

This could reduce the inherent risks of competition which would be a feature a workably competitive market.

Anti-competitive price signalling is engaged in with the hope, or even expectation, that competitors will reciprocate in term of the setting of the price and price-terms and conditions for their goods or services, although it does not require any commitment from them to do so. The effect of such behaviour will often be the same as prohibited conduct but is said by the ACCC to currently not be captured by existing prohibitions.

This conduct is unilateral and therefore is deemed to not be adequately dealt with under the existing 'price fixing' prohibition where an understanding to exchange information that has the purpose, effect or likely effect of fixing, maintaining or controlling prices is required.

Currently, price signalling is not covered by the existing cartel prohibitions of the *Trade Practices Act (1974)* in the absence of an 'understanding' between the parties. This means there is a commitment to act in particular way, with the purpose or effect of substantially lessening competition.

NRMA is of the view that anti-competitive price signalling and other information disclosures can occur as part of a wider cooperation agreement, or as a stand-alone practice absent of an explicit cartel arrangement. The ability of oil companies and some retailers to access real time price movements can contribute to the coordinated conduct seen in some petrol markets which may have the effect of artificially inflating the price of petrol.

Communication of price related information

NRMA notes the increasing the flow and timeliness dealing with the communication of price related information can be pro competitive and beneficial for consumers.

The ability of consumers to compare prices, to be aware of discounting or imminent price increases, to be readily able to efficiently research purchasing decisions and compare rival offers is preserved and protected by the provisions of the Bill that contains the prohibitions to anti-competitive price signalling.

The definition of unlawful anti competitive price signalling detailed in the Bill contains three elements specifically designed to ensure that pro-competitive and pro consumer price related communication is not impeded while the anti-competitive price related communication that facilitates co-ordination to distort markets and disadvantage consumers is captured as unlawful.

Application to the oil industry

The use of pricing data and information disclosure in the retail sector of the Australian petroleum industry has led to the establishment of a regular price cycle for unleaded petrol grades in most capital cities and some major regional towns. One of the core aims of NRMA is to ensure that cost of motoring, including the buying of fuel, is as low as possible and at an efficient competitive price. In addition, NRMA welcomes greater price information transparency in the public domain, and not less.

NRMA has expressed on a number of occasions the following concerns about petrol pricing that:

- a) Access by the oil companies and some retailers to real time price movement information contributes to the coordinated conduct seen in some petrol markets which may have the effect of artificially inflating the price of petrol; and
- b) Given how rapidly petrol price changes occur, motorists (without assistance from consumer advocates like NRMA) are unable to ascertain where and when to buy petrol at the low end of the petrol cycle.

NRMA is firmly of the view that two possible reform options are available to the ACCC and the Australian Government to address the two issues identified above. The first is an amendment to the new TPA directed at what type of co-ordinated conduct is caught by the Act. The second is a provision seeking an industry specific requirement for the disclosure of pricing information.

Legislative change

It should be noted that the key to the ACCC's inability to successfully prosecute petrol retailers for price fixing conduct has been the definition of the term "understanding" as it is used in the Act. In particular, the requirement that there be a commitment by the relevant parties to act in a particular way, rather than a "mere expectation" that those parties will act in that way.

Legislative change which illuminates conceptually the definition of "understanding" by recognising that the conscious or intentional creation of an "expectation" regarding future conduct may be sufficient to constitute an understanding would assist the ACCC in prosecuting petrol retailers for price-fixing.

The lack of a definition of the term "understanding" implies that an agreement or arrangement has occurred and this is understood by all parties. Clearly there is ambiguity in the setting of a price agreement in the petrol market.

NRMA notes that in comparable jurisdictions, including the United Kingdom, the European Union and the United States that there is no prescriptive price signalling legislation but a focus on what the intent of possible price movement and more importantly the consequence of price collusion.

The ACCC Chairman was also quoted on ABC'S *Lateline* program, 2 December 2009, following the ACCC's decision on the Caltex/ Mobil merger, in response to a question about how the law should be changed in order to catch coordinated behaviour,

...Now, it's our view that the Government perhaps ought to be having a look at the sort of laws that are applicable in the European Union and the United States which are called facilitating practices or concerted practices. What are they? They are a means of communication, setting patterns of behaviour which are designed or by chance lead your competitors to know exactly what's going to happen and thus reduce competition. They don't require necessarily a commitment - it's the adoption of a behaviour; it's the processes of communication with the resultant expectation that your competitors will follow a course of action that is less than competitive. (Emphasis added)

Industry change

NRMA notes that with some very specific and limited exceptions, there are few markets where:

- a) price changes occur so rapidly; and
- b) information about those price changes is made available is almost real time to subscribers of a private information service and consequently is only made available to some suppliers in the market.

Were it not for NRMA's vigilance in monitoring pricing practices and weekly price cycles, motorists may not have access to information about the petrol weekly price cycle and, for example, may not be aware that the price-hiking part of the cycle occurs in a Wednesday or Thursday of each week.

The public release of historical information that is not of a commercially sensitive nature would give motorists the opportunity to make assessments about where and when they can purchase petrol more cheaply. Publication on a daily basis of the information for the previous day may well be appropriate.

It should also be pointed out that one of the ACCC key regulatory roles is monitoring the Australian petroleum industry. There is a need to use information provided from a data collection agency in being able to undertake this core function.

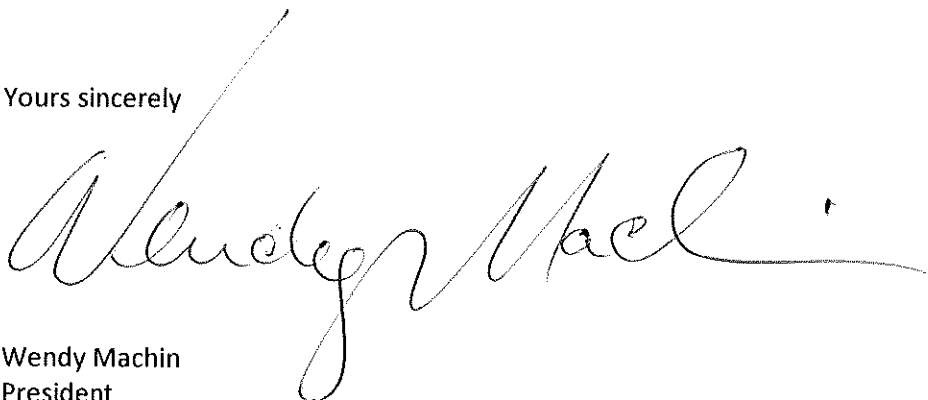
NRMA also believes that if all petrol prices are displayed on a price board at the retail service station, and collected by a data collection agency, then the provision of anti competitive behaviour through price signalling should be exempt.

The provision of this price data is critical to keep motorist informed of daily price movements. Any dilution of this process will hinder the ability of motoring clubs, including NRMA in serving the interests of our members. We welcome increased transparency in the provision of price data, thereby allowing motorists to search and purchase petrol at a lowest price possible.

Recommendations

1. NRMA does not seek legislative change that could have the potential ability to lessen the amount of real time information available to motorists. Information technology advancements will provide opportunities for the increased provision of real time information to motorists.
2. There needs to be an examination of legislation in comparable jurisdictions, that is, the United Kingdom, the European Union and the United States. These jurisdictions have no prescriptive price signalling legislation but have a focus on what is the intent of possible price movements and more importantly the consequence of price collusion. This may also assist in providing a definition of what an understanding is.
3. NRMA believes that increased transparency in the provision of price data, is essential, to allow motorists to search and purchase petrol at the lowest price possible. It will also have some economic benefit in reducing the cost of disseminating information.
4. NRMA also believes that before any potential legislation is applied to the Australian Fuels Industry there needs to be key stakeholder engagement before any general legislation can be enacted given the unique industry structure that applies to the oil industry.

Yours sincerely



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President