was collected pre-1998 was directed towards constructing and controlling a wholesale price. In fact, there was possibly less retail information that we collected and basically monitored; indeed, we did not monitor retail prices. If we are looking at the relationship between information that we provide and produce and information that is relevant to consumers, then that was not particularly relevant or useful to consumers. The wholesale price would have meant very little to consumers. They purchase at retail price, so it is a different kind of information.³⁵

7.63 The ACCC currently undertakes prices surveillance in the airport and stevedoring industries and produces related annual reports. Mr Samuel argued that if prices surveillance were to be reinstated in the petrol industry, a publication such as an annual report would be of virtually no use to motorists in terms of purchasing petrol on a weekly basis.³⁶ The information the ACCC gathers under the prices surveillance provisions of the TPA is for the purpose of reporting to Government.³⁷ There is no power within Part VIIA for it to display the information on a regular basis on its website or in any other public forum.

7.64 To reinstate price notification requires the Government to again declare petroleum prices – the ACCC cannot invoke these powers of its own volition. Other forms of price surveillance under the TPA also require either ministerial notice in writing (price inquiry) or ministerial direction (price monitoring). To this end, the Minister must decide that competitive pressures are not sufficient to achieve efficient prices and protect consumers.

7.65 Based on the evidence received during this inquiry and the conclusions the Committee reached in Chapter 4 of this report, the Committee considers that there is no persuasive evidence to support reinstating price notification. Furthermore, if price notification artificially inflates prices as can be inferred from the ACCC Report on the Fuel Price Declaration, it does not represent the best option for consumers.

Should the ACCC increase price monitoring?

7.66 Many submissions called for the ACCC to increase its monitoring of fuel prices. Whilst the bulk of these were not suggesting that the ACCC revert to its formal

34 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 3 August 2006, p. 4.

35 Mr Joseph Dimasi, General Manager, ACCC, *Committee Hansard*, 19 October 2006, p. 15.

36 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 19 October 2006, pp 14–15.

37 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Committee Hansard*, 19 October 2006, p. 15.

prices surveillance role, it is not clear to the Committee exactly what additional information submitters believe should be sought:

In recent years, the ACCC has published very little of its petrol price monitoring information. Apart from providing data on petrol price cycles in just five cities on its website, very few reports on petrol price monitoring have been published by the ACCC since 2000. In fact, the ACCC has even removed information from its website; for a brief period in the second half of 2005, it published a 'petrol pricing snapshot', though this is no longer available.³⁸

7.67 The RACWA made a similar point:

Mr Moir—Our concern is more about what they do about that monitoring. They are obviously collecting heaps of information, but I think they are sitting on it. Our concern is that they should be more active both in metro areas and particularly in regional centres, where these anomalies seem to be occurring, and they should be reporting on the price anomalies. We do not hear much reporting from the ACCC—

CHAIR—Again, they say that they put the results of their monitoring on their website.

Mr Moir—But I think there is a role for them to be more active in this area—to analyse the market and to work out whether the prices being charged are reasonable and whether there is some anticompetitive behaviour. The ACCC should either be doing more with the powers it has at the moment or be given greater powers, if it needs them, to keep a closer eye on the oil industry and the retail industry.³⁹

7.68 Mr Richards suggested that the ACCC could consider adopting a less passive monitoring stance in protecting competition and consumers under the new Oilcode.⁴⁰ He suggested that there may be a case for the ACCC to collect information, but not necessarily publish it:

I am suggesting that a more productive line of approach for the ACCC would be to actually look at what is going on in an economic market context and to equip itself—if necessary by regulation—with some of the information that would make it possible to assess whether there are economic issues of market power and whether the market is conducive to exploitation of market power. For example, on the critical question, given the weight that was put previously on product importation, the ACCC says in its submission that it is in surveillance mode because the market is going to be conducive to imports. Is the market still conducive to imports? How much product is coming in to Australia? Who is importing that? That is not published data. That is not available. If you want to understand it, you have

38 AAA, *Submission 29*, p. 13.

39 Mr David Moir, RACWA, *Committee Hansard*, 20 September 2006, p. 32.

40 Mr Warwick Richards, Director, Economic and Energy Analysis Pty Ltd, *Committee Hansard*, 26 September 2006, p. 28.

to gather that information at the grassroots level yourself. It is not published by the ABS, and it is quite important to how this market is working.⁴¹

7.69 Furthermore, Mr Richards suggested that the ACCC should do more economic analysis rather than simply collecting price data, particularly in regard to the shortcomings of the import parity pricing mechanism:

...I am explicitly not advocating some form of re-regulation of the market. I would like, though, to suggest that it is quite important for the ACCC to approach what is going on in the oil market in a knowledgeable way, in possession of data about the fundamental economics of the market, rather than relying simply on recapitulating product import parity numbers...In particular, in the short term, on issues about product import parity, I am merely suggesting that, by a less passive role, it ought to be thinking through the issues of how one deals with the discontinuity in product specifications in terms of the Australian market and the way that is working. It should be satisfying itself about the way import parity is being related to the market in those circumstances.⁴²

7.70 Some submissions questioned whether the ACCC had stepped back from its surveillance of the market because its website contains less information than it had previously.⁴³ Between September and December 2005 the ACCC produced a weekly petrol price snapshot on its website, the aim of which was to provide additional information to consumers after retail prices and Singapore refined petrol prices increased significantly in early September 2005 (principally as a result of the damage inflicted by Hurricane Katrina to some oil refineries).⁴⁴ In late December 2005 retail petrol prices in the five largest metropolitan cities and Singapore refined petrol prices had decreased significantly from their peak levels in mid-September 2005 and the ACCC discontinued its petrol price snapshot.

7.71 Whilst some consumers may believe that the extent of the ACCC's monitoring is limited to what it publishes on its website, Mr Samuel told the Committee that the ACCC does not post all the information that it gathers:

The other information we have, which we have discussed and is contained in our submission, is not published on the website but is information that relates to the connection, the relationship or the broad consistency of Australian domestic prices taken on an average basis for petrol, LPG and diesel with the international benchmarks...They are not currently displayed on our website. They were, for a period following Hurricane Katrina, portrayed there on a weekly basis as part of a petrol pricing snapshot. Once

41 Mr Warwick Richards, Director, Economic and Energy Analysis Pty Ltd, *Committee Hansard*, 26 September 2006, p. 54.

42 Mr Warwick Richards, Director, Economic and Energy Analysis Pty Ltd, *Committee Hansard*, 26 September 2006, p. 48.

43 See for example, AAA, *Submission 29*, p. 13.

44 ACCC, *Submission 31*, p. 97.

the prices declined after the Hurricane Katrina spike, if I can call it that, we found that the website showing the international relationship of domestic prices in Australia with the international benchmarks was becoming less useful to consumers and therefore we ceased to publish that in January this year.⁴⁵

7.72 According to Mr Samuel, the aim of monitoring prices is to provide information to those that are interested in the pricing structure of the commodity in a competitive environment to determine whether the prices that are being charged are fair.⁴⁶ In a competitive marketplace, competition normally leads to a price that is justified; that is, it is determined by market factors. He does not see that publishing more information than is currently available will have any impact on pricing:

In a competitive marketplace we could publish all the information that is currently available, if we had contractual ability to do so, and then we would have to ask ourselves what the impact would be. It would provide publication of the various charts which are set out [in our submission]...It could reflect the price movements and show the relationship or corelationship of those movements to the Australian dollar, to US dollar movements, to the crude oil prices, and to the refining margins. Indeed at some stage we have made relatively public issues such as refining margins and the like, but then one has to ask, 'What does that transparency achieve?' It may lead some parties to conclude that the prices that have been charged are justified. It may lead others to conclude that they are excessive, but in a commodity such as petroleum, which is largely regulated in price terms by international pricing factors, we are not entirely sure that the added transparency from making all this currently available information public or obtaining any more information would lead to any changes in the pricing factors.⁴⁷

7.73 Mr Craig James, Chief Economist with Commonwealth Securities thought that the monitoring was generally sufficient:

...the ACCC's powers are quite sufficient at the moment in terms of price surveillance. Perhaps there could be a tinkering in terms of how much they take on in terms of analysis of freight costs; perhaps they could keep a closer watch on margins. There could also be more assessment in terms of the international factors which go into final terminal gate and retail prices.⁴⁸

7.74 Whilst Professor Paul Kerin, Professorial Fellow at Melbourne Business School, considered that the ACCC does too much monitoring:

45 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 19 October 2006, p. 6.

46 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 3 August 2006, p. 12.

47 Mr Graeme Samuel, Chairman, ACCC, *Committee Hansard*, 3 August 2006, p. 12.

48 Mr Craig James, Chief Economist, Commonwealth Securities Ltd, *Committee Hansard*, 26 September 2006, p. 35.

If I look at the ACCC's activities in the last few years, it does far too much monitoring. It monitors petrol prices in 110 towns in rural and regional areas, for example, which is a significant cost. When we look at how much benefit there has been from doing that, we see there has been very little. The ACCC has tried to prosecute in some cases where there has been limited local power and there has been collusion. There are instances of those, and yes, the ACCC has won a couple of cases, but it is very difficult for the ACCC to prove. Are we going to get a significant benefit that is worth the cost? I would put a big question mark over that. I have not seen evidence that the market fails, so my point of view would be to reduce the government's activities rather than propose to increase them.⁴⁹

7.75 The utility and effectiveness of the ACCC's petrol price monitoring is to be seen in the context of the very high levels of price transparency in the petroleum industry. The Committee concludes that in this highly price-transparent industry, given the extensiveness of the ACCC's existing monitoring, there is no case to be made for further expanding its monitoring role.

Should a Fuel Industry Ombudsman be established?

7.76 Mr Kevin Hughes and the NRMA suggested that a Fuel Ombudsman is established to monitor petrol prices and investigate complaints.⁵⁰ Such an ombudsman would refer potential breaches of the Trade Practices Act to the ACCC. The office could also handle consumer complaints, reconcile industry conflicts and advise governments on petroleum issues:

I see the role of an ombudsman as being not prosecutorial; that is the role of the ACCC. I believe the role of such an ombudsman should be to closely monitor the industry, to attend to complaints from the industry and to give advice to the government about pricing and all matters relating to the industry. I see that, if a complaint came in about predatory behaviour by, say, someone in a regional area, that would be investigated by the ombudsman.⁵¹

7.77 The Committee is not persuaded that any useful purpose would be served by establishing a fuel industry ombudsman. There is little that such an office could do that is not already done or could be done within the ACCC.

49 Professor Paul Kerin, Melbourne Business School, *Committee Hansard*, 26 September 2006, p. 56.

50 Mr Kevin Hughes, *Submission 70*, pp 5–6; and NRMA, *Submission 33*, p. 24.

51 Mr Kevin Hughes, HEH Australian Petroleum Consultancy Co, *Committee Hansard*, 27 September 2006, p. 108.

What are the State and Territory Governments doing?

7.78 Some State and Territory Governments provide subsidies at either the wholesale or retail level that effectively lowers the price of petrol to consumers.⁵² Details of these subsidies are contained in Chapter 6 of this report. Only Western Australia and the ACT do not provide subsidies.

7.79 The highest subsidy is provided in Queensland (NSW matches the amount of subsidy in the zone closest to the border with Queensland).

7.80 Since prices surveillance was ended at the Commonwealth level, two States have enacted legislation on the pricing of petrol and diesel. In 2000, Victoria instituted a mandatory system of terminal gate pricing, under which suppliers were required to publish wholesale prices at the terminal gate; however, there was no control of the actual price levels.

7.81 In 2001, Western Australia established a comprehensive regulatory framework for pricing of petrol and diesel. Chief components were:

- a terminal gate pricing system for spot sales;
- a maximum wholesale price;
- a '24' hour rule, limiting intra-day price movements;
- pricing information systems for public awareness;
- a '50/50 rule, under which retailers could source half their supplies from sources other than their primary supplier.

7.82 This system was explained in more detail in Chapter 3 – The Petrol Price Rollercoaster.

Should Governments intervene in the market?

7.83 The Treasury warned that Governments need to be careful that their intervention does not distort an already competitive market, resulting in inefficiencies.⁵³ For example, formal prices surveillance may have harmful side effects on the efficiency of an industry and may facilitate price coordination, not competition, and create an incentive for companies to charge the maximum notified price (rather than a lower one).

7.84 Price oversight methods also impose varying costs on business due to the requirement for businesses to identify, collect and provide to the ACCC relevant data

52 ACCC, *Submission 31*, pp 30–31.

53 Australian Treasury, *Submission 68*, p. 22.

on prices, costs and profits. Dr Mundy suggested that it is arguable that price control and price monitoring are the same thing.⁵⁴

7.85 The Committee notes that intervention in the market can confuse price signals to consumers, which are important if they are to respond appropriately to what may be fundamentally changing market conditions. Intervention can interfere with competition which could lead to consumers paying higher prices than would otherwise be the case.

7.86 Given the small Australian fuel market and the age of its refineries, the Committee considers that this country is extremely well served by its petrol industry supply and regulatory arrangements. It did not find the evidence put during the inquiry that the ACCC's powers are somehow inadequate to be persuasive. The Committee does not consider that extra regulation, over and above that already foreshadowed, is warranted at this time.

7.87 The Committee notes the claims that have been made about the positive effects of the Western Australia scheme as regards the 24 hour rule, but is also mindful of the evidence it has received that this inhibits competition. The Committee is therefore unable to support its extension to other states.

54 Mr Warren Mundy, Director, Bluestone Consulting, *Committee Hansard*, 26 September 2006, p. 38.

