



GOVERNMENT RESPONSE TO
THE PRODUCTIVITY COMMISSION
REVIEW OF THE
PRICES SURVEILLANCE ACT 1983

Government Response to the Productivity Commission Review of the *Prices Surveillance Act 1983*

Recommendation

Productivity Commission's general recommendation: The Prices Surveillance Act 1983 (PSA) should be repealed and a new part inserted in the Trade Practices Act 1974 (TPA) to provide for inquiries and prices monitoring in nationally significant markets where there may be concerns about monopolistic pricing.

Government response

The Government agrees that the PSA should be repealed and a new part incorporated in the TPA. Incorporation of the price restriction provisions and oversight powers in the TPA is consistent with the view that such provisions should be an explicit part of Australia's competition policy. The Government also sees merit, in the interests of consumer protection, in preserving in the new part of the TPA the price restriction provisions currently existing in the PSA.

The Government believes that the existing price restriction provisions should be available in circumstances that the Minister considers important and in the public interest. Such circumstances might include markets of state or regional significance which are structurally changing due to reform measures and where there is a heightened concern to protect consumers (for example, the public interest required the monitoring of milk prices when dairy industry reforms were taking effect, and price monitoring helped to confirm the benefits of the reforms). An objects clause for the new part of the TPA will provide that price surveillance will only be applied in those markets where competitive pressures are not sufficient to achieve efficient prices and protect consumers (see below).

Recommendation

Specifically, the new part of the Trade Practices Act would:

1. *Include an objects clause stating the objectives for the inquiry and monitoring parts of the Act.*

Government response

The Government agrees that the proposed new part of the TPA should include an objects clause specifying the objectives of the new part. The objects clause will be drafted to be consistent with the Treasurer's statement in September 1996 that price surveillance will only be applied in those markets where competitive pressures are not sufficient to achieve efficient prices and protect consumers.

Recommendation

2. *Provide for public inquiries into monopolistic pricing.*

Government response

The Government agrees that the TPA should provide for public inquiries into monopolistic pricing (that is, inquiries into markets where specific prices are sustained at levels significantly exceeding unit costs and an adequate return on capital). The Government believes the TPA should also provide for public inquiries in certain other circumstances, which the Minister might consider important and where there is a public interest. As the Commission's report notes, public inquiries can facilitate good policy making in such situations as where there is concern about the effectiveness of competition, strong community concern about price levels and movements, or where governments are considering reform and deregulation of industries.

Recommendation

- 2(a) *Require the relevant Minister to be satisfied that the pricing issue is of significance to the Australian economy, before initiating an inquiry.*

Government response

The Government agrees that the Minister should be satisfied a pricing issue is of sufficient importance before initiating an inquiry. A Minister, however, would not initiate an inquiry unless satisfied the pricing issue was important and, in particular, consistent with the proposed objects clause and the Treasurer's statement in September 1996. Given that the scope of prices surveillance activity is to be defined in an objects clause, the Government, on-balance, does not see a strong case for legislating the above mentioned requirement. Further, subject to how the requirement was implemented, the Minister's ability to respond to a pricing issue in a timely way could be constrained. This could be contrary to the public interest.

Recommendation

2(b). Require the relevant Minister to make public the reasons for the inquiry and specify the duration of the inquiry, which normally should not exceed six months.

Government response

The Government supports the principle that the relevant Minister should make public the reasons for an inquiry and that he or she should specify the duration of the inquiry. This is consistent with existing practice, and the Government intends for this practice to continue to be followed. The Government also agrees that any inquiry should be completed within a reasonable time, and six months should be reasonable for most purposes. However, the Government considers that this requirement should not be legislated as circumstances may arise when it is in the public interest for an inquiry to be extended or widened to gain the information necessary for a well-informed decision. The Minister should retain the discretion to alter the scope of an inquiry, should a public interest case exist for doing so.

Recommendation

2(c). Require that the inquiry be conducted in a transparent manner with input from, but not by, the regulator.

Government response

The Government agrees that inquiries be conducted in a transparent manner. This is consistent with existing practice. However, the choice of who will conduct an inquiry will remain at the discretion of Government. The Minister currently has discretion to choose an inquiry body separate from the regulator, to seek further reports from other sources where an inquiry report is considered to be inadequate, and has the benefit of additional advice from central and industry departments. An inquiry body separate from the regulator would be appropriate where the Minister considers there is a possible conflict of interest involving the regulator. However, in other circumstances, the expertise of the regulator may help to expedite an inquiry.

The legislation, for the new part of the TPA, will be drafted to allow the Minister to determine which body should undertake a particular inquiry in light of the particular circumstances at the time.

Recommendation

2(d). Specify that a public inquiry should:

- (i) identify the nature and significance of the pricing issue referred to it by the Minister;***
- (ii) identify and assess alternatives to prices oversight, including pro-competitive reforms;***
- (iii) be required to publish a report, containing the reasons for its recommendations;***
- (iv) be able to recommend price monitoring;***
- (v) in the event that price monitoring under this part is recommended, be required to nominate the indicators to be disclosed and the period for which monitoring will apply (which normally should not exceed three years and would be limited to a maximum of five years); and***

(vi) be able to recommend structural reform, industry-specific measures, or appropriate forms of price control.

Government response

The Government supports this recommendation in principle, and it has been Government practice in setting terms of reference for pricing related inquiries to ask, or provide the scope, for these factors to be examined. There is, however, no compelling case for these requirements to be prescribed in the proposed new part of the TPA. Rather, the Government, in initiating a public inquiry, should retain its discretion to specify terms of reference that are appropriate to the particular circumstances.

For some years, it has been the practice of Government to only initiate inquiries on pricing issues the Minister considers significant and where there is a public interest. Should it be considered important, the Minister currently has the scope to direct an inquiry to further identify the nature and significance of the pricing issue referred to it.

The Government agrees that pro-competitive reform is likely to be the most durable remedy for monopolistic pricing. More generally, it regards competition as the best means of lowering prices and improving choices for consumers. Accordingly, an inquiry, where appropriate, should seek to identify whether pro-competitive reforms would be feasible or sufficient to remedy a pricing problem referred to it. However, the Government does not wish to restrict the ability of an inquiry body to recommend prices oversight. For example, a market could have significant natural monopoly characteristics and there may be no feasible alternative to prices oversight. Therefore, the Government does not propose to include in any amendment of the TPA a requirement for an inquiry to identify and assess alternatives to prices oversight, including pro-competitive reforms.

The Government agrees in principle that an inquiry should publish a report containing the reasons for its recommendations. Inquiry reports are produced at public expense and, in the interests of transparency, the reasons for an inquiry's recommendations should be published. However, while unlikely, it is possible that a report or its recommendations, if disclosed, could cause unnecessary public concern or speculation. Accordingly, the

Government proposes to retain its discretion in deciding whether a report or its recommendations are made public.

Unless otherwise directed by the Minister, public inquiries are able to consider and recommend structural reform, industry specific measures, price monitoring or other appropriate forms of price surveillance. However, a public inquiry should not be directed by legislation to specific types of recommendations, but should consider, within its terms of reference, which course of action is most beneficial in the circumstances. The Government also considers that if price monitoring is recommended by an inquiry, the inquiry should suggest the indicators to be disclosed and the period for which monitoring will apply (which normally should not exceed three years). However, the indicators used and the monitoring period, would remain the decision of the Minister.

Recommendation

3. Provide for monitoring.

(a) Monitoring could be initiated by the responsible Minister following:

- (i) a recommendation from an inquiry under this part; or***
- (ii) a recommendation from an independent public inquiry initiated by the Commonwealth or a State Government that is deemed to be equivalent to an inquiry under this part (one that included 2(d) above in its terms of reference); or***
- (iii) a recommendation from the Australian Competition and Consumer Commission (ACCC) or the National Competition Council, as an alternative to third party access declaration, where provided for in the relevant access legislation.***

Government response

The Government agrees that the proposed new part of the TPA should provide for price monitoring but does not agree that the Minister should be able to initiate monitoring only if a recommendation has been received consistent with 3(a) above.

It is unreasonably restrictive to require a 'positive' recommendation from a public inquiry (or some close substitute) before the Minister could initiate price monitoring, while also expecting the Minister to have been satisfied that sound reasons existed for that inquiry. Further, price monitoring is viewed as a relatively light handed form of oversight, and there may be occasions when the use of monitoring may be preferable prior to initiating any full public inquiry. Information collected through prior monitoring may also provide the basis for initiating an inquiry and could provide an inquiry body with a useful source of relevant data.

As earlier mentioned, the Government's policy that price surveillance (including price monitoring) will only be applied in those markets where competitive pressures are not sufficient to achieve efficient prices and protect consumers will be formalised in an objects clause for the new part of the TPA. This clause will provide a further safeguard that price monitoring is not unduly used.

On-balance, the Government does not see a convincing case to constrain the Minister to only being able to initiate monitoring following an inquiry (or close substitute).

Recommendation

3. *Provide for monitoring (continuation).*
 - (b) *Designate the ACCC as the administrator for the monitoring provision.*
 - (c) *Require the Chief Executive Officers to sign a declaration stating that the monitoring data are true.*
 - (d) *Provide for the ACCC to seek financial penalties through the courts if declared firms fail to provide the information.*

- (e) Require the ACCC to publish and report on the information being monitored under this part. The ACCC should not have authority under this part to request information beyond that specified in the monitoring declaration issued by the Minister.*

Government response

The Government supports recommendation 3(b-e). Given the ACCC's expertise, the Government considers that the ACCC should be designated as the administrator for prices monitoring, and that monitoring would be more effective with the compliance mechanisms outlined in 3(c) and (d). With respect to 3(c), the Government proposes to require the Chief Executive Officer, or their nominee, to sign the applicable declaration.

The Government agrees that the ACCC's authority should not allow it to impose overly onerous reporting requirements and therefore it should be prevented from requesting information beyond that specified in the Minister's declaration, or other relevant instruments. The Government also agrees that the ACCC should be required to publish and report (in an appropriate form, given consideration of commercial confidentiality) on the information it has collected under price monitoring.

Recommendation

- 4. Not provide for price control to be administratively implemented. In the event that an inquiry recommended some form of price control, it would need to be implemented through industry-specific legislation.*

Government response

The Government proposes to retain its current price restriction provisions. Removal of the existing price restriction provisions would weaken the Government's ability to respond promptly to concerns about price related matters. This could be contrary to the public interest and consumer protection. Furthermore, while appreciating the potential for inappropriate price restrictions to create inefficiencies, the Government intends that prices surveillance will only be applied in those markets where competitive pressures are not

sufficient to achieve efficient prices and protect consumers, and where the Minister considers that the pricing issue is sufficiently important and a public interest exists.

Current price restriction provisions may be applied either during a prescribed period (generally no more than 21 days) under price notification, or during the term of an ACCC public inquiry (generally no more than 6 months' duration). The Government intends that these provisions also be available during the term of an inquiry conducted by a body other than the regulator.

Longer lasting price control would need to be implemented through industry-specific legislation.

Consultation

The Government is satisfied that the Productivity Commission encouraged public participation in the inquiry process. The Commission received submissions from 18 participants and visited a number of interested parties during its inquiry. The Commission's final report was based on evidence from a wide range of sources.