

Market Studies: Making All the Difference?

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Market studies have recently risen to prominence in Australia's competition policy. Reviews of energy markets, financial services, insurance, agriculture, Murray Darling water markets, car retailing, and digital platforms have all been completed in the last half decade.² Almost every major sector of the Australian economy has been examined.

Why has this happened? What is the role of market studies? Why are they needed when we have traditional enforcement and compliance tools?

This article seeks to answer these questions and makes the case that market studies are an important and complementary part of the toolkit for a competition enforcement agency. Market studies can enable a deeper and broader understanding of how markets are operating, and this can inform important further actions including legal action, regulatory reform, and competition and consumer advocacy.

I. Introduction

The Australian Competition and Consumer Commission ("ACCC") is an independent Commonwealth statutory agency established by the *Competition and Consumer Act 2010* (Cth) ("CCA"). Its purpose is to make markets work for consumers, now and in the future.

In pursuit of its mission, and in addition to pursuing breaches of the CCA in court, through settlements, and promoting compliance through education and outreach, the ACCC undertakes in-depth market, sector, or industry reviews. These reviews help to improve the ACCC's understanding of sector dynamics and industry

practices that may impact competition and consumers.

Reviews are either self-initiated (market studies) or undertaken with the direction or approval of the Australian Government (price inquiries),³ in accordance with the ACCC's enabling legislation.⁴ With some exceptions, market studies and price inquiries are broadly similar in nature. They typically involve a public fact-finding exercise culminating in public reporting, often with recommendations for policy changes and sometimes leading to enforcement or other action by the ACCC itself.

Market studies and price inquiries help the ACCC to:

- identify market failures and determine how to address them
- assess the implications of emerging competition issues
- support and inform compliance and enforcement action
- identify areas for regulatory and policy considerations.

Before 2015, the ACCC undertook two price inquiries⁵ under Part VIIA. The ACCC also engaged in a variety of activities involving market research and industry assessments, although did not formally refer to these activities as market studies. Since 2015, the ACCC has held fourteen Part VIIA price inquiries and self-initiated six market studies.⁶

II. Role and Regulatory Context of the ACCC

The ACCC is a combined competition, consumer protection and product safety authority, and economic regulator, which

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² For a full list of ongoing and finalized market studies and price inquiries see: <https://www.accc.gov.au/focus-areas>.

³ *Competition and Consumer Act 2010* (Cth) ("CCA"), Part VIIA, s 95H.

⁴ CCA.

⁵ ACCC, *Petrol Prices and Australian Consumers: Report of the ACCC inquiry into the price of unleaded petrol* December 2007; and ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* July 2008.

⁶ For full list of ongoing and finalised market studies and price inquiries see: <https://www.accc.gov.au/focus-areas>.

administers a range of *ex post* and *ex ante* regulatory frameworks in pursuit of its purpose. It is equipped with a diverse set of tools to effectively pursue its broad mandate. This diversity and range in regulatory tools provide the ACCC with a degree of discretion in deciding which tools it uses to address market failure or consumer harm.

The ACCC sits within the Commonwealth Treasury portfolio and is accountable to the responsible Minister, the Treasurer. The ACCC advises the federal government and Australian Parliament in relation to matters impacting consumers. It also has responsibility for raising awareness of the Australian public of competition and consumer policy and objectives.

Competition Policy Review

In 2013, the Australian Government commissioned a wide-ranging review of competition policy, law, and institutions in Australia.⁷ The Competition Policy Review Panel delivered its final report on March 31, 2015,⁸ in which it had formed the view that the competition regulator should not be responsible for competition advocacy, because “advocacy on particular issues may be seen to prejudice the outcome of investigations.”⁹ The Panel’s position was in direct contrast to the view of the ACCC (and others) and ultimately no legislative change was made.

Interestingly, the Review Panel’s Final Report was published just before the significant increase of self-initiated market studies and price inquiries directed under Part VIIA. The experience of the intervening years since the Final Report might have more clearly demonstrated the value of markets studies with some persuasive examples (elaborated below in section V).

III. Market Studies

Self-initiated Market Studies

The ACCC self-initiates market studies to enhance outcomes across its range of functions. A decision to commence a market study involves evaluating the effectiveness of the ACCC’s various regulatory tools concerning the issues or conduct raising concerns. Sectors chosen for market studies are based on the annual compliance and enforcement priorities.

The ACCC undertakes different forms of market research and review in the performance of its legislated functions. Section 28 of the CCA establishes the ACCC’s obligations regarding the dissemination of information, law reform, and research, and identifies the mechanisms available to meet those obligations.

The ACCC cannot access compulsory information-gathering powers where it has self-initiated a market study and instead relies on information that is publicly available or obtained voluntarily from market participants or other interested stakeholders. This includes circumstances where the ACCC undertakes a market study as part of responding to a request from a house of Parliament or a parliamentary committee.¹⁰

The ACCC has initiated six market studies since 2015, relating to customer loyalty schemes, certain wine grape markets, agricultural machinery, cattle and beef processing, the new car retailing industry, and a broad-ranging market study into the communications sector.¹¹ In addition, the ACCC provides the Australian Senate with an annual report on anti-competitive or other practices in the private health insurance sector in Australia.¹²

⁷ See joint [media release of then Prime Minister and then Minister for Small Business](#).

⁸ Pr Ian Harper, Peter Anderson, Su McCluskey and Michael O’Byrne QC (together “the Panel”), [Competition Policy Review: Final Report](#) March 2015.

⁹ Competition Policy Review Panel, Final Report 2015, p 453.

¹⁰ CCA, 29(3).

¹¹ For full details see: <https://www.accc.gov.au/focus-areas/market-studies>.

¹² Senate procedural order no. 18 Health—Assessment reports by the Australian Competition and Consumer Commission agreed to March 25, 1999, by means of an amendment to the motion that the report of the committee on Health Legislation Amendment Bill (No. 2) 1999 be adopted. J.626, amended September 18, 2002 J.761.

IV. Part VIIA Price Inquiries

The Treasurer may, on behalf of the Australian Government, require¹³ or approve¹⁴ the ACCC to undertake a “price inquiry.” Typically, price inquiries are high profile and generate significant commentary and scrutiny. Sectors and industries under inquiry often exhibit characteristics such as significant bargaining power imbalances; stifled or reduced competition; opaque or deceptive trading practices; and uninformed or misled consumer decision-making.

Price inquiries can inquire into “a specified matter or specified matters”¹⁵ relating to the supply of goods or services,¹⁶ and are not limited in a literal sense to “prices.” For example, the ToRs for the 2017 Digital Platforms Inquiry required the ACCC to look into the impact of digital platforms on a range of matters including the *choice* and *quality* of news and journalism in Australia, without once using the terms “price” or “cost.”¹⁷

Background and Context

In 2001 the Productivity Commission recommended the *Prices Surveillance Act 1983* (“PSA”) be incorporated into the CCA to align with monetary policy reforms during the intervening period and squarely identify prices oversight as a plank of competition policy and regulation.¹⁸ The PSA was repealed and replaced by Part VIIA – Prices Surveillance of the CCA, which commenced on March 1, 2004.

Section 95E of the CCA sets out the object of Part VIIA – Prices Surveillance:

The object of this Part is to have prices surveillance applied only in those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers.¹⁹

Part VIIA establishes three types of prices oversight:

- (i) price inquiries
- (ii) price notification, and
- (iii) price monitoring.

Whereas the price notification provisions have remained dormant, the ACCC has well-established government-directed price monitoring roles in certain sectors, including petrol, container stevedoring, and aeronautical services and facilities.

The object statement clarifies the responsible Minister – the Treasurer – has ultimate authority over Part VIIA. Taken as a whole, Part VIIA enables market intervention of economic significance and potential national consequence it amounts to public policy, suggesting the Treasurer’s authority strikes an appropriate balance between regulatory and executive power.

Current and Concluded Price Inquiries

The ACCC held two price inquiries under Part VIIA before 2015.

- In June 2007 the Treasurer approved a request from the ACCC to hold an inquiry into the price of unleaded petrol.
- In January 2008 the Assistant Treasurer requested the ACCC hold an inquiry into the competitiveness of retail prices for standard groceries.

Since 2015, the ACCC has held fourteen Part VIIA price inquiries relating to particular sectors and/or industries:

- 4 into agriculture and regional issues
- 4 into energy with two focused on gas and two on electricity

¹³ CCA, s 95H(1).

¹⁴ CCA, s 95H(2); CCA, s 95G(3).

¹⁵ CCA, s 95H(1).

¹⁶ CCC, s 95F(2).

¹⁷ See ACCC, [Digital Platforms Inquiry: Final Report](#) June 2019, Appendix A p 537; or Letter from former Australian [Treasurer Scott Morrison MP to ACCC Chair Rod Sims 4 December 2017](#).

¹⁸ Ray Steinwall, *Annotated Competition and Consumer Legislation 2016 Edition* (LexisNexis) [11,915.1].

¹⁹ CCA, s 95E.

- 3 into digital platforms, including a specific inquiry in digital advertising
- 3 into financial services, including two relating to home loans and mortgages and one into foreign currency conversion services.

Gas, electricity, and digital platforms are each the subject of long-term inquiries with regular reporting requirements and, in the case of digital platforms, the ACCC was directed to hold an inquiry into digital advertising services concurrent with the long-term inquiry underway.

The significant increase in market studies and prices inquiries reflects the growing recognition in Australia of the significant value of market studies as a tool for understanding how to address difficult and long-standing competition and consumer issues. Each review, taken in isolation, had a unique set of specific reasons warranting a close and deep assessment of sector issues.

In 2018, ACCC Chair Rod Sims postured:

The age old question of when to intervene in markets has long held a fascination for economists. Do you intervene to prevent market failure, or to correct it once it has already begun? If you do intervene, do you do so with a light-touch, or a heavy-touch?²⁰

Enforcement action cannot always address the causes or facilitating circumstances of the harmful conduct. This may be particularly important where competitive harm and/or consumer detriment is widespread or not limited to particular market participants or occurring at such a pace that enforcement action would not be timely enough. Over the last decade, critical sectors of the Australian economy have emerged for scrutiny. While the sectors are diverse in nature, a common feature has been concerns about high prices, conduct that harms

consumers or customers, and oligopolistic market structures.

The ACCC's purpose, "making markets work for consumers, now and in the future," demands a holistic and nuanced assessment of market factors and sector conditions – including for example policy settings, industry frameworks, upstream and downstream influences – so proposed responses deliver improved competition and consumer outcomes over the long term, while also addressing immediate harms. Market studies and price inquiries are vital tools because sometimes it is not enough to only consider explicit and immediate breaches of the CCA.

Price Inquiries in Practice

The Australian Government has wide discretion in determining the topics of price inquiries as well as the substance and scope of an Inquiry's Terms of Reference ("ToRs"). The Treasurer may direct the ACCC to have regard to certain matters in the course of the inquiry.²¹ However, once the inquiry has commenced the Treasurer is prohibited from intervening in the conduct of the inquiry,²² for example in relation to how the ACCC construes the ToRs.

Government directed price inquiries are in-depth processes involving comprehensive exploration and analysis of matters under inquiry. They impose added regulatory burden on market participants, often in already highly regulated industries. Part VIIA imposes robust governance arrangements on the conduct of price inquiries, including strict transparency and accountability mechanisms such as prescribing publication obligations on the ACCC.²³

V. Outcomes and Impact of Market Studies and Price Inquiries

Market studies and price inquiries are a "key component of the ACCC's competition

²⁰ Rod Sims, "When and how to intervene in markets," Speech to Australian Conference of Economists July 12, 2018:

<https://www.accc.gov.au/speech/when-and-how-to-intervene-in-markets>.

²¹ CCA, s 95J(6).

²² CCA, s 29(1A).

²³ CCA, s 95P(3).

advocacy role”²⁴ and can lead to a range of outcomes including: enforcement action; determination intervention into a market is not required; and/or can assist the ACCC in identifying market problems and possible solutions.

The ACCC reports its findings at the completion of a market study or price inquiry, along with a suite of recommendations it considers will be effective to address its findings. These recommendations generally fall within the following categories:

- policy review and law reform
- recommendations to industry
- regulatory action, including referrals to the ACCC or other relevant regulators for enforcement or compliance action, and
- recommendations to the government identifying further specific matters or sectors suitable for subsequent inquiry.

Publicly reporting findings and recommendations contributes to making markets work for consumers by informing stakeholders and encouraging public debate, contributing to policy considerations, and improving the way markets function through the adoption of recommendations.

Set out below are several examples of the different types of outcomes that may arise from a market study or price inquiry.

Findings

Reporting findings publicly, including identifying nefarious conduct and/or traders, promotes compliance and provides evidence and analysis underpinning recommendations and regulatory actions. Findings are often the initial focus of media reports and commentary, and also form a critical component of advocacy initiatives.

In December 2020, the ACCC published its *Home loan price inquiry – Final report*,²⁵ which made a range of findings about impediments to

Australian consumers switching mortgage providers, several of which supplied the substance of headlines in the ensuing media coverage.

In September 2021, the ACCC published the *Digital advertising services inquiry – Final report*, which found that:

Google is the dominant provider of services across the ad tech supply chain. No other provider has comparable scale in any ad tech service or reach across the supply chain.²⁶

This blunt and unequivocal statement not only garnered substantial media attention given Google’s pervasiveness, but it also publicly clarified a critical part of the ACCC’s understanding of digital advertising and the digital platform sector more generally, potentially influencing regulatory analysis and other activities.

Transparency over its reasoning and the evidentiary basis for its findings allows interested stakeholders and the public to analyze and assess the strength of the ACCC’s conclusions and recommendations and is crucial for the ACCC’s integrity and continued credibility.

Recommendations – Advocacy and Policy Reform

Reform Proposals and Advocacy

The ACCC prioritizes advocacy initiatives guided by formal findings of a market study or price inquiry. Publicizing this work can help inform government, businesses, and consumers, as well as encourage public debate over competition and consumer matters and contribute to policy considerations. Whether self-initiated or government-directed, the ACCC commits to advocacy initiatives that continue long after the market study is complete.

The ACCC’s *Digital Platforms Inquiry – Final report* made a suite of recommendations for review and reform of Australia’s privacy

²⁴ OECD, *Working Party No. 3 on Co-operation and Enforcement*, “Methodologies for Conducting Market Studies – Note from Australia,” June 20, 2017, [2].

²⁵ ACCC, *Home loan price inquiry – Final report*, November 2020, see for example Chapter 2 “Bringing the benefits of switching to borrowers’ attention,” p 17.

²⁶ ACCC, *Digital advertising services inquiry – Final report* September 2021, p 51.

regime.²⁷ This included 6 specific changes recommended to the *Privacy Act 1988*, along with an overarching recommendation for broader reform of the Australian privacy law. In December 2019, the Attorney-General announced the Australian Government would conduct a review of the *Privacy Act 1988*. The announcement specifically mentioned that the review formed part of the government's response to the ACCC's Final Report.²⁸

The ACCC's *Retail Electricity Pricing Inquiry: Final Report* recommended abolishing and replacing retail electricity standing offers with a default market offer to be set by the Australian Energy Regulator.²⁹ The Australian Government adopted the recommendation, and in April 2019 the AER completed consultation and published its final determination on default market offer prices, which applied from July 1, 2019 for standing offer customers in regions not subject to state-based price regulation.

Industry Codes

The ACCC regulates mandatory industry codes that are prescribed under the CCA³⁰ and also supports industries in developing and implementing voluntary codes. The ACCC has recommended the adoption of mandatory or voluntary industry codes on several occasions.

Industry codes can improve consumer and small business outcomes and/or enhance competition, for example through transparency measures or by addressing bargaining imbalances. Mandatory codes facilitate efficient regulatory action where appropriate, allowing the ACCC to respond swiftly to proscribed conduct and possibly limiting the harm caused.

In 2018 the ACCC recommended the government prescribe mandatory industry codes following completion of price inquiries in the dairy and retail electricity sectors. Similarly, in 2019 it recommended that designated digital platforms be required to sign on to a code of conduct governing commercial relationships with news media businesses. The Australian Government adopted each of these recommendations.³¹

In September 2019, the ACCC recommended a substantial strengthening of the voluntary Australian Wine Industry Code of Conduct³² after finding the Code had not been effective in addressing industry problems, primarily due to a low number of signatories.³³ In December 2021 the ACCC reviewed the industry's progress in implementing the recommendations and found there had been significant efforts made to improve the coverage and strength of the voluntary code.³⁴

Recommendations – Industry

In April 2016, the ACCC launched a market study into the cattle and beef industry in Australia, examining competition, efficiency, transparency, and trading issues in the beef and cattle supply chain. Its Final Report made a range of recommendations including several for direct action by the industry's main bodies, Meat & Livestock Australia and the Red Meat Advisory Council.³⁵ In May 2018 the ACCC reviewed progress towards implementing the recommendations. The review found the industry had not acted on most of the recommendations.³⁶ The ACCC highlighted the industry's inaction in the media, foreshadowing subsequent engagement with policymakers to

²⁷ ACCC, *Digital Platforms Inquiry – Final report* June 2019, see Chapter 7 p 373.

²⁸ See joint media release: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/response-digital-platforms-inquiry>.

²⁹ ACCC, *Retail electricity pricing inquiry – Final report* June 2018, see recommendation 30 p xxii.

³⁰ See generally: CCA Part IVB – Industry Codes; for regulations see s 51AE; for dedicated information gathering and enforcement powers see generally Part VIB Div 2A or ss 51ACC – 51ADD.

³¹ Dairy: *Competition and Consumer (Industry Codes–Dairy) Regulations 2019*; Electricity: *Competition and Consumer (Industry Code–Electricity Retail) Regulations 2019*; and Media: *Competition and Consumer Act 2010* (Cth) Part IVBA – News media and digital platforms bargaining code.

³² See: http://www.wineindustrycode.org/online_code.html.

³³ ACCC, *Wine grape market study: Final Report September 2019*, recommendation 9 p 12.

³⁴ ACCC, *Wine grape market study: Follow-up review* December 2021, p 2.

³⁵ ACCC, *Cattle and beef market study – Final report* March 2017, see p 11 to p 14 for recommendations.

³⁶ ACCC, *Cattle and beef market study – Update report* May 2018.

advocate for the implementation of the market study's substantive recommendations.³⁷

Regulatory Action

Further Inquiry

The ACCC's *Digital Platforms Inquiry – Final Report* recommended the ACCC be directed under Part VIIA to hold an inquiry into competition in the market for the supply of ad tech services and the supply of online advertising services and media agencies.³⁸ The Australian Government adopted the recommendation and provided the necessary direction to the ACCC in February 2020.³⁹ The ACCC published its final report in late September 2021.

In October 2018, the Australian Treasurer issued a notice approving the ACCC to hold an inquiry into the supply of foreign currency conversion services in Australia.⁴⁰ The ACCC had sought approval for the Inquiry after receiving several complaints from consumers about the relevant services, in addition to a Productivity Commission recommendation to the Australian Government that the ACCC should review the transparency of fees for foreign exchange services as part of its *Inquiry into Competition in the Australian Financial System*.⁴¹

Referrals – Internal

In addition to publishing an extensive list of findings and recommendations, the *Digital Platforms Inquiry – Final report* disclosed the existence of several investigations into certain digital platforms under the CCA, and included specific details relating to the alleged conduct, traders, and contraventions. It is fairly unusual for the ACCC to reveal such specific details of multiple investigations in this way, and in taking

this strategy it highlighted the seriousness and pervasiveness of the conduct.

Referrals – External

In November 2020, the ACCC published a detailed and extensive final report after completing a wide-ranging price inquiry into the supply of residential buildings (home), contents and strata insurance in northern Australia.⁴² Among its recommendations, the ACCC recommended the Insurance Council of Australia work with the Australian Securities and Investments Commission (ASIC) to update the General Insurance Code of Practice in order to obtain ASIC approval for the Code.⁴³

VI. Conclusion

The use of market studies and inquiries has become a core part of the ACCC's functions. They have been used widely across the economy, achieving significant outcomes for Australians (including those detailed above) in ways that standard enforcement and compliance tools could not.⁴⁴ Their increased use means greater market transparency and more informed decision-making by the ACCC, governments, industry, and consumers alike. ACCC findings, recommendations, and advocacy efforts apply a competition and consumer lens on policy development in order to mitigate unforeseen consequences before they materialize, or to address problems at their source. Based on recent experience, it seems likely that market studies will continue to help shape the future direction of competition law and policy as well as broader policy and regulatory settings.

The market studies tool is an important component of the competition agency's toolkit for several reasons:

³⁷ ACCC media release, "[Poor progress on cattle and beef industry market reform](#)," MR 80/18 May 4, 2018.

³⁸ ACCC, [Digital Platforms Inquiry: Final Report](#) June 2019, recommendation 5 p 31.

³⁹ ACCC, *Digital advertising services inquiry – Final report* August 2021, see Appendix A p 184 for Ministerial Direction.

⁴⁰ Approved pursuant to s 95H(2) of the CCA, see https://www.accc.gov.au/system/files/Ministerial%20direction_0.pdf.

⁴¹ Productivity Commission, *Inquiry report – Competition in the Australian Financial System*, recommendation 17.4 see [Overview](#) p 49.

⁴² ACCC, [Northern Australia Insurance Inquiry: Final Report](#) November 2020.

⁴³ ACCC, [Northern Australia Insurance Inquiry: Final Report](#) November 2020, recommendation 20.3 p xxvii.

⁴⁴ For additional examples, see also: ACCC Media Release, "[Google misled consumers about the collection and use of location](#)" MR47/21 April 16, 2021; and ACCC, "[Household electricity bills fall, but affordability still a concern](#)" MR252/19 December 22, 2019.

First, market studies enable “deep dive” fact finding that allows the agency to methodically gather information and present a clear picture to the government, industry members, and consumers about how markets operate. This transparency is vital for promoting confidence in public policy decisions affecting the operation of markets and the welfare of consumers. Enforcement and compliance tools are insufficient for this purpose.

Second, market studies can uncover nefarious conduct that is harming competition or consumers that would otherwise not have been identified. The Digital Platforms Inquiry and the Retail Electricity Pricing Inquiry are examples of this.

Third, market studies help ensure that the right public policy tool is being used for the policy

problem at hand. While the core focus of market studies is on competition, consumer protection and economic regulation, related areas of policy affecting competition and consumers are inevitably examined as well, such as the privacy considerations examined as part of the Digital Platforms Inquiry.

Finally, ongoing scrutiny of particular sectors, such as that which is occurring with gas, electricity and digital platforms, helps to “shine a light” on sectors where issues are still nascent or evolving and cannot be resolved through action under the CCA, legislative change, or other actions. Regular reporting on the operation of these sectors provides an ongoing source of evidence on which to base policy decisions.