

ACCC *update*

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ADVERTISING PRICES—UPFRONT OR ELSE

WHAT IS PRICES SURVEILLANCE?

ELECTRICITY PRICING—HOW IT WORKS

PREDATORY PRICING

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Editorial

THE COST OF GOODS AND SERVICES AS A CONVERSATION TOPIC MUST BE RIVALLED ONLY BY THE WEATHER. WE ALL WANT TO KNOW WE ARE PAYING A FAIR PRICE FOR WHAT WE GET, A PRICE THAT'S NOT INFLATED BY PRICE FIXING BETWEEN COMPETITORS OR BY A FIRM HAVING A MONOPOLY IN THE SUPPLY OF A PRODUCT OR SERVICE. AND WE WANT TO KNOW WE ARE NOT BEING CONNED BY ADVERTISING THAT MIGHT, FOR EXAMPLE, DISHONESTLY COMPARE SALE PRICES WITH BEFORE-SALE ONES. SIMILARLY, WHEN BUSINESSES MAKE DISCLAIMERS, WE WANT THEM TO BE SPECIFIC AND EASILY SEEN.

For most industries and services the ACCC doesn't have the power to regulate or set prices under the Trade Practices Act. However, it can prevent price fixing, which is always illegal under the Act, and it does all it can to stamp it out.

When prices are being discussed over a cuppa these days, the topic is as likely to be the cost of an internet connection as that of a loaf of bread. The ACCC's role in the pricing of services provided by the telecommunications industry and others such as aviation and electricity is outlined in this issue.

Petrol pricing, which is also a hot topic, is not governed by the ACCC in a formal way but cyclical changes in prices are monitored and this can help consumers buy their fuel at the best price.

It is heartening that almost all businesses in Australia are careful not to infringe the Act with their pricing policies. But for those that do, the ACCC will do its utmost to protect consumers from unfair pricing. The articles that follow contain a wealth of information for consumers and businesses on what the ACCC considers to be acceptable and unacceptable pricing practices.



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Advertising prices—upfront or else

THE GOVERNMENT HAS SIGNALLED ITS INTENTION TO AMEND THE TRADE PRACTICES ACT TO MAKE SURE THAT WHEN THEY ADVERTISE PRICES, BUSINESSES INCLUDE A PROMINENT SINGLE-FIGURE PRICE.

THIS PRICE SHOULD INCLUDE ALL MANDATORY COSTS THAT CONSUMERS HAVE TO PAY TO OBTAIN THE PRODUCT OR SERVICE, SUCH AS GOVERNMENT CHARGES, TAXES (INCLUDING THE GST), LEVIES OR MANDATORY DELIVERY CHARGES. THIS REQUIREMENT ALSO APPLIES TO BUSINESS-TO-BUSINESS TRANSACTIONS.



All Australian consumers have the right to know how much they will be charged for goods and services. Consumers also need to know the final price of goods and services so they can compare competitors' prices and decide which fits their budget. In other words they need to be able make informed decisions on how they spend their money.

Because of this, businesses need to state prices clearly including all mandatory charges so that consumers know the full price they have to pay. This means consumers won't have to calculate the total price to be paid for goods or services, making it easier for them to compare prices.

The amendment is consistent with GST policy that displayed prices should include any GST.

Since July 2000, when the goods and services tax (GST) was introduced, the ACCC has played a major role in ensuring consumers are not misled about the GST.

GST-inclusive pricing means that a displayed price includes the GST. Prices should not be shown as excluding GST. Advertisements, price lists, or quotes that specify prices without referring to any extra mandatory amounts payable, such as the GST, risk contravening the Act.

However, businesses can draw the consumer's attention to the GST component separately.

It is unlawful to promote part of the price of a product, without also specifying its full cash price, for example, '\$200 plus GST'.

Even before the Act is amended, the best way businesses can make sure they are not misleading consumers, and avoid risking prosecution for breaching the Trade Practices Act, is to state upfront the full price of any item for sale.

The ACCC considers all-inclusive pricing to be best practice for business and good risk management.

A case in point

In October 2002, after an ACCC investigation, a restaurant meal home delivery service agreed to immediately stop distribution of its menu booklets that did not contain GST-inclusive prices and associated fees.

The company also agreed to amend all its menu prices and associated fees on its website so they were GST-inclusive.

Other measures the company agreed to included corrective advertising in the national press; re-voicing telephone recordings and other operation procedures to alert customers to the fact that GST applied (as an interim measure until all of its booklets contain GST-inclusive prices and associated fees); and an undertaking that future advertising and promotional material would contain GST-inclusive menu prices and associated fees. The company also agreed to implement a trade practices compliance program approved by the ACCC.

The ACCC and prices

CONSUMERS (INCLUDING BUSINESSES) ARE RIGHTLY VERY CONCERNED ABOUT THE PRICES THEY PAY FOR GOODS AND SERVICES. THEY WANT TO FEEL THAT WHEN THEY BUY SOMETHING THEY ARE GETTING VALUE FOR MONEY.

GENERALLY CONSUMERS WILL GET VALUE FOR MONEY BECAUSE THE PRICES THEY PAY HAVE BEEN DETERMINED IN COMPETITIVE MARKETS AND BECAUSE THEY HAVE BEEN GIVEN ENOUGH CLEAR, ACCURATE INFORMATION ON THE PRICES OF THE GOODS AND SERVICES THAT THEY ARE INTERESTED IN.

When is the ACCC interested in pricing issues?

Broadly, the ACCC becomes involved when prices have not been determined through a competitive process and when they have been misrepresented. Prices are not likely to have been determined by a competitive process if the firm supplying a good or service is a monopoly provider (or has significant market power) or when firms engage in anti-competitive practices, such as price fixing, predatory pricing and resale price maintenance. Advertised prices may be misleading if, for example, a retailer doesn't state the full cash price or advertises a was/now price but the 'was' price never existed.

The ACCC is involved in pricing issues because of its responsibilities under the *Trade Practices Act 1974*. It has a role in regulating prices for some specific services provided under monopoly, or near monopoly, conditions, such as electricity, gas, telecommunications, rail, postal and air traffic control. Its involvement relates to parts of the Act that deal with access to essential facilities (Parts IIIA and XIC) and prices surveillance (Part VIIA).

The ACCC's regulatory role mainly relates to national organisations and industries supplying national services. State governments also have independent agencies, such as the Essential Services Commission Victoria, the New South Wales Independent Pricing and Regulatory Tribunal, and the Queensland Competition Authority that regulate prices for monopoly infrastructure services in certain state-based industries, such as port services, rail, gas, electricity and water.

How does the ACCC become involved in pricing issues?

The ACCC monitors prices in particular markets when directed to do so by the Australian Government. However, this happens infrequently and monitoring is usually restricted to markets that are newly deregulated, subject to micro-economic reforms or where consumers are significantly concerned about the effect of competition on pricing. Aeronautical prices at Australia's major airports, container stevedore prices, public liability and professional indemnity insurance premiums, medical indemnity insurance premiums and petrol prices are currently being monitored by the ACCC.





More generally, the ACCC makes sure businesses comply with the provisions of the Trade Practices Act that relate to anti-competitive pricing practices. It also has a national consumer protection role in its administration of the law, which covers misleading and deceptive representations on pricing.

State governments also have some roles in this area through their fair trading agencies. The ACCC is more likely to be involved in national and international issues, whereas the state government fair trading agencies are involved in state-based issues.

While the ACCC is the only Commonwealth Government agency that has these roles, individuals or companies can also take private actions in some circumstances.

What does the ACCC do about prices?

When the ACCC has the role of regulating prices, either by setting price levels (such as for electricity transmission, gas pipeline charges and telecommunication charges) or by reviewing pricing proposals (such as postal charges, air navigation charges and charges for interstate rail access), the broad approaches and objectives are similar.

The ACCC publicises its processes, provides information, seeks submissions from interested parties and will usually issue a draft decision for comment before making a final decision. It aims to set prices at levels that encourage efficient services and provide a reasonable rate of return for investment.

In monitoring prices the ACCC will collect information on the costs, profits and prices of the goods or services. It then reports either directly to the Australian Government or to the public. Price monitoring provides information on price levels and price movements to identify unacceptable pricing practices or structural market problems. If these are identified it is up to the government to consider what action to take.

In the case of petrol prices the ACCC took on an informal monitoring role after petrol and diesel prices were deregulated in 1998. Information on petrol price cycles in Sydney, Melbourne, Brisbane, Adelaide and Perth, available on the ACCC's website, can be used by consumers to help them decide when to buy petrol. The site explains what determines the price of petrol generally; and has information on country prices and provides links to other internet sites that provide petrol price data. During the past couple of years the Australian Government has asked the ACCC to report on various petrol pricing issues.

The ACCC also investigates pricing complaints relating to the anti-competitive and consumer protection provisions of the Trade Practices Act. If it believes the Act has been breached, the ACCC will take some form of enforcement action depending on the nature of the breach involved. Any firms engaging in pricing practices that breach the Act are likely to be penalised by the courts. In some cases consumers will benefit directly through corrective advertising measures or monetary compensation.

Keeping an eye on the airports

WHAT IS PRICE MONITORING

PRICE MONITORING IS THE MONITORING OF THE PRICES, COSTS AND PROFITS OF COMPANIES AND GOVERNMENT AUTHORITIES FOR SPECIFIED GOODS AND SERVICES. IT IS UNDERTAKEN BY THE ACCC AT THE REQUEST OF THE MINISTER.

The ACCC's role relating to airports began in 1997, when privatisation of Australian airports began. That role involved administering price caps, price monitoring and quality of service monitoring.

Currently the ACCC's role is to monitor prices, costs and profits relating to the supply of aeronautical services by Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports. It also monitors the quality of services provided at these airports.

Apart from regional air services provided by Sydney airport, airports are no longer subject to price caps and are not required to notify the ACCC before increasing prices.

These airports are also required under the Airports Act to provide the ACCC with annual financial accounts.

In 2001 the Productivity Commission held an inquiry into the price regulation of airport services and recommended that airports with market power should be subject to a light-handed approach to price regulation.

In particular the Productivity Commission recommended that price notification and price caps under the Prices Surveillance Act stop for all airports (except for regional air services at Sydney airport). It also recommended that price monitoring for Adelaide, Brisbane, Canberra, Darwin, Melbourne, Perth and Sydney airports be introduced for a five-year period and that it be reviewed at the end of that period.

The Australian Government accepted the recommendations but reserved its right to hold a review sooner if it believes there have been unjustifiable price increases warranting the re-introduction of price controls.

The second airport price monitoring report

In February 2005 the ACCC released the *Airports price monitoring and financial report 2003-04*.

The report stated that the prices airlines pay Australia's major airports for aeronautical services such as the use of runways and terminal facilities increased by less in the reporting year than the previous year.

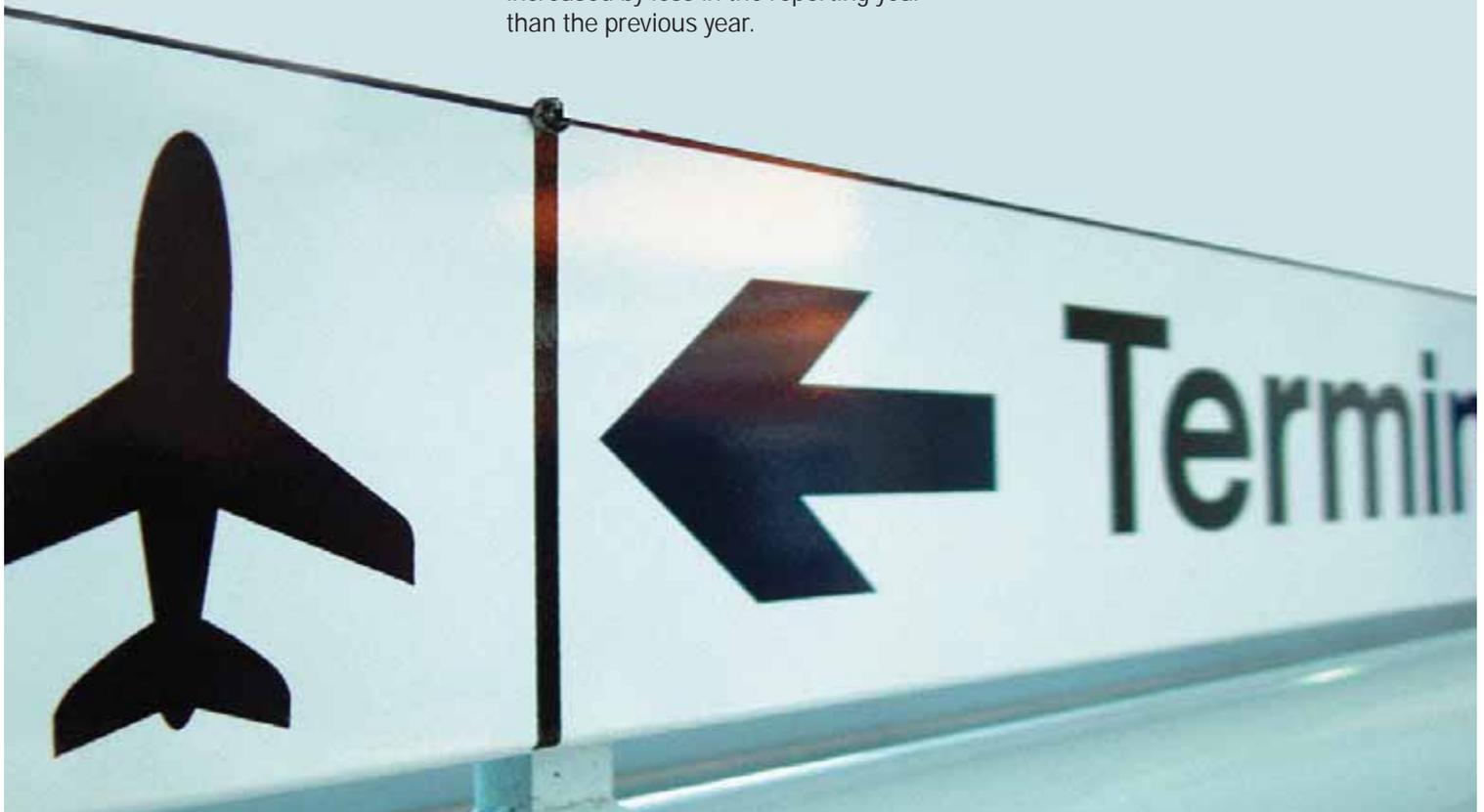
ACCC Chairman, Mr Graeme Samuel, said last year's report showed that prices (as measured by aeronautical revenue per passenger) in the two years from 200-01 to 2002-03 had increased substantially at all major airports.

In 2002-03 there were lower price increases (up to 16 per cent) and in some cases, reductions, he said.

But, Mr Samuel said that over the past three years prices increased by between 50 per cent and 200 per cent.

What are aeronautical charges?

Aeronautical charges are the prices airports charge airlines for airport services, such as the use of runways, parking aprons and terminal facilities.



Predatory pricing

PREDATORY PRICING IS WHEN A COMPANY SETS AN UNREALISTICALLY LOW PRICE FOR A PRODUCT OR SERVICE TO FORCE A COMPETITOR TO WITHDRAW FROM THE MARKET. THIS LEAVES THE COMPANY WITH LESS COMPETITION, WHICH MEANS IT CAN DISREGARD MARKET FORCES, RAISE PRICES AND EXPLOIT THE CONSUMER.

Predatory pricing is against the law. The Trade Practices Act prohibits businesses that have substantial market power from taking advantage of that power to eliminate or substantially damage a competitor, stop someone from entering the market or deter someone from engaging in competitive conduct.

Price cutting or underselling competitors is not necessarily predatory pricing, but when a business with substantial market power uses these techniques to get rid of competitors, this is considered to be a misuse of that power.

Predatory pricing can only happen when the business setting the price has a substantial degree of market power. A business has this when its activities are not significantly constrained by competitors, suppliers or customers.

The intention of the price cutting must be to eliminate or substantially damage a competitor, prevent someone entering the market or deter or prevent someone from engaging in competitive conduct in a market.

It's this clear purpose that turns price cutting by a company with substantial market power into predatory pricing. Once competitors are eliminated the likely results are that the company can raise its prices, recoup its losses and exploit consumers.

The ACCC is often asked to investigate accusations of predatory pricing and to explain what it is to members of the business community.

But predatory pricing is difficult to prove because the initial signs are pro-competitive (in that initially lower prices are good for consumers) and there is often no written evidence of a company's purpose with which an allegation could be upheld.

A case in point

In a long-running seesawing case that the ACCC brought against Boral Besser Masonry Ltd, the High Court finally found in a 6–1 majority decision in February 2003, that Boral had not breached the misuse of the market power provision of the Trade Practices Act. It was the High Court's first decision about predatory pricing and s. 46 of the Act.

C&M Bricks, a private company that manufactured concrete masonry products in Bendigo, Victoria, had begun new manufacturing operations in the outskirts of Melbourne in February 1994 using highly efficient, state-of-the-art technology, which increased production capacity and reduced costs significantly.

The ACCC alleged that Boral Besser Masonry Ltd slashed prices below manufacturing costs to drive C&M Bricks out of the concrete masonry products market and deterring anyone else entering it.

At the initial trial in 1998 the court found that s. 46 had not been breached. The court was not persuaded that Boral Besser Masonry Ltd had the requisite degree of market power to establish a contravention. However, it did find that Boral had engaged in pricing below manufacturing costs to deter new entrants and drive the more efficient C&M out of the market.

The ACCC appealed to the Full Court of the Federal Court.

However, two years later, the Full Court of the Federal Court's decision was overturned in the High Court. The High Court found that Boral did not have substantial market power and therefore had not contravened the Act. The court found that Boral did not have the market power necessary to recoup its losses after a price war. It also considered that price cutting when operating in an intensely competitive market is different from predatory pricing because price cutting to meet market conditions is a competitive response, not an anti-competitive one.

Many Australian markets are highly concentrated—often having only a few large players. In taking these proceedings, the ACCC sought to explore how effective s. 46 of the Act is in protecting existing and new players with more efficient manufacturing processes.

What is prices surveillance?

PRICES SURVEILLANCE ADDRESSES SITUATIONS WHERE COMPETITIVE PRESSURES IN AN INDUSTRY ARE NOT ENOUGH TO ACHIEVE EFFICIENT PRICES AND PROTECT CONSUMERS. SO PRICES SURVEILLANCE WOULD TYPICALLY BE USED IN INDUSTRIES WHERE THERE IS LITTLE EFFECTIVE CONSTRAINT ON A BUSINESS' PRICING POWER.

Under the prices surveillance provisions of the Trade Practices Act:

- › the minister may ask the ACCC or any other body to hold a **price inquiry** into the supply of specified goods or services
- › the minister or the ACCC (with the minister's approval) may declare that supplier is a **declared** supplier and that specified goods or services are **notified** goods or services, in which case, unless permitted by the ACCC, certain restrictions are imposed on their ability to increase prices or supply new localities
- › the minister may direct the ACCC to **monitor** the prices, costs or profits of a specified business or industry.

What is a price inquiry?

A price inquiry is conducted to determine whether buyers are getting a fair deal in the supply of goods and services. The minister may ask the ACCC to conduct an inquiry into the supply of specified goods or services. The minister may also confine an inquiry to a particular supplier and will also set a time limit for when the inquiry must be completed.

When the inquiry ends the ACCC will report its findings to the minister. Under the Trade Practices Act the minister may also request a body other than the ACCC to conduct the inquiry.

Price inquiries must generally be held in public and the submissions would normally be made available to interested parties. If commercially sensitive information would be revealed during the inquiry, the ACCC may take evidence in private and receive confidential submissions.

During the course of an inquiry certain restrictions relating to supply in new localities and price increases may be imposed on the businesses concerned.

What is price notification?

Price notification protects buyers from excessive price increases. The minister (or the ACCC with the minister's approval) may declare that a supplier is a 'declared' supplier and that specified goods or services are 'notified'. The declaration is published in the Commonwealth Gazette. The ACCC would also advise the body that they are declared for the purposes of the Act, and set out the length of time that they are to be declared.

Certain price and supply restrictions are imposed on a 'declared' body's supply of the specified goods or services. Unless approved by the ACCC, they cannot sell specified goods or services at a higher price than was in place over the previous 12 months.

The ACCC maintains a public register of price notifications, its own decisions and the reasons for those decisions. Anyone who contravenes the price notification provisions is liable to a fine.



What is price monitoring?

Price monitoring is where the ACCC monitors the pricing in an industry, or the pricing behaviour of certain businesses in an industry. Under the Act the minister may direct the ACCC to monitor the prices, costs or profits of supplying goods or services in a specific industry. The ACCC must provide the minister with a report on its findings, and make it available for public inspection.

What are the statutory criteria that the ACCC must take into account?

The ACCC must take into account three statutory criteria, although the minister may also direct the ACCC to consider other matters. The three statutory criteria are:

- ▶ the need to maintain investment and employment, including the influence of profitability on investment and employment
- ▶ the need to discourage a person who is in a position to substantially influence a market for goods and services from taking advantage of that power in setting prices
- ▶ the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

The minister has also issued general directions in the past, however the only current general direction was issued on 22 April 1988 and requires the ACCC to give special consideration to 'the government's policy that increases in executive remuneration in excess of those permitted under wage fixation principles and decisions announced by the Australian Conciliation and Arbitration Commission in National Wages Cases should not generally be accepted as a basis for price increases'.

The minister has also issued other specific directions, for example, directions relating to privately owned airports.

How does the ACCC obtain information to carry out its prices surveillance functions?

The ACCC relies heavily on interested parties and the general public volunteering relevant information. However, if the ACCC thinks a person or a business has relevant information or documents, then the ACCC can direct them to provide it. If they claim that public disclosure of information would damage their competitive position, the ACCC will try to maintain confidentiality, but only if it is satisfied that the claim is justified and that disclosure is not necessary in the public interest.

What businesses are subject to prices surveillance?

Prices surveillance may be imposed in the supply of goods and services by trading, financial and foreign corporations, as well as certain Commonwealth and state authorities. In practice, prices surveillance is likely to be appropriate only for the relatively small number of Australian businesses that operate in significant markets with limited or no competitive constraints.

Reform on the waterfront—how monitoring works in practice

Starting in the 1980s the Australian Government has instituted a number of reforms in the port environment. On 20 January 1999 the Federal Treasurer directed the ACCC to monitor prices, costs and profits of container terminal operator companies at the ports of Adelaide, Brisbane, Burnie, Fremantle, Melbourne and Sydney and to report within four months of the end of each financial year.

The monitoring program provides information to the government and wider community about the progress of waterfront reform.

The annual monitoring reports have established some clear trends that include increasing productivity and profitability of the stevedores, and a history of falling average costs incurred by users. In recent years the reports have shown that the stevedores' operations are running close to capacity.

Whatever happened to the Prices Surveillance Act?

THE PRICES SURVEILLANCE ACT PASSED INTO HISTORY IN 2004 AFTER THE PASSAGE THROUGH PARLIAMENT OF THE TRADE PRACTICES LEGISLATION AMENDMENT BILL 2003.

The bill repealed the *Prices Surveillance Act 1983* and, in essence, replaced it with the inclusion of similar provisions as a new part (Part VIIA) to the *Trade Practices Act 1974*.

Like the Prices Surveillance Act, Part VIIA of the Trade Practices Act provides for selective surveillance of the prices of certain goods and services, at the discretion of the minister. Declared companies and authorities must give the ACCC notice before raising the prices of notified goods or services and to wait a statutory period before implementing an increase.

At the direction of the minister, the inquiry body (which may be the ACCC or another organisation nominated by the minister) will inquire into prices charged and conduct certain other inquiries, such as investigating options for pro-competitive reform.

RRP—it's just a suggestion

A MAJOR CONCERN FOR PEOPLE RUNNING BUSINESSES IS PRICE SETTING. REVENUE, TURNOVER AND FINAL PROFIT ARE ALL AFFECTED BY THE PRICES A BUSINESS SETS FOR GOODS AND SERVICES.

Generally speaking, a business is free to set its own prices, and decisions on how much to charge will be affected by a range of factors including what competitors are charging and efforts to attract customers by advertising 'specials' or having seasonal or promotional sales.

Any business is free to set selling prices at whatever level it wants to, as long as those prices are set independently.

Businesses who supply other businesses' goods are allowed to recommend a price that the goods should be sold at, but this can only be a recommendation. Any attempt to force another business to charge this price, or to not charge below a certain price, may be a breach of the Act. This not only includes situations where a price is overtly stated, but also where the desired price is described by a formula (e.g. selling price = cost + 20%). The Trade Practices Act prohibits manufacturers, importers or wholesalers from:

- › making it known to resellers the minimum price below which goods must not be sold
- › setting a price that retailers are likely to understand is the price below which goods should not be sold or advertised
- › agreeing with a retailer that goods will not be advertised below a specified price
- › inducing a retailer not to discount goods by giving a better buying price
- › cutting off supply to a retailer to force them to comply with any of the above
- › threatening to refuse supply for any of the reasons above.

It's fine for suppliers to recommend a retail price so long as it is just that—recommended. But it's illegal for them to put pressure on a retailer to charge the listed price—this is called 'resale price maintenance' and carries heavy penalties under the Trade Practices Act.

Sometimes suppliers try to impose a resale price to maintain brand positioning or to give resellers attractive profit margins. However, this is illegal.

In a recent case that the ACCC took to the Federal Court, Dermalogica Pty Ltd, a wholesaler of prestige skin care products, was fined \$250 000 for engaging in resale price maintenance.

Dermalogica had attempted to stop two retailers discounting its products below recommended retail prices. Dermalogica had written to the two retailers stating:

It has come to our attention that your website is offering the Dermalogica product range for sale lower than the recommended retail price. Our web guidelines and policies clearly state that in order to maintain Dermalogica's premium brand image and consistent pricing strategy, we strongly discourage the selling of Dermalogica products for more or less than their suggested retail prices.

I would ask you therefore to please adjust your prices for online retailing with immediate effect.

Dermalogica staff had met with the retailers to voice their concerns in person and its web guidelines stated that a violation of its pricing policy could result in account termination and legal action.

As Justice Goldberg pointed out, the company's conduct was 'deliberate, bold and somewhat aggressive'.

The only exemption to the law is when suppliers withhold supplies of goods because a company has engaged in 'loss leader selling'. That is, buying goods with the intention of selling them below their cost so that:

- › the company can promote their business
- › the company can attract customers who are likely to buy other goods or services.

This exemption does not apply to genuine clearances, or when a supplier has agreed to supply goods to a company for the purpose of loss leader selling.

Retailers are sometimes tempted to ask their suppliers to use their price lists to stop competitors from discounting. The retailer, as well as the supplier who agrees with the suggestion, would then be breaking the law—that is, inducing resale price maintenance or price fixing.

Any business person who believes a supplier is pressuring them into charging higher prices, can contact the ACCC Infocentre on 1300 302 502.

When a 'wink and a nod' is not OK

ANY AGREEMENT BETWEEN A BUSINESS AND A COMPETITOR TO FIX PRICES IS ILLEGAL UNDER THE TRADE PRACTICES ACT. PRICE FIXING AGREEMENTS DO NOT HAVE TO BE IN WRITING. THEY CAN BE A 'WINK AND A NOD', MADE OVER A DRINK IN A LOCAL PUB, AT AN ASSOCIATION MEETING OR AT A SOCIAL OCCASION.



What's important is not how the agreement was made, or even how effective it is, but that competitors are working out their prices collectively and not individually.

Price fixing is a per se offence—that is, no matter what the effect is on competition in a market, price fixing agreements between competitors are illegal.

Price fixing includes agreements that purport to 'recommend' prices but which in reality fix prices.

Agreements to fix, maintain or control any discount, allowance, rebate or credit for goods or services are also considered to be price fixing under the Act.

However, there are some exceptions. In certain circumstances, selling arrangements made by joint venture participants and collective buying arrangements are exempt from the per se price fixing provision. If there are other competition concerns with these arrangements, parties may apply for authorisation. The ACCC can authorise particular conduct that would normally breach the Act if it is satisfied that the public benefit outweighs the detriment.

Amendments are likely to be passed later this year to provide a new joint venture defence for price fixing. Under the new amendments a price fixing arrangement will not breach the Act if it is for the purposes of a joint venture and does not substantially lessen competition.

A case in point

It took nearly three years for the ACCC to win a case against petrol companies operating in Ballarat.

But in the Federal Court in March 2005 penalties of \$23.3 million were imposed on the respondents for price fixing conduct in the Ballarat petrol market.

The case began in May 2002 after the ACCC had investigated allegations by a service station operator, who was supplied by one of the participants at the time.

The ACCC instituted the case against 16 companies and individuals, alleging they had a long-standing price fixing arrangement.

The ACCC alleged the companies arranged to increase prices by telephoning each other, communicating the size and approximate time of price rises and then contacting retail sites to implement the rises.

The ACCC alleged when a company became aware that a service station had not raised its price, further calls were made to participants to encourage the site to raise its prices.

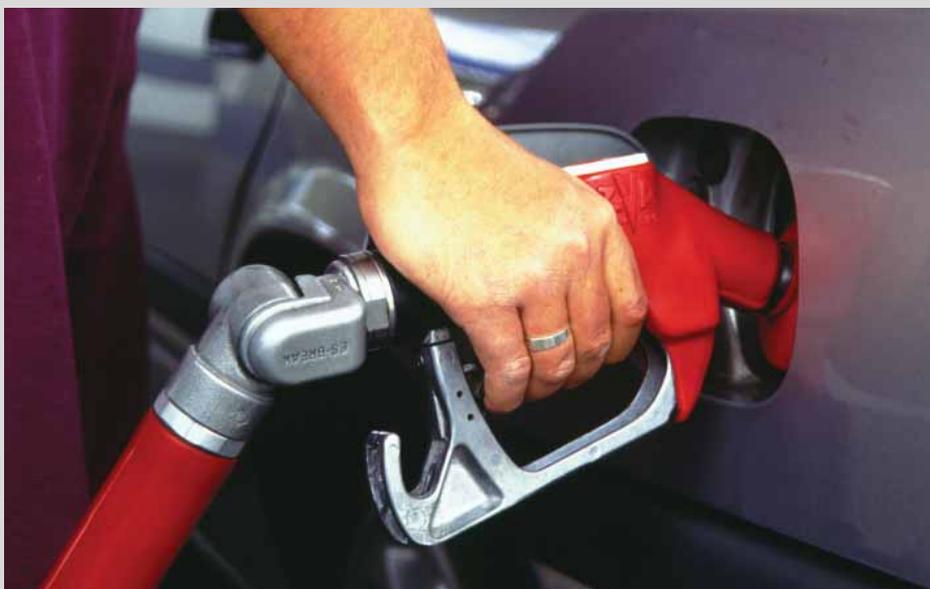
A number of respondents made admissions and proceeded to early penalty hearings, while the contesting respondents went to trial.

In December 2004 the presiding judge in the Federal Court found the contesting respondents had engaged in price fixing conduct in breach of s. 45 of the Trade Practices Act.

Some of the respondents are now appealing the decision and penalties to the Full Federal Court. The ACCC has also filed a cross-appeal seeking greater penalties against one of the respondents.

Getting the good oil on petrol prices

THE PRICE OF PETROL IS ALWAYS A HOT TOPIC. A NUMBER OF FACTORS AFFECT THE PRICE OF PETROL INCLUDING CHANGES IN INTERNATIONAL PRICES FOR REFINED PETROLEUM PRODUCTS, MOVEMENTS IN THE AUSTRALIAN/US DOLLAR EXCHANGE RATE, FEDERAL EXCISE AND THE GST, STATE GOVERNMENT SUBSIDIES, PRICE CYCLES AND THE LEVEL OF COMPETITION IN LOCAL MARKETS.



In March 2001 the Australian Government asked the ACCC to look at whether it was feasible to place limitations on petrol and diesel retail price fluctuations in Australia. The resulting report—*Reducing fuel price variability*—was issued on 14 May 2002 and is available to download from the publications section of the ACCC website www.accc.gov.au.

It examined issues such as petrol price cycles in the major metropolitan cities, movements of petrol prices within a day, causes of price cycles, implications of price cycles for consumers, and options to limit price cycles.

The report concluded that it is likely that, overall, consumers benefit from price cycles. In general consumers are better off with variable prices than they are with a fixed (simple average) price. When the price is fixed, consumers have to pay that price and that price alone. However, when the price is variable, consumers can buy at the lower price. They will tend to buy more at the lower price and restrict their purchases when the price is high. The data obtained by the ACCC concerning sales volumes over the price cycle supported this analysis. It showed that on average, around 60 per cent of petrol is sold at prices below the average price of the price cycle, and around 40 per cent is sold above.

As a result the ACCC began an awareness raising campaign to help consumers understand more about price cycles, and help them to buy petrol when prices are relatively low.

For this purpose, the ACCC has a section of its website devoted to petrol price cycles.

Peaks and troughs—the petrol price cycle

In those Australian metropolitan cities which have regular petrol price cycles, the cycle tends to show a sawtooth pattern. In other words prices rise rapidly over a short period and then steadily decrease. However, while these cycles follow a general pattern, they are not totally regular and therefore each cycle is likely to differ.

The ACCC provides information on petrol price cycles on its website to help consumers decide when to buy petrol.

For ACCC analysis, a price cycle is considered to have occurred when there are total price movements between trough and peak of 1.0 cents per litre or more and similar movements between the peak and the next trough.

In a price cycle, the price will move from a trough (the lowest average daily price after a peak) to a peak (the highest average daily price after a trough). The length of a price cycle is the number of days between two troughs.

For more information and details on current price cycles visit www.accc.gov.au.

Country petrol prices

Unlike petrol prices in some of the major metropolitan cities, prices in most country towns do not generally move in cycles. They generally tend to remain broadly stable over the week.

The major factors in determining country prices are movements in the price of international product and the Australian/US dollar exchange rate. These movements tend to influence country prices with a greater lag compared with their influence on metropolitan prices. This is because fuel stocks are replenished less often in the country where less fuel is sold.

It can be misleading to compare country prices with the low point of a metropolitan price cycle. The low price is probably unsustainable, with metropolitan retailers possibly only breaking even or making losses. A more accurate comparison is to compare prices over a longer period (e.g. a month) so that the effect of the price cycles in metropolitan areas can be averaged out.

Data on country petrol prices is available from a number of sources on the internet including the Travelmate website—www.travelmate.com.au—which has information on prices at Caltex and Ampol service stations across Australia and the Shell website at www.shell.com.

Other useful websites

www.fuelwatch.wa.gov.au

The Western Australian Fuelwatch website provides information on prices at service stations in 53 regional locations. It also has information on the best prices and average prices in seven major country towns and a list of the best 50 unleaded petrol prices in non-metropolitan areas.

www.aip.com.au

The Australian Institute of Petroleum website has average weekly retail unleaded petrol prices for 98 country towns throughout Australia (as well as for eight capital cities). The prices are based on information supplied by BP, Caltex and Mobil. There are also charts showing movements in the weekly average price for the past 12 weeks in these towns.

www.nt.gov.au/justice/graphpages/cba/ntfuel/nt_fuel_watch.shtml

The Northern Territory Fuelwatch website lists average weekly petrol prices for Alice Springs, Katherine, Nhulunbury, Tennant Creek, Darwin and Palmerston. A chart showing the movements in unleaded petrol prices in these towns in the current year and previous years is also included.

www.aaa.asn.au

The Australian Automobile Association website provides monthly data on 98 regional and rural centres and eight capital cities around Australia. Historical data is available back to April 1998.

www.racq.com.au

The Royal Automobile Club of Queensland website has monthly data on over 25 country towns in Queensland. The data is available for the previous eight months.

www.caltex.com.au

The Caltex website has information on average monthly prices for city and country, for each state and territory, based on prices set by Ampol and Caltex dealers at the pump. These prices are broken down into their various components (including terminal gate price, GST and freight).

Why country prices are higher than city prices

In 1996 the ACCC held an inquiry into the petroleum products declaration and one of the issues considered was the difference between city and country petrol prices.

The ACCC found that the country generally had higher prices because of a combination of:

- › higher freight costs
- › lower volume
- › less diversity of revenue sources for country outlets
- › higher retail margins
- › lower competition levels
- › the absence of independent retail chains
- › the general absence of wholesale and retail price discounting
- › regular and sometimes deep wholesale price discounting in capital cities which increases the differences with country areas
- › the greater likelihood of conscious price parallelism and possible collusion existing between country dealers and distributors
- › availability of some 'under-the-canopy' discounts and the extent of oil company card sales which can result in retailers applying higher pump prices to offset these effects.

You can order a copy of the ACCC's report *Inquiry into the petroleum products declaration* by ringing the ACCC Infocentre on 1300 302 502.

What is the ACCC's role in relation to petrol prices?

The ACCC is responsible for administering the *Trade Practices Act 1974*.

The main purpose of the Act is to promote competition and efficiency in markets within Australia and to protect consumers from unlawful anti-competitive conduct and unlawful market practices.

Since petrol and diesel prices were deregulated in 1998, the ACCC is no longer required to endorse maximum wholesale prices. Therefore, petrol wholesalers are free to set their own prices based on market conditions.

However the ACCC still retains an informal monitoring role and closely monitors petrol prices in metropolitan areas and around 110 country towns. Information on prices in the five major capital cities is available on the 'petrol price cycles' page of the ACCC website at www.accc.gov.au.

Electricity pricing—how it works

THERE ARE MANY DIFFERENT COSTS INVOLVED IN THE GENERATION, TRANSPORT AND SALE OF ELECTRICITY TO CONSUMERS. CONSUMERS ARE OFTEN ONLY AWARE OF THE BILL THAT AN ELECTRICITY RETAILER SENDS, YET MANY OTHER PARTIES ARE INVOLVED IN THE SUPPLY OF ELECTRICITY.

Retailers are essentially the middlemen that link electricity customers or users with the companies that produce and transport electricity. Electricity use can only really be measured at the point of consumption, so electricity retailers bundle the costs of generation, transmission and distribution and send customers a single bill.

Generation

In the National Electricity Market (NEM), comprised of Queensland, NSW, ACT, Victoria, SA and Tasmania, generators offer electricity at a variety of prices, and the cheapest electricity is used to supply customers. Customers have no way of knowing which generator has produced the electricity they use.

Before the reform of the electricity market, each state generated its own power to sell to its own customers. Now, electricity is traded across state borders (except WA and NT) using interconnectors between high voltage networks. Stronger interconnection means sharing reserves between states and results in greater security of supply.

Transmission and distribution

Each state is served by its own transmission company, which transports electricity along large capacity electricity lines from the site of generation to smaller lines.

Due to the huge costs involved in establishing and maintaining transmission assets, there is generally only one transmission company in each state or area, and for this reason they earn a fixed revenue. The ACCC was responsible for determining revenues for transmission companies in NEM participating states. However, from July 2005 the Australian Energy Regulator came into being and took on the regulation of the electricity transmission networks.

The final transport of electricity to the customer is completed by smaller lines, known as distribution lines, the lines we see in our streets. Distribution companies are regulated by price caps, which are determined by state regulators. Transmission companies work out the prices they can charge from the revenue they are allowed to earn. Whereas, distribution companies are told what prices they can charge their customers, which determines the revenue they can earn.



Retailers

RETAILERS ARE RESPONSIBLE FOR MEASURING THE ACTUAL ELECTRICITY USAGE OF CUSTOMERS. CUSTOMERS PAY RETAILERS IN THE FORM OF A TARIFF WHICH IS GENERALLY NEGOTIATED BETWEEN THE CUSTOMER AND THE RETAILER. SAFETY NET TARIFFS, ESPECIALLY FOR SMALL COMMERCIAL AND DOMESTIC CUSTOMERS, EXIST IN ALL STATES AND ARE APPROVED BY THE STATE REGULATORS.



The following table provides an approximate breakdown of the final costs for electricity.

Cost component	Description	Proportion of total costs	Cost determination
Generation	Production of electricity	50–60%	Trade in the NEM and associated financial markets
Transmission and distribution	Connection to and use of electricity networks	30–35%	Transmission: AER Distribution: state regulators
Retail	Retail margin	5%	State regulators and retail company boards
Market fees	Charges for participation in the NEM	Less than 1%	NEMMCO
Network losses	Electrical energy lost in transmission between the point of generation and the point of consumption	Less than 1%	NEMMCO

The AER and regulation

The Australian Energy Regulator has a role in regulating transmission companies. It does this by limiting the amount of revenue that they can earn in each year. Similarly distribution companies are regulated, by limiting the prices they can charge their customers. The regulation is necessary as transmission and distribution companies are monopoly companies—that is, there are no competing transmission or distribution companies in their areas. Regulation of monopolies limits the prices these companies can charge.



Public liability and professional indemnity insurance monitoring

THE COST OF PUBLIC LIABILITY AND PROFESSIONAL INDEMNITY INSURANCE HAS BEEN A HOT TOPIC FOR COMMONWEALTH, STATE AND TERRITORY GOVERNMENTS IN RECENT YEARS.

The issue prompted governments to begin reforming legislation, with relevant ministers committing to a consistent national approach to reform following a ministerial summit on the issue in May 2002.

Many of the measures taken were aimed at changing the administration of claims and the amount of damages that could be awarded for personal injury associated with such claims.

Governments have also indicated they expect the insurance industry to deliver affordable public liability products to the community on the basis of the reform package.

As a part of this reform the Australian Government asked the ACCC to monitor costs and premiums in public liability and professional indemnity insurance, and determine, to the extent possible, whether the benefits of reforms are being passed on to consumers. The ACCC was to report to the government every six months over a two-year period.

To undertake this monitoring role, the ACCC requested a range of information from a sample of insurers accounting for a large market share in each of these classes of insurance. This information was used to determine movements in costs and premiums and, as best possible, the impact of reforms.

The government released the fourth report in this series on 17 February 2005. The report found that for public liability insurance both the average claims size and the average premium fell in the six months to 30 June 2004, by 11 and 15 per cent respectively. These results were counter to trends in previous years, and may be the result of various factors, including tort law reforms.

In professional indemnity insurance, the average premium fell by 17 per cent whereas the average claim size rose by 21 per cent in the six months to 30 June 2004. The report found that although insurers did not expect reforms enacted up to 30 June 2004 would affect professional indemnity costs and premiums, several jurisdictions had subsequently enacted legislation that insurers expect will impact on costs and premiums in the longer term.

It was originally intended that this report would be the last. However, the Assistant Treasurer, the Hon. Mal Brough, has asked the ACCC to continue to monitor public liability and professional indemnity insurance annually for a further three years.

Copies of the public liability and professional indemnity insurance monitoring reports can be found at www.accc.gov.au.

Medical indemnity insurance monitoring

In May 2002 the largest medical indemnity provider in Australia, United Medical Protection, was placed into provisional liquidation resulting in a potential lack of indemnity cover for many doctors.

At the same time, medical practitioners were experiencing large increases in premiums charged by all medical indemnity providers. The Australian Government responded to these concerns by introducing a framework of reforms aimed at ensuring a viable and ongoing medical indemnity insurance market.

The reform package included a variety of measures including premium subsidies, government assistance to medical indemnity providers and medical practitioners for high cost claims, and placing the industry within a new regulatory framework.

As a part of this package of reforms, the government requested that the ACCC monitor medical indemnity insurance premiums to assess whether they are actuarially and commercially justified.

In assessing the actuarial justification, the ACCC examines the process adopted by medical indemnity providers to derive premium rates, the approach taken to construct those premiums, the level of detail used to support pricing assumptions and the breadth of issues taken into consideration (such as recent government reforms).

In assessing the commercial justification of premiums the ACCC considers the ability of medical indemnity providers to meet their commercial obligations to key stakeholders. It examines the impact on premiums of the Australian Prudential Regulation Authority's minimum capital regulatory requirements that medical indemnity providers need to achieve to reach a fully capitalised position by 30 June 2008, as well as other broader commercial obligations.

The analysis covers the five medical indemnity providers in Australia that offer insurance to private medical practitioners. To conduct its analysis the ACCC requests quantitative and qualitative information from these entities about their premium setting arrangements, cost structures and the impact of various government reforms.

On 23 February 2004 the government released the ACCC's first report, which examined the actuarial and commercial justification of premiums for 2003–04.

The report concluded that the premiums charged by four providers were actuarially justified on the basis that the overall premium pool was adequate to cover projected costs. The ACCC was unable to assess the premiums of the remaining provider because of the lack of information it provided. The ACCC found that the premiums set by all five providers were considered to be commercially justified.

On 16 March 2005 the government released the ACCC's second report for 2004–05.

It concluded that the premiums charged by all five providers were considered to be actuarially and commercially justified. The report also found that the average medical indemnity insurance premium fell by 12 per cent in 2003–04.

Copies of the first and second medical indemnity insurance monitoring reports can be found at www.accc.gov.au.

The ACCC's role in telco pricing

THE ACCC HAS TWO ROLES THAT RELATE TO PRICING TELECOMMUNICATION SERVICES. FIRST, IN SOME CIRCUMSTANCES, THE ACCC DETERMINES WHOLESALE PRICING PRINCIPLES FOR THE TELECOMMUNICATIONS SERVICES THAT ARE REGULATED UNDER THE *TRADE PRACTICES ACT 1974*. SECOND, THE ACCC ALSO REGULARLY ADVISES THE GOVERNMENT ABOUT FUTURE RETAIL PRICE CONTROLS THAT SHOULD APPLY TO TELSTRA, AS WELL AS ITS COMPLIANCE WITH THE EXISTING RETAIL PRICE CONTROLS. NEITHER ROLE INVOLVES THE ACCC DIRECTLY SETTING RETAIL PRICES THAT ARE CHARGED TO CONSUMERS.



Pricing principles

The ACCC determines pricing principles for the wholesale services it has 'declared' under the Trade Practices Act.

Once a service has been declared, the provider of that service is subject to standard access obligations. These require the provider to make the service available to an access seeker, if requested. The ACCC can declare a particular service if it has held a public inquiry and is satisfied that the declaration will promote the long-term interests of consumers.

The terms and conditions on which the provider makes the service available are subject to commercial agreement. If the parties cannot agree, the ACCC can determine the terms and conditions, acting as an arbitrator. The provider also has the option of setting out the terms and conditions in an undertaking. If the ACCC accepts the undertaking, the ACCC cannot then make an arbitration decision that is inconsistent with the undertaking terms and conditions.

When a service is declared, or as soon as practicable afterwards, the ACCC must make a determination setting out the pricing principles relating to the price of access to the declared service. The ACCC must then have regard to its determination if it is required to arbitrate an access dispute in the future.

A recent example is the ACCC's setting of price-related terms and conditions for access to the mobile terminating access service (MTAS).

The MTAS is a wholesale service that enables consumers to call mobile networks operated by a service provider other than their own. For example, if a Hutchison mobile subscriber calls a Telstra mobile subscriber, Hutchison will buy the MTAS service from Telstra so that its customer can be connected to the Telstra subscriber.

On 30 June 2004 the ACCC declared the MTAS. At the same time, the ACCC also made a pricing determination setting out pricing principles for the MTAS, which included the terms and conditions for access to the MTAS. The determination set out a table of indicative wholesale prices from 1 July 2004 through to 30 June 2007.

The indicative wholesale prices are intended to promote a close association between the price and the underlying costs of providing the MTAS.

Since the release of the determination, a number of relevant events have occurred. These include the ACCC being notified of two undertakings for the MTAS, one from Vodafone and one from Optus, and the notification of numerous access disputes relating to the service. The ACCC is currently considering the undertakings and access disputes.

Telstra retail price controls

The ACCC has also regularly advised the government on the setting of future price controls for Telstra, as well as reporting on Telstra's compliance with the existing price controls, which are set by government.

Price controls are considered a key consumer safeguard in the absence of fully effective competition at the infrastructure and wholesale level. In particular, price controls aim to ensure that efficiency improvements are passed on to consumers in the form of lower prices for telecommunication services in markets where competition is not yet fully developed.

Price controls have also been used as a tool for achieving the government's social policy and equity objectives.

The current price controls restrict the amount by which Telstra can increase the overall price of certain groups (or baskets) of services. For example, there is currently a cap of CPI + 4 per cent on increases in business and residential line rentals. The price controls also include more specific measures aimed at achieving equity objectives, such as requiring that Telstra offer a line rental service to schools at a price at or below the standard line rental offered to residential customers.

In April 2004 the Minister for Communications, Information Technology and the Arts directed the ACCC to hold a public inquiry into the nature of the price control arrangements that should apply from 30 June 2005. The ACCC concluded its inquiry in early 2005 and the minister has recently released the final report.

The ACCC recommended that the price controls continue to apply to the services that they currently apply to. However, the ACCC also recommended that services to businesses with more than five lines should no longer be subject to price controls as competition in this area is relatively strong.

At the time of writing, the minister is considering the ACCC's report.

Competing over the copper network

ON 15 FEBRUARY 2004 TELSTRA ANNOUNCED MAJOR DECREASES IN THE RETAIL PRICES FOR ITS ADSL INTERNET SERVICE WHILE MAINTAINING ITS WHOLESAL PRICES.

ADSL (asymmetrical digital subscriber line) is a form of high speed, broadband internet service that enables the quick download of large files, such as music, movie trailers and real time viewing of live internet-based broadcasts. It is carried over Telstra's copper public switched telephone network (PSTN).

Following Telstra's announcement, the ACCC received complaints from competitors buying the wholesale ADSL service from Telstra. These competitors are unable to buy the wholesale ADSL service at cheaper prices elsewhere because there are no other national providers of an equivalent service. Therefore, the wholesale customers must rely on a Telstra wholesale service to be able to provide their own retail ADSL services, while also competing at the retail level with Telstra's BigPond ADSL service.

Because Telstra had not changed its wholesale prices, these competitors were concerned that it was impossible to match Telstra's new low retail prices on a long-term basis, especially for its entry level ADSL plans. They alleged that they had very little or no margins to offer retail broadband services in competition with those offered by Telstra.

The ACCC then initiated an investigation into Telstra's wholesale and retail pricing of its broadband internet services. The ACCC was concerned that if Telstra's wholesale customers were unable to compete, especially at the important entry level of the broadband internet market, this could ultimately prevent more sustainable competition at a vital stage of broadband growth in Australia.

The ACCC investigated Telstra's pricing under the anti-competitive conduct provisions of the *Trade Practices Act 1974*. The Act prohibits a wide range of anti-competitive conduct, including anti-competitive agreements and the misuse of market power, and specifically anti-competitive conduct in the telecommunications industry.

In late February 2004 the ACCC issued Telstra with an advisory notice while it continued to investigate whether Telstra's conduct amounted to a breach of the Act. Advisory notices are not legally binding, but contain advice on how a carrier can change its conduct to avoid contravening the Act. In the notice issued to Telstra, the ACCC advised Telstra to reduce its wholesale prices to a level below Telstra's retail prices.

After the ACCC issued the advisory notice, Telstra reduced some prices for its wholesale services. However, these reductions did not go far enough, and the ACCC issued Telstra with a Part A competition notice in March 2004, stating that it believed Telstra was engaging in anti-competitive conduct.

The ACCC may issue a competition notice when it has reason to believe that a carrier or carriage services provider has engaged, or is engaging in, anti-competitive conduct. A Part A competition notice allows parties, such as internet service providers, to seek damages and compensation for the specified anti-competitive conduct. It also allows the ACCC to seek penalties through the Federal Court of Australia. The Federal Court can impose maximum penalties of \$10 million for each contravention and \$1 million for each day it continues.

Shortly after the ACCC issued the competition notice, Telstra announced a revised wholesale pricing structure. Even in light of this, the ACCC considered that Telstra's pricing still had significant limitations which were likely to substantially hinder the ability of Telstra's wholesale customers to compete with Telstra at the retail level. Accordingly, the competition notice remained in force and the ACCC continued to investigate Telstra's pricing of its broadband internet service.

In the following months, Telstra made further reductions to its wholesale prices, the most recent of which came into effect at the start of 2005. Soon after, in February 2005, the ACCC revoked the competition notice.

Since the ACCC began its investigation, Telstra restructured its pricing, including reducing some of its wholesale prices by about 30 per cent. The ACCC considered that wholesale customers were no longer hindered from competing with Telstra BigPond's ADSL services on the basis of its new wholesale ADSL pricing.

Telstra acknowledged that its pricing changes made in February 2004 for its retail broadband services may have adversely affected the competitive position of its wholesale broadband customers.

As a result of the enforcement action taken, the ACCC secured:

- › reduced wholesale pricing for wholesale customers
- › rebates worth \$6.5 million to affected wholesale customers
- › a notification protocol which means BigPond must provide advance warning of future broadband price changes.

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