

Discussion paper

National Competition Policy Review of the  
Prices Act 1948  
- Final Report

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Office of  
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## CONTENTS

EXECUTIVE SUMMARY .....	i
1. INTRODUCTION.....	1
1.1 Why review the Act?.....	1
2. WHO DOES THE ACT AND THIS REVIEW APPLY TO? .....	4
3. WHAT ARE THE OBJECTIVES OF THE ACT? .....	5
3.1 Identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address.....	5
3.2 Provisions of the Act.....	5
3.3 Current Operation of the Act.....	6
3.3.1 Currently declared goods.....	8
4. WHAT IS HAPPENING IN OTHER STATES?.....	9
5. COMPETITION: WHAT IS IT? WHY THE NEED? .....	10
5.1 What are the benefits of price control?.....	10
5.2 What are the disadvantages of price control? .....	12
5.3 The relevant market .....	14
6. WHAT IS THE NATURE AND EXTENT OF THE RESTRICTION OF COMPETITION? .....	15
6.1 The Act.....	15
6.2 Enforcement provisions.....	16
6.2.1 Section 12 - requirement to keep accounts .....	16
6.2.2 Section 29 - Prohibition on hoarding .....	17
6.2.3 Section 30 - Alteration of container size.....	17
7. WHICH GROUPS BENEFIT FROM THE ACT AND WHICH GROUPS PAY THE DIRECT AND INDIRECT COSTS WHICH FLOW FROM ITS OPERATION? .....	18
7.1 The Act.....	18
7.2 General Costs .....	18
8. DO THE BENEFITS OF THE ACT'S OPERATION OUTWEIGH THE COSTS? .....	20
8.1 Price control.....	20
8.2 Enforcement Provisions.....	22
8.2.1 Record keeping requirements.....	22
8.2.2 Container size requirements.....	23

9. WHAT ARE THE ALTERNATIVES? .....	25
9.1 Reliance on other Acts which contain powers to control prices.....	25
9.1.1 Essential Services Act 1981.....	25
9.1.2 Emergency Powers Act, 1941-1952 .....	25
9.1.3 Prices Surveillance Act 1983 (Cth) .....	26
9.2 Reliance on Consumer Protection Legislation .....	27
9.2.1 Fair Trading Act 1987.....	27
9.2.2 Trade Practices Act 1974 (Cth).....	27
9.3 Creating competition for the market .....	28
9.4 Granting access to essential facilities.....	28
9.5 Codes of practice .....	29
9.6 Industry self-regulation.....	29
9.7 Base orders on quantity rather than container size .....	29
9.8 Amend section 30 .....	30
9.9 Conclusion.....	30
10. WHAT ARE THE OPTIONS? .....	31
10.1 The Act.....	31
10.1.1 Retention of the Act.....	31
10.1.2 Amendment of the Act, limiting the circumstances of its application .....	31
10.1.3 Repeal of the Act, with amendments to the Fair Trading Act ...	31
10.1.4 Repeal of the Act, with the establishment of Codes of Practice	32
10.1.5 Repeal of the Act with Industry Self Regulation .....	32
10.1.6 Repeal of the Act, relying on other forms of control.....	32
10.2 The List of Declared Goods.....	32
10.3 Recommendation.....	33
11. THE PRICES REGULATIONS RELATING TO BREAD .....	34
11.1 What are the objectives of the regulations? .....	34
11.2 What is the relevant market? .....	35
11.3 How do the regulations affect competition? .....	35
11.4 Who benefits from the regulations, and who bears the cost of their operation? .....	37
11.5 A cost/benefit analysis .....	40
11.6 What are the options? .....	42
11.6.1 Retention of the Regulations.....	42
11.6.2 Develop a Code of Practice under the Fair Trading Act.....	42
11.6.3 Industry self-regulation.....	43
11.6.4 Enforcement under the Trade Practices Act 1974 (Cth).....	43
11.7 Recommendation.....	45
12. THE PRICES ORDERS RELATING TO INFANT AND INVALID FOODS .....	46
12.1 What are the objectives of the prices orders? .....	46
12.2 What is the relevant market? .....	46

12.3 How do the prices orders affect competition? .....	46
12.4 Who benefits from the prices orders, and who bears the costs of their operation? .....	47
12.5 A cost/benefit analysis .....	48
12.6 What are the options? .....	49
12.6.1 Retention of the Order under the Act.....	49
12.6.2 Revocation of the Order .....	49
12.7 Recommendation.....	50
13. THE PRICES ORDER RELATING TO MEDICAL SERVICES .....	51
13.1 What are the objectives of the prices order?.....	51
13.2 What is the relevant market? .....	51
13.3 How does the order affect competition?.....	51
13.4 Who benefits from the prices order, and who bears the costs which flow from its operation? .....	51
13.5 A cost/benefit analysis.....	52
13.6 What are the options? .....	52
13.7 Recommendation.....	52
14. THE PRICES ORDER RELATING TO KANGAROO ISLAND SEALINK FERRY.....	53
14.1 What are the objectives of the prices order?.....	53
14.2 What is the relevant market? .....	53
14.3 How does the order affect competition?.....	54
14.4 Who benefits from the order, and who bears the cost of its operation? .....	54
14.5 A cost/benefit analysis.....	54
14.6 What are the options? .....	55
14.6.1 Retention of the Order under the Prices Act .....	55
14.6.2 New order under another Act.....	55
14.6.3 Revocation of the Order .....	55
14.7 Recommendation.....	55
15. SUMMARY.....	56
15.1 Recommendations.....	56
APPENDIX A - TERMS OF REFERENCE .....	58
APPENDIX B - CONSULTATION LIST .....	60
APPENDIX C - SUBMISSIONS RECEIVED .....	62
APPENDIX D - CURRENTLY DECLARED GOODS .....	63
APPENDIX E - SUMMARY OF ORDERS MADE UNDER THE <i>PRICES ACT</i> 1948 SINCE 1980.....	65
APPENDIX F - GLOSSARY .....	74

## Executive Summary

This review applies to the *Prices Act 1948* ('the Act'), the *Prices Regulations 1985*, and Prices Orders currently in force.

### A. *The Act*

The Act was introduced following World War II, to curb rising inflation and to deal with market failure arising from shortages of goods. At one point, all States had some form of prices regulation. Some States have either repealed their *Prices Acts* or allowed them to lapse. However, the Northern Territory made recent use of its *Prices Regulation Act* to control profiteering following floods in Katherine (see section 4).

The Act enables the Governor to declare goods and services. Once goods and services have been declared, the Minister can issue a Prices Order in relation to those goods or services, setting the maximum price at which those goods or services may be supplied.

In 1948, a large number of items were declared. Since then, the list of declared items has been pared down, and only a small number of items continue to be declared. A list of currently declared goods can be found in Appendix D.

Even fewer items are subject to price control. Prices orders are issued in relation to four goods or services:

- infant foods;
- medical services;
- tow truck services; and
- the Kangaroo Island Sealink Ferry.

In addition, regulations prohibit the practice of 'sale and return' in relation to bread and bread rolls.

The stated objective of the Act is to control prices. The price control power is intended to be used for the benefit of the community. When the Act was initially introduced, price control was used to deal with shortages of goods following the war. Since then, the objectives of the Act have changed, and it is now aimed at dealing with market failure arising from monopoly power and unconscionable conduct.

The Act only restricts competition in a minor way. Orders made under the Act have the potential to restrict competition by preventing profit maximisation, inhibiting the development of better quality but more expensive goods or services in the specified categories, reducing the incentives to provide more of specified goods and services, deterring potential entrants into the market and reducing the incentives to increase efficiency.

The beneficiaries of the Act are consumers, who have the assurance of a mechanism to protect them from completely unjustified price increases imposed by firms in a monopoly or near monopoly situation. The benefits of the Act are that there is a fast, effective mechanism for dealing with sudden changes in the market (eg emergencies) and if a need arises, there is a power to deal with it, rather than having to go through the legislative process. The costs of the Act are borne by the Government, which pays the minimal costs of administering the Act. (see section 7)

Certain provisions of the Act impose restrictions on competition. Section 12 of the Act contains a requirement to keep records, which imposes an administrative burden on business which outweighs the minimal benefit which may be derived from this requirement (see section 8.2.1). It is recommended that section 12 is repealed.

Other requirements include in relation to controlled goods and services include a requirement to maintain container size. In relation to goods subject to prices orders where container size is an integral part of those goods (for example, infant foods) the benefits of the restriction will outweigh the costs. For declared goods generally, however, it is difficult to identify any benefit in restricting container size which is not outweighed by the costs of the restrictions on flexibility and innovation which result (see section 8.2.2). Amending section 30 so that it only referred to goods subject to prices orders would partially ameliorate the restrictions on competition.

Overall, the importance of the Act as a reserve power and the benefit which flows from this outweigh the minimal administrative costs of the Act's operation. There is no power to fix maximum prices that is as comprehensive and capable of such flexible application as that in the *Prices Act* in any other SA legislation. Powers to fix maximum prices in other Acts are limited to particular, short periods of time under narrowly defined circumstances (eg *Essential Services Act 1981*) or apply only to particular goods or services.

The *Prices Surveillance Act 1983 (Cth)* may be effective in some situations but does not have the facility to deal with certain local circumstances. The *Trade Practices Act 1974 (Cth)* provides an effective protection against price fixing and some other anticompetitive practices, and reliance on the *Trade*

*Practices Act* may sometimes provide an alternative to specific regulation. However, neither of these Acts can completely fulfil the objectives of the *Prices Act*. (see sections 9.1 and 9.2)

The recommendation of the Review Panel is that the Act be retained. The Review Panel also recommends removal of all items from the list of declared goods and services except for those items that this review recommends continued control of (bread and bread rolls, tow trucks and Kangaroo Island Sealink Ferry), in addition to infant and invalid foods. It is also recommended that section 12 is repealed and section 30 is amended to only refer to goods subject to prices orders.

### ***B. The Regulations***

Regulations under the Act restrict the practice of 'sale and return' of bread and bread rolls, whereby retailers of bread and bread rolls would return unsold product to the manufacturer and demand (and receive) a refund.

The regulations were introduced to address practices in the baking industry that were resulting in large scale wastage of bread and threatening the survival of small bakeries (see section 11.1). They affect the market for the sale and supply of bread and bread rolls in South Australia at both a wholesale and a retail level.

The regulations promote competition by encouraging retailers to engage in competitive conduct specifically in relation to bread. They restrict competition by placing restrictions on the market conduct of the bakeries, which must not redeem bread or offer to do so, thereby eliminating one level on which the bakeries could compete. The regulations may also offer some protection to small bakeries, but their survival relates more to the niche marketing of their product than their protection from massive returns of bread (see section 11.3).

Society as a whole benefits from the restrictions imposed by the 'bread' regulations. They ensure that a stable and orderly market is maintained. The restriction also ensures efficiency. Supermarkets have incentives to limit their bread orders to that which they can realistically expect to sell. They will also incur less wastage, as they will sell most of what they order. The restriction prevents the type of bread wastage that occurred in South Australia in the mid-1980's, which is both inefficient and socially undesirable.

The cost of the restrictions is borne by bread retailers, mostly supermarkets. Supermarkets are prevented from returning unsold bread (and thus bear the cost of holding leftover stock). This is a private cost, however, unless that cost is borne indirectly by the consumer in the form

of higher prices. Research into comparative bread prices in Australia indicates that this is not the case (see section 11.4).

In the review process, it was argued that the regulations also reduce the choice for consumers, as the restriction on the return of bread prevents them from offering as wide a range of bread as they otherwise could. The Review Panel is of the view that any reduced choice for consumers results from the commercial decisions of the retailers and not from the bread regulations.

The benefits of the 'bread' regulations outweigh the costs. There are no viable alternatives to the regulations (see section 11.6). Therefore, the Review Panel recommends the retention of the bread regulations.

### *C. The prices orders relating to infant and invalid foods*

The infant and invalid foods' prices orders seek to prevent a necessity being taken out of the reach of some consumers (see section 12.1). They affect the market for the sale and supply of infant and invalid foods in South Australia at wholesale level.

The infant foods' price orders restrict competition by preventing the firms subject to price control from maximising their profits. They also give other firms a competitive advantage over firms subject to price control. The costs of the prices orders are borne by Wyeth Pharmaceuticals, HJ Heinz, Nestle Beverages, the Government and potentially by consumers, if prices are kept artificially high as a result of the orders (see section 12.4).

The costs of the infant foods prices orders are that profit maximisation of firms is limited, firms subject to prices orders are unfairly discriminated against, and prices may be artificially high, although this cannot be established by any independent evidence. Thus, the current orders create inequality within the market place and there is insufficient evidence to demonstrate benefit to consumers (see section 12.5).

It is therefore the conclusion of the Review Panel that the costs of the infant foods prices order outweigh the benefits.

In the light of this conclusion, it is recommended that the prices orders relating to infant foods be revoked. Concerns were raised in the review process that this may result in price increases and hardship for disadvantaged consumers. It is therefore proposed that the status of infant foods as 'declared goods' be maintained. If sudden increases in price occurred and these were causing significant hardship, the Minister for Consumer Affairs could then issue a new prices order.

Concerns that retaining the status as declared goods may still cause distortions in the market are acknowledged. It is therefore proposed that a



two-stage deregulation process should occur, with revocation of the declaration to occur in two years time.

*D. The prices order relating to medical services*

The medical services prices order was introduced to resolve a short term conflict between the Australian Medical Association and the Commonwealth and State governments over the provision of services by medical practitioners to private patients in public hospitals and to prevent private patients in public hospitals being disadvantaged (see section 13.1).

The medical services prices order potentially restricts competition between specialists by imposing price conditions on specialists in recognised hospitals, thereby limiting the amount that those specialists can earn. In reality, since it is not being followed, there is no restriction on competition (see section 13.3).

There are no actual benefits or costs associated with the medical services prices order. There are significant potential costs for doctors, however, were the order enforced. All doctors would have to charge a much lower fee. This could lead to doctors refusing to perform these services in recognised hospitals, which would be highly undesirable and impose significant costs on consumers who would then have to use private hospitals for those services (see sections 13.4 and 13.5).

The public costs of the order are considered to outweigh the benefits. Therefore, the recommendation of the Review Panel is revocation of the medical services prices order.

*E. The prices order relating to Kangaroo Island Sealink Ferry*

The Kangaroo Island Sealink Ferry prices order seeks to prevent excessive prices being charged for freight to and from Kangaroo Island, as Kangaroo Island Sealink Ferry is in a monopoly position in relation to the carriage of freight (see section 14.1). It affects the market for the carriage of freight by sea from Kangaroo Island to the mainland and back.

The order restricts the market conduct of the owners of Kangaroo Island Sealink Ferry.

The beneficiaries of the prices order in relation to Kangaroo Island Sealink Ferry are residents of Kangaroo Island, all consumers of goods from Kangaroo Island and suppliers of goods to Kangaroo Island. Arbitrary price increases from a monopoly provider are prevented and the residents of Kangaroo Island are assured of an affordable freight service (provided Kangaroo Island Sealink Ferry continues to provide such a service) (see section 14.4).

The costs of the prices order are borne by Kangaroo Island Sealink Ferry which is potentially restricted in the profits it can make and the Government, in the slight administrative costs involved in issuing a prices order.

The public benefits of the prices order are considered to outweigh the costs. The recommendation of the Review Panel is retention of the Kangaroo Island Sealink Ferry prices order.

# CONSULTATION DRAFT

## REVIEW OF THE *PRICES ACT 1948* (SA)

### 1. INTRODUCTION

During the Second World War the Commonwealth Government introduced price control under the *National Security Act 1939* (Cth). This was maintained until 1948. A referendum was held on 29 May 1948, on the question whether to amend the Constitution to grant the Commonwealth Government permanent powers to legislate with respect to prices and charges. The *Prices Act 1948* ('the Act') was enacted following the defeat of this referendum. The Bill was designed to replace temporarily Commonwealth price controls by State price controls.

Interference in the market by the government via price control was deemed justified where the supply of goods and services was limited, and the free market price would put such goods and services beyond the reach of people on fixed incomes and "those who are not in a position to indulge in competitive buying for the limited quantity of goods and services available"<sup>1</sup>.

Initially, a wide range of basic items was controlled under the Act. Since 1948, however, successive State Governments decontrolled items considered to be non-essential or subject to strong competition, so that only a relatively small group of items now remain under control.

In this review, the Act and the accompanying regulations and orders will be dealt with individually. The nature of this Act is such that the effect on competition and the costs and benefits which flow from the Act's operation will be different in each situation to which the Act is applied.

#### 1.1 Why review the Act?

On 11 April 1995, the Council of Australian Governments entered into three intergovernmental agreements to facilitate the implementation of national competition policy objectives. One of these agreements was the *Competition Principles Agreement*. As part of its obligations under this agreement, State governments undertook to review all existing legislation that restricts competition. The Office of Consumer and Business Affairs ("OCBA") is reviewing the *Prices Act 1948* (SA) as part of this process.

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<sup>1</sup> Second reading speech of the Hon Thomas Playford, *Parliamentary Debates* (SA) July 1 1948 p164.

The guiding principle is that legislation (including Act, enactments, ordinances or regulations) should not restrict competition unless it can be demonstrated that:

- the benefits of the restriction to the community as a whole outweigh the costs; and that
- the objectives of the legislation can only be achieved by restricting competition.<sup>2</sup>

All existing legislation that restricts competition should be reviewed and, where appropriate, reformed. Reforms should be implemented by the year 2000. Any new legislation that restricts competition should be accompanied by evidence that the legislation is consistent with the guiding principle outlined above. Legislation identified as restricting competition should be reviewed every ten years thereafter.

The procedure for reviewing the Act is that contained in clause 5(9) of the *Competition Principles Agreement*. A review should:

- a) clarify the objectives of the legislation;
- b) identify the nature of the restriction on competition;
- c) analyse the likely effect of the restriction on competition and on the economy generally;
- d) assess and balance the costs and benefits of the restriction; and
- e) consider alternative means for achieving the same result including non-legislative approaches.

Where there is a requirement to balance the benefits of a policy or course of action against its costs, or to assess the most effective means of achieving a policy objective, the following matters shall be taken into account where relevant:

- government legislation and policies relating to ecologically sustainable development;
- social welfare and equity considerations, including community service obligations;
- government legislation and policies relating to matter such as occupational health and safety, industrial relations and access and equity;

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<sup>2</sup> Clause 5(1) of the *Competition Principles Agreement*.

- economic and regional development, including employment and investment growth;
- the interests of consumers generally or a class of consumers;
- the competitiveness of Australian business; and
- the efficient allocation of resources.

## **2. WHO DOES THE ACT AND THIS REVIEW APPLY TO?**

The Act has no direct application to any group. Orders made under it may apply to many different manufacturers and retailers of goods and services.

Current orders apply to the supply of bread, infant and invalid foods, medical services, tow truck services and the Kangaroo Island Sealink Ferry. This review is only considering the regulations and orders made in relation to bread, infant and invalid foods, medical services and the Kangaroo Island Sealink Ferry.

The order relating to tow truck services is part of a broader scheme administered by the Department of Transport under the *Accident Towing Roster Scheme Regulations, 1984* made under *The Motor Vehicles Act, 1959*. It would be inappropriate for the Office of Consumer and Business Affairs to review the prices order in isolation from the rest of the scheme. The Office of Consumer and Business Affairs will therefore contribute to a review of the scheme currently being conducted by the Department of Transport.

### **3. WHAT ARE THE OBJECTIVES OF THE ACT?**

#### **3.1 Identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address**

The stated objective of the Act is to control prices. The price control power is intended to be used for the benefit of the community. The benefits of price control for the community are detailed in section 5.1 below.

The Act originally sought to address the problem of providing for a just and equitable distribution of the limited supply of consumer goods, particularly necessities, that were available in the immediate post-war period. Without price controls, the price of scarce goods would have been expected to rise to the extent that people on low incomes, particularly those on fixed incomes, would not have been able to buy them.

In the 50 years since 1948, the social and economic problems that the Act originally sought to address have long been overcome. The problems that the Act currently seeks to address are different from those that it was originally designed to address.

#### **3.2 Provisions of the Act**

The Act serves two main functions:

- it establishes a mechanism for setting maximum prices for certain classes of goods; and
- it creates offences relating to overcharging or refusal to supply goods.

The setting of maximum prices involves a two part process. Firstly, the goods are declared. Section 19 of the Act empowers the Governor to declare goods and services by proclamation. 'Goods' is not defined in the Act. 'Services' is defined in section 3(1) of the Act:

“service” means a service supplied on a commercial basis, and includes  
(a) any such service available from the Crown or a statutory authority (including transport and the supply of water, gas or electricity); and  
(b) a right to a service.

Providers of declared goods and services must keep records of the amount that it costs to supply or provide the goods or services and the amount charged for supplying or providing the goods or services (section 12).

Once goods or services have been declared, the Minister may fix and declare maximum prices in relation to the sale or supply of those goods or services<sup>3</sup>. The Minister does this by order. This order may:

- a) fix differential maximum prices that vary according to factors specified in the order;
- b) apply to sales generally or to specified classes of sales; and
- c) apply throughout the State or in specified parts of the State.

An order may apply to specific goods, specific services or a particular person or persons, or may apply to all persons, goods or services in the relevant class.<sup>4</sup>

The Act creates certain offences. Where a maximum price has been set, it is an offence to:

- a) sell goods or supply services at a price above the set maximum (section 25);
- b) pay or offer to pay a greater price than the set maximum (section 31); or
- c) refuse to sell or supply the relevant goods (section 29).

In addition, if goods are to be provided in a specific container size, it is an offence to sell the goods in a different sized container (section 30)

The Act establishes the statutory office of the Commissioner for Prices (section 4). The Commissioner is responsible for the administration of the Act (section 5), but may delegate his/her powers (section 7).

### **3.3 Current Operation of the Act**

An inter-Departmental review team conducted a review of the price control function in 1979. As a result, the list of declared goods was reduced significantly and price control was divided into three categories, namely:

#### *(1) Formal Control*

When a declared product or service is in this category, the industry or firm seeking a price rise will need to apply to the Commissioner for Prices, and provide relevant costing information on price movements. If the application is approved, either a prices order is

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<sup>3</sup> *Prices Act 1948* section 21 (goods) and section 24 (services).

<sup>4</sup> Section 43.



issued to the applicant or, in the case of items of general public interest, the prices order is published in the *Gazette*.

(2) *Justification*

When a product or service is in this category, the industry or firm is requested to advise the Prices Commissioner within 5 working days of any price movement. This notification should provide justification for that movement, including relevant costing information. The Commissioner acknowledges receipt of the advice but does not formally accept or approve the price movement. The Commissioner investigates the justification provided and satisfies himself that the price change was justified. If not satisfied, the Commissioner may recommend that the Minister make a price order.

(3) *Monitoring*

When a declared product or service is in this category, the industry or firm is requested to advise the Prices Commissioner in writing of price increases within 5 working days. In the retail area, monitoring would be undertaken by Consumer Affairs officers by means of market surveys and questioning of retailers concerned as to their price levels. If it appeared that the price had moved without any justification, a recommendation may be made to the Minister regarding the need for a detailed investigation.

These changes were not the result of any amendment to the Act.

Prices orders are issued in two ways. Firstly, gazetted price orders are published in the *Gazette*. This is done in cases where the order has industry wide application. Applications for increases in the price of goods or services are usually made by organisations representing the industry.

Secondly, individual pricing orders are issued to specified firms. Applications for increases in the price of goods or services are made by the firm. Such firms are generally those in industries with a very high degree of market concentration (eg, those supplying infant and invalid foods).

The basis on which applications for price increases have been granted has varied over time. Traditionally, a "cost recovery" basis has been used. Increases granted have been based on unavoidable cost increases. Such procedures have been applied by other authorities throughout Australia, including the former Prices Surveillance Authority.

Recently, however, the 'cost recovery' basis has been widely criticised. This criticism highlights two main flaws in the use of cost recovery as a

basis for increasing maximum prices - it deters innovation and perpetuates inefficiency.

As a result of this criticism, other methods, in particular “price capping,” under which price increases are linked to the Consumer Price Index, have also been applied. Price capping is based on working out an efficiency factor, known as X, and then basing price increases on the balance of the Consumer Price Index minus X. This involves greater emphasis on efficiency and productivity improvements than the cost recovery basis.

### ***3.3.1 Currently declared goods***

In 1980, an order revoking all previous declarations of goods and services was made and a new list of goods and services was declared. Additional items were declared in 1982<sup>5</sup> and 1995<sup>6</sup>. A full list of declared goods and services can be found in Appendix B.

Prices orders and regulations have only been made in relation to a small number of these items. These are discussed in detail later in the consultation draft (see sections 11, 12, 13 and 14). Some of the items on this list are subject to price control by other mechanisms. Gas, for example, is controlled by a pricing regulator under the *Gas Act 1997*. Others are not subject to any form of price control.

The only submission which related to these issues was from the Small Retailers Association which indicated that they agreed with the substance of the conclusions.

It is therefore the final conclusion of the review panel that the historical objective of the Act was to address the need for the just and equitable division of resources. However the current objectives of the Act differ from the historical ones and relate more to issues of market failure and prevention of profiteering.

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<sup>5</sup> Quoting for the repair of motor vehicles.

<sup>6</sup> Carriage of freight by MBF Sealink Pty Ltd (amended in 1997 to refer to Kangaroo Island Sealink Pty Ltd after the operator changed its name)

#### **4. WHAT IS HAPPENING IN OTHER STATES?**

It is understood that Victoria, Western Australia and Tasmania have allowed their Prices Acts to lapse. Victoria has, however, retained some price control powers in its *Fuel Prices Regulation Act 1981*. The Northern Territory recently used its *Prices Regulation Act 1949* to control prices of some goods following the Katherine floods, and is not proposing to review the Act. Queensland's *Profiteering Prevention Act 1948*, which is not in active use, is due to be reviewed in 1999. New South Wales is considering the repeal of its *Prices Regulation Act*, and the transfer of emergency pricing powers to its *Independent Pricing and Regulatory Tribunal Act*.

## 5. COMPETITION: WHAT IS IT? WHY THE NEED?<sup>7</sup>

Competition is a process rather than a situation. However, whether firms compete is very much a matter of the structure of the market in which they operate. A market is the field of actual and potential transactions between buyers and sellers amongst whom there can be strong substitution, at least in the long term, if given a sufficient price incentive.

The structure of the market is characterised by a number of other factors, such as the number and size of competitors, the barriers to entry into the market, the ability for different products to be substituted, the extent of vertical integration, and the presence of co-operative arrangements between competitors which detracts from their independence. However, of all the elements making up a market structure, ease of entry into the market is probably the most important. It is the difficulty that firms experience in entering a market that establishes the possibility of market concentration over time; and it is the threat of the entry of a new player into a market that operates as the best regulator of competitive conduct.

Competition expresses itself as rivalrous market behaviour. Rivalry can take a number of forms, whether it be on price, service, technology, quality or even consistency of product. Effective competition requires both that prices should be flexible, reflecting the forces of demand and supply, and that there should be independent rivalry in all dimensions of the price-product-service packages offered to consumers.

Many economists point out that competitive market forces deliver greater choice and benefits to consumers. If a monopoly service provider is able to exercise significant power within its market, a misallocation of resources may result - the provider has no incentive to offer new products to consumers, and consumers themselves may pay more for the service than it is worth. Vigorous competition between service providers promotes marketing designed to attract consumers to the business with targeted service provision and/or reduced prices.

### 5.1 What are the benefits of price control?<sup>8</sup>

Under normal market conditions, the market itself will determine the price of goods through the normal channels of supply and demand. The operation of competitive markets may, however, be inhibited by the abuse

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<sup>7</sup> Drawn from *re Queensland Co-op Milling Association Ltd & Defiance Holdings Ltd* [1976] ATPR ¶40-012 at 17,246; Commonwealth of Australia, Department of Industry, Science and Tourism, *Codes of Conduct Policy Framework* (Canberra 1998) p9.

<sup>8</sup> Partly drawn from SG Corones *Restrictive Trade Practices Law* (Law Book Company, Sydney 1994) pp3-7 and Victoria, Competition Policy Task Force, *National Competition Policy: Guidelines for the review of legislative restrictions on competition* (Melbourne 1996) pp34-39

of market power by a firm, industry group or sector. Examples of such abuse include price fixing, predatory pricing, exclusive dealing, resale price maintenance and third line forcing. Abuse of market power can result in lower quantities of goods or services being produced at an artificially high price, and is an example of market failure.

Another cause of market failure is the natural monopoly. A natural monopoly develops when the fixed costs of providing goods are high relative to the variable operating costs so that the average cost declines over the relevant range of demand. In this situation, it is more efficient for a single firm to produce the total output of the industry than for two or more smaller firms. An example of this situation is utilities such as electricity and water.

There are many markets within Australia that are either monopolies, duopolies or oligopolies. These market conditions develop because the Australian marketplace is comparatively small (18 million people), and because of the large distances spanned by the continent. The relative isolation of many cities and towns creates the conditions in which it is easy for firms to gain a monopoly on the provision of specified goods and/or services.

Monopoly is the antithesis of perfect competition. Under monopoly conditions, there is only one seller who can dictate price. Since consumers have a choice of whether to purchase the goods or services, there will be a fall off in demand as price increases. The total profit of the monopolist may be higher, but there is an overall loss to society. This loss occurs because fewer of society's resources are being channelled to that product while consumers allocate more money resources to the product than would be the case under perfect market conditions. Hence monopoly results in a misallocation of society's resources.

It follows that the results of a natural monopoly may include supernormal profits and allocational and technical inefficiencies. The normal competitive forces that reduce price and promote allocative efficiency and the development and use of efficient technologies and practices fail to operate in a situation of natural monopoly.

In such a situation, the government may step in to reduce the effect of a natural monopoly by imposing price controls. By setting a maximum ceiling on the price, government can prevent the imposition of artificially high prices. Effectively, government can assume the price setting function of the market. Such a function is particularly important where the goods or services involved are essential ones, like the provision of water or electricity.

Another possible ground for government intervention in pricing is where there is unconscionable conduct arising from a particular vulnerability of consumers. Such vulnerability may arise through the circumstances where the goods or services are required. An emergency situation is an example of a situation where consumers will be placed in a position of special vulnerability. In such situations, providers of goods or services may seek to take advantage of the vulnerability of consumers by charging artificially high prices.

Where such practices are common in an industry, price control may be an effective mechanism of preventing the unconscionable conduct. While consumer protection legislation, such as the *Fair Trading Act 1987* and the *Trade Practices Act 1974* (Cth) may be effective in dealing with such conduct in some circumstances, in situations where unconscionable conduct is widespread price control may be more effective in dealing with such conduct. Both the *Fair Trading Act* and the *Trade Practices Act* are reactive rather than proactive in this regard, whereas price control can intervene before problems arise.

Price control by governments should be considered as a last resort. Undue interference via a price control mechanism may inhibit competition, and may have significant economic costs. There may be alternative methods of dealing with market failure in such an instance. These include creating competition for the market and giving access to essential facilities. Where such measures are ineffective, however, price intervention is a legitimate strategy to employ.

## **5.2 What are the disadvantages of price control?<sup>9</sup>**

Firms are generally motivated by a desire to make a profit. Avenues that are likely to lead to increased profits will therefore tend to be pursued more vigorously than those where likely profit is lower. Price control may limit profit maximisation if the maximum price set is below that which the market will bear. Rather than gaining maximum profit, profit is limited to the difference between the cost of producing the goods and the set maximum price.

Limitation of profit maximisation may, in turn, affect competition by reducing or eliminating the incentives for the provision of goods or services. If a maximum price were not set, then the prices of particular goods and services would be determined wholly by market forces. There would then be an incentive to produce more of those goods and services. If a maximum price lower than the market price is set, profits, and therefore incentives to produce, are reduced. The extent of the effect of price control on competition is therefore dependent upon the difference

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<sup>9</sup> Partly drawn from Commonwealth of Australia *National Competition Policy: Report by the Independent Committee of Inquiry* pp 269-277.

between the maximum price set under the Act and the maximum price the market would otherwise bear.

For the same reasons, restrictions on price also deter new investment in an industry. Prospective investors will be less likely to invest in an industry in which their profits will be limited. They will be more attracted to industries in which they can maximise their profits.

Price regulation can therefore deter potential competitors from entering into the market. High profits provide an important incentive for potential entrants into a market. This means, in turn, that those already in the market face a lower threat of new entrants into the market, which reduces the competitive pressures they experience. Even in a monopoly situation, high profits may motivate potential competitors to innovate in a way that would enable them to 'crack the monopoly'. Such innovation is beneficial to the market in terms of increased competition due to the ability to substitute products or services.

The use of price control mechanisms may also inhibit the development of higher quality but more expensive products.

Where there are complex administrative procedures such as justification or formal control, costs will be higher for participants. This can further reduce the incentives both for incumbents and potential participants in the market. Further, if compliance costs are high, it is likely that these will be passed on to consumers.

Where a cost recovery basis is used to determine price increases, there is less incentive for incumbents to increase efficiency. This process involves determining the increase in the costs of manufacturing the goods or providing the services and increasing the price in accordance with that cost increase.

This approach creates no incentives for increased efficiency. Thus where increased efficiency has led to a lower increase in the cost of producing the goods than would otherwise have been the case, the increased efficiency is not rewarded. Instead, the price of the goods will only be increased relative to the increased costs. The result is that the firm derives no benefit from increasing its efficiency. There is therefore no incentive for the firm to increase its efficiency. As a result, prices will increase by more than they should, and society as a whole is denied the benefits of increased efficiency.

The use of 'price capping' rather than 'cost recovery' as the basis for any increase in price may alleviate some of these concerns. Price capping (outlined in section 3.3) makes more allowance for improved efficiency, and rewards it.

### **5.3 The relevant market**

In considering the relevant market, a distinction must be drawn between the Act itself and regulations and orders made under it.

The Act itself potentially impacts on the market for the supply of all goods and services. In considering the market, therefore, it is relevant to consider the market in South Australia as a whole.

There are two main factors that affect the market in South Australia: relative isolation and relatively low population. These factors combine to make the South Australian market one in which, in many instances, relatively few firms dominate an industry. The large distance between Adelaide and other major markets has led to a tendency for oligopolistic enterprises to flourish within a geographically isolated market. Further, South Australia's low rural population density gives rise to a number of small local market areas for many goods and services effectively separated by distance from competition.

The regulations and orders affect specific markets within the general South Australian market.

The relevant market is therefore the market for the supply of goods and services in South Australia.



## **6. WHAT IS THE NATURE AND EXTENT OF THE RESTRICTION OF COMPETITION?**

### **6.1 The Act**

The Act, on its own, affects competition in a very minor way. If no goods are declared under the Act, then there is little restriction on competition. The only potential effect on competition is that some firms may modify their behaviour in the knowledge that the Act may be used. However, in general terms, the Act itself simply provides a mechanism for intervention in the market where required.

Such intervention may affect competition. Regulations and orders made under the Act have the potential to restrict competition by preventing profit maximisation, inhibiting the development of better quality but more expensive goods or services in the specified categories, reducing the incentives to provide more of specified goods and services, deterring potential entrants into the market and reducing the incentives to increase efficiency. This effect, however, arises from the terms of the orders or regulations and not from the Act itself.

The Small Retailers Association questioned the potential restrictions on competition identified above. It was suggested that 'within the confines of the order there is still an opportunity to maximise profit otherwise there would be no one in the business'.

It is the view of the review panel that any price order will inevitably limit the profit maximisation of suppliers. It is the intention of any prices order to limit profit maximisation, where profits are supernormal and arise because of the dominant market position of the supplier. While firms may, indeed, maximise their profits within the confines of the order (eg by increasing efficiency and thereby reducing costs) they will not be able to maximise their profits to the same extent as if they were not subject to price control.

The submission further suggested that there was some doubt that 'the incentive to produce or provide specified goods and services would be reduced - if a market exists that can return a profit, someone will ultimately take the opportunity'. However, as above, a price order which limits the profit which can be made too greatly may in the end result in the elimination from the market of providers of such goods and services.

The submission also suggests that price control leads to a 'very high incentive to increase efficiency, reduce operating costs and so increase profit'. To some extent this is true, and is indeed the objective of price control. However, the extent to which this is true will depend on the manner in which any increases in price are calculated. If a pure 'cost-

recovery' basis is used, then there are no incentives to increase efficiency, since increases in price are calculated solely on the basis of increases in costs. Such an approach is cost-neutral.

In the light of the submissions and the above discussion, the final conclusion of the review panel is that the Act, of itself, restricts competition in only a minor way. Orders made under the Act have the potential, however, to prevent profit maximisation, inhibit the development of better quality (but potentially more expensive) goods or services, reduce the incentives to provide goods and services, deter potential entrants into the market and reduce the incentives to increase efficiency. The extent of any such effect will depend on the terms of the order and the conditions of the market to which it applies.

Existing orders will be analysed later in this report to determine their effect on competition and the costs and benefits of their operation. These will only be retained if the costs of their operation are outweighed by the benefits and there are no viable alternatives which would achieve the same end. Any new order would be subject to National Competition Policy review, and would therefore only be made if the costs of its operation were outweighed by the benefits and there were no viable alternatives to achieve the same end.

While the Act itself does not restrict competition, as soon as goods and services are declared and prices orders made, other sections of the Act, in addition to the Order, come into play and may restrict competition.

## **6.2 Enforcement provisions**

These provisions impose a restriction on competition. The requirement to hand over books and other documents at the request of authorised officers could impose costs on business. Other enforcement provisions may increase the costs of business by requiring the performance of certain tasks and compliance with certain orders. Three sections in particular, each of which is aimed at ensuring that prices orders are complied with, may impose significant costs on business, thereby restricting competition.

### **6.2.1 Section 12 - requirement to keep accounts**

This section requires people who sell declared goods or provide declared services in the course of a business to keep accounts of the costs of producing or acquiring the goods for sale, or the costs of providing the service, and the price at which the goods or services are provided. This requirement may impose costs on business, restricting competition.

### **6.2.2 Section 29 - Prohibition on hoarding**

This section prevents the hoarding of goods. It creates an offence of refusing to supply declared goods.

The objective of this section is to prevent the hoarding of goods. If hoarding were to occur, this could have significant detriment to consumers who were unable to obtain the declared goods.

The section restricts competition in that it restricts the market conduct of retailers and wholesalers.

### **6.2.3 Section 30 - Alteration of container size**

This provision is unclear. It is assumed that the intended meaning of the provision is that where a price order has been issued relating to goods of a specific size, it is prohibited to alter the size of the package or container so as to circumvent the Act. In other words, if a price order had been issued in relation to 500ml cartons of iced coffee, it would be an offence to offer 600ml iced coffee at a much higher price to get around the Act.

The objective of this section is to ensure compliance with the Act. It would obviously be pointless to issue a price order relating to a certain size of good if the manufacturer, wholesaler or retailer could evade that by only manufacturing or stocking goods of a different size to that encompassed by the price order.

This section restricts competition. It may be commercially efficacious to offer the goods in a different sized container, or at least to have the flexibility to alter container sizes.

The only submission which addressed this conclusion was the submission from the Small Retailers Association. This submission only addressed the enforcement provisions relating to container size, and it is inferred from the discussion surrounding these provisions that they agreed with the conclusions of the review panel.

It should be noted that no submissions indicated that the provisions were imposing significant restrictions on the way in which the respondents conducted their business. On the other hand, nobody disagreed with the conclusions of the review panel as stated.

It is therefore the final conclusion of the review panel that sections 12, 29 and 30 of the Act may restrict competition by imposing additional costs on business and by restricting the market conduct of retailers and wholesalers.

## **7. WHICH GROUPS BENEFIT FROM THE ACT AND WHICH GROUPS PAY THE DIRECT AND INDIRECT COSTS WHICH FLOW FROM ITS OPERATION?**

### **7.1 The Act**

The community as a whole benefits from the existence of the Act. Its existence ensures that there is a mechanism available if there is a need to control prices due to market failure, including emergency situations.

There are a number of potential situations in which it may be necessary or at the very least desirable to make use of the *Prices Act*. If, for example, there were a mice plague which destroyed 90% of the wheat crop of the Eyre Peninsula, the price of flour and bread could rise dramatically. To protect consumers, it would be necessary to impose some form of price control.

Similarly, if a crisis similar to the Sydney Water crisis occurred in Adelaide, and still water manufacturers decided to make a windfall profit, taking advantage of the vulnerability of consumers by charging excessive prices for still water, it would be important for the protection of consumers that the government was able to step in and control the price.

The Act is a convenient, general purpose Act which can be utilised in any number of situations. This is a significant benefit to the community, due to the reduced need for specific regulations or other Acts.

There are only minor costs that arise from the operation of the Act *per se*. However, some costs arise as a result of the operation of orders and regulations under the Act.

### **7.2 General Costs**

There are administrative costs associated with the Act. These arise from:

- the duties of the Prices Commissioner in monitoring prices, setting prices and determining whether price increases are justified. These costs are borne by the government;
- the administration involved in making applications for an increase in price. These costs are borne by firms and most probably passed on to the consumer. These costs only arise when an order is made under the Act.

It is therefore the final conclusion of the review panel that the beneficiaries of the Act are consumers, who have the assurance of a mechanism to protect them from completely unjustified price increases imposed by firms

with monopolies or near monopolies, while the costs of the Act are borne by Government, which bears the minimal costs of administering the Act.

## 8. DO THE BENEFITS OF THE ACT'S OPERATION OUTWEIGH THE COSTS?

### 8.1 Price control

The Act itself has only administrative costs. In the context of the overall scheme, these administrative costs are minimal, and are far less than it would cost to re-establish a prices mechanism should one be required.

The existence of a comparatively fast and effective price control mechanism may be of benefit in any situation where the market problems identified in **section 5.1** arise. Particularly in the context of an economic community the size of Australia, there is significant potential for market failure arising out of the existence of monopolies, duopolies and oligopolies. There are many industries in which it is not economically viable for more than one or two firms to participate. The market share simply does not exist in such industries.

Where one or two firms are able to control the market, the normal operation of market forces is constricted. This may result in market failure. Firms may set artificially high prices. This may result in allocative inefficiency.

The costs of price control are generally borne by those who would seek to abuse their market power by artificially inflating prices. Provided the Act is applied in such a context and where other avenues have been exhausted, the benefits of the Act significantly outweigh the costs.

Additionally, the Act is a useful reserve power in emergency situations. Social problems, including major unrest, could well arise if essential goods were out of the reach of large sections of the community. Throughout much of modern history rationing of scarce goods has been introduced during times of war. Very few countries have allowed prices during periods of war to be determined wholly by market forces. The Act does not provide a mechanism for the imposition of full-scale rationing, but provides the first step in that direction.

The advantage of price control in extreme situations was demonstrated earlier this year during the Katherine floods. Certain profiteers were charging extremely inflated prices for basic goods. The Northern Territory Government was able to intervene thanks to similar powers to those contained in the *Prices Act*. Similarly, the recent Victorian gas crisis prompted concerns of profiteering. While price control was rendered unnecessary, thanks to rapid resolution of the problem, an Act like the *Prices Act* would have been an asset to the Victorian government if the situation had been prolonged. In these situations, the government may be reluctant to declare a state of emergency, but may wish to impose some form of price control to prevent profiteering.

Administratively, it is convenient to have one price control mechanism, which can be applied in a variety of circumstances. As a result of the *Prices Act*, the government has been able to control the prices in the towing industry and with the Kangaroo Island Sealink Ferry.

When negotiating the contract for the provision of the Kangaroo Island Sealink Ferry price control was seen as an integral part of the agreement. Without a *Prices Act* or similar power, the government would have had to create detailed mechanisms for setting the price within the contract itself. The *Prices Act* provides a convenient means of price control of this kind.

It has been argued that the danger of a power like the power under the Act is that it can be exploited, and used in situations where its application is unnecessary. Analysis of the use of the powers contained in the Act over the last decade demonstrates that, to the contrary, governments have been reluctant to make use of the power. It has eliminated or reduced the level of price controls in many situations and only used it in extreme situations.

However, there are legitimate concerns about the possible abuse of such a broad power. Where price control is used inappropriately, it may have serious implications for competition within the relative market, which were outlined in section 5.2. However, National Competition Policy would require consideration of the costs and benefits of any new order before such an order was made. This, in itself, should provide some control over the use to which the price control power is put.

In an ideal world, price control would never be necessary. There are situations, however, in which price control becomes very necessary for the protection of consumers. Emergency situations as highlighted in the report are just one example of where free market forces may not be adequate to protect consumers against profiteering. Other situations can develop where traders take advantage of the vulnerability of consumers to charge excessive prices. Towing services are an example of this latter category. Consumers who have just been involved in a car accident in the middle of a crowded street are not in a good bargaining position. Because of the *Prices Act*, the Minister for Consumer Affairs is able to step in and set maximum prices, thereby protecting consumers from exploitation.

Some may question the need for a separate Act, given that the price of utilities such as electricity is set by an independent regulator set up under the relevant Act (in the case of electricity, the *Electricity Act 1996*). It may be considered that any price control could be done under industry specific legislation, rather than under general legislation such as the *Prices Act*. While this argument may be relevant in relation to utilities, which will constantly require price control, it will not always be an efficient use of resources to set up separate pricing regimes for each industry requiring price control. In some situations, price control is not complex (infant foods

is an example of this). In others it is. The Prices Act provides a mechanism for ensuring that expertise in price control is concentrated in one department, rather than spread thinly through many. An examination of industries currently subject to price control shows the broad spectrum of industries which may require price related intervention.

Further, the need for price control may arise suddenly, and may dissipate as suddenly. The Prices Act provides flexibility both in the application of price control and in its removal. Where problems in the market develop rapidly, there may be need for rapid intervention. The Prices Act provides a mechanism for doing so, as opposed to the lengthier Parliamentary process. At the same time, once the need for price control has dissipated, it is easier to revoke a prices order than to repeal legislation.

It is therefore the final conclusion of the Review Panel that the importance of the Act as a reserve power and the benefit which flows from this outweigh the minimal administrative costs of the Act's operation.

## **8.2 Enforcement Provisions**

The enforcement provisions may impose some costs on business. However, if Parliament desires the outcomes of the *Prices Act*, it is necessary that some enforcement of its provisions is available. The enforcement provisions are reasonable under the circumstances. If it is accepted that there is a public benefit which outweighs the costs of the *Prices Act*, then the enforcement of the provisions of the Act must clearly be a public benefit that outweighs the costs. There is a clear intention that the powers be used so as not to unduly interfere with business, as demonstrated in section 10(4) of the Act.<sup>10</sup>

### **8.2.1 Record keeping requirements**

The requirement to keep records may increase the costs of business. There may be extra administration involved in keeping the records.

The benefits of requiring these records to be kept is that they provide a basis on which the Minister can determine the amount, if any, of any price increase. This may have been beneficial when 'cost recovery' was used as the basis for determining price increases. Now that a measure based on the Consumer Price Index is favoured, this requirement may no longer be necessary to enable the Minister to issue prices orders.

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<sup>10</sup> This section provides that the powers conferred by subsection one must be exercised so as to avoid any unnecessary disruption of, or interference with, the conduct of business or the performance of work.



Particularly in the case of goods which are not subject to prices orders, this section seems to impose unnecessary costs on business. The administrative costs of keeping these records may be significant. On the other hand, they may be records which would be maintained in any case, in which case it could not be said that the requirement imposes any significant costs. However, it does not appear to have great benefits if a price capping basis is used for issuing prices order. In any case, it would be up to the applicant to justify to the Minister for Consumer Affairs that the price should increase. How they do that is their business. If the Minister was not convinced, then he or she would not agree to a price increase.

The Small Retailers Association disagreed with the conclusions of the review panel. Its main grounds for doing so were that any sensible business person would keep records in any case, and thus the Act does not impose any greater costs on the business person, while any who aren't keeping such records should be made to do so.

It is the view of the review panel that the reason for the record keeping requirements is to enable a business person to justify any proposed increases in price. Thus if the Minister for Consumer Affairs does not see the justification for a proposed increase, the business proprietor can show the records which demonstrate the need for such a price increase.

Given that any sensible business person would be keeping proper records, and would be required to do so for taxation purposes, it seems unnecessary for the Prices Act to impose additional record-keeping requirements on business proprietors.

It is therefore the final conclusion of the review panel that while the requirement to keep accounts may not impose significant costs on business, it is a requirement that no longer has any benefit.

### **8.2.2 Container size requirements**

The cost of this restriction is reduced flexibility. Manufacturers must get approval from the Minister before offering goods for sale in alternative container sizes.

The benefits of this restriction are only felt in relation to goods subject to prices orders. For some of these goods, the requirement that goods only be manufactured in the specified sizes is a vital component of the prices order. Without this requirement, it would be easy for anyone to circumvent the order, simply by manufacturing goods of a different size. Therefore, if the cost/benefit analysis, which has been completed in relation to goods currently subject to prices orders and which will be

completed in relation to all future prices orders, demonstrates that the costs of the order are outweighed by the benefits, the benefits of this section are significant.

In relation to goods subject to prices orders where container size is an integral part of those goods (for example, infant foods) the benefits of the restriction will outweigh the costs. For declared goods generally, however, it is difficult to identify any benefit in restricting container size which is not outweighed by the costs of the restrictions on flexibility and innovation which result.

The only submission which addressed this conclusion was received from the Small Retailers Association. This submission was of the view that 'the restriction, if any, must be on any marketable quantity of goods and not restricted to one size of container'.

It is the view of the review panel that the restriction should continue to apply where the goods are subject to a price order, so as to prevent circumvention of the price order by alteration of container size. Where goods are not subject to a prices order, however, there appears to be little benefit in retaining a container size requirement.

It is therefore the final conclusion of the review panel that the benefits of the container size restriction outweigh the costs where the goods are subject to a prices order. Where goods are not subject to a prices order, however, there is no identified benefit which outweighs the costs of restricted flexibility and reduced innovation which result.

## **9. WHAT ARE THE ALTERNATIVES?**

### **9.1 Reliance on other Acts which contain powers to control prices**

If there were no *Prices Act* use could be made of other South Australian and Commonwealth Acts that contain powers to control prices in some situations.

#### **9.1.1 *Essential Services Act 1981***

A 'period of emergency' may be declared under this Act in certain defined circumstances. When such a period of emergency has been declared, the Minister may, via a notice in the Gazette, fix maximum prices in relation to the sale of specified goods or services during this period (Section 7). Such a notice may fix differential maximum prices that vary according to factors specified in the notice, and may apply throughout the State, or in specified parts of the State.

The length of any period of emergency is normally only seven days, but may be extended to fourteen days. Any extension beyond that time requires a resolution of both Houses of Parliament.

The Act contains no provision, similar to section 29 of the *Prices Act*, which requires a person to sell goods subject to a notice, if they have been exposed for sale. There is also no power in the Act that enables the Minister to sell requisitioned property as a means of overcoming hoarding.

As the Act only applies to a 'period of emergency', it cannot be used in crises which fall short of a period of emergency, or where the government does not wish to declare a period of emergency.

#### **9.1.2 *Emergency Powers Act, 1941-1952***

This Act applies only to any war in which the Commonwealth is engaged, and during "the continuance of any war". This is defined in section 2 as the period between the day on which the war commences, and ending six months after the day declared by the Governor by proclamation to be the day on which the war shall be deemed to cease.

The Act contains no express powers to control prices, but section 3, *inter alia*, empowers the Governor to make regulations to secure and maintain the safety and well-being of the civil population and maintain public order for and with respect to:

- (b) safeguarding and regulating the production, manufacture, sale, supply and distribution of food, water, fuel, gas, electricity, and any other commodities or things;

(c) safeguarding and regulating the provision of any services necessary to life and health;

(i) the determination and payment of compensation for any property which is acquired or of which possession is taken pursuant to the regulations made under this Act;”

It is likely that the powers under this Act could be interpreted widely enough to enable maximum prices to be set, or even to enable prices to be fixed. However, the Act has only limited applicability. It could not be used later than six months after the end of a war. It could also not be used in any economic emergency other than a war, such as a major and prolonged interruption to supplies of essential goods.

These Acts are only applicable in certain designated circumstances. Even in emergency situations, they are of limited application. They do not contain the same power to control prices for extended periods that is contained in the *Prices Act*. Therefore, it is foreseeable that circumstances could arise where price control was necessary, but where these Acts did not provide sufficient powers to control prices effectively for extended periods of time.

### **9.1.3 *Prices Surveillance Act 1983 (Cth)***

The *Prices Surveillance Act* establishes a price monitoring regime. Like the *Prices Act*, goods must be declared before their price can be controlled. Additionally, the Act contains the power to declare persons. A declared person effectively may not increase the price of declared goods without giving notice to the ACCC. On receiving notice of a proposed price increase, the ACCC may object to the price increase, and may require a person to give the ACCC a notice stating that they will supply the goods at a price specified by the ACCC.

This may appear to obviate the need for the *Prices Act*. However, there may still be some circumstances where there is still a need for State legislation in this area. Local crises may occur which require immediate action, which the *Prices Act* can deal with. The *Prices Surveillance Act* only deals with increases in price after goods are declared, and thus may not be able to deal effectively with profiteering.

## 9.2 Reliance on Consumer Protection Legislation

### 9.2.1 *Fair Trading Act 1987*

There are only limited powers for the Commissioner for Consumer Affairs to intervene in pricing matters. Under section 8 of the Act, the Commissioner can investigate practices that may adversely affect the interests of consumers generally or a class of consumers. The Commissioner would therefore have the power to investigate matters involving pricing issues. However, in the absence of a price control mechanism, it would be difficult for the Commissioner to determine if an excessive price had been charged. Additionally, sanctions under the *Fair Trading Act* could not be applied. For sanctions to apply, the person must have engaged in or proposed to engage in conduct that constitutes a breach of the *Fair Trading Act* or a related Act. Overcharging would not amount to such a breach. The Commissioner for Consumer Affairs could use his naming power (s91A) to name traders that were charging excessively high prices.

The *Fair Trading Act* could be amended to include a power to control prices. This would seem to have administrative effect only, however, and would not lead to a lessening of any restrictions on competition.

### 9.2.2 *Trade Practices Act 1974 (Cth)*

The provisions of the *Trade Practices Act* do not prevent the charging of monopoly prices. Section 46 (1), which is the primary section dealing with misuse of market power, provides:

A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

- (a) eliminating or substantially damaging a competitor of the corporation or a body corporate that is related to the corporation in that or any other market;
- (b) preventing the entry of a person into that or any other market;  
or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

Where a corporation deliberately lowers its price well below a long-term sustainable level, in order to force competitors out of the market (predatory pricing) this may be a breach of section 46(1).

This section does not catch the exploitation of market power by the charging of prices above the level that would prevail in a competitive market.

The *Trade Practices Act* would be an effective mechanism for dealing with price fixing, however. Were the three firms in the infant foods industry to fix their prices, for example, they would potentially be in breach of sections 45 and 45A of the Act.<sup>11</sup> It may also be an effective mechanism for dealing with the conduct which occurred in the bread industry.

### 9.3 Creating competition for the market

This is a method of price control that is only applicable where there is a market in which it is not viable for more than one firm to compete (ie a natural monopoly). One way of dealing with this situation is to create competition *for* the market. This may involve firms tendering for the power to operate in that market. Low prices may be one factor used to determine which firm will be granted permission to operate in the market.

Although this may be an effective means of dealing with high prices resulting from some forms of market failure, it is no substitute for the flexible operation of the *Prices Act*, because it only applies to limited circumstances.

This could apply to the Kangaroo Island Sealink Ferry, however. Under such an initiative, firms could tender for the right to operate a ferry service from the mainland to Kangaroo Island.

The level of infrastructure required to run such a service would make such an idea unviable in practice. It is unlikely that there would be any successful tenders other than that of Sealink.

### 9.4 Granting access to essential facilities

This method of dealing with market failure is only applicable where there are essential facilities for operation within a market which are within the sole power of one operator. It is particularly applicable to utilities. This way of dealing with market failure therefore does not apply to the majority of situations dealt with by the *Prices Act*.

The only exception to this is the Kangaroo Island Sealink Ferry. Under its contract with the South Australian government, the ferry has semi-exclusive rights of access to certain key facilities. It is suggested, however, that even if rights of access to these facilities were granted to other

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<sup>11</sup> Section 45A provides that price fixing will be deemed to have the purposes, or to have or be likely to have the effect, of substantially lessening competition. Section 45(2) provides that a corporation shall not enter into a contract that will, *inter alia*, have the effect of substantially lessening competition.

companies, the market for the carriage of freight from Kangaroo Island to the mainland is simply not large enough to sustain more than one firm.

### **9.5 Codes of practice**

The *Fair Trading Act 1987* provides for codes of practice to be prescribed. Such codes must be complied with by traders. The *Fair Trading Act* contains no power to set maximum prices, however. It is probable that any attempt to use such a Code to set maximum prices would be ultra vires and would fail.

Further, it would be difficult for any code of practice to avoid the undesirable practices of price fixing and collusion, which would be a breach of the *Trade Practices Act*.

### **9.6 Industry self-regulation**

In most industries there is no legislative mechanism under which industry self-regulation can be applied to prices. It is also extremely difficult in many cases to identify the industry to which self-regulation is to apply. In many industries the industry associations with which an agreement might otherwise be made do not include the whole or even a major portion of the industry.

There would be a danger that the setting of maximum prices by industry groups would become a form of price fixing, whereby all firms in the industry charged the maximum price set by the industry group, rather than engaging in competition.

In any case, any price fixing, or setting of maximum prices by an industry association would be a breach of the *Trade Practices Act 1974* (Cth).

### **9.7 Base orders on quantity rather than container size**

This is intended to deal with the specific restriction on competition brought about by section 30. One alternative would be to base prices orders on quantity rather than container size. For example, iced coffee price could be based on a certain price per 100ml. This would enable manufacturers to use any sized container they wanted, because all prices would be based on the flat rate per 100ml (and the fractional differences for eg a 375ml carton would be based on the price per 100ml  $\times$  3.75). Although this would create more flexibility in terms of container size, it fails to take into account the fact that in many cases container sizes do not increase proportionately. It would, therefore, be almost impossible to factor a container size cost into the prices order.

It must also be recognised that bulk purchases of goods tend to cost proportionately less than smaller purchase. Thus a 600ml iced coffee (to

reuse that example) will generally cost less per 100ml than a 375ml carton (of course, 'specials' and other marketing tactics may sometimes cause the opposite to be true).

### **9.8 Amend section 30**

Another alternative would be to amend the section so that it only related to goods subject to prices orders. This is particularly important where goods are declared but not made subject to price orders. Manufacturers may incur costs (including costs arising from lack of flexibility and decreased innovation) from restrictions on container size where there is no benefit derived by the community. Limiting the operation of the section to goods subject to prices orders would prevent evasion of prices orders but limit the impact of the Act on competition.

### **9.9 Conclusion**

There is no power to fix prices that is as comprehensive and capable of such flexible application as that in the Prices Act in any other SA legislation. Powers to fix maximum prices in other Acts are limited to particular, short periods of time under narrowly defined circumstances, or apply only to particular goods and services. The Prices Surveillance Act (Cth) may be effective in some situations but does not have the facility to deal with certain local practices. Likewise the Trade Practices Act 1974 (Cth) provides an effective protection against price fixing and some other anti-competitive practices, and may sometimes provide an alternative to specific regulation. Neither provides a complete alternative to the flexibility of the Prices Act, however.

Amending section 30 of the Act would partially ameliorate the restrictions on competition.



## **10. WHAT ARE THE OPTIONS?**

### **10.1 The Act**

#### ***10.1.1 Retention of the Act***

The advantages of this option are that the government retains a fast and effective mechanism for dealing with high prices resulting from market failure. There are minimal costs associated with the Act's operation. The cost/benefit analysis demonstrated that the benefits outweigh the costs.

The disadvantages are that the power could be used in circumstances where its use was not warranted. This could be addressed by limiting the scope of the power. For example, there could be a time limit placed on the declaration of goods, after which the declaration must be reviewed.

Any future orders made under the Act would be subject to considerations of National Competition Policy in any case.

If this option is pursued, it is recommended that section 30 of the Act be amended so as only to apply to goods subject to prices orders. It is also recommended that section 12 be repealed, as this section no longer appears to be of benefit.

#### ***10.1.2 Amendment of the Act, limiting the circumstances of its application***

This option would involve leaving the Act substantively as it is, but amending it (possibly by amending sections 19 and 24) to provide that the proclamations may only be made in certain defined circumstances. This would prevent it being used inappropriately, but involves the risk that the defined circumstances might be restrictive, and not cover the actual situation being confronted.

The Department of Equity and Fair Trading (Qld) was of the view that the objectives of the legislation should be very specific and that the provisions of the legislation should not be used for purposes outside those objectives, otherwise the legislation should be repealed.

It is the view of the review panel that limiting the scope of the Act would limit its flexibility which is one of its great assets. While concerns in relation to potential restrictions on competition are acknowledged, it is noted in the review that any future declarations would be subject to considerations of National Competition Policy in any event, and would only be able to be made if their benefits outweighed their costs and there were no viable alternative means of achieving the same objectives

#### ***10.1.3 Repeal of the Act, with amendments to the Fair Trading Act***

This option would not lead to a reduction in control, unless such amendments were specifically tied to the establishment of codes of practice.

#### ***10.1.4 Repeal of the Act, with the establishment of Codes of Practice***

Although this option leads to a reduction in control, it is not considered desirable as the likely outcome would be price fixing.

#### ***10.1.5 Repeal of the Act with Industry Self Regulation***

Again, this option would probably lead to price fixing and hence a lessening of competition.

#### ***10.1.6 Repeal of the Act, relying on other forms of control***

The advantages of this option are that the slight administrative costs of the Act and the danger of unwarranted governmental intervention are removed.

The disadvantage of this option is that the other forms of price control are very limited in their operation. Without a reasonably fast and effective mechanism to intervene in the marketplace, there is the possibility of social unrest if essential goods and services were placed out of the reach of large sections of the community. Without an Act, the government would be forced to go through the long and costly legislative process, during which time substantial losses may be incurred.

### **10.2 The List of Declared Goods**

There appears to be little value in maintaining such a long list of declared goods when so few are subject to price control. It is recommended that the list of goods be reduced. Only those goods which continue to be controlled should remain on the list. This would result in a much shorter list consisting of bread and bread rolls, tow trucks<sup>12</sup> and the Kangaroo Island Sealink Ferry. The declaration in relation to all other goods could be revoked. Should a need to control other goods arise in the future, those goods could then be declared.

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<sup>12</sup> For the time being. Until a review of this scheme is carried out by Transport SA, it would be inappropriate for the Office of Consumer and Business Affairs to take any action in relation to tow trucks.

### **10.3 Recommendation**

**It is therefore the final recommendation of the review panel that:**

- 1) The Prices Act be retained**
- 2) Section 30 be amended to only apply to goods subject to prices orders**
- 3) Section 12 be repealed**
- 4) The current list of declared items be revoked and a new declaration issued declaring only the following as declared items:**
  - a) bread and bread rolls**
  - b) infants' foods**
  - c) towing of motor vehicles**
  - d) recovery of motor vehicles**
  - e) storage of motor vehicles**
  - f) quoting for the repair of motor vehicles**
  - g) carriage of freight by Kangaroo Island Sealink Pty Ltd**

## **11. THE PRICES REGULATIONS RELATING TO BREAD**

### **11.1 What are the objectives of the regulations?**

Retailers are prohibited by regulation from reselling bread and bread rolls to suppliers. Bakeries, in turn, are prohibited from offering to accept such resale. These regulations were brought into operation at a period of turmoil in the bread industry, to prevent the practice known as 'sale or return'. A new bakery had entered the market in the early 1980s. This bakery offered to redeem unsold bread, in order to establish its own market share. Soon most other bakeries were following suit.

At around the same time, large retailers began competing as to who had the lowest prices. To substantiate their claims, they were ordering huge amounts of bread, which they then sold at extremely low prices. As part of this competition, they wished to have full shelves of bread at all times. The natural outcome of these steps taken by the retailers was that at the end of the day they often had large amounts of unsold bread. The retailers were able to use their market power to place pressure on all suppliers to redeem this unsold bread, an arrangement that suited the needs of the retailers.

Larger bakeries were generally able to absorb the loss. The viability of smaller bakeries, however, was threatened. The bakeries had no use for the old bread, and had little choice but to dump it or give it away, leading to a public outcry about the wastage.

Had the practice been allowed to continue, there is little doubt that many small bakeries would have been forced to close. This would have led to a substantial lessening of competition and a corresponding reduction in choice for the consumer. This problem may recur if the regulations were to be revoked.

However, the market has changed to some degree. Many smaller bakeries now sell bread directly to the consumer, rather than via supermarkets. For these bakeries, the return of bread is not an issue. Some small bakeries still supply bread to supermarkets, however. These bakeries would be placed at a significant disadvantage if bread redemptions were permitted.

The objective of the regulations was not to protect small bakeries per se. Rather, the objective was to protect consumers and the community at large from the potential consequences of practices in the baking industry. These practices were resulting in large scale wastage of bread, and were threatening the survival of small bakeries (which at the time offered consumers the widest choice of bread).

## 11.2 What is the relevant market?

The 'bread' regulations affect the market for the sale and supply of bread and bread rolls within South Australia. They apply specifically to the market for the wholesale of bread, but impact upon the market for the retail of bread. According to the Baking Industry Association ('BIA')<sup>13</sup>, two firms control approximately 75% of the wholesaling market, with the remainder being made up of small suppliers. The main retailers in this market are supermarkets, which have a large degree of market power. This market also includes bakeries which sell directly to the public ('hot bread' shops).

## 11.3 How do the regulations affect competition?

The regulations restrict competition between bakeries for the sale of bread to retailers. A willingness to accept bread returns may increase their attractiveness to retailers. Under the current regulations, however, this practice is prohibited. While bakeries can and do compete on other levels, including product quality, service, merchandising and pricing (as was pointed out by bakeries, union representatives and retailers in their submissions) the regulations still restrict competition through the prohibition of bread redemptions.

The regulations may also affect competition between supermarkets. Supermarkets are unable to engage in a discounting war because they may not return bread and fear having too much bread left on their shelves at the end of the day. As they are unable to return the bread, they would have to bear any losses (rather than transferring this loss to the bakeries). This deters supermarkets from engaging in this form of conduct. However, the retailers themselves indicated that competition between supermarkets still happens daily on price, and that 'supermarkets can still compete if they wish on bread prices'. They stated that the use of 'discounting wars' is no longer a part of their marketing philosophy. The BIA pointed out that 'every week in South Australia supermarkets have bread highly discounted and often as a leader line', while the union pointed to the evidence of 'advertising campaigns undertaken by supermarkets in the electronic print media discounting both home brand and proprietary brand bread and bread rolls'. It would appear that in practice, competition between supermarkets is not being limited by the regulations.

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<sup>13</sup> In their submission to the review of the regulations conducted by the Office of Consumer and Business Affairs in 1996-97.

The regulations may also have the potential to affect competition between supermarkets and hot bread shops. These shops are able to offer a wider range of bread than supermarkets, because of supermarket's reluctance to be left with the excess stock. However, the major retailers asserted that 'the bread regulations do not restrict competition between supermarkets and other bread shops'. This view was supported by the bakeries, union and small retailers.

However, it could be argued that the regulations encourage competition by forcing supermarkets to engage in competitive conduct. As supermarkets must bear the loss of any bread that is not sold, they are forced to make commercial decisions about the amount of bread that they will buy, rather than buying bread in quantities well in excess of what they could hope to sell. In their submissions, the union, small retailers and bakeries agreed that the regulations encourage supermarkets to engage in competitive conduct, while the major retailers argued that they engage in competitive conduct regardless of the operation of the regulations. This assertion tends to be displaced by an examination of conduct in unregulated jurisdictions.

The regulations also offer some protection to small bakeries, which would be unable to absorb the loss incurred by bread returns. Whereas the larger bakeries have some degree of market power through their size, smaller bakeries are not in a position to negotiate terms with large retailers. These bakeries may be forced, through their lack of market power, to redeem unsold bread. Larger bakeries are better able to absorb losses incurred through bread redemptions. The protection of small bakeries may increase competition in the market.

The extent to which the regulations have protected small bakeries was questioned by submissions on both sides of the industry. Both the Retail Traders Association and Port Lincoln Bakery pointed to the closure of several small bakeries in the period since the introduction of the bread regulations. BIA and the Union, on the other hand, both felt that the regulations do protect small bakeries. BIA said that smaller bakeries are not in a position to bear any extra losses. Thus, while some bakeries have gone out of business, the remaining small (and large) bakeries are protected from massive returns of bread by the regulations. However, it appears from the submission from the Retail Traders Association that the survival of small bakeries is more dependent on their ability to market themselves as providers to a niche market than on their protection from bread returns.

In the light of these submissions, it is the final conclusion of the review panel that the regulations promote competition by encouraging retailers to engage in competitive conduct specifically in relation to bread. They restrict competition by placing restrictions on the market conduct of the

bakeries, which must not redeem bread or offer to do so, thereby eliminating one level on which the bakeries could compete. The regulations may also offer some protection to small bakeries, but their survival relates more to the niche marketing of their product than their protection from massive returns of bread.

#### **11.4 Who benefits from the regulations, and who bears the cost of their operation?**

In 1995, the Office of Consumer and Business Affairs reviewed the 'bread' regulations. This review concluded that the present situation regarding bread appears to give an advantage to the baking industry. The industry does not have to be concerned with retailers returning large amounts of unsold bread. However, the review also noted that should the regulations be discontinued, there was the potential for:

- increased costs to the industry which would be passed on to the consumer;
- unnecessary wastage;
- price differentials;
- uneconomic trading arrangements with large retailers; and
- a decline in the number of small bakeries operating, particularly in country regions.

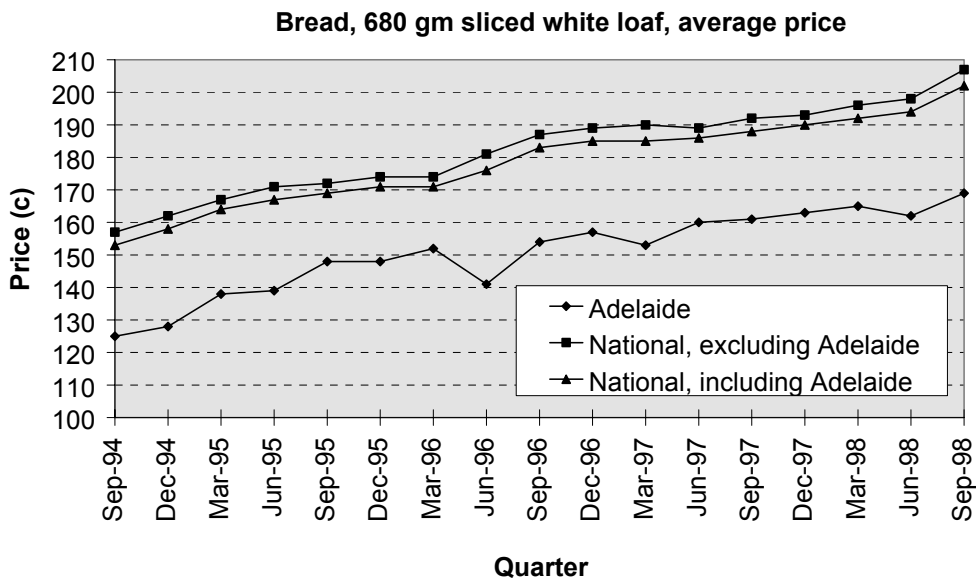
That review noted that in South Australia there is a return rate of only 2-4%. In all other States, the return rate was 20%. This leads to significant potential wastage. The current review panel has made inquiries with the industry interstate to ascertain current wastage levels. While not all states were able to provide wastage levels, those that did indicated wastage levels of between 11 and 20%.

Submissions to the review indicated varying levels of wastage in South Australia, with retailers citing a wastage rate of 6% while unions suggested that wastage was in the vicinity of 2-4%. As retailers are currently in the best position to determine wastage levels, the review panel considers that the figure of 6% is most likely to be accurate. Even taking this figure as the wastage rate in South Australia, however, it appears that wastage is significantly lower in South Australia than in other States. Although the link between the bread regulations and the lower wastage rates cannot be demonstrated empirically, it is probable that the regulations are at least a significant contributing factor in the reduced level of wastage. The regulations force those who have the greatest power to

control stock levels, the retailers, to bear the risk of unsold bread. This means that those retailers order bread in quantities that they can realistically expect to sell, reducing the level of wastage.

The 1995 review also found that the price of bread in South Australia is significantly lower than in all other states. It was considered probable that should wastage return to the level pre-regulation, the price of bread would increase significantly.

The two submissions which specifically addressed the issue of price were contradictory. Port Lincoln Bakery submitted that the price of bread is lower in SA while the major retailers submitted that there is no significant difference in price, and that SA is not the cheapest state. The review panel has researched this issue with the Australian Bureau of Statistics. The following chart shows the average price of a 680 gm white, sliced loaf of bread in Adelaide for each quarter from December 1994 to September 1998 compared to the average price of the same in Australia as a whole. The latter figures have been calculated both including and excluding Adelaide.



On the basis of these statistics, it is clear that the price of an average loaf of bread in Adelaide is significantly lower than in all other capital cities. While there may be other factors which contribute to this (Adelaide is a fairly cheap marketplace generally) it is considered probable that the bread regulations, with their reduction of wastage, contribute to the lower prices experienced by consumer in Adelaide. At the very least, they do not appear to be causing increased bread prices.

There is little doubt that major retailers would make use of sale or return if the regulations were repealed. The supermarkets have declared that they would not abuse this situation, however. They claim to have evolved



significantly in the past ten years, to an extent where such tactics are no longer part of their marketing strategy. Throughout their submission, they reiterated that they have no intention of entering into price wars with other supermarkets.

This must be compared with an assertion by the Union that when, on a previous occasion, the retailers believed that the regulations had been repealed, the Association immediately advised all members to demand a credit on unsold bread and bread products, and the assertions of the industry as a whole that the practice would recur. It should also be noted that, in the previous review of the regulations conducted only two years ago, the major retailers admitted that they would again take advantage of 'sale or return' if it was not prohibited by the regulations. The retailers also admitted in their submission that their purchasing staff are currently more cautious in the quantities of bread that they buy than they would be if the regulations did not exist. Further, the significantly higher wastage levels in other States undermines the retailers argument. In addition, the Baking Industry Association has indicated that the same practice is used in relation to other baked goods (eg cakes) which are not covered by the regulations.

Having taken all of these submissions into consideration, it is the view of the review panel that it is likely that retailers would take advantage of 'sale or return' if the regulations were revoked.

It follows that society as a whole benefits from the restrictions imposed by the 'bread' regulations. They ensure that a stable and orderly market is maintained. The restriction also ensures efficiency. Supermarkets have incentives to limit their bread orders to that which they can realistically expect to sell. They will also incur less wastage, as they will sell most of what they order. The restriction prevents the type of bread wastage that occurred in South Australia in the mid-1980's, which is both inefficient and socially undesirable.

The cost of the restrictions is borne by bread retailers, ie mostly supermarkets. Supermarkets are prevented from returning unsold bread (and thus bear the cost of holding leftover stock). This is a private cost, however, unless that cost is borne indirectly by the consumer in the form of higher prices. The research into comparative bread prices in Australia indicates that this is not the case (or at least not in a statistically significant way).

Supermarkets argue that the restriction on the return of bread prevents them from offering as wide a range of bread as they otherwise could. In particular, those consumers who are unable to shop except late on Thursdays and on the weekends may be unable to get specialty breads. The bakeries, union and small retailers all rejected the conclusion that

there is a reduction in choice for consumers, pointing to the extensive variety of bread that is currently available seven days a week, with the emergence of hot bread shops, in-store bakeries and franchises such as Bakers Delight. The Retail Traders Association, on the other hand, argued that 'as a result of retailers needing to control their stock levels at the end of each day, a reduced choice is available for consumers shopping at that time of day.'

However, if the demand at such times is sufficient it stands to reason that supermarkets would cater for that demand. The fact that they do not do so tends to suggest that the demand is not there or that there is insufficient demand to justify a commercial decision to order more product.

If there is any restriction, it is a self-imposed restriction rather than one caused by the 'bread' regulations. The review panel is of the view that any reduced choice for consumers results from the commercial decisions of the retailers and not from the bread regulations.

### **11.5 A cost/benefit analysis**

Because of the peculiar conditions of the market for wholesaling bread in South Australia, it appears necessary that some form of control on the activities of supermarkets and large manufacturers is exercised. If it is not, it appears certain that supermarkets will once again engage in the tactics of purchasing significantly more bread than they require, and then forcing the bakeries to redeem this bread. This may force smaller bakeries out of the market, thereby reducing competition for the larger manufacturers, and ultimately reducing the choice for consumers. Alternatively, the price of bread may rise as bakeries seek to compensate for the massive losses incurred in redeeming bread. Such a price rise will bear no relation to increased productivity, but rather will be compensating for waste.

Comparing waste levels in South Australia with those in other States, it appears likely that the level of wastage would increase if the bread regulations were repealed. This is also supported indirectly by the submission from the Retail Traders Association which suggested that retailers are currently cautious with the amounts of bread they order as they wish to avoid incurring excessive costs via unsold bread. The implication from the submission is that if the bread regulations did not exist, retailers would be less cautious in the ordering process, ordering greater quantities of bread with less consideration given to probable wastage levels, on the basis that the bakeries would bear the costs of this practice. Thus wastage levels would be expected to rise to the levels currently experienced interstate.

All submissions agreed that there is less wastage of bread as a result of the regulations, although the Retail Traders Association indicated that

wastage may be offset in some other States by the use of unsold bread as breadcrumb, croutons and pig feed. While this may be true, the desirability of allowing increases in wastage of high quality bread because it can be used as stock feed if unsold does not make good policy sense.

The industry has indicated that if bread redemptions were permitted, any bread that was returned to bread manufacturers would be dumped. The reason for dumping the bread is that old bread can cause a bacteria commonly called 'rope' to develop in a bakery, which has the potential to cause damage to stock and may be a risk to public health. Thus bakeries appear to have no alternative but to dump the bread.

The acceptance of bread returns would impose substantial additional costs on bakeries. Not only would bakeries bear the costs of manufacturing the bread, they would also bear the costs of using additional vehicles to collect the wastage (as the risk of contamination would apply to trucks as well) and the costs of dumping the excess product. While these may be considered to be private costs, they would have an indirect effect on the consumer, as the bakeries would have to increase the price of bread to cover their losses. It is estimated by the BIA that the price of bread could rise by 30 cents if the bread regulations were repealed. How realistic this assessment of potential price increase is is open to question as the average price difference between Adelaide and the other states is only 17 cents. The assertion that price would rise to some degree is accepted, however.

The review panel also considers that the regulations result in more efficient use of resources. This issue provoked disagreement between respondents. Bakeries, union and small retailers all agreed that the regulations result in more efficient use of resources, but the Retail Traders Association disputed this conclusion. Their submission stated that 'retailer resources are certainly worse off, through double handling of any product left over which has not sold. Resources in controlling stock levels through telephone calls and faxes are now higher than they were for both retailer and bakery in the days of Sale or Return'.

It is the view of the review panel that the resources which need to be considered are not merely the phone/facsimile and human resources used in the ordering process as cited by the Retail Traders Association, but also the human and physical resources (ingredients, power etc) which are involved in making the bread itself. If the unsold bread is merely dumped at the end of the day, it is a waste of all of those resources. While acknowledging that some wastage will inevitably occur regardless of the existence of the regulations, the benefit of the regulations is that less bread is wasted, meaning that this inefficiency is reduced.

It is also questionable whether the cited resources would be used less efficiently if the regulations were revoked. Surely the 'double-handling' which currently occurs would continue if the regulations were revoked..

Even if retailers' resources would be used more efficiently in the absence of regulation, the cost would simply be transferred to the bakeries. There would be no net benefit. Equally, the increase in the use of telephones and faxes may well arise from the increase in the number of delivery times per day which leads to greater ordering demand.

The public benefits of the regulations are therefore that small bakeries are protected, competition is increased, there is less wastage of bread and resources are used more efficiently. Bread prices are lower than in any other State, which may be a further benefit of the regulations, although there is insufficient evidence to be certain if this is a result of the regulations or simply a reflection of other market factors. In any event, it supports the argument that the regulations have not increased prices. There is a further private benefit for bakeries, who do not have to bear the cost of unsold bread. This private benefit may also lead to a public benefit as any increased costs to bakeries are likely to be passed on to consumers. It would therefore appear that these benefits outweigh the costs, which in the long term are incurred only by those who would seek to exploit their market power.

It is therefore the final conclusion of the review panel that the benefits of the regulations outweigh the costs.

## **11.6 What are the options?**

### ***11.6.1 Retention of the Regulations***

The benefits of these regulations are argued to outweigh the costs. Although they impose some restriction on competition, that restriction is necessary to ensure that consumers' interests are protected in the long run. Some form of control of the bread industry is therefore necessary. Regulations are not the only available form of control, however. Enforcement under the *Trade Practices Act 1974 (Cth)* may provide an alternative, less intrusive, form of regulation of this industry. If such protection is available, the regulations are not necessary. The viability of this option is discussed in more detail below.

### ***11.6.2 Develop a Code of Practice under the Fair Trading Act***

The development of a Code of Practice under the *Fair Trading Act* would be a less intrusive form of regulation. Such a code could be developed with the cooperation of the baking industry and the retailers. Some industry groups have indicated that they would be willing to participate in a code of conduct. The advantage of this measure is that it would be a measure with industry support that would be able to meet the needs of that industry effectively, while consecutively providing protection for consumers. The difficulty with this option is that the history of the relationship between bakeries and retailers indicates that it would be very difficult to establish a code of practice that was acceptable to all parties.

### ***11.6.3 Industry self-regulation***

There is perhaps scope for different industry groups, such as supermarkets and bakeries, to agree not to include certain types of contractual conditions such as “buyback clauses” in contracts between them. Such agreements would, however, only be isolated in nature, and would hardly qualify as an example of industry self regulation.

An agreement on the exclusion of certain terms from contracts might itself contravene the *Trade Practices Act*.

### ***11.6.4 Enforcement under the Trade Practices Act 1974 (Cth)***

It has been suggested that the conduct of the bakery that initiated the practice of redeeming bread returns may have amounted to predatory pricing and therefore potentially a breach of s46(1) of the *Trade Practices Act*. Were the Office of Consumer and Business Affairs to repeal the regulations, and the practice to be initiated again by the bakeries with market power, this may amount to a breach of s46(1). There would need to be substantial evidence that the purpose of this conduct was either

- eliminating or substantially damaging a competitor; or
- preventing the entry of any person into any market; or
- deterring or preventing a person from engaging in competitive conduct in any market.

The section does not prevent conduct which merely has the effect of causing the elimination of businesses unless that was the purpose of engaging in the conduct. Therefore very strong evidence on intention would be needed.

It has also been suggested that the conduct of the retailers, in using their market power to force manufacturers to accept bread redemptions, may be unconscionable conduct for the purposes of s51AA. Were the Office of Consumer and Business Affairs to repeal the regulations, and the practice to recur, this may amount to a breach of s51AA. Again, however, strong evidence would be needed to show that the conduct was unconscionable. To come within this section, it would need to be shown that:

- a party to the transaction suffered from a special disadvantage, or was placed in some special situation of disadvantage, in dealing with the other party;
- the disability was sufficiently evident that the stronger party knew, or ought to have known, about it; and
- the stronger party took unfair advantage of its superior position or bargaining power.

Generally, a disparity in bargaining power is not considered to be a 'special disability'.

It has also been suggested that the conduct of both manufacturers and retailers may be unconscionable conduct for the purposes of the new section 51AC. This section prohibits unconscionable conduct in connection with the supply to or acquisition from a corporation, other than a listed public company, of goods and services. This section provides a much broader list of factors which may be taken into account in determining whether conduct is unconscionable. These include:

- the relative bargaining strengths of the parties;
- whether, as a result of the stronger party's conduct, the other was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interest;
- whether the small business could understand any documentation used;
- the use of any undue influence, pressure or unfair tactics by the stronger party;
- how much the small business would have had to pay/charge, and under what circumstances, to buy/sell identical or equivalent goods or services from/to another supplier;
- the extent to which the stronger party's conduct was consistent with its conduct in similar transactions with other small businesses;

- the requirements of any applicable industry code (or of any other code if the small business acted in the reasonable belief that the stronger party would comply with it);
- the extent to which the stronger party unreasonably failed to disclose:
  - any intended conduct that might affect the interests of the small business; or
  - any risks to small business arising from that conduct which the stronger party should have foreseen would not be apparent to the small business;
- the extent to which the stronger business was willing to negotiate with the small business the terms of any supply contract;
- the extent to which each party acted in good faith.

It is possible, therefore, that section 51AC may apply to this situation.

Although these sections may apply to the conduct engaged in by both manufacturers and retailers, it would not be prudent to rely solely on these sections at this stage. There is considerable uncertainty as to the extent that these sections would protect the small manufacturers or prevent bread dumping if the practice of demanding bread redemptions recurred.

### **11.7 Recommendation**

All submissions (except that of the Retail Traders Association) supported the retention of the bread regulations. In the light of the earlier conclusion that the benefits of the regulations outweigh the costs and the absence of any viable alternative, it is difficult to avoid this conclusion.

It is therefore the final conclusion and recommendation of the review panel that the *Prices Regulations* be retained.

As the regulations are due to expire on 1 September 2000 under the *Subordinate Legislation Act*, it will be necessary for the regulations to be remade prior to that date.

## **12. THE PRICES ORDERS RELATING TO INFANT AND INVALID FOODS**

### **12.1 What are the objectives of the prices orders?**

Present prices orders specify wholesale prices for certain infant and invalid foods. The orders do not specify retail prices. They apply to two manufacturers of infant and invalid foods, Wyeth Pharmaceuticals and H. J. Heinz. A third manufacturer, Nestlé Beverages, notifies the Commissioner of increases in its prices.

Infant and invalid foods are necessities. The market is in a near monopoly situation. Issuing prices orders prevents the firms in this market from abusing their position and thereby placing necessities out of the reach of some consumers.

### **12.2 What is the relevant market?**

The infant and invalid foods' prices orders apply to the market for the sale and supply of infant foods at wholesale level. This market is dominated by three firms, Wyeth Pharmaceuticals, HJ Heinz and Nestlé Beverages. Although price control is only present in South Australia, the practice of the manufacturers is to use the price set under the prices order as the uniform price throughout Australia.

### **12.3 How do the prices orders affect competition?**

The orders potentially restrict competition by imposing a maximum price for the sale of infant food by two firms. By doing this, it prevents the natural competitive forces of the market from setting an appropriate price. This may prevent profit maximisation by the firms in the market. Additionally, it may deter further entry into the market by reducing the incentives for firms to enter.

The orders also interfere with competition between the two firms subject to prices orders and any other firms in the market. There is at least one other participant in the market for infant foods that is not subject to formal price control. This gives this firm a competitive advantage, since it is free to set its own prices, and is not required to comply with administrative procedures.

The only submission which addressed this issue was from the Small Retailers Association, which disagreed with the conclusions reached by the review panel. The Small Retailers Association contended that the firms operating within this market are 'hardly profit poor' and therefore



apparently not restricted in their profits. It was further submitted that other firms do not have a competitive advantage since if they charge more, they are likely to lose market share.

The review panel does not agree with this submission. While the relevant firms may be profitable, no evidence has been provided to show that these firms make excessive products in relation to infant foods in other states (SA being the only state to control prices). Further, the suggestion that firms charging more are likely to lose market share fails to take into account other considerations such as brand recognition and brand loyalty (as well as numerous other marketing strategies).

It is therefore the final conclusion of the review panel that the infant foods' price orders restrict competition by preventing the firms subject to price control from maximising their profits and giving other firms a competitive advantage over firms subject to price control.

#### **12.4 Who benefits from the prices orders, and who bears the costs of their operation?**

Consumers benefit from the prices orders relating to infant and invalid foods. These necessities are kept within the price range of all consumers. As the market is dominated by a small number of firms, it is possible that prices would rise in the absence of price control.

Wholesalers are forced to consider price rises more carefully when confronted with a requirement to justify them. This may prevent arbitrary, unjustified price increases.

It may be, however, that enforced low prices of baby food deter other potential producers from entering the industry. This reduction of competition or potential competition may lead to a reduced incentive for manufacturers to increase efficiency. This could in turn raise the price, in which case consumers would bear this cost.

The firms involved currently have to bear the administrative costs of compliance with the prices order. Whenever it becomes necessary or desirable for the firms to increase their prices, they must make an application to the Prices Commissioner for an increase. This may cause delays, during which time the profits that the firm makes are reduced. There are also the costs involved in an officer of the company making the application.

Although the firms theoretically bear these costs, they may be factored into the price. This will increase the cost of the goods without providing any benefit.

The only submission which addressed this issue was from the Small Retailers Association. They agreed that the beneficiaries of the prices orders were consumers, but did not agree that competitors of firms subject to prices orders were also beneficiaries of the orders.

They pointed out that where goods are controlled, the 'controlled price' becomes the benchmark for consumers. However, in the view of the review panel, consumers are not generally aware that these goods are subject to price control. They may assume that price differentials are based on other factors, such as quality. As pointed out in the Small Retailers Association's submission, purchasers of infant food tend to be more interested in quality than they are influenced by price.

Once again, they considered that the firms in the market must be able to maximise their profits, otherwise they would 'vacate the market'. Concurrently, they argued that the existence of these costs 'would surely encourage manufacturers to embrace every efficiency possible to maximise their profit'.

It is the view of the review panel that the first of these issues has been dealt with adequately earlier in this report. In relation to the second, there appears to be no firm evidence to show whether or not consumers are bearing any costs in relation to these prices orders.

It has also come to the attention of the review panel that the Government also bears costs in relation to the administration of the order.

It is therefore the final conclusion of the review panel that the beneficiaries of the prices orders in relation to infant and invalid foods are consumers and the competitors of firms subject to prices orders. The costs of the prices orders are borne by Wyeth Pharmaceuticals, HJ Heinz, Nestle Beverages, the Government and potentially by consumers.

### **12.5 A cost/benefit analysis**

Consumers may benefit from the price orders, if prices are kept lower as a result. It is unclear, however, whether the price orders are keeping prices any lower than those that would prevail under normal market conditions. It may be that the prices are in fact higher.

The limitations on the incentives for entering the market, and the consequent reduction of competition, may also be increasing the price.

There are three firms in the market, which should provide sufficient competition for each other. If there were no prices orders, it is unlikely that prices would increase dramatically.

The only submission which addressed this issue was from the Small Retailers Association, which disagreed with the conclusions of the review panel. Once again, they disputed whether profit maximisation of firms was limited. It is the view of the review panel that for reasons given earlier, profit maximisation of firms is inevitably limited by a prices order.

The submission conceded that discrimination may occur, but felt that such discrimination was reasonable and in the public interest. However, the submission failed to address the question of discrimination between firms subject to price control and firms not subject to price control. It is the view of the review panel that such discrimination is unfair. In any case, regardless whether it is 'fair' or 'unfair', it represents a cost which is borne by those firms.

The submission also questioned whether prices were artificially high. It is impossible to determine whether the prices order is keeping prices higher or lower than they would be in the absence of the order. A comparison with other states indicates that there is no significant difference in price between the states - however, it has also been suggested that this is due, in part, to manufacturers basing their Australia-wide prices on the South Australian prices orders.

The costs of the infant foods prices orders are that profit maximisation of firms is limited, firms subject to prices orders are unfairly discriminated against, and prices may be artificially high. The sole benefit of the prices order is that infant food prices may be lower, but this cannot be established by any independent evidence. Thus, the current orders create inequality within the market place and there is insufficient evidence to demonstrate benefit to consumers.

It is therefore the final conclusion of the review panel that the costs of the infant foods prices order outweigh the benefits.

## **12.6 What are the options?**

### ***12.6.1 Retention of the Order under the Act***

There is no evidence that prices in this market would be any higher without the order. There are three firms in the market, which should provide each other with enough competition. The only real benefit of the orders appears to be that price fixing is prevented. Restrictions under the *Trade Practices Act* on price fixing, which the ACCC is responsible for enforcing, should prevent such conduct. Competition would therefore be a much better way of ensuring that the market price of these products is controlled.

### ***12.6.2 Revocation of the Order***

The controls on the price of infant and invalid food seem anachronistic. The risk of a dramatic price increase is not significant enough to justify the level of price control to which infant and invalid foods are currently subject. The industry appears to have sufficient competition - both actual and potential - to enable it to be successfully controlled by the operation of the market. It is recommended that the prices orders relating to infant and invalid food be removed. It is possible that prices would increase in all states, due to the uniform pricing structure.<sup>14</sup> The market appears to be sufficiently competitive to prevent such a price increase, however. To safeguard against this possibility, however, it is recommended that infant and invalid foods be retained as declared goods. If a dramatic and apparently unjustified price increase occurred, it would then be open to the Minister for Consumer Affairs to issue a prices order.

Two submissions were received on this issue. Both were opposed to the revocation of the prices orders, on the grounds that a significant rise in price could lead to significant hardship. The Department of Human Services was particularly concerned about this possibility.

It is the view of the review panel, however, that retaining the status of declared goods should alleviate these concerns, as if sudden increases in price occurred and these were causing significant hardship, the Minister for Consumer Affairs could issue a new prices order.

Concerns that retaining the status as declared goods may still cause distortions in the market are acknowledged. It is therefore proposed that a two-stage deregulation process should occur, with revocation of the declaration to occur in two years time.

### **12.7 Recommendation**

It is therefore the final conclusion and recommendation of the review panel that the prices orders relating to infant foods should be revoked, but that infant foods should continue to be subject to a declaration. The declaration should be reviewed in two years time to determine whether it is still necessary to retain the declaration or whether it is appropriate to deregulate completely.

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<sup>14</sup> Outlined in section 12.2.

## **13. THE PRICES ORDER RELATING TO MEDICAL SERVICES**

### **13.1 What are the objectives of the prices order?**

In 1984, a dispute arose between the Australian Medical Association and the Commonwealth government in relation to Medicare. One area of dispute was in relation to services provided by diagnostic specialists to private patients in public hospitals. The Commonwealth wanted the specialists to enter into contracts to charge no more than the scheduled fee, while the specialists refused to do so. As the Commonwealth had no power to control prices (constitutionally), the States intervened. In South Australia, a prices order was issued which set the maximum fee to be charged by medical practitioners in public and country hospitals. The set fee was equivalent to the scheduled fee under the *Health Insurance Act 1973* (Cth).

The decision to set the scheduled fee as the maximum price was based on a concern that private patients in public hospitals would be placed at a financial disadvantage and that doctors would begin to charge excessive rates.

### **13.2 What is the relevant market?**

The medical services prices order only applies to the supply of specified services (mainly diagnostic) in recognised hospitals. The relevant market is broader than this, however, as there is ready substitution between recognised and non-recognised hospitals for these services. Therefore the market is more accurately defined as the market for the supply of the specified services generally.

### **13.3 How does the order affect competition?**

The prices order relating to medical services has not been updated since 1984.

It potentially restricts competition between specialists by imposing price conditions on specialists in recognised hospitals, thereby limiting the amount that those specialists can earn. In reality, since it is not being followed, there is no restriction on competition.

### **13.4 Who benefits from the prices order, and who bears the costs which flow from its operation?**

The order was introduced to deal with a short-term political difficulty. As the impasse was quickly resolved, the order was never complied with, nor

was it enforced. As this order is not complied with, there are no beneficiaries of the order, nor are there any costs resulting from it.

### **13.5 A cost/benefit analysis**

As this order has not been updated since 1984, it is doubtful that it is still being adhered to. It is apparent that the order was a convenient way of dealing with a problem which existed in 1984 but which no longer exists. There are significant potential costs for doctors, however, were the order enforced. All doctors would have to charge a much lower fee. This could lead to doctors refusing to perform these services in recognised hospitals, which would be highly undesirable and impose significant costs on consumers who would then have to use private hospitals for those services.

Additionally, it is difficult to see that any benefit would be derived from enforcing it. The prices charged in recognised hospitals generally do not exceed the scheduled fee because of the arrangements under which doctors provided these services in the hospitals. Consumers are therefore protected without the prices order.

Therefore, although the prices order currently has no costs or benefits associated with it, there are significant potential costs, and minimal benefits, if the order were enforced. The costs of the order therefore outweigh the benefits.

### **13.6 What are the options?**

This order was introduced to solve a problem that existed in 1984. That problem no longer exists. It follows that it is no longer necessary to retain this prices order.

### **13.7 Recommendation**

The only submission which addressed the issue of the medical services prices order was from the Australian Medical Association (SA Branch) which agreed with each conclusion of the review panel. It is therefore the final conclusion and recommendation of the review panel that the medical services prices order be revoked.

## **14. THE PRICES ORDER RELATING TO KANGAROO ISLAND SEALINK FERRY**

### **14.1 What are the objectives of the prices order?**

The freight service between Kangaroo Island and the mainland is operated under a contract between the company, Kangaroo Island Sealink Pty Ltd and the South Australian Government. One of the conditions of the contract is that prices for carriage of freight will not be increased by more than the rise in the Consumer Price Index during any 12 month period. In addition, Kangaroo Island Sealink Ferry will comply with any order made under the *Prices Act*. Such an order has been made.

The prices order applies only to freight, and not to passenger services. Other operators provide passenger services, and air transport is also available.

In 1994, there were two ferries operating services between Kangaroo Island and the mainland:

- 1) Island Seaway - run by the government and private enterprise, operating between Port Adelaide and Kingscote; and
- 2) The Philanderer - operated by private enterprise (MBF Sealink Pty Ltd), operating between Cape Jervis and Penneshaw.

It became evident that it was not viable to operate two ferries. The government decided to withdraw from the market, but wanted to ensure that a freight service to and from Kangaroo Island would continue to operate. The government therefore entered into a contract with MBF Sealink Pty Ltd (later Kangaroo Island Sealink Pty Ltd) for the provision of this service.

With the withdrawal of Island Seaway from the market, the service became a monopoly. It was considered necessary to ensure that some form of price control existed, to prevent possible overpricing. The *Prices Act* was deemed an appropriate vehicle for this price control.

### **14.2 What is the relevant market?**

The Kangaroo Island Sealink Ferry order applies to the market for the carriage by sea of freight to and from Kangaroo Island. This market is a monopoly. Kangaroo Island Sealink Ferry is the monopoly provider of the service. Although there is potential substitution by way of air freight, the real costs of air freight are significantly larger than the costs of sea freight, so carriers by air cannot compete with carriers by sea for the carriage of goods of significant weight.

### **14.3 How does the order affect competition?**

In the case of the Kangaroo Island Sealink Ferry, the Act has no application to any other party. It does not prevent new entrants from offering a freight service to or from Kangaroo Island, at prices of its own choice. It restricts the conduct of the Kangaroo Island Sealink Ferry, in that Kangaroo Island Sealink Ferry cannot charge whatever prices it wishes.

### **14.4 Who benefits from the order, and who bears the cost of its operation?**

The groups that benefit from the Act include the inhabitants of Kangaroo Island, who are protected from potential arbitrary price increases by a company in a monopoly position. They are able to plan their economic affairs in the knowledge that freight costs will not rise by more than the maximum price specified in the prices order, which is varied according to transparent criteria in accordance with an identified process.

The benefits apply to exports from and imports to, the island. They apply also to imports required to service the tourist industry on the island.

The Act does not deny the inhabitants the benefits of competition that might arise if new carriers were to enter the industry, as it imposes no barriers to entry. Nor does the Act prevent the company from offering services at a price lower than that specified in the prices order.

The costs of the order are borne by Kangaroo Island Sealink, whose profits are limited by the imposition of price control. There are also administrative costs borne by Kangaroo Island Sealink Ferry and the government in the process of issuing a prices order.

### **14.5 A cost/benefit analysis**

A strong case can be made out for continuing price regulation in this area. The volume of freight to and from Kangaroo Island is probably not sufficient for two or more competing ferry services to operate economically. At the same time, the maintenance of the service is essential for the inhabitants of Kangaroo Island. The necessity for price control of monopolies has been widely accepted. *Prima facie*, the costs of price control are outweighed by the benefits in the case of monopolies where there are no other available means of simulating or creating competition within the market.

The costs of the order are not significant, but there is significant benefit derived from its existence.



## **14.6 What are the options?**

### ***14.6.1 Retention of the Order under the Prices Act***

The Kangaroo Island Sealink Ferry has a natural monopoly, arising from the small size of the market, which makes it inefficient for more than one firm to compete within it. Although there is some possibility of substitution (air freight rather than sea freight) this would be of even greater cost to the consumer. Hence, Kangaroo Island Sealink Ferry could raise its prices well above a competitive level, and keep them there for a considerable period. Both from a competition policy point of view, and with a view to the importance of freight to the Kangaroo Island economy generally, it is necessary that some maximum price be imposed upon Kangaroo Island Sealink Ferry.

If the *Prices Act* is retained, then the Act is a convenient place to locate such an order.

### ***14.6.2 New order under another Act***

If the *Prices Act* is repealed, then it is important that the Kangaroo Island Sealink Ferry order is not lost. This could be achieved by locating the order under another Act. There is no current Act that provides as appropriate a location as the *Prices Act*. It may be necessary to enact a new Act along the lines of those which accompanied the privatisation of certain utilities, to ensure the continued protection of the Kangaroo Island community. If this option were pursued, it would also be necessary to alter the contract with Kangaroo Island Sealink Ferry to allow for the new order.

### ***14.6.3 Revocation of the Order***

For the reasons outlined above, complete revocation of the order is undesirable.

## **14.7 Recommendation**

No submissions were received in relation to this prices order. Under those circumstances, the review panel affirms its original conclusions.

It is therefore the final conclusion and recommendation of the review panel that the Kangaroo Island Sealink Ferry prices order is retained.

## 15. SUMMARY

The Act is presently of very limited application. It was designed to provide solutions to social problems at the time of its enactment. Price controls have become less fashionable in recent decades, but have never been totally abandoned. Indeed, price controls have been enacted in very recent times, albeit in a different guise, by different mechanisms, and to achieve different objectives, including the duplication of competitive markets.

The Act is only required in limited circumstances. Nevertheless it performs important functions in those very limited areas, and, is an important reserve power which, if retained, would enable the South Australian Government to respond more flexibly and effectively to difficult economic circumstances, particularly those that involve a shortage of essential goods and services. There is no mechanism that can fulfil the objectives of the Act as effectively as the Act can.

### 15.1 Recommendations

**The recommendations of the review panel are that:**

- 1) The *Prices Act 1948* be retained;**
- 2) Section 30 be amended to only apply to goods subject to prices orders;**
- 3) Section 12 be repealed;**
- 4) The current list of declared items be revoked and a new declaration issued declaring only the following as declared items:**
  - a) bread and bread rolls**
  - b) infants' foods**
  - c) towing of motor vehicles**
  - d) recovery of motor vehicles**
  - e) storage of motor vehicles**
  - f) quoting for the repair of motor vehicles**
  - g) carriage of freight by Kangaroo Island Sealink Pty Ltd**
- 5) The Prices Regulations be retained;**
- 6) The Infant Foods and Medical Services Prices Orders be revoked; and**

**7) The Tow Truck and Kangaroo Island Sealink Ferry Prices Orders be retained.**

## APPENDIX A - TERMS OF REFERENCE

The *Prices Act* and associated regulations are referred to the Office of Consumer and Business Affairs for evaluation and report by March 1999. The review is to focus on those parts of the legislation which restrict competition or which impose costs or confer benefits on business.

Consistent with the Competition Principles Agreement, the review should assess whether any restrictions on competitive conduct represented by the *Prices Act* are justified in the public interest by:

- identifying the nature and magnitude of the social, economic or other problems that the Act seeks to address;
- identifying the objectives of the Act;
- identifying the extent to which the Act restricts competition;
- identifying relevant alternatives to the Act, including less intrusive forms of regulation or alternatives to regulation;
- identifying which groups benefit from the Act and which groups pay the direct and indirect costs which flow from its operation; and
- determining whether the benefits of the Act's operation outweigh the costs.

## METHODOLOGY AND TIMETABLE FOR REVIEW

The review should adopt the following procedures (**in accordance with the indicated timetable**):

- Initial research identifying relevant resources and materials, including materials on any interstate and overseas equivalents (**by mid-September 1998**)
- Preparation of a report and recommendations (**by end October 1998**)
- Forward to CSO for comments (**mid-November 1998**)
- Discussion of report with interested parties (**to mid-December 1998**)
- Forward to CSO/DPC for comments (**end of December 1998**)
- Final report for Minister (**mid-February 1999**)
- Release of report

## **CONSULTATION**

The review will consult widely with industry and consumer representatives, educational institutions and relevant government agencies.

## **THE REVIEW TEAM**

The review will be conducted by staff of the Office of Consumer and Business Affairs' Legal & Policy Unit, under the direction of the Deputy Commissioner for Consumer Affairs.

## **CONTACT OFFICER**

The contact officer for the review is:

Ms Kate Tretheway  
Policy Officer (Competition Policy)  
Office of Consumer and Business Affairs  
GPO Box 1719  
ADELAIDE SA 5001

Facsimile: (08) 8204 9509

**APPENDIX B - CONSULTATION LIST**

<u>Organisation/Individual</u>
ACT Consumer Affairs Bureau
Australian Competition and Consumer Commission
Australian Medical Association, SA Branch
Australian Small Business Association
Baking and Sales Section, Australian Liquor, Hospitality and Miscellaneous Workers Union
Consumer Affairs Division, Cth
Consumers Association of SA Inc
Department of Fair Trading, NSW
Department of Human Services, SA
Fenwick's Bakery
H J Heinz
Kangaroo Island Sealink Pty Ltd
Ministry of Fair Trading, WA
Mr Mugford
Nestle Beverages
Office of Consumer Affairs and Fair Trading, NT
Office of Consumer Affairs and Fair Trading, TAS
Office of Consumer Affairs, QLD
Office of Energy Policy
Office of Fair Trading and Business Affairs, VIC
Port Lincoln Bakery Pty Ltd
RAA

Retail Traders Association of SA Inc
SACOSS
Small Business Advocate
Small Retailers Association of SA Inc
South Australian Employers Chamber of Commerce and Industry Inc
The Baking Industry Association of South Australia
The Bread Basket
The Law Society of South Australia
The Motor Trade Association of SA Inc
Transport SA
Wyeth Pharmaceuticals Pty Ltd

**APPENDIX C - SUBMISSIONS RECEIVED**

	<u>Name of individual/ organisation</u>
P1	Royal Automobile Association of SA Inc
P2	Port Lincoln Bakery
P3	Department of Equity and Fair Trading, Qld
P4	Australian Medical Association, SA Branch
P5	Department of Fair Trading, NSW
P6	The Baking Industry Association of SA Inc
P7	Department of Human Services
P8	Retail Traders Association of SA
P9	Small Business Advocate
P10	Australian Liquor, Hospitality & Miscellaneous Workers Union, SA Branch, Baking and Sales Section
P11	Small Retailers Association of SA Inc



## APPENDIX D - CURRENTLY DECLARED GOODS

Currently declared goods are:

- Ale, beer, lager, stout and any mixture thereof and wines and spirits
- Flour, wheaten, wheat meal and self raising
- Milk
- Meat pies and pasties
- Girls' and maids', boys' and youths' school footwear
- Text books, primary and secondary schools
- Bread and bread rolls
- Infants' and invalids' foods
- Ice cream including ice cream whether coated or otherwise served in containers or packages of all kinds and descriptions
- Girls' and, maids', boys' and youths' school uniforms
- School exercise books
- School requisites, namely:-
  - a) coloured chalks
  - b) coloured pencils
  - c) compasses and dividers
  - d) drawing paper and pins
  - e) erasers
  - f) maps
  - g) note books
  - h) pasting books
  - i) pens, nibs, pencils, including drawing sets
  - j) protractors (celluloid)
  - k) rulers

- l) set squares
- m) "T" squares
- n) drawing and sketching materials.
- Superphosphate
- Kerosene
- Petroleum and shale products, other than aviation gasoline
- Stone
- Public utilities - gas
- Towing of motor vehicles
- Storage of motor vehicles
- Carriage of freight by Kangaroo Island Sealink Pty Ltd
- Sulphate of ammonia
- Oils - mechanical and lubricating
- Sand and gravel
- Galignite
- Services supplied or rendered by or on behalf of any legally qualified medical practitioner in the practice of his profession
- Recovery of motor vehicles
- Quoting for the repair of motor vehicles

**APPENDIX E - SUMMARY OF ORDERS MADE UNDER THE *PRICES*  
*ACT 1948 SINCE 1980***

<b>Declared Goods/ Services</b>	<b>Date Declared</b>	<b>Initial prices order</b>	<b>Updates (if any)</b>	<b>Last prices order</b>	<b>Date of Revocation</b>
<b>Grapes</b> <sup>15</sup>			12/12/80 15/12/81 13/12/82 13/12/83 8/1/85 16/12/85 5/5/86 16/12/86 4/9/87 8/12/87 13/2/89 12/12/90 12/2/91	12/2/91	Power to set prices for grapes repealed by the <i>Wine Grapes Industry Act 1991</i> .
<b>Ale, beer, lager, stout and any mixture thereof</b>	10/1/80				No prices orders have been made for these goods
<b>Bread and Bread rolls</b>	10/1/80		25/1/80 22/7/80 21/9/81		18/2/91
<b>Flour, wheaten, wheat meal and self raising</b>	10/1/80				8/1/80 <sup>16</sup>

<sup>15</sup> Grapes were not a "declared good" as such. Sections 22A - 22E of the Act empowered the Prices Commissioner to set minimum prices for the supply of grapes to wineries. These sections were repealed by the *Wine Grapes Industry Act 1991*.

<sup>16</sup> Revocation of the prices orders which previously applied to these goods occurred on 8/1/80. Two days later (10/1/80) these goods were included in the revised list of declared goods published in the Gazette. No prices orders have been made for these goods since that time.

Appendix E

Infants' and invalids' foods	10/1/80		16/9/97 <sup>17</sup> 7/4/98 <sup>18</sup> 24/6/98 <sup>19</sup>	
Milk <sup>20</sup>	10/1/80	10/12/84	8/7/85 24/2/86 8/12/86 22/4/87 12/4/88 14/12/88 4/7/89 28/2/90 5/12/90 25/6/91 4/9/91 30/6/92 4/1/93 25/9/93 13/12/93 18/7/94	12/12/94
<b>Ice cream including ice cream whether coated or otherwise</b>	10/1/80			No prices orders have been made for these

<sup>17</sup>

Only applies to Heinz 'Farleys Biscuits'

<sup>18</sup>

Only applies to Heinz infant foods

<sup>19</sup>

Only applies to Wyeth Pharmaceuticals infant foods

<sup>20</sup>

These orders only applied to milk outside the metropolitan area. Prices for milk within the metropolitan area were set under the *Metropolitan Milk Supply Act 1946*.

<b>served in containers or packages of all kinds and descriptions</b>						goods.
Meat pies and pasties	10/1/80					8/1/80 <sup>21</sup>
Girls' and maids', boys' and youths' school uniforms	10/1/80	8/1/80	10/2/86			9/1/95
Girls' and maids', boys' and youths' school footwear	10/1/80	8/1/80	10/2/86			9/1/95
School exercise books	10/1/80					No prices orders have been made for these goods
Text books, primary and secondary schools	10/1/80					No prices orders have been made for these goods
School requisites, namely a) coloured chalks b) coloured pencils c) compasses and dividers d) drawing paper and pins e) erasers f) maps g) note books h) pasting books i) pens, nibs, pencils including drawing sets	10/1/80					No prices orders have been made for these goods

<sup>21</sup> See footnote 16.

Appendix E

<p><b>j) protractors (celluloid)</b>  <b>k) rulers</b>  <b>l) set squares</b>  <b>m) "T" squares</b>  <b>n) drawing and sketching materials</b></p>					
<p><b>Superphosphate</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>
<p><b>Sulphate of ammonia</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>
<p><b>Kerosene</b></p>	<p>10/1/80</p>				<p>8/1/80<sup>22</sup></p>
<p><b>Oils - mechanical and lubricating</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>
<p><b>Petroleum and shale products, other than aviation gasoline</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>
<p><b>Sand and gravel</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>
<p><b>Stone</b></p>	<p>10/1/80</p>				<p>No prices orders have been made for these goods</p>

<sup>22</sup> See footnote 16

<b>Gelignite</b>	10/1/80				No prices orders have been made for these goods
<b>Public utilities - gas</b>	10/1/80				Under the <i>Gas Act 1988</i> , the Minister of Mines and Energy set gas tariffs, but had to take into account any recommendation of the Commissioner for Prices. This Act has since been repealed and replaced by the <i>Gas Act 1997</i> , which establishes a pricing regulator.
<b>Services supplied or rendered by or on behalf of any legally qualified medical practitioner in the practice of his profession</b>	First declared 2/8/73, redeclared 10/1/80	20/3/84		4/7/84	
<b>Towing of motor vehicles</b>	10/1/80		27/5/80 6/4/82 14/10/83 19/9/84 21/8/85 27/4/87 21/8/87 18/7/88	18/12/97	






					21/8/87 18/7/88 10/10/89 14/8/90 9/9/91 14/9/92 14/9/93 19/10/95 10/11/96			
<b>Quoting for the repair of motor vehicles</b>	6/5/92				14/10/83 19/9/84 21/8/85 27/4/87 21/8/87 18/7/88 10/10/89 14/8/90 9/9/91 14/9/92 14/9/93 19/10/95 10/11/96	18/12/97		
<b>Carriage of freight by Kangaroo Island Sealink Pty Ltd</b>	16/3/95 altered 10/4/97	17/3/95 <sup>23</sup>			16/2/96 <sup>24</sup>	17/4/97 <sup>25</sup>		

<sup>23</sup>

Orders served personally on the company rather than published in the Gazette.

<sup>24</sup>

See footnote 23

 = Order still in operation.

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<sup>25</sup> See footnote 23

**APPENDIX F - GLOSSARY<sup>26</sup>**

<b>ACCC</b>	Australian Competition and Consumer Commission. The national body responsible for enforcing the Trade Practices Act
<b>allocative efficiency</b>	the optimum allocation of scarce resources between end uses, in order to produce a combination of goods and services which best accords with the pattern of consumer demand.
<b>competition</b>	rivalry or rivalrous behaviour between firms, including price differentiation or incentives, to try to get more consumers to purchase goods or services from the firm.
<b>exclusive dealing</b>	a practice where a supplier contracts with distributors to deal only in the supplier's products to the exclusion of competitors' products.
<b>externality</b>	an action by either a producer or a consumer that affects other producers or consumers yet is not accounted for in the market price.
<b>fixed costs</b>	costs that do not vary with the level of production (includes things like the cost of the plant)
<b>goods</b>	tangible economic products that contribute to the satisfaction of human wants. See also services.
<b>market</b>	a group of products among which substitution is easy as long as there is a price incentive.
<b>market failure</b>	failure of the market to provide perfect competition. This may be caused by, for example, externalities, differences of information between consumer and producer, or natural monopoly.
<b>market power</b>	the ability of a firm to administer within limits the supply price and terms of sale of its

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<sup>26</sup> some definitions drawn from Pass, Lowes and Davies. *Dictionary of Economics*. Collins: 1988, Glasgow, and Pindyck and Rubinfeld. *Microeconomics Second Edition*. MacMillan: 1992, New York.

product without immediate risk of competitors getting some of the supplier's share of the market.

**Monopoly**

a market in which there is one firm and many buyers, a lack of substitute products and severe barriers to entry which make it almost impossible for new firms to enter the market; essentially, a market with only one seller.

**natural monopoly**

a situation where costs are only minimised where supply is made by a single producer ie where it would be inefficient for more than one firm to operate in the market.

**objectives**

what the act sets out to achieve.

**perfect competition**

a situation where there are many sellers and many buyers, products are identical both in physical attributes and in consumer preference, there are no barriers to entry, and both buyers and sellers have perfect knowledge of the market; a market in which no one firm can affect the market price.

**predatory pricing**

a policy pursued by a firm to try to get rid of a competitor. It may include, for example, lowering prices significantly when a new competitor enters the market.

**price fixing**

the establishment of a common price for a good or service by a group of suppliers acting together.

**Prices order**

an order issued by the Minister for Consumer Affairs under the *Prices Act* which sets the maximum price at which specified goods or services may be provided.

**profiteering**

taking advantage of the misfortune of others to gain a profit by, for example, charging excessive amounts for scarce goods following a natural disaster.

**profit maximisation**

the objective of firms in traditional market theory. This is achieved by providing the price - output combination which leads to the maximum amount of profit.

<b>resale price maintenance</b>	the practice of a supplier setting the price at which retailers must sell the final product to consumers.
<b>services</b>	intangible economic activities that contribute to the satisfaction of human wants.
<b>substitution</b>	the practice of purchasing one good or service instead of another because of a price difference. This will only occur where goods or services are considered interchangeable by buyers. An example might be tea and coffee. If a rise in the price of coffee causes consumers to stop buying coffee and buy tea instead, then substitution may be said to have occurred.
<b>third line forcing</b>	the practice of supplying goods or services to a consumer on the condition that the consumer will buy goods or services of a specified kind from another person.
<b>unconscionable conduct</b>	usually refers to the taking advantage of another's disability. For more detailed discussion of unconscionable conduct, see section 11.6.4 of the report.
<b>variable operating costs</b>	costs which tend to vary with the level of production (including wages, raw materials).