

## THE RE-EMERGENCE OF PRICES SURVEILLANCE

DAVID COUSINS AM\* AND ALLAN FELS AO\*\*

### I INTRODUCTION

In an election year with inflation starting to creep up and beyond the Reserve Bank of Australia's target zone, it is not surprising that the focus of the major parties turned to prices. In particular, petrol prices were of significant consumer concern, having risen by some 15 cents per litre over the January – June 2007 period from an already historical high. In June, the Australian Competition and Consumer Commission ('ACCC') raised concerns that local prices had remained high despite a significant fall in international prices. Shortly after this, the Federal Opposition announced that if elected, it would 'appoint a national Petrol Commissioner with the sole responsibility to formally monitor and investigate price gouging and collusion'.<sup>1</sup> The ACCC then recommended to the Treasurer that a general inquiry into petrol prices be conducted by the ACCC, and this was agreed to by the Treasurer the following day. The inquiry was to be completed by the end of October, before the election date later in November, but was subsequently given an extension of time. Also in July, the Opposition Leader made what was billed as a major statement on the cost of living in Australia. He promised, if in government, to strengthen the powers of the ACCC to monitor supermarket prices and to direct the ACCC to hold a National Grocery Pricing Inquiry. The ACCC would also be directed to publish a periodic survey of grocery prices at supermarkets for a typical shopping basket to be published on a dedicated website.<sup>2</sup>

The petrol and groceries inquiries subsequently undertaken by the ACCC were both substantial exercises requiring extensive involvement by the Chairman and a number of the Commissioners. They were the first significant prices surveillance inquiry references given by the Federal Government to the ACCC since its establishment through the merger of the Trade Practices Commission

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\* Professorial Fellow at the Centre for Regulatory Studies, Monash University. Dr Cousins chaired the Prices Surveillance Authority from 2002–05.

\*\* Dean of the Australian and New Zealand School of Government and former Chairman of the Australian Competition and Consumer Commission and Trade Practices Commission, from 1992–2003. Professor Fels chaired the Prices Surveillance Authority from 1989–92.

1 Australian Labor Party, 'Rudd Labor Government to Appoint Petrol Commissioner' (Press Release, 10 June 2007) 1.

2 Kevin Rudd, 'Fresh Ideas for the Future Economy: Cost of Living Pressures Faced by Australian Families' (Speech delivered at the Cranbourne Secondary College, 11 July 2007); Australian Labor Party, 'Powers to ACCC to Monitor Prices in the Supermarket' (Press Release, 11 July 2007).

and the Prices Surveillance Authority.<sup>3</sup> The provisions of the old *Prices Surveillance Act 1983* (Cth) were generally incorporated into Part VIIA of the *Trade Practices Act 1974* (Cth) in 2004.

This paper summarises the key aspects of these two inquiries and comments on the policy recommendations made by them. Whilst generally supporting the views the ACCC has put, there are some areas where we have a different emphasis. Some further general observations on the use of the prices surveillance powers conclude the paper.

## II PETROL PRICES INQUIRY

The terms of reference proposed by the ACCC and accepted by the Treasurer required the Commission, pursuant to section 95H(2) of the *Trade Practices Act 1974* (Cth) ('TPA'), to hold a general inquiry into the price of unleaded petrol. This was not an inquiry into the supply of goods by any specified persons and thus no restrictions on prices existed during the inquiry.<sup>4</sup> The inquiry covered the determination of prices as well as industry structure, competition and performance considerations. It extended over six months; received 51 submissions, received information from 13 organisations under section 95ZK notices and held hearings on 25 days with 52 organisations. One party was required to provide documents under summons (section 95S).

The major oil companies were declared under the prices surveillance legislation up until 1998. This meant that price increases were subject to notification. In practice, an import parity pricing formula determined maximum wholesale prices. In 1994, the Industry Commission reviewed competition and regulation in the petroleum industry, and recommended the removal of prices surveillance on the basis that competition was considered to be effective.<sup>5</sup> The ACCC was later directed to review the declaration of the oil companies, and whilst it considered the industry to be less competitive than did the Industry Commission, it agreed that surveillance could be revoked in the following year, subject to certain conditions being realised. In particular, it saw a need for the further development of independents and imports as viable and competitive forces, and for it to investigate horizontal arrangements in the industry, such as refinery exchange agreements.<sup>6</sup> The Government removed prices surveillance from petrol in August 1998, but informal monitoring of prices was maintained.

Since that time there have been many significant changes in the industry, the overall impact of which has probably been to weaken rather than strengthen competition. Some of these changes include the replacement of refinery exchange agreements with buy-sell arrangements, the entry of the big supermarket

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3 The ACCC in 1995–97 conducted a number of inquiries into the continuing relevance of declarations under the *Prices Surveillance Act 1983* (Cth), including one into the declaration of the major oil companies. This was a continuation of a process commenced under the Prices Surveillance Authority.

4 See *TPA* s 95N.

5 Industry Commission, *Petroleum Products*, Report No 40 (1994).

6 Australian Competition and Consumer Commission, *Inquiry into Petroleum Products Declaration* (1996).

operators into petrol retailing and their joint venture links with two refiner-marketers, the tightening of fuel quality standards on environmental grounds, the demise of importing by independents and the closure of the Port Stanvac refinery. There have been some moves to enhance wholesale pricing transparency, through terminal gate pricing disclosure and retail price transparency, through the West Australian FuelWatch scheme. The introduction of a mandatory Oil Code also saw the abolition of legislation aimed at limiting the number of sites oil companies could directly operate and legislation regulating their relationship with franchisees.

At the refining level, the industry remains highly concentrated with four companies operating the seven local refineries. These companies also dominate the wholesale supply of petroleum in Australia. The local refineries are relatively small and high cost compared to overseas refineries, though they are operating at relatively high utilisation rates. They supply around 80–85 per cent of local demand with the balance being imported – primarily by them. Independent imports now account for only around two per cent of the market. The four refinery operators sell products to each other under buy-sell agreements to obviate the need for them to transport to markets where they do not have refineries or import facilities. Notional import parity pricing is used to determine the price of refined product and imports by the major companies. The ACCC focused significant attention on buy-sell arrangements and their pricing:

It is clear that the buy-sell prices are significant for petrol pricing in Australia as it essentially forms a floor for the setting of wholesale prices. It forms the basis for the negotiated prices for all wholesale sales by the refiner to wholesale resellers and it forms the basis of terminal gate prices ('TGP') ...<sup>7</sup>

Local refiners are protected from international competition by a natural transport cost advantage, by the impact of different Australian quality standards, and by the limited threat of imports. Most import terminals are owned or leased by the four majors. The major supermarket operators have long term supply arrangements with two of the majors, and hence the market for independent imports is very restricted. There is little likelihood of substantial new entry into domestic refining. Despite their higher cost structure, the evidence indicated to the ACCC that the refiners were profitable.

The wholesale sector of the industry is also dominated by the four vertically integrated refiners. Independent wholesalers acquire supply from the majors rather than through imports. Their pricing is largely determined by that set by the majors. Independent wholesalers are not permitted to buy under the buy-sell arrangements of the major companies, and their pricing is largely set on the basis of what alternatives are available to them. Pricing to independent wholesalers and retailers is not strictly cost based or transparent. Prices are negotiated and are influenced by bargaining power. Competition between firms results in highly variable prices between locations and over time, which is reflected in retail pricing.

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7 Australian Competition and Consumer Commission, *Petrol Prices and Australian Consumers – Report of the ACCC Inquiry into the Price of Unleaded Petrol* (2007) 9.

A key characteristic of retail pricing in the major cities is the prevalence of discount cycles. The ACCC undertook extensive conceptual and empirical analysis of these cycles, but concluded that ‘the causes of the well-defined price cycles in Australia’s retail unleaded petrol markets are an enigma’.<sup>8</sup>

The ACCC’s analysis of price cycles highlighted the more general issue of price transparency in petrol markets. It was suggested that an imbalance in transparency existed ‘which allows sellers to react more quickly than buyers to price movements with likely negative effects on competition and consumer search costs’.<sup>9</sup> For sellers, an important contributor to enhanced transparency was the availability of current information on prices through Informed Sources, a private subscription company which collects price information. Price transparency for buyers was reduced by the volatility of price movements, which meant that consumers could not be certain that observed price board prices would be maintained for any period of time. Three options were presented by the ACCC to redress the imbalance it saw in market transparency. These were to reduce the potential for sellers to share price information; to introduce a national FuelWatch scheme, along the lines of that operating in WA; and to expand the availability of pricing information to consumers, either through Informed Sources or through the ACCC. The ACCC, however, decided that it did not have the time to review these options fully, and indicated that a detailed assessment of their administrative implications, their effects on competition or their likelihood of achieving the objective of increased transparency ‘would have to be made before government could confidently embark on any one of the suggested options’.<sup>10</sup>

### A FuelWatch

The ACCC’s analysis of the WA FuelWatch scheme has attracted significant comment. Under this scheme, retailers are required to notify a government department by 2:00pm of the prices they are to charge the following day from 6:00am for 24 hours. Prices are unable to be adjusted by the retailers, even downwards, after they have been committed to. This enables motorists to easily identify their best supplier, and it forces the retailers to be careful in making their pricing decisions. A concern expressed in the past by the ACCC about the FuelWatch scheme is that it may harm competition, especially by disadvantaging independent operators.<sup>11</sup> If this was the case, it could be anticipated that retail margins and prices would be higher. Prior to the introduction of FuelWatch, Perth prices were typically higher than those in the eastern state capital cities; however this situation has now changed with Perth generally being lower. Analysis of changes in retail margins over time by the ACCC indicated that

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8 Ibid 16.

9 Ibid 17.

10 Ibid 18.

11 Australian Competition and Consumer Commission, *Reducing Fuel Price Variability* (2001) 69.

the average of the price margin reduced by a statistically significant amount for Perth relative to the eastern capitals in the time since the introduction of FuelWatch. The relevant weekly average price margin was around 1.9cpl less on average for the period January 2001 to June 2007 than for the period from August 1998 to December 2000.<sup>12</sup>

In addition to appearing to cause a reduction in prices relative to the eastern state capital cities, there appears to have been a reduction in the amplitude and increase in the average duration of price cycles in Perth in recent times.

Criticisms of the ACCC's analysis should be seen in the context of the political debate at the time over the possible introduction of a national FuelWatch scheme, and the clear self-interest of some of the participants involved. For instance, it can hardly be assumed that Informed Sources had no commercial interest in criticising the WA FuelWatch scheme. It was suggested, however, that other factors, specifically the entry of Coles in 2004, were the reason for any margin reduction. Further, it was suggested that FuelWatch had altered the distribution of prices in Perth such that there were fewer stations with very low prices and more stations with high prices. This it was said 'would seem to especially disadvantage price-conscious consumers with relatively low search costs such as pensioners and the disadvantaged'.<sup>13</sup> In response, the ACCC conducted further econometric work which found that the entry of Coles may have had a price impact (as it could also have had in the eastern state capital cities), but that its impact was small compared to that at the time of the introduction of FuelWatch. The ACCC also found that the overall price reductions it observed occurred across the price cycle for the highest and lowest price days. The ACCC concluded:

From the econometric analysis, on a conservative basis, the ACCC can say there is no evidence that the introduction of FuelWatch in Western Australia led to any increase in prices and it appears to have resulted in a small price decrease overall.<sup>14</sup>

There was some criticism also of the ACCC for its refusal to release the data underlying its econometric analysis for detailed review by 'independent' experts.<sup>15</sup> It is not clear why the ACCC did not do this. It may have wanted to avoid being caught in a political debate, or it may have felt constrained by its contractual relationship with Informed Sources. It is understood that this data was not obtained under formal notice. As a matter of principle, it would seem desirable that experts be given the opportunity to review and thus also contribute to work of this nature by the ACCC.<sup>16</sup>

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12 Australian Competition and Consumer Commission, *Petrol Prices*, above n 7, 247.

13 Concept Economics, *FuelWatch: Submission to the Senate Economics Committee* (8 August 2008) 1.

14 Australian Consumer and Competition Commission, *Petrol – Further Econometric Analysis Undertaken by ACCC* (2008) 4.

15 Don Harding, 'FuelWatch: Evidence-based-policy or policy-based-evidence?' (2008) 27 *Economic Papers* 315.

16 The Senate Standing Committee on Economics expressed a similar view when it recommended that 'any data collected by FuelWatch be made available by the ACCC to independent academic researchers to allow open analysis of the scheme': Senate Standing Committee on Economics, Parliament of Australia, *National Fuelwatch (Empowering Consumers) Bill 2008; National Fuelwatch (Empowering Consumers (Consequential Amendments) Bill 2008* (2008) Recommendation 1.

## B ACCC Recommendations

The ACCC made a number of recommendations aimed at dealing with the competition concerns its analysis had highlighted with the wholesale sector of the industry. Specifically it sought:

- A more detailed examination and on-going monitoring of buy-sell arrangements (the ACCC suggested that the companies seek authorisation for these arrangements given the competition concerns – an invitation unlikely to be taken up);
- A greater alignment of Commonwealth and State fuel quality standards with appropriate overseas standards, subject to meeting environmental policy objectives;
- A comprehensive audit of terminals suitable for importing refined petrol into Australia; and
- On-going monitoring of the use, leasing and sharing of terminals to discourage ‘hoarding’ of capacity.

These recommendations are appropriate given the circumstances, but they seem unlikely to produce significant change, certainly not in the short to medium term.

## C The Meaning of ‘Understanding’ in Section 45 of the *Trade Practices Act*

The ACCC made further recommendations to clarify the meaning of the term ‘understanding’ in section 45 of the *TPA*, which covers contracts, arrangements or understandings that restrict dealings or affect competition. These recommendations were prompted by the outcomes of two recent major cases where the ACCC had alleged price fixing between petrol retailers had occurred. The first of these concerned retailers in Ballarat, and the second, retailers in Geelong. In the case relating to the Ballarat market the ACCC was successful at first instance,<sup>17</sup> but an appeal to the Full Federal Court by one of the parties was successful.<sup>18</sup> The ACCC’s case relating to the Geelong market was unsuccessful.<sup>19</sup>

Both cases relied heavily on inferential evidence of extensive telephone contact between competitors, especially, it was alleged, around the time that prices moved up sharply after periods of discounting. The key issue in determining whether an understanding existed between the parties was whether the sharing of price information by the parties amounted to a commitment between them to fix prices. In the Ballarat appeal, the Full Court considered that there was no expectation by those providing information to the business

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17 *Australian Competition and Consumer Commission v Leahy Petroleum Ltd* (2004) 141 FCR 183 (‘Ballarat case’).

18 *Apco Service Stations Pty Ltd v Australian Competition and Consumer Commission* (2005) 159 FCR 452.

19 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) ATPR ¶42-162; *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) ATPR ¶42-200 (‘Geelong case’).

concerned as to what it would do, and there was no commitment by the business to increase prices following receipt of the information. In the Geelong case, the Court also concluded that the exchange of price information through regular telephone contacts and discussions before prices were increased did not amount to a commitment between them to increase prices, and did not constitute an understanding in breach of the Act.

The ACCC noted:

While on the one hand, it might be said that these cases simply applied well accepted principles concerning the expression 'understanding', the ACCC is concerned that they disclose a subtle but significant shift in the nature of the commitment that must be found to establish the existence of an understanding. Earlier decisions of the Federal Court interpreted the term to include an expectation regarding future conduct consciously or intentionally engendered in one person by the words or conduct of another person. However, the more recent decisions suggest that an understanding will not be regarded as having been reached in those circumstances; rather, there is a need for at least one of the parties to give or accept a commitment, obligation, undertaking or assurance that they will act in a certain way.<sup>20</sup>

The issue raised by the ACCC is a significant one, as there are many highly concentrated industries in Australia where price information sharing may be easily affected. It is important that the law is clear in discouraging joint pricing behaviour. Parallel pricing may occur, but it should only be the result of the independent pricing decisions of competitors. Clarity in the law is even more important given the likely introduction of criminal sanctions for serious cartel conduct.

The ACCC also expressed a concern about the willingness of the courts to accept inferential evidence concerning the existence of an understanding, and proposed legislative amendment to overcome this concern. This was a reaction, in particular, to the decision in the Geelong case. However, there did not appear to be an unwillingness of the court to consider inferential evidence in this case, but rather it was how this evidence was used and what it indicated that seemed to be in question. The Court was, in fact, highly critical of the evidence presented by the ACCC. For example, Gray J commented as follows:

With the benefit of hindsight, there is much in the applicant's preparation and conduct of the case about which it is possible to be very critical. Plainly, the ACCC's investigators and its legal representatives, were too carried away by the supposed correlation in the data the ACCC had collected between telephone calls and petrol price increases.<sup>21</sup>

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20 Australian Competition and Consumer Commission, *Petrol Prices*, above n 7, 228.

21 *Australian Competition and Consumer Commission v Leahy Petroleum Pty Ltd* (2007) ATPR ¶42-200, 48 330.

Justice Gray further commented:

It is clear that closer attention to the content of the available evidence, and to its relationship with the elements that the ACCC was required to prove, in order to establish contraventions of s 45(2) of the Trade Practices Act, might well have led to the conclusion that the prospect of a successful outcome for the ACCC was not great enough to warrant the expenditure of money involved in the proceeding. Further, the need for such close analysis became greater as the trial advanced, with the inconsistencies between the circumstantial evidence and the oral evidence, and the absence of evidence about significant elements, becoming progressively more apparent.<sup>22</sup>

The Geelong case also highlighted a further issue relating to an apparent lack of integration of on-going prices surveillance and competition enforcement work within the ACCC. For many years there had been informal monitoring of prices in the Ballarat and Geelong markets, along with other regional markets. Discounting had not been a feature of the Ballarat market. This changed in the late 1990s when independent operators entered the market. Geelong, in contrast, had always been an intensely competitive market with discount cycles often deeper than in the Melbourne metropolitan area. One possible reason for this often speculated upon was the close proximity of the Shell refinery. Given that there had been no apparent change in the pricing performance of the Geelong market over the period of time considered by the ACCC in the price fixing case from before and after, it was, perhaps, surprising that the case was run in the way it was. This was also clearly the view of the Court which said:

It is most unfortunate that the leader of the ACCC's investigating team remained unaware of the ACCC's own report, entitled *Reducing Fuel Price Variability ...* until she was being cross examined during the trial. If the investigators had taken into account the fact that the sawtooth pattern of movements in the retail price of petrol was common in Australia, and the various possible reasons advanced by the ACCC for that pattern, two things might have followed. They might not have made the assumption, which the principal investigator was reluctant to abandon in the witness box, that the only likely cause for such a pattern was collusion between petrol retailers. The investigators might also have been prepared to consider the possibility of a relationship between prices in the Geelong petrol market and those in the Melbourne petrol market. They might have taken a less Geelong-centric view than they appear to have taken.<sup>23</sup>

In response to the ACCC's call to amend the law in relation to understandings and inferential evidence, the Government has announced that it is giving careful consideration to the amendments proposed. It issued a discussion paper early in 2009<sup>24</sup> and indicated that it would consult on the most appropriate way to implement the ACCC's recommendations.<sup>25</sup> The necessity for any amendment to the Act in this area is strongly opposed by the Law Council of

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22 Ibid 48 331.

23 Ibid 48 330.

24 Australian Treasury, *Discussion Paper – Meaning of 'Understanding' in the Trade Practices Act 1974* (2009).

25 Chris Bowen, 'Government Consultation on the Meaning of "Understanding" under the *Trade Practices Act 1974*' (Press Release No 002, 8 January 2009).

Australia;<sup>26</sup> it considers the law to be adequate and its interpretation by the courts not to have changed. It sees dangers in extending the law to cover cases where a commitment to collude does not exist. Whilst this is not an unreasonable position to take, there does appear to be some benefit to be gained by clarifying the use that may be made of inferential evidence in determining whether one or other of the parties involved in any alleged activity have, in fact, made a commitment to collude.

#### **D Price Discrimination**

The ACCC also proposed in its petrol inquiry report that the appropriateness of the arrangements for terminal gate price publication be reviewed as part of a scheduled review of the Oil Code. The ACCC found that there were few sales made at the terminal gate price level and considered that the demand for spot sales was likely to diminish further. This is not surprising as the oil companies were never going to adopt genuine terminal gate pricing arrangements in the absence of strict legislation to impose it.

The ACCC expressed little concern in its report that discriminatory prices may be set by the major companies to the detriment of competition in the industry. This has been a concern of independent operators in the industry over many years, and was the basis of attempts to put in place an effective terminal gate pricing scheme. Whilst it is important to maintain the capacity for competitive discounts to be offered to buyers, it is also important to ensure that independents are not unfairly discriminated against by the majors.

#### **E Formal Monitoring**

The ACCC generally shied away from any direct regulatory intervention in pricing. This is despite finding that competition was not fully effective at the wholesale level, and that prices were set at higher-than-competitive levels. There seems a clear case now for a further review of the appropriateness of import parity prices determined by the companies. One argument used to support removal of surveillance and the declarations under the Act was that the maximum price may have facilitated price coordination and added to price volatility in the cities.<sup>27</sup> However, experience has since shown that these cycles have generally increased, not decreased, in amplitude.<sup>28</sup> Rather than facilitating collusion, it seems the controls may have had some effect in preventing the companies from using their market power to set excessive prices.

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26 Trade Practices Committee of the Business Law Section of the Law Council of Australia, *Submission on the Australian Government Information and Consultation Paper on The Meaning of 'Understanding' in the Trade Practices Act 1974* (31 March 2009).

27 Australian Competition and Consumer Commission, 'ACCC recommends end to petrol declaration when competitive forces re-structure fuel industry' (Press Release No 113/96, 15 August 1996); Industry Commission, above n 5.

28 Australian Competition and Consumer Commission, *Petrol Prices*, above n 7, Appendix M.

Although the ACCC did not favour a return to formal notifications, it seemed more supportive of formal prices monitoring,<sup>29</sup> though no recommendation was made: ‘The view of the ACCC is that formal price monitoring is appropriate and useful where it is necessary to increase price transparency, particularly in industries where there is concern over pricing practices.’<sup>30</sup>

The Government responded to the ACCC’s report immediately by invoking the formal prices surveillance monitoring powers over petrol prices. On 17 December 2008, the Minister for Competition and Consumer Affairs directed the ACCC to undertake formal monitoring of the prices, costs and profits relating to the supply of unleaded petrol products in the petroleum industry in Australia, pursuant to section 95ZE of Part VIIA of the *TPA*. The ACCC was directed to report on its monitoring activities annually for a three year period.<sup>31</sup> The Minister suggested in his covering letter that the ACCC may wish to focus its monitoring on those parts of the industry where its December 2007 report indicated competition is less than fully effective.

The Government also agreed to further detailed examination and on-going monitoring of buy-sell arrangements; completion of an audit of import terminals covering terminal capacity, use, leasing and sharing arrangements and on-going monitoring of use, leasing and sharing of terminals; and monitoring of developments relating to shopper dockets.<sup>32</sup> It did not consider there was any case to change fuel quality standards.

In early 2008, the Government appointed a Petrol Commissioner, who had previously been in charge of the WA department responsible for FuelWatch in that State, and a few months after this, announced that a national FuelWatch scheme would be established to enhance competition and transparency in the petrol market. The scheme was to cost \$20.9 million over four years and commence on 15 December 2008. The Government considered that only the FuelWatch option would address the retail price transparency imbalance and eliminate consumers’ angst caused by intra-day price volatility.<sup>33</sup> The FuelWatch scheme appeared to receive mixed support from within the Government, and the legislation subsequently failed to be passed by the Senate.

Shortly after announcing that the ACCC was to have formal monitoring powers over petrol, the Minister announced that the ACCC Chairman had written to the oil companies seeking an explanation of a recent significant divergence between the retail price of unleaded petrol in Australia and international price movements.<sup>34</sup>

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29 Formal price monitoring powers are covered by div 5 of Pt VIIA of the *TPA*. The ACCC can monitor prices, costs and profits and report to the Minister if directed by the Minister to do so.

30 Australian Competition and Consumer Commission, *Petrol Prices*, above n 7, 225.

31 The formal reference could be read as indicating the period of monitoring was open-ended, but that the ACCC was only required to report annually for three years.

32 Chris Bowen, ‘Petrol Prices and Australian Consumers: Release of the ACCC Report into Unleaded Petrol Prices’ (Press Release No 002, 18 December 2007).

33 Chris Bowen, ‘A National FuelWatch Scheme’ (Joint Press Release with the Hon Kevin Rudd MP Prime Minister No 023, 15 April 2008).

34 Chris Bowen, ‘ACCC to Use Formal Monitoring Powers to Investigate “Significant Divergence” in Petrol Prices’ (Press Release No 003, 22 December 2007).

The ACCC noted in its subsequent monitoring report<sup>35</sup> that there had been some periods when retail prices had not fallen in line with reductions in import parity prices. The ACCC seemed to accept the explanations given by the companies for divergences in December 2007 and January 2008 relating to domestic refinery supply issues, and in October 2008 relating to the high volatility of the Singapore petrol prices and the \$A/\$US exchange rate. However the ACCC has in the past also been critical of this aspect of industry performance. In its 2007 report it noted:

While in general terms there is a strong relationship between domestic retail unleaded petrol prices and Singapore Mogas95 and no systematic divergence, two instances of divergence occurred between domestic prices and international prices in January and June 2007. ... Taking into account all this evidence, the ACCC does not consider that it has been provided with a satisfactory explanation of the divergences. At least in the period since January 2007, there appears to have been a degree of asymmetry in the response of the retail petrol prices to decreases in Singapore Mogas prices compared with the response of retail prices to increases in Singapore Mogas prices.<sup>36</sup>

Given that the oil companies are not subject to formal price notifications, public criticisms of alleged divergences between international and domestic price movements seem to be of questionable benefit. If the aim of these criticisms is to force the companies to price in a particular way, it would seem more appropriate that they be subjected to a formal surveillance regime.

The analysis of costs, revenues and profits in the petroleum industry is complex because of the international linkages of the major oil refiners, their vertical integration and joint production of different products, and their use of different accounting treatments. Nevertheless, the ACCC presented some aggregated industry data which could be subjected to further analysis. For example, breaking down costs into fixed and variable components would be a useful exercise, and further analysis of profitability in light of the very substantial on-going capital investment in the industry would be useful. If assets are valued at current costs rather than historical costs, a 10 per cent rate of return for the industry as a whole, as reported by the ACCC in its monitoring report, looks to be quite healthy. The ACCC also needs to make this assessment in light of the industry's efficiency.

### III GROCERIES PRICES INQUIRY

The ACCC was directed on 22 January 2008 to conduct a broad-ranging inquiry into the structure, competitiveness and pricing of groceries, to be completed by 31 July 2008. This was the second prices inquiry conducted by the ACCC at the direction of the Minister under the provisions of Part VIIA of the *TPA*. The inquiry was again a general one, not into any specific person or persons. It was also a very substantial inquiry: it received over 250 submissions,

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35 Australian Competition and Consumer Commission, *Monitoring of the Australian Petroleum Industry: Report of the ACCC into the Prices, Costs and Profits of Unleaded Petrol in Australia* (2008).

36 Australian Competition and Consumer Commission, *Petrol Prices*, above n 7, 13.

obtained information and documents under formal notice requirements (section 95ZK), conducted 22 public hearings in capital cities and regional centres, with many witnesses being summonsed to appear and produce documents (section 95S). Detailed empirical analysis of supermarket pricing was undertaken and a report of over 550 pages was produced.

Aside from concerns about rapidly rising prices for consumers,<sup>37</sup> there were other long-standing concerns considered during the inquiry, including the gap between farm-gate and retail prices, and the position of small independent supermarkets and specialist traders. The ACCC focused particularly on identifying whether there were weaknesses in competition which might be contributing to problems in these areas. The groceries industry is dominated by two vertically integrated wholesalers-retailers, Woolworths and Coles, which account for approximately 30 and 25 per cent respectively of consumer expenditure on grocery items in Australia. Their combined share is higher in relation to packaged groceries and lower in relation to fresh groceries. These firms have grown significantly over time through internal expansion, and through acquisitions of small independent firms which did not breach existing merger laws. Other firms in the industry include Aldi, a relatively new entrant operating in the larger eastern states; Franklins, operating in NSW; other independent supermarkets, supplied mainly by the wholesaler Metcash; and many other small specialty stores.

The ACCC found that significant increases in grocery prices over time could largely be explained by factors like drought and supply disruptions, world commodity price movements affecting raw material and other inputs like petrol and fertilisers and world food price movements. However, it did also note some impact from higher gross margins in the industry.

In the ACCC's assessment, at most, roughly one–twentieth of the increases in food prices over the last five years could be directly attributable to the increase in gross margins achieved by the major grocery players.<sup>38</sup>

The ACCC considered that 'grocery retailing is workably competitive',<sup>39</sup> but that there are factors limiting price competition. The use of the term 'workable competition' without further explanation could be confusing; the term has a long history in industrial organisation/economics which may differ from its more colloquial usage.

According to the ACCC, Coles and Woolworths had limited incentives to compete on price. Aldi had provided some competitive stimulus, but the independent stores tended to focus on convenience and service. The wholesale prices set by Metcash, their main supplier, inhibited them from competing more on prices. Also, there were high barriers to entry and expansion, particularly in

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37 Food prices had risen by an annual average of 3.9 per cent from December 2002 to December 2007 compared to the all groups prices in the Consumer Price Index, which had risen by an average of 2.9 per cent. However, over the period December 2006 to December 2007, the respective movements were 1.1 per cent and 3.0 per cent: Australian Bureau of Statistics, *6401.0 Consumer Price Index* (22 March 2009).

38 Australian Competition and Consumer Commission, *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (2008) xvii.

39 *Ibid* xiv.

relation to difficulties in finding new sites for development, which limited competition. The ACCC considered that evidence to the inquiry ‘does not support the proposition that retail prices have risen while farm-gate prices have stagnated or declined’.<sup>40</sup> Farm-gate prices were considered to be set by supply and demand forces in competitive markets. Coles, Woolworths and Metcash have significant buying power in dealing with suppliers, especially of packaged groceries. However, lower wholesale prices were at least to some extent passed on to consumers in the form of lower retail prices. Data presented by the ACCC indicated that Woolworths, in particular, had increased margins over the previous five years and its profitability appeared to be high. Coles was less efficient, but still also quite profitable. The ACCC did not appear to place much emphasis on this profitability data.

The ACCC was quite critical in its analysis of the role of Metcash as a specialist wholesaler supplying independent retailers. It suggested that Metcash, through acquisitions, had been able to improve its earnings significantly and not set competitive prices, which could allow independents to compete more effectively on prices with the major supermarkets. Moreover, it was protecting its position by building ownership linkages with independent retailers and restricting them contractually from dealing with other wholesalers. Contracts discouraged suppliers from dealing directly with the independent retailers. According to the ACCC:

Given Metcash’s dominant position in the wholesale market any restriction on potential competitive tension may have a significant anti-competitive effect. The ACCC will closely examine these arrangements and any complaints received that relate to such clauses with Metcash.<sup>41</sup>

An alternative perspective is that Metcash has been performing a valuable role in the industry enabling independent operators to survive and compete against the dominance of the two vertically integrated and diverse major supermarkets. It has been able to build its returns in recent years to the point where it can also support more direct moves into retailing and thus achieve the benefits of vertical integration. While the ACCC may see some moves as shoring up its market power in independent wholesaling, others may see it as helping to strengthen the competitive position of the company and its independent customers against the major supermarkets.

This important role of the wholesaler was recognised by the Trade Practices Tribunal when it considered the authorisation of the merger between Davids Ltd and Composite Buyers Ltd. The Tribunal commented:

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40 Ibid 301.

41 Ibid 161.

The creation of a 'Fourth Force' through the Davids merger, if achieved, would be a substantial benefit. It would allow the independent sector to simulate the best features of the vertical chains, while retaining a significant degree of independence and individuality for the retailer. It would improve the merged company's access to capital, its ability to compete with the chains, strengthen the competitive process, enlarge the options available to consumers and enhance consumer welfare. It would also promote small business opportunity, which was of value to Australian society.<sup>42</sup>

Davids was subsequently taken over, and its name was changed to Metcash in 2000.

The evidence used to support the claim that Metcash was able to use market power to set 'monopoly' prices for its independent customers was flimsy. It is based on data which indicates the company's earnings before interest tax and amortisation: the sales ratio has risen from 2.17 per cent in 2001–02 to 3.34 per cent in 2007–08, and on a not like-for-like comparison with some UK wholesalers. It was also influenced apparently by evidence that Metcash, not surprisingly it might be suggested, priced under the umbrella of prices set by the major supermarkets. However, it could do this and not be extracting excessive margins. As the ACCC itself concluded, Metcash appeared to pay more for grocery products than the major supermarkets, it appeared to be unable to achieve the same economies of scale, scope and density in wholesaling, and it had disadvantages associated with vertical separation, all suggesting its costs of supply were higher. In considering the returns obtained by Metcash, the ACCC seems to have disregarded the different product mix of the company compared to the major supermarkets, despite the evidence that margins varied across major product groupings (for example, they were higher on groceries than petrol or liquor, and higher on dry products than fruit and vegetables and meat), and it did not report any attempt to ascertain the wholesale margins of the vertically integrated major supermarkets. However, on a number of occasions the ACCC inferred that margins were lower in retailing than wholesaling. On the basis of the evidence provided in the report, it is difficult to accept the conclusion that Metcash was achieving excessive margins, certainly in comparison with the major integrated suppliers.

As a wholesaler Metcash has many competitive threats, including having its retailers being undercut by the major supermarkets; having its retailers switch to alternative sources of supply, including other wholesalers or new entrants into wholesaling, which might be existing independent retailers; and having its retailers bargain collectively for improved terms. It seems unlikely then that Metcash does have significant market power as suggested by the ACCC. Nevertheless, Metcash seems to have responded to the ACCC's comments.<sup>43</sup> The danger here is that competition in the industry as a whole could be weakened if Metcash is pushed into making changes which weakens its own position.

The petrol and groceries reports considered the likely impacts of the shopper docket schemes which both Woolworths and Coles have in place. Under these schemes a discount on the pump price of fuel can be obtained by the motorist, if

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42 *Re Queensland Independent Wholesalers Ltd* (1995) ATPR ¶41-438.

43 Ari Sharp, 'Metcash drops supplier controls', *The Age* (Melbourne), 5 February 2009.

a receipt for purchase of a minimum amount of groceries from its groceries arm is produced. Woolworths first introduced this scheme after it entered petrol retailing in 1996. In general, the ACCC considers consumers to have benefited from reduced petrol prices and enhanced competition in petrol retailing from the shopper docket schemes. The major grocery retailers appear to have gained a competitive advantage from shopper dockets. The ACCC saw this as part of the broader competitive mix and highlighted the schemes other retailers had put in place to counter the competitive threat to them. According to the ACCC, there was 'no evidence to suggest grocery retailers as a whole are in jeopardy as a result of the MSC's (major supermarket chains) shopper docket schemes'.<sup>44</sup>

It is clear, however, that the shopper docket schemes have had a significant impact on groceries retailing, and have added to the barriers to entry to this industry. They have also had a not insignificant impact on grocery prices. The ACCC noted that 'Woolworths has indicated that the cost of the shopper docket schemes is in the order of half of one percent of the total annual sales'.<sup>45</sup> This is around 10 per cent of the company's earnings before interest and tax.

The bigger impact on competition, however, which the ACCC did not discuss in great detail, was the existence of the joint venture arrangements between Coles and Shell, and between Woolworths and Caltex. Coles and Shell entered an alliance in July 2003 under which Coles manages Shell's core network of retail outlets. Despite noting a high level of concern about the proposed alliance the ACCC considered:

the proposal will not cross any of the ACCC's concentration thresholds for the exercise of market power. Shell will not increase its overall market share in fuel wholesaling simply through its participation in the proposed alliance whereas Coles Myer represents an entirely new entrant into fuel retailing.<sup>46</sup>

Woolworths and Caltex announced their joint venture arrangement in August 2003. The ACCC considered that:

while Woolworths will gain a further small increase in market share in fuel retailing, the existence of other strong vertically integrated petroleum suppliers and the presence of Coles in the retail market leads the ACCC to conclude that the long term arrangement is unlikely to result in a substantial lessening of competition in any market.<sup>47</sup>

These alliances have enhanced barriers to entry into both petrol retailing and groceries, in particular the former. Major retailers are perhaps the most likely new entrants into petrol retailing as they can command enough of the market to achieve a viable level of imports through independent importers. Woolworths had already demonstrated this through its supply arrangement early on with Trafigura, an independent importer. However the alliances have greatly reduced the likelihood of the major retailers seeking supply from other than their alliance partners.

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44 Australian Competition and Consumer Commission, *Report of the ACCC Inquiry*, above n 38, 205.

45 Ibid 204.

46 Australian Competition and Consumer Commission, 'ACCC Not to Oppose Proposed Alliance between Coles Myer and Shell' (Press Release No 145/03, 2 July 2003).

47 Australian Competition and Consumer Commission, 'ACCC Not to Oppose Long Term Arrangement between Woolworths Ltd and Caltex Australia Ltd' (Press Release No 123/04, 9 July 2004).

The ACCC was not persuaded that the level of buying power held by the major groceries retailers was itself a significant problem for public policy. It concluded that buying power was really only an issue in relation to the purchase of packaged groceries by the major supermarkets and Metcash. In most supply chains there was adequate competition, and retail prices broadly reflected cost and price changes within those chains. In packaged groceries, however, the major supermarkets and Metcash accounted for around 70 per cent of national sales. Suppliers had fewer options than the major buyers. They had to gain access to shelf space which was controlled by the major retailers. These retailers could exert even more pressure where they also provided private labels. Suppliers gained some benefit from having a strong brand that consumers wished to see on their shelves, but this did not necessarily give protection to all of a supplier's range.

The ACCC's analysis of buying power was very much influenced by its review of the theoretical literature on the subject. This is illustrated, for example, by its discussion of whether buying power was best characterised as being monopsony power or as bilateral bargaining power. Whilst the ACCC referred to the significant case taken by the ACCC against Safeway (Woolworths),<sup>48</sup> which highlighted the practice of the company removing all of a manufacturers' bread products from its shelves unless special prices at nearby retailers supplied by the manufacturer ceased to be charged, it is not clear that the practical significance of this kind of behaviour for buying power was fully taken into account. A penalty of \$8.9 million was imposed on Safeway for fixing the price of bread and misusing its market power, following the Full Federal Court decision on the matter.

The ACCC made no distinction between the level of buying power held by the major supermarkets and by Metcash. However, it seems unlikely that Metcash does match the major supermarkets in this regard. Its overall volume of purchases is less and it does not directly control shelf space in the independent grocery stores it supplies. Its home brand is arguably not as strong as that of the major supermarkets and, given their market position, there is arguably a greater need for suppliers to gain access to shelf space with the major supermarkets than there is with independent groceries.

To the extent that buying power simply rests on the market power of the major retailers, there is a concern that its potential benefits will just be captured by these firms and not passed on to consumers. The ACCC recognised this, and saw the need for greater competition to be promoted through lowering barriers to entry and by promoting a new wholesaler to compete with Metcash.

As part of its inquiry the ACCC was also specifically directed to review the effectiveness of the Horticulture Code of Conduct, which is a prescribed mandatory industry code under section 51AE of the *TPA*. At the time the Code had only been in operation for a little over a year. The ACCC considered that the

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48 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (No 2)* (2001) 119 FCR 1; *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339.

Code ‘has merit’ and if amended as proposed by the Commission ‘has the potential to provide a framework which ensures transparency in transactions and fairness in dispute resolution procedures’.<sup>49</sup> The proposed amendments aimed especially to clarify the Code’s coverage and conduct restrictions, expand its enforcement remedies by introducing civil penalties and infringement notices, and encourage use of the dispute resolution mechanisms.

### A ACCC Recommendations

The ACCC considered that the appropriate response to its findings was ‘to attempt to lower barriers to entry and expansion, in both retailing and wholesaling to independent supermarkets and potential new entrants’.<sup>50</sup> It saw high barriers to entry as being the most significant underlying factor explaining the nature of competition in the industry. This had two aspects. First, the ACCC highlighted concerns about restrictive provisions in shopping centre leases which operated to maintain the dominance of the major players. It flagged that it would be undertaking reviews of specific cases and may take further action if breaches of the Act were found. Secondly, it highlighted concerns about planning and zoning laws. These were seen to inhibit new developments and thus access by independents, and planning processes were used unfairly by incumbent supermarkets to deter new entry. The ACCC recommended that governments consider ways in which zoning and planning laws, and decisions on individual planning applications should have specific regard for likely competition impacts.

It may be that in some cases there are more flexible instruments than zoning and land use restrictions to achieve valid planning objectives relating, for example, to amenity.<sup>51</sup> Where restrictions do apply, however, planning authorities should not take into consideration the commercial impacts on other businesses of their decisions. To do so would inappropriately restrict competition. Conversely, by ignoring such considerations, their decisions will be more pro-competitive. Since planning authorities are not experts in competition policy, they should obtain expert advice before attempting to take competition issues into account in their decision making. The ACCC has the power to challenge new leases that it believes may substantially lessen competition.<sup>52</sup> It should seek to have proposed agreements which may raise such concerns brought to its attention, or it should initiate its own analysis of proposed agreements.

In response to the ACCC’s recommendation, the Council of Australian Governments (‘COAG’) has agreed to examine further planning and zoning policies from a competition perspective. ‘This will ensure COAG can better

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49 Australian Competition and Consumer Commission, *Report of the ACCC Inquiry*, above n 38, 390.

50 *Ibid* xvii.

51 For a general discussion of the economic impact of exclusionary planning laws and their impacts on competition, see Allan Fels AO, Stephen Beare and Stephanie Szakiel, *Choice Free Zone*, Report prepared for the Urban Taskforce Australia (2008).

52 Acquisitions of new leases or sites by supermarkets can be examined as acquisitions of assets under s 50 of the *TPA*.

understand whether competition issues are adequately incorporated into planning and zoning regulation.’<sup>53</sup>

### B Creeping Acquisitions

The ACCC sensibly did not support the idea of placing market share or similar limitations on the major retailers as a way of limiting their influence. However, it reiterated its support for a tightening of the merger laws to deal with creeping acquisitions, despite also suggesting that creeping acquisitions had not been an issue in the groceries industry in recent years.

The term ‘creeping acquisitions’ refers to a series of acquisitions over time that individually do not raise competition concerns, but when taken together may do so. The Baird Committee,<sup>54</sup> which reviewed Australia’s retailing sector in 1999, recommended that retail grocery acquisitions be subject to mandatory notification as a way of dealing with concerns about creeping acquisitions. The Dawson Committee<sup>55</sup> considered the *TPA* was adequate to deal with them, but the Senate References Committee<sup>56</sup> recommended specific provisions to deal with them. In its preliminary response to the groceries report, the Government indicated its intention to implement a creeping acquisitions law. It released a discussion paper<sup>57</sup> on 1 September 2008 which noted two approaches by which it could do this.

One approach, referred to as the aggregation model, would involve a corporation being prohibited from making an acquisition if, when combined with acquisitions made by the corporation within a specified period, the acquisition would be likely to substantially lessen competition in a market.

An alternative model is to add a new prohibition to section 50. A corporation would be prohibited from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to substantial lessening) of competition in that market. The ACCC has expressed support for this latter model.<sup>58</sup> The Government is yet to make its intentions known.

### C Unit Pricing

Of particular significance to consumers also was the ACCC’s recommendation that a mandatory, nationally consistent unit pricing regime be

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53 Council of Australian Governments, *Communiqué for Meeting* (29 November 2008) 7.

54 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure?: A Review of Australia’s Retailing Sector* (1999).

55 Committee of Inquiry for the Review of the *Trade Practices Act*, Parliament of Australia, *Review of the Competition Provisions of the Trade Practices Act* (2003).

56 Senate Economics References Committee, Parliament of Australia, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business* (2004).

57 Australian Treasury, *Discussion Paper – Creeping Acquisitions* (2008); Chris Bowen, ‘Government Takes First Step Towards Creeping Acquisitions Law to Promote Competition’ (Press Release No 072, 1 September 2008).

58 Australian Competition and Consumer Commission, *Submission to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs Regarding Creeping Acquisitions* (2008).

introduced for standard grocery items both on in-store price labels and in print advertising, for significant supermarket stores.<sup>59</sup>

Unit pricing involves the display of prices on a unit of measurement basis, for example, per kilogram or per litre. Apart from a requirement for unit pricing on products covered by trade measurement legislation, there was no general requirement for unit pricing in Australia, unlike the situation in Europe and in numerous states in the USA. There was some voluntary adoption of unit pricing, however, and the major supermarkets also flagged their support for it. The Queensland Government indicated that it intended to legislate to require unit pricing in that State, and a Regulation was drafted to this effect.<sup>60</sup>

It is argued that unit pricing facilitates price comparisons and better value choices by consumers. How much it does this is a moot point. Survey evidence from the UK suggested that over 30 per cent of consumers did not understand the benefits of unit pricing, and 35 per cent did not use unit pricing information.<sup>61</sup> However, the ACCC accepted that 'unit pricing is a tool that would make it easier for consumers to acquire and process pricing information and assist them in engaging in a meaningful price search'.<sup>62</sup> The ACCC considered that unit pricing would be highly beneficial in facilitating intra-store price comparisons and also would be useful in facilitating inter-store comparisons. There would be offsetting costs incurred in introducing and maintaining unit pricing; but these would be significantly reduced by allowing plenty of lead time to allow changes to be made to things like computer systems and shelf labels.

The Government quickly indicated its support for mandatory unit pricing<sup>63</sup> and consulted on the details of the best way to implement it.<sup>64</sup> Early in 2009 the Government announced that the scheme would apply to all packaged grocery items. It will:

- be established by regulation as a mandatory code of conduct under Part IVB of the *TPA* by 1 July 2009, to apply from 1 December 2009;
- apply to all store-based retailers with floor space for display of groceries greater than 1000 m<sup>2</sup> and that supply at least a prescribed range of food-based grocery items;
- apply to all online retailers that supply at least a prescribed range of food-based grocery items;
- apply to any other retailer that chooses to display unit prices for grocery items with a transition period of six months;
- require retailers covered to provide a unit price for all items they sell for which a selling price is displayed, unless the item is part of a prescribed category of exempt items;

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59 Australian Competition and Consumer Commission, *Report of the ACCC Inquiry*, above n 38, 456.

60 Anna Bligh, 'Bligh moves to ease the squeeze at Qld check-outs' (Press Release, 26 June 2008).

61 Australian Competition and Consumer Commission, *Report of the ACCC Inquiry*, above n 38, 449.

62 Ibid 450.

63 Chris Bowen, 'Rudd Government Releases its Preliminary Action Plan in Response to the ACCC's Grocery Inquiry' (Press Release No 065, 5 August 2008).

64 Australian Treasury, *Unit Pricing – Issues Paper* (2008).

- not apply to goods sold at a reduced price due to damage or their perishable nature, offered for sale as a bundle of different types of items for a single price, or that are part of a prescribed category of exempt goods for which unit prices are not practical;
- apply to all in-store representations of price unless specifically excluded;
- apply to all online store price lists unless specifically excluded;
- apply to other non-store print advertising such as catalogues, newspaper advertisements or front page website advertisements;
- not apply to non-print advertising such as radio and television;
- require the unit price to be prominent, unambiguous, legible and in close proximity to the selling price;
- use standard units of measure, being per 100 ml/100 g/metre/m<sup>2</sup>/l unit (where sold by count) with other measures for prescribed categories of goods; and
- operate only to the extent that it is not inconsistent with any other Commonwealth legislation.<sup>65</sup>

#### **D Formal Monitoring**

The ACCC did not recommend that formal monitoring of grocery prices, costs and margins be implemented on an on-going basis following its report. However, prior to completion of the inquiry, the Government announced, in line with its election commitment, that the ACCC had been asked to conduct a monthly survey of the prices for typical grocery baskets across Australia, and to publish the survey results on a dedicated consumer website. This was to provide practical grocery price information to assist consumers in locating the cheapest supermarket chain in their area.<sup>66</sup> The ACCC was to receive additional budget of \$12.9 million over four years to run the GROCERYchoice website.<sup>67</sup>

#### **E GROCERYchoice**

The GROCERYchoice website was launched in August 2008. The intention was to empower consumers to find the best deals at supermarkets. However, the website failed to do this.<sup>68</sup> The ACCC provided information about the price of typical grocery baskets from a range of supermarkets located within 61 broad regions across the country. Approximately 600 supermarkets of generally more than 1000 m<sup>2</sup> were surveyed, and approximately 500 products made up the eight baskets. Whilst the data provided an indication of which of the major retailers was the cheapest across each region, it gave no indication of prices for particular

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65 Chris Bowen, 'Australian Consumers to Save with Unit Pricing' (Press Release No 001, 8 January 2009).

66 Wayne Swan, 'Cost-of-Living Pressures' (Press Release No 034, 13 May 2008).

67 Chris Bowen, 'Increased budget funding for the Australian Competition and Consumer Commission' (Press Release No 32, 13 May 2008).

68 Chris Bowen, 'ACCC Inquiry into Grocery Prices' (Press Release No 003, 22 January 2008).

products in particular supermarkets. It excluded specials, and was based on historical averages for the previous month.

Subsequently, the Government moved to allow the consumer organisation CHOICE to take over the management of GROCERYchoice. The intention is that the web site will be enhanced by providing individual supermarket pricing comparisons,<sup>69</sup> and possibly, individual product price comparisons, subject to satisfactory supermarket co-operation.

The failure of the ACCC to deliver an effective GROCERYchoice scheme was excused by the Minister who suggested that:

the ACCC, as the regulator, was always limited in what information it could present on the website. Adding new features like 'specials' would have compromised the regulator whose responsibility it is to respond to consumer complaints about false or misleading representations in advertising.<sup>70</sup>

#### IV SOME GENERAL OBSERVATIONS ON THE INQUIRIES

The style of public inquiry conducted by the ACCC was different to those conducted by the Prices Surveillance Authority ('PSA'); reflecting the different nature of the two organisations. The PSA was primarily an investigatory body which provided advice to the Government. The ACCC does this as well, but it is also an enforcement agency.

The petrol and groceries inquiries were more legalistic in style than the inquiries run by the PSA. Witnesses were often required to attend the ACCC hearings; they were questioned by legal counsel, especially in the petrol inquiry, and were often required by formal notice to provide information to the Commission. Notices can be issued by the ACCC under the prices surveillance powers (section 95ZK) when it has reason to believe a person is capable of providing it with information or documents relevant to an inquiry it is conducting. There does not have to be a reason to believe the person can provide information or documents relating to a breach of the Act, as with section 155 notices. Information and documents obtained under the prices surveillance powers can, however, still alert the ACCC to possible breaches of the Act and can be used for enforcement purposes. Because of this, parties assisting the ACCC are likely to be a little circumspect in their responses.

A further interesting aspect of the two inquiries was the ACCC's willingness to use its public interest power to override claims that disclosure of information supplied to the ACCC would damage the competitive position of the person concerned.<sup>71</sup> It utilised this power on numerous occasions. In order to convey to the public a clear picture of competition and pricing performance in a highly concentrated industry, it will often be necessary to challenge confidentiality claims of suppliers.

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69 Chris Bowen, 'Choice to Provide Expertise in Managing Grocerychoice' (Press Release No 110, 22 December 2008).

70 Ibid.

71 See *TPA* s 95ZN.

The two inquiries have enabled the ACCC to update and extend its understanding of the structure, conduct and performance of the industries concerned, more than could be done in the context of particular competition investigations. In particular, the inquiries have focused more attention on the demand side of competition in these industries than do most competition cases, which tend to focus on the supply side. In doing so, the inquiries have enabled the ACCC to take a more holistic view of ways to enhance competition.

The inquiries highlighted the issue of price transparency for consumers who may be at a disadvantage in this respect compared to suppliers. If pricing transparency can be enhanced for consumers, it may assist them to make more informed and better purchasing decisions. It is not necessary for all consumers to act on the information provided to them for there to be a significant impact on a market. Small shifts in custom and market share can induce competitive responses from suppliers. FuelWatch allows consumers to shop around with the certainty that prices will be stable for some time. Unit pricing in groceries will also facilitate easier price comparisons. And despite its severe limitations, GROCERYchoice seemed to have some beneficial impact for consumers, as the major suppliers seemed to respond to the favourable publicity for Aldi's low prices by also attempting to be the lowest price setters in a region.

The prices surveillance inquiries undoubtedly serve a useful purpose in helping educate consumers, suppliers and the community generally about pricing issues. An understanding of the underlying causes of price levels and movements over time is likely to moderate claims for inappropriate interventions, for example to try to control prices directly. If there is an underlying lack of competition which is giving rise to high prices, the best policy response is generally to seek to enhance competition. However, where industries are highly concentrated and barriers to entry difficult to breakdown, on-going prices surveillance or monitoring may have a significant role to play, especially in helping to empower consumers and giving them confidence that they are being treated fairly.

Finally, an interesting question highlighted by the inquiries is how far the ACCC as a regulator should go in providing policy advice to the Government. Certainly given its practical experience, it is appropriate for the ACCC to advise Government of the operation of the existing law, and its strengths and weaknesses and to provide comment on Government proposals to change the law. However, it is arguable the ACCC went beyond this point, particularly in drafting an amendment to deal with the understandings issue. The danger when regulators design policy is that they are likely to propose measures that widen the law and extend their powers, possibly unnecessarily. Whilst we do not suggest that this is in fact the case here, we do think it is an issue that needs to be closely watched for the future if more prices surveillance public inquiries are to be held.