



National Press Club of Australia

***Delivering for Australian consumers:
making a good Act better***

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Learning from the past

It was Karl Marx who once said, “history repeats itself, first as tragedy, second as farce”. It is true that we often repeat our mistakes.

Australians are currently experiencing a difficult period as the cost of living increases. But this is not the first time we have experienced such pressures. If we look hard enough at our current circumstances there are similar periods in our past that we can learn from.

Our immediate concerns in Australia circulate around costs associated with fuel, food and housing.

According to data from the International Monetary Fund, average global food prices have jumped nearly 50 percent since the end of 2006. World oil prices went up by 9 per cent in one month during May, and angry truck drivers and fishermen have begun blockading major European cities and ports demanding government action. In Australia, these pressures have led to consumer confidence hitting a 16-year low, according to the Westpac-Melbourne Institute survey released earlier this month.

But as a nation we have seen and overcome similar difficult periods in the past.

In 1973, Australia and much of the western world was facing a major oil shock as Arab members of the Organisation of the Petroleum Exporting Countries announced they would not supply oil to countries that had supported Israel’s conflicts in the Middle East. Speculators went into a panic, the price of petrol soared and long lines of cars at petrol stations became a common sight.

Australia was facing a period of considerable economic dislocation, where the cost of consumables was artificially high as the result of numerous cartels throughout a sluggish economy. Resale price maintenance was a commonly employed tactic to keep prices of everyday items artificially high.

Fast forward to the late 1980s/early 1990s, where a stockmarket boom had been followed by the 1987 stock market collapse, the economy was faltering and families were struggling under interest rates of 14-17 per cent.

Ask anyone who was trying to pay off a mortgage at that stage or run a small business and they will tell you it was also a difficult period.

So how did the governments of the early ‘70s and ‘90s go about improving conditions for Australian citizens?

In the face of strong opposition they embarked on unwavering campaigns of competition reform and opening previously closed markets to increased competition.

One year after the Middle East oil crisis, Australia introduced the *Trade Practices Act*, one of the most fundamental and ambitious economic reforms ever attempted in Australia.

Along with further deregulation and tariff reform, competition policy was further entrenched in the 1990s following the Hilmer Review, which culminated in the *Commonwealth Competition Reform Act* and the creation of the Australian Competition and Consumer Commission.

These reforms sparked a period of unprecedented growth and prosperity in Australia, directly increasing the spending power and earnings of millions of citizens.

The time has now come for Australia to embark on a third wave of competition and consumer policy reform.

The reforms of the 1970s and '90s have been credited with playing a major role in taking Australia from a colonial backwater to an economy that was last year ranked by the United Nations as delivering to its citizens the third highest standard of living out of 177 countries surveyed.

Looking at what these previous reforms have delivered to us today serves as a salient reminder to all of us of the steps we now need to take.

While we need to do everything sensibly possible to alleviate the pressures families are facing right now, we can't let reacting to immediate concerns of the day distract us from focussing on the big-picture, fundamental reforms that can deliver real, lasting improvements to our standard of living.

By this I mean reforms that will improve the supply side of our economy and enhance our competitiveness both domestically and internationally.

These are reforms that will enhance the range of goods and services and the prices at which they are available to the average Australian consumer.

These fundamental reforms will not avoid Australia being affected by developments that are of international origin and affecting every country in the world. However, they will help ensure that the price effects of these developments in Australia are no more than they absolutely have to be and that Australians have real rising incomes to help pay for the unavoidably higher priced goods such as petrol and food.

We are now facing what could be the most fundamental set of changes to the *Trade Practices Act* since its introduction in 1974 – what I term the 'third wave' of reform.

As the *Global Competition Review* noted earlier this month, the political environment in Australia is indicating preparedness for what could be seismic changes to the country's competition laws.

While the National Competition Policy reforms of the 1990s extended the coverage of the competition provisions of the *Trade Practices Act* to services and to all entities carrying on business, as well as to bottleneck infrastructure, they did not make many changes to the actual law itself.

It has also been many years since the consumer protection provisions of the Act were thoroughly reviewed.

The world has moved on and while the *Trade Practices Act* remains a fundamental driver of competitive behaviour and consumers being fully and

accurately informed in their purchasing decisions, it is time for it to be refreshed to deal with the challenges we now face.

Reforms to enhance Australia's competition regime

The newly elected government has been quick to articulate its firm belief in the benefits of competition and the need for on-going reform. For the first time we have a dedicated Minister for Competition Policy and a government that has committed to delivering on important reforms to the *Trade Practices Act* which the ACCC considers are long overdue.

There have been a number of quick responses to our most immediate concerns, starting with the ACCC's inquiry last year into the price of unleaded petrol. These include the introduction of a petrol commissioner, stronger monitoring powers and a proposed national Fuelwatch scheme.

We are also currently in the middle of a national inquiry into the price of groceries.

These actions are designed to address specific concerns in our current markets.

While receiving less attention, the new government is also proposing a far more significant and far reaching package of reform to the competition provisions of the *Trade Practices Act* based on recommendations of the ACCC. These include changes to the misuse of market power and predatory pricing provisions of the Act, a refreshing of the anti-competitive agreement provisions and the introduction of criminal sanctions for cartel conduct.

Predatory pricing and misuse of market power

The first element of this package of necessary, fundamental reforms is improving laws that have to date largely failed to deal with the issues of predatory pricing and misuse of market power.

For many years businesses have expressed their frustration that the provisions of the Act have not adequately dealt with concerns of predatory pricing. This conduct results in fewer competitors in the market and ultimately leads to higher prices as businesses are freed from the constraints of their competitors' best offers.

But proving a company has engaged in predatory pricing is notoriously difficult. This is because the difference between what is predatory pricing and vigorous price competition is not immediately obvious and requires careful analysis. These laws are designed to deliver the best possible prices to consumers, not deter companies from legitimate sales and discounting.

Closely related to these concerns regarding predatory pricing have been concerns regarding the inability of the Act in recent years to deal with abuse of market power more generally, of which predatory pricing is but one form.

The tests involved in proving allegations of abuse of market power have been inconsistently interpreted by the courts over recent years. As a consequence, it has become unrealistically difficult to overcome the hurdles necessary to prove contraventions of the law - resulting in few successful cases.

Following on from the recommendations of the Senate Committee inquiry into the effectiveness of the *Trade Practices Act 1974* in protecting small business, the former government introduced to Parliament the *Trade Practices Legislation Amendment Bill (No. 1) 2007*. This Bill included a number of the amendments to the misuse of market power provisions which were originally recommended by the ACCC to, and accepted by, the Senate Committee.

The major change introduced in 2007 was designed to clarify what actually constitutes market power – the first hurdle that needs to be overcome.

However, the last minute inclusion of the so-called “Birdsville Amendment” introduced a number of complexities and legally untested terms that would potentially take years for the courts to clarify – a case of one step forward but perhaps a couple backward.

The Birdsville Amendment established a dual track process, whereby a business could potentially have been found guilty of predatory pricing under one part of the Act, yet not under the other, divergent track. While well intentioned, this change was ill-conceived and created more problems than it solved by increasing complexity rather than removing it.

The recently announced proposed amendments to the law seek to address the dual track process. Importantly, the government is also proposing dealing with two further important reforms recommended by the ACCC that were not dealt with last year, to clarify what constitutes the “taking advantage” of market power and to make it clear that, in relation to the offence of predatory pricing, it is not necessary to demonstrate a capacity to recoup any losses incurred in the predatory pricing behaviour.

It has been suggested that these changes will see a gutting of the so-called Birdsville Amendment – this is not our view.

The Birdsville Amendment will now be framed in terms that are familiar in the jurisprudence on misuse of market power with these terms being clarified as advocated by the ACCC - and the dual track process for considering predatory pricing allegations will be largely removed.

Rather than being gutted, the “Birdsville Amendment”, with the changes proposed by the government, will become the predatory pricing provision in the *Trade Practices Act*.

The ACCC considers the changes proposed by the government strike the right balance between ensuring businesses are exposed to the rigours of competition – with all the associated economic benefits – while being protected from the possible anti-competitive consequences associated with firms misusing power gained from that competitive process.

This will not put an end to ongoing calls for greater action by the ACCC to protect firms that are struggling to compete with more efficient rivals – whether those rivals are more efficient due to economies of scale or the ability to be nimble and innovate quicker.

But what it does mean is when firms that have market power are using that power for an anti-competitive purpose the ACCC will be well placed to act.

Creeping acquisitions

As a second element of the reform package the government has flagged its intention to legislate so that the ACCC can deal effectively with so-called creeping acquisitions. The Trade Practices Act currently deals effectively with situations where one firm seeks to merge with another thereby substantially reducing competition in the relevant market.

However the Act currently cannot deal with situations where the substantial reduction in competition results from a series of small acquisitions rather than a single large acquisition.

The government has undertaken to remedy this shortcoming so that anti-competitive mergers can be effectively dealt with regardless of the timeframe in which they occur.

Cartels and anti-competitive agreements

Major changes to the way the law deals with cartels represents the third element of the reform package that is now on the table.

There is great alarm at present at the rising cost of essential consumer goods, most notably petrol and groceries. But imagine for a moment the impact on household budgets if these goods suddenly became a further 20 per cent more expensive for no obvious reason.

This is the direct impact cartels can have on consumers, and why fighting cartels was one of the first priorities I outlined when I was appointed chairman of the ACCC in 2003.

Prior to 1974 and the introduction of the Act, our economy was riddled with cartels and consumers were routinely gouged by artificially high prices for many goods, mostly without knowing it.

We have had some notable successes in the fight against cartels since that time, including last year's record total penalty awarded by the Federal Court of \$38 million against Visy and its executives. It is fair to say every single person in this room has probably been a victim of that cartel at some stage. Its exposure will save Australians potentially hundreds of millions over the coming years.

Apart from our success in the Visy case we have been very active in the pursuit of cartels.

Since 2003 we have brought 21 alleged cartels to court. We introduced our new cartel immunity policy in September 2005 and since its introduction we have had 40 applicants for immunity under that policy – an average of about one a month.

We currently have 21 alleged cartels under detailed investigation, with about half of these involving informants under our immunity policy. We also currently have six cartel matters in court.

Despite its strong stance, Australia has fallen behind some of its major trading partners in its pursuit of cartels. Unlike countries such as the United States, Canada and the United Kingdom, we do not have the power to send the worst cartel offenders to jail. In a world where major cartels often cross national borders, countries that do not have strong laws risk being seen as a soft

target. In addition, as we are finding in some of our international cartel investigations, countries without criminal sanctions are placed at the back of the queue in investigations. Understandably perhaps, companies deal first with competition authorities where their executives are facing jail and then worry about the other investigatory competition authorities later.

The threat of criminal sanctions focuses the mind of cartel criminals in a way that civil penalties alone cannot. That threat of time behind bars becomes a powerful motivator for them to confess and save their own skins through accessing the ACCC's immunity policy.

When the United States Department of Justice interviewed members of major international cartels in 2006, it questioned a number of executives why they had stopped their cartel arrangements at the US border, despite the illegal deals flourishing elsewhere. The business leaders said the threat of being sent to jail under the US's anti-trust laws was the biggest single motivation for not running cartels on US soil.

After many years of advocacy by the ACCC, the current government is now proposing to strengthen those laws by the end of this year and has released an exposure draft of a Bill that would include criminal sanctions for cartels in the *Trade Practices Act* as well as refreshing the anti-competitive agreement provisions more generally. This is an important reform that will create a much stronger disincentive for cartels forming. It will also step up the pressure on cartel members to take advantage of the ACCC's immunity policy and report their fellow cartel members before they find themselves facing possible time behind bars.

Protecting consumers

So far I have spoken a lot about reforming the competition provisions of the Act. Some would argue this is only half of the picture, that consumer protection is the greater area of need. It is true there are reforms needed in the area of consumer protection that I will move on to in a moment, but before I do it is important to make the following point. Competition policy and consumer protection are inseparable, they are two sides of the same coin.

Improving competition in our markets protects consumers from being exploited by unfair trading. Competition protects consumers by delivering lower prices. Competition protects consumers by offering more choices in the goods they buy. And competition protects consumers by weeding out the poor performers who are likely to offer the weakest levels of service and price.

Trying to protect consumers while ignoring important questions of competition reform is like trying to swim against the tide with one arm tied behind your back.

As I noted earlier it has been many years since the consumer protection provisions of the *Trade Practices Act* were thoroughly reviewed.

The Productivity Commission has recently completed two important reviews in this regard – a review of the product safety provisions and a more general review of the consumer protection framework including the consumer protection provisions of the *Trade Practices Act*.

The Productivity Commission's recommendations in relation to product safety – which the ACCC supports – have been agreed in principle by the COAG Ministerial Council on Consumer Affairs with the aim being to have them implemented by 2010.

While there is significant work still to be done here the Productivity Commission's recommendations hold the promise of a single national regime for dealing with product safety issues where if a product is deemed unsafe it will be treated as being unsafe everywhere in Australia.

In relation to the consumer protection framework built around the consumer protection provisions of the *Trade Practices Act* and the State and Territory Fair Trading Acts more generally, the Productivity Commission found that while still effective, there were changes needed to these provisions.

It found inconsistencies between jurisdictions and the variable outcomes it produced were costing both businesses and consumers money.

The rapid expansion of goods and services available to the public over the last 30 years means making good decisions has become more difficult over time.

In its submission to the Productivity Commission, the ACCC argued for significant reform including the need to unify the nine separate sets of fair trading and consumer protection laws that currently exist. We argued that to help Australian consumers, more research was needed to allow us to better understand the pressures they face.

We argued that pecuniary penalties were needed for offences against the consumer protection provisions of the *Trade Practices Act* and that the ACCC needs stronger investigative powers to detect and prosecute these offences.

We also argued that the ACCC needed stronger powers to seek redress for consumers who had been victims of unfair trading, and the ability to force traders to substantiate claims they make about the goods or services sold to the public.

The majority of the ACCC's recommendations were adopted by the Productivity Commission and presented as recommendations in its final report.

At a meeting last month the COAG Ministerial Council on Consumer Affairs agreed in principle to support the recommendations in the Productivity Commission's report. The Ministerial Council will meet in August to agree its response to the Productivity Commission's report with this response being submitted to the COAG meeting in October this year.

Conclusion

All this may sound a bit esoteric and a long way from the kitchen table budgets of Australian families. Indeed if you just focus on individual changes to the *Trade Practices Act* that are proposed they may not seem of particular consequence.

However, they need to be looked at as a package. This reform package addresses three key pillars of competition law – provisions relating to anti-competitive agreements, particularly cartels, to anti-competitive mergers and

to the abuse of market power. You also have reforms to the whole framework of consumer protection law with a move to a single national law and a significant strengthening of that law.

As a package these changes will help to enhance the competitiveness of Australian markets, and therefore the Australian economy, and allow consumers to properly exercise their sovereignty in these more competitive markets.

It is difficult to estimate, but unfortunately easy to underestimate, the significance of these proposed changes. The Productivity Commission has estimated that its recommended changes to the consumer protection framework alone, would result in a net gain to the community of between \$1.5 and \$4.5 billion a year – a potential saving to every household of up to \$542 every single year.

This is not an easy time for many Australians. Many households are justifiably upset to see costs they cannot control, rising on a daily basis. They are right in demanding that their legislators do what they can to address these issues.

But it is important to realise there is no silver bullet solution that can suddenly reverse rising costs. If there was, governments would have used it long ago. In the struggle to contain costs and improve basic standards for Australian consumers we need to remember where the biggest savings come from and ensure our focus remains firmly on getting those reforms right. In dealing with immediate arising concerns we must also not forget the ways we have achieved success in the past.

The best way to put more money back into the pockets of everyday Australians is to ensure we deliver them the most competitive environment we can, where they can effectively exercise their right to choose the cheapest and best quality goods and services on offer.

The climate is now right for Australia to embark on a third wave of competition and consumer law reforms that build on the strong foundations laid down in the 1970s and 1990s.

We owe Australians who are feeling the pinch the best, most competitive prices possible. Relentless pursuit of effective, competitive markets has delivered this to them several times in the past. So long as we maintain our focus on getting these fundamentals right, it can deliver for us again now.