



Statement of regulatory approach to assessing price notifications

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This statement is designed to give you basic information; it does not cover the whole of the Trade Practices Act and is not a substitute for professional advice.

Moreover, because it avoids legal language wherever possible there may be generalisations about the application of the Act. Some of the provisions referred to have exceptions or important qualifications.

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1. Introduction

The Australian Competition and Consumer Commission (ACCC) has responsibility for assessing price notifications under Division 4 of Part VIIA of the *Trade Practices Act 1974* (the Act). Under s.95X the Minister, or the ACCC with the approval of the Minister, may declare goods or services to be notified goods or services and a firm in relation to certain goods and services to be a declared firm.¹ Declaration of a firm obliges that firm to notify the ACCC of proposed increases in the price of notified goods or services in certain circumstances. The ACCC must then assess the proposed price and decide whether or not to object to the increase.

The aim of this statement is to outline the ACCC's preferred approach to undertaking a price notification assessment. It provides some background on the historical development of price notifications, the legislative framework within which price notifications are assessed, the ACCC's approach to assessment and the information that it is likely to require from a declared firm. The approach outlined in this statement draws on the ACCC's experience in assessing price notifications.

This statement replaces the 2005 *Statement of regulatory approach to price notifications*.

2. Background

The *Prices Surveillance Act 1983* (PS Act) was introduced at a time of relatively high inflation, and it was intended to operate as part of the (then) Government's Prices and Incomes Policy. That policy, and the Accord agreement with the Australian Council of Trade Unions which underlay it, emphasised the need for all groups in the community to exercise income restraint to assist economic recovery. At the time general wage restraint was being exercised under the wage fixation principles established by the Australian Conciliation and Arbitration Commission. The Prices Surveillance Authority (PSA) was responsible for promoting pricing restraint among public and private business enterprises in a matching effort to reduce inflation and achieve other objectives.

The economic environment has changed considerably since the introduction of the PS Act. Inflation is not the pressing problem that it was in the mid-1980's and wage fixing principles have moved away from central determination to an enterprise-bargaining approach. These changes have resulted in a shift in the emphasis of prices surveillance, from a prices and incomes policy role to a competition policy one.

The number of declarations under the PS Act was substantially reduced from 63 companies in 1987 to 17 companies in six industries by 1998. These remaining declarations covered companies which were in monopoly industries and industries that

¹ Section 95X of the Act indicates that, the Minister, or the ACCC with the approval of the Minister may declare a person to be, in relation to good or services of a specified description, a 'declared person' for the purposes of the Act. In this statement, a 'declared firm' is used to refer to a 'declared person' to assist in the reading of this guidance.

provide inputs such as infrastructure services to other industries, rather than final goods and services. The reduction in the number of declarations was also associated with the removal of barriers to competition arising from policies such as tariff reductions and removal of legislative entry barriers.

The criterion for declaring areas for prices surveillance, as stated by the (then) Treasurer in September 1996, was *those markets where competitive pressures are not sufficient to achieve efficient prices and protect consumers*.² In 2003 the *Trade Practices Legislation Amendment Act 2003* inserted Part VIIA into the Trade Practices Act to preserve the prices surveillance provisions. On 1 March 2004 Part VIIA of the Trade Practices Act commenced and the PS Act was repealed. Declarations and other instruments made under the PS Act have been carried over to have effect as if made under the corresponding section of the Trade Practices Act.³

Three firms remain declared for prices surveillance under s.95X at the time of writing this statement—the Australian Postal Corporation, Airservices Australia and Sydney Airports Corporation Ltd (see Table 1).

² Treasurer, Press Release, ‘Treasurer Announces Decisions on Future Prices Surveillance Report Activities’, 19 September 1996.

³ *Trade Practices Legislation Amendment Act 2003*

Table 1 Declared firms and notified services

Declaration	Declared firm	Notified services
No.91*, 23 August 2007. Commenced on 1 July 2007 and ceases on 1 July 2010	Sydney Airports Corporation Ltd in relation to Sydney Kingsford Smith Airport.	Aeronautical services and facilities ⁴ to regional air services being regular public transport air services operating wholly within New South Wales.
No.66, 5 April 1991, relating to the Civil Aviation Authority, as varied to relate to Airservices Australia on 11 August 1995	Airservices Australia	Provision of services relating to: <ul style="list-style-type: none"> ▪ terminal navigation ▪ fire-fighting and rescue ▪ en-route air route and airway facilities.
No. 75, 5 February 1992	Australian Postal Corporation	Reserved letter services ⁵ and carriage of registered publications within Australia

* This declaration replaces Declaration 90 which ceased on 1 July 2007.

⁴ Having the same meaning as aeronautical services and facilities under Part 7 of the *Airports Regulations 1997*.

⁵ Certain letter services are reserved to Australia Post under Division 2 of Part 3 of the *Australian Postal Corporation Act 1989*.

3. Legislative framework

3.1 The ACCC's functions under Part VIIA

Section 95G of the Act sets out the following functions for the ACCC in relation to prices surveillance under Part VIIA:

- conducting and reporting on price inquiries (subs.95G(2), 95G (3) and 95G (4));
- considering notifications (locality notices) for price increases and taking action as appropriate (subs.95G(5)); and
- monitoring and reporting on prices, costs and profits in any industry or business as directed by the Minister (subs.95G(6)).

This statement focuses on the second of these functions—price notifications.

3.2 Price notifications and restrictions on price increases

Under s.95X of the Act, the Minister, or the ACCC with the approval of the Minister, may

- declare goods or services to be 'notified' goods or services; and
- declare a person to be, in relation to goods or services of a specified description, a 'declared person' for the purposes of the Act.

Sub-sections 95Z(1) and (2) of the Act sets out restrictions on the ability of declared firm to increase prices at a particular location for notified goods or services above the highest prices that applied in that location if there is existing local supply, or otherwise in Australia over the preceding 12-month period. Sub-section 95Z(3) also restricts the declared firm from supplying notified goods or services if that firm has not supplied these goods or services in Australia in the immediately preceding 12-month period. A firm found to be in contravention of s.95Z may be subject to a penalty of 100 penalty units.⁶

3.2.1 Increasing the prices of notified goods or services

The Act sets out conditions for the availability of a defence when a declared firm may increase prices, or commence to supply notified goods or services in Australia, otherwise in contravention of s. 95Z. Subsection 95Z(4) sets out four requirements which must be satisfied:

- (1) The first requirement is set out in subs.95Z(5) and requires that the declared firm must notify the ACCC if it proposes to commence supply or increase the price of a notified service in contravention of subss. 95Z(1), (2) or (3). Such a notice is termed a '**locality notice**' under subs.95Z(5) (also referred to as a 'price notification' in this statement).

⁶ At the time of writing 100 penalty units equates to \$11,000.

- (2) The second requirement is set out in subs.95Z(6) and requires that either the applicable period has elapsed, or the ACCC has considered the locality notice and has either notified the firm that it does not object to the proposed price, or if it does object, has notified the firm of a lower price that it does not object to and the applicant has agreed to that lower price (known as the approved price).
- (3) The third requirement is set out in subs.95Z(7) and requires that the terms of supply are the same or substantially similar to those proposed to the ACCC in the locality notice.
- (4) The fourth requirement is set out in subs.95Z(8) and requires that the actual price does not exceed the relevant 'proposed' or 'approved' price.

3.3 Consideration by ACCC

As set out in subs.95G(5) the ACCC's role in price notifications is to consider them and to take such action in accordance with the Act as it considers appropriate. Under subs.95Z(6) of the Act, on receipt of a price notification the ACCC may:

- serve a notice stating it has no objection to the firm supplying the relevant goods or services on the proposed terms at the proposed price; or
- serve a notice specifying a lower price to which it would have no objection.

There is an 'applicable period' of initially 21 days, starting on the day the notification is given, within which the ACCC is to make its assessment—although subs.95ZB(2) allows for the period to be longer than 21 days with the agreement of the notifying firm before the original 21 days expires.

The applicable period is extended by 14 days if the ACCC serves a notice specifying a lower price than the proposed price. The notifying firm may then within seven days of being given notice of the lower price, give the ACCC written notice agreeing to that lower price being the applicable maximum price.

Assessment criteria under sub-section 95G(7)

In performing its prices surveillance functions, subs.95G(7) of the Act specifies that the ACCC must have 'particular regard' to the following matters:

- (a) the need to maintain investment and employment, including the influence of profitability on investment and employment;
- (b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices; and
- (c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

Consideration of the above criteria is subject to any direction issued by the Minister under s.95ZH of the Act.

4. The ACCC's approach to applying the legislative framework

4.1 The ACCC's assessment process

Under the legislative framework, the ACCC is given a statutory period of time to consider the terms of the notification. However, price notifications are often necessarily complex. Therefore, it is beneficial if the ACCC and the declared firm can consult with each other (and other parties where appropriate) to collect sufficient information prior to the declared firm submitting a formal notification proposal to the ACCC for assessment under the Act.

To assist the ACCC to consider notifications properly and to assist the declared firm to provide sufficient information, the ACCC's suggested process for all notifications is as follows:

- **Pre-lodgement**—Representatives for the declared firm are encouraged to meet informally with ACCC staff to discuss the prospective price notification, process and timetable before lodgement.
- **Draft notification is lodged**—The declared firm lodges a draft notification and a supporting submission. This provides the declared firm and the ACCC with sufficient opportunity to consider all relevant issues involved in the pricing proposal at a preliminary stage and to ensure all information requirements supporting the proposal are satisfied.
- **ACCC issues paper released**—The ACCC releases an issues paper to interested parties which outlines issues likely to be relevant to its consideration and seeks submissions. The ACCC may conduct other public consultation processes where appropriate such as holding roundtable discussions to seek the views of relevant industry stakeholders.
- **ACCC preliminary view**—The ACCC considers submissions on the issues paper and releases a preliminary view and statement of reasons to the declared firm and interested parties for comment.
- **Formal notification is lodged**—The declared firm lodges a formal notification with the ACCC.
- **ACCC final decision**—After lodgement of a formal notification, the ACCC issues its final decision under subs.95Z(6) within 21 days or otherwise in accordance with s.95ZB.

A flowchart ('Chart A') is presented on the following page and outlines the ACCC's preferred assessment process. **This provides a general guide to the ACCC's likely approach to assessing a draft price notification and reaching a final decision on a formal price notification.** The process should assist the declared firm to submit a complete pricing proposal that satisfies the ACCC's information requirements and also provides the ACCC with sufficient time and information to conduct a proper and accurate pricing assessment. The timeframe for each stage of the assessment process

(except for the statutory assessment period that applies following the lodgement of a formal notification by the declared firm) is likely to depend on the nature and complexity of each price notification. In some cases, the declared firm may have further legal obligations outside of the Act in relation to proposals to increase prices of notified goods and services (these other legal obligations are not included in this statement).

Under the Act, a declared firm is able to lodge a formal notification without prior consultation with the ACCC. In such a case the ACCC will give due consideration to the notification lodged, although it notes the benefits of, and its preference for, a consultative process as set out above.

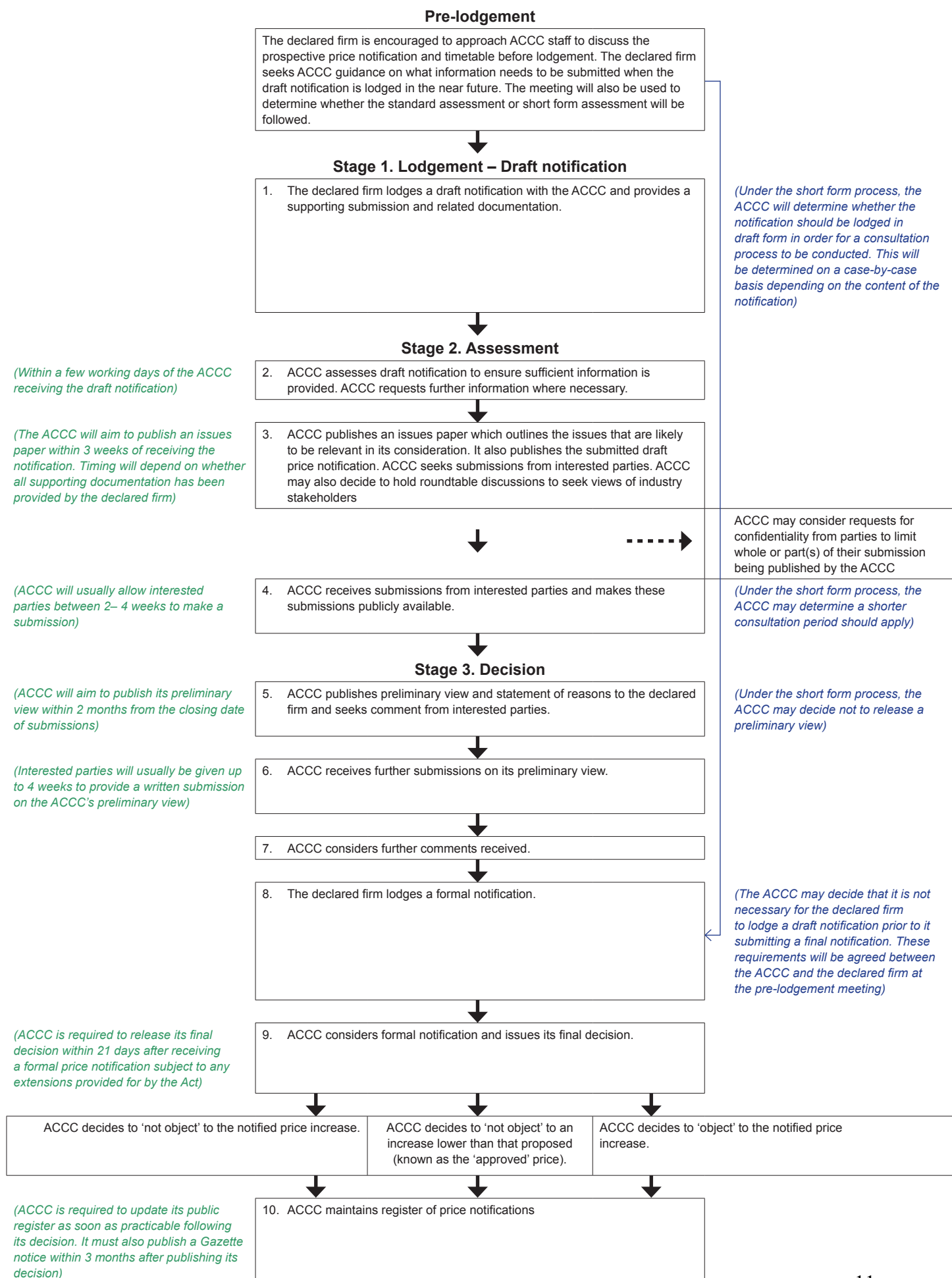
Where a declared firm first submits a notification which includes a long-term price path, the ACCC may conduct a detailed standard assessment of the proposal (as per the process outlined in chart A). However, where a subsequent notification proposes a price that was anticipated in a price path submitted in a previous notification, the ACCC may consider, on a case by case basis, that it is more appropriate to conduct a short-form assessment process.⁷ A short-form assessment process provides scope for the ACCC to adopt an expedited assessment of a subsequent notification. An expedited process may be available through shorter consultations during the informal preliminary assessment stages prior to the declared firm lodging a formal notification proposal. A guide to a short-form assessment process is also presented in chart A.

⁷ A discussion about long-term price paths is presented in section 4.4 of this statement.

Chart A: Procedure for lodgement and assessment of Part VIIA price notifications

Standard assessment (a guide only)

Short form assessment (a guide only)



4.2 The ACCC's approach to assessing the legislative criteria

The ACCC's general approach to assessing the criteria in subs.95G(7) of the Act is discussed below. However, on a case by case basis, the ACCC may have regard to other matters it considers relevant.

Investment, employment & market power

Subsection 95G(7) of the Act specifies that the ACCC must have 'particular regard' to the following factors:

- a) the need to maintain investment and employment, including the influence of profitability on investment and employment;
- b) the need to discourage a person who is in a position to substantially influence a market for goods or services from taking advantage of that power in setting prices; and
- c) the need to discourage cost increases arising from increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals.

The declared firm may possess monopoly or market power which could allow it to charge excessive prices through having either costs above efficient levels, or profit margins above competitive levels.⁸

An important consideration relevant to the first two criteria in subs. 95G(7) is that in an open and competitive market economy efficient provision of services underpins investment and employment opportunities. Further, investment and employment in the national economy will be promoted when firms produce goods or services efficiently and price them competitively.

Pricing decisions by a declared firm may involve conflict between the investment and employment interests of the declared firm on the one hand, and the interests of users and other groups in the economy on the other. To obtain an appropriate balance, the ACCC has interpreted the criterion in subs.95G(7)(a) and (b) as seeking to promote economically efficient investment and employment throughout the economy. This is broadly consistent with the objectives outlined by the Government for pricing infrastructure services under the national access regime.⁹ This is also consistent with the object of prices surveillance, as set out in s.95E of the Act.

Economic efficiency encompasses the following elements:

⁸ Australia Post and Airservices Australia are both statutory monopoly providers of particular services and the Productivity Commission found that Sydney airport has a high degree of market power in domestic markets (*Price regulation of airport services—Inquiry report*, 23 January 2002).

⁹ See Commonwealth Government, *Government response to Productivity Commission report on the review of the National Access Regime*, Canberra, September 2002.

- *productive efficiency*, which is achieved when firms have the appropriate incentives to produce goods or services at least cost, and production activities are distributed between firms in a manner that minimises industry-wide costs.
- *allocative efficiency*, which is achieved when firms employ resources to produce goods and services that provide the maximum benefit to society.
- *dynamic efficiency*, which is achieved when firms have appropriate incentives to invest, innovate and improve the range and quality of goods and services, increase productivity and reduce costs over time.

In an open and competitive economy, efficient provision of services underpins investment and employment opportunities. Welfare enhancing investment and employment in the national economy will be promoted when firms produce goods or services at least cost and charge prices that correspond as closely as possible to competitive levels. Although a competitive benchmark may be lacking in industries subject to prices surveillance, economically efficient prices would, as in competitive areas, reflect least-cost production and include profit margins reflecting a return on capital commensurate with the risks faced by the firm.

Prices above efficient levels result in a loss of allocative efficiency as they discourage some marginal purchases which would have had a value to the purchaser above the cost of supply. As excessive prices are passed on in higher costs for other industries using the services, they lead to lower profits and potentially a loss of investment and employment opportunity in the competitive sectors of the economy.

Accordingly, the ACCC considers that the criteria in subs.95G(7) will generally be met by economically efficient prices which reflect:

- an efficient cost base
- a reasonable rate of return on capital.

Including a reasonable rate of return on capital employed in prices for goods and services addresses the criterion in para.95G(7)(a) in relation to the declared firm's industry by providing incentives to maintain profitable investment. At the same time, a declared firm which may have substantial influence in a market for notified goods and services is discouraged from charging prices based on profits above that reasonable rate of return addressing the criterion in para.95G(7)(b).

Wages & conditions of employment

The ACCC considers para.95G(7)(c) is less relevant to its consideration of price notifications following changes to industrial relations legislation in 1996 which led to a movement away from centralised wage fixing to agreements negotiated at the enterprise level. The object of the *Workplace Relations Act 1996* was to give 'primary responsibility for industrial relations and agreement making to employers and employees at the enterprise and workplace levels'.¹⁰

¹⁰ Commonwealth Department of Industrial Relations, *Changes in federal workplace relations law - legislation guide*, Dec. 1996, p.1.

Enterprise bargaining has remained central to enabling an enterprise to negotiate the types of terms and conditions and work practices that allow an enterprise to retain good staff and make productivity gains that ultimately promote the future profitability of that enterprise. This type of remuneration is intended to boost the capacity of the enterprise to attract investment and provide future employment.

Consistent with the current wage determination framework, the ACCC is more likely to not object to price increases based on wage increases where such wage increases are associated with improvements in productivity and/or wage levels are at market levels. However, in monopolies or industries with highly concentrated market power, there may be less pressure for wage and labour agreements to be kept within the bounds of conditions across the economy generally. In assessing a price notification the ACCC will usually treat the level of wages and conditions as part of its broader concern for an efficient cost base.

4.3 Other considerations by the ACCC in assessing price notifications

Ministerial directions

Under s.95ZH the Minister may direct the ACCC to give special consideration to specified matters in exercising its powers and performing its functions under Part VIIA. Ministerial directions previously given under the PS Act have been carried over to have effect as if made under the corresponding section of the Trade Practices Act.¹¹

Direction No. 8, a general direction given to the ACCC by the Government under s.20 of the PS Act in 1988, provides that the ACCC must give special consideration to:

The Government's policy that increases in executive remuneration in excess of those conferred under wage fixing principles should generally not be accepted as a basis for price increases.

At the time of writing, this was the only such general direction in place. The ACCC considers this issue in a similar way to that of para.95G(7)(c) as outlined above. Both issues are less relevant now than in 1998 in light of the movement away from centralised wage fixing to agreements negotiated at the enterprise level. Nevertheless, the ACCC treats the level of wages and executive remuneration as part of its broader concern for an efficient cost base.

Directions relating to specific industries can also be made; for example:

- Direction No. 11, which relates to Australia Post, requires the ACCC to give special consideration to Australia Post's functions and obligations, particularly its pricing and financial targets.

Price caps

For certain industries the Government has previously given specific directions under s.95ZH of the Act requiring the ACCC to assess proposed price increases in terms of price caps.

¹¹ *Trade Practices Legislation Amendment Act 2003*

For example, in the past aeronautical services at major newly privatised airports were subject to prices surveillance under CPI-X price caps set by the Government. That is, price increases after a specified a starting date were restricted to the rate of increase in the Consumer Price Index minus a target rate of productivity increase—X. These provisions were revoked in June 2002.

The only such direction current at the time of writing relates to provision of aeronautical services and facilities to regional air services at Sydney airport. Direction No. 30¹² requires the ACCC to assess proposed prices paid by operators of regional air services in terms of a price cap and specifies that price increases should not exceed the percentage increase in the Consumer Price Index over that same period.

4.4 The ACCC's assessment methodology

Cost-based approach to assessing price increases

The ACCC's experience has led it to adopt a flexible approach to the process of assessing price notifications within the legislative framework of Part VIIA. The ACCC's preference is to adopt an assessment process which reflects the individual characteristics of each price notification. For example, the complexity of issues raised, the length of the pricing period and the number of goods and services covered will affect how the ACCC approaches an assessment.

In general, the ACCC approaches its assessment of price notifications from declared firms using a cost-based 'building block' approach, unless it has been otherwise directed by the Government to assess prices under a price cap or it has reached an agreement with the declared person on a price-based approach to assessment.

As outlined earlier, in assessing price notifications against the criteria in subs.95G(7), the ACCC considers it relevant to examine:

- the efficiency of the declared firm's cost base
- the reasonableness of the rate of return that the declared firm is seeking.

In addition to these two factors, a price notification may raise other issues which are relevant to the ACCC's assessment, such as the allocation of costs between declared and non-declared services and the structure of prices across services.

Efficient cost base and reasonable rate of return

Relevant to the criteria in subs.95G(7)(b), one way in which a declared firm could take advantage of its market power and lack of competition is by allowing costs to inflate to

¹² Direction 30 took effect on 1 July 2007 (replacing Direction 28) and ceases on 1 July 2010. The Direction directs the ACCC in exercising its powers and functions under the Act in relation to the pricing of aeronautical services and facilities at Sydney Kingsford Smith Airport to give special consideration to the policy that the total revenue-weighted percentage increases in prices over the three years from 1 July 2007, or part thereof, paid by operators of regional air services to Sydney Airport Corporation Limited for the provision of declared services should not exceed the total percentage increase in the CPI over that same period.

unnecessary or inefficient levels. Therefore, in considering a price notification, the ACCC usually prefers to base its analysis of the proposed price, where possible, on the service provider's efficient cost base, rather than its actual cost base. The 'building block model' is used to calculate the amount of revenue required to cover the total costs of an efficient service. Allowable revenue under the building block model is calculated as the sum of return on capital,¹³ return of capital (depreciation), operating and maintenance expenditure and an allowance for tax. The building block model provides a framework for deriving the aggregate level of revenue, which can then be translated into individual prices, using activity forecasts.

The ACCC will generally adopt a building block approach when assessing significant price notifications which would, for example, require all declared services to be assessed and/or would specify prices over a significant period of time. The ACCC utilized a building block approach when it assessed the price notifications for Australia Post's letter pricing proposal in 2008 (and earlier in 2002), Airservices Australia's long-term pricing proposal in 2004, and Sydney Airport's aeronautical pricing proposal in 2001. However, the ACCC does not always consider that adopting a building block is appropriate, for example in its assessment of Australia Post's Impact Mail price notification during 2004, the ACCC considered that for a number of reasons it would not conduct a detailed examination of an efficient cost base.¹⁴ The ACCC will determine the appropriate cost base for assessing price notifications under Part VIIA on a case by case basis.

Non-declared services

The current declared firms provide non-regulated goods and services as well as goods and services that are subject to notification under the Act. In general when assessing a price notification, the ACCC does not consider it necessary to assess business areas which provide goods and services that are not declared and that operate in a competitive environment. Nevertheless, the ACCC does consider that in some instances the relationship between business areas that provide declared and non-declared goods and services may be relevant to its assessment of a price notification. For example, where a dual-till approach is adopted by the declared firm, the ACCC considers that it may be important to assess whether common costs have been appropriately allocated between the declared and non-declared parts of the business.¹⁵

¹³ The return on capital is derived by applying a rate of return to an asset base. The ACCC generally uses the Capital Asset Pricing Model to determine the rate of return.

¹⁴ The Impact Mail price notification applied to a new service that was not being provided at the time. The introduction of this service was not expected to result in any additional costs or require any additional resources. The ACCC considered that the establishment of an efficient cost base would require an unduly detailed analysis of all of Australia Post's regulated services including an assessment of the appropriate prices across Australia Post's reserved services. The ACCC considered that such an analysis in this case was not warranted.

¹⁵ A dual till approach separates regulated and non-regulated services. It then determines the required revenue for the regulated services by reference to those assets used for the provision of that service and costs directly attributable to the services, plus an allowance for joint costs (which costs related to the delivery of regulated and non-regulated services).

Structure of prices

In assessing a price notification it may be relevant for the ACCC to consider both the overall level of pricing for regulated goods or services and the structure of relative prices for individual goods or services. The ACCC considers that an examination of the structure of prices proposed by a declared firm is particularly relevant where several individual goods or services are notified. The ACCC considers it will generally be in the interests of a declared firm to set relative prices which broadly reflect relative costs. Market power of regulated firms can be reflected in inefficient or anti-competitive pricing structures. Broad examples of this may be:

- excessively high mark-ups on some services, which result in distorted price signals for purchasing and investment
- pricing below cost in particular areas with the effect of suppressing competition from other potential suppliers.¹⁶

In assessing the structure of prices in a pricing proposal, the ACCC will, when relevant, consider the extent to which the pricing structure promotes the objectives of efficiency which are consistent with meeting the criteria set out in s.95G(7). Efficient pricing requires that consumers be charged the marginal social cost of supply of a good or service. Prices that are not cost reflective will generally adversely affect the efficiency of the resource allocation decisions by the declared person and its users.

However, where a declared firm has fixed costs, marginal costs may be below average costs and hence strict adherence to marginal cost pricing will result in insufficient revenue for the declared person to recover its total costs. A declared firm that supplies multiple products may also have costs common to several of the services it supplies. The ACCC considers it important that fixed and common costs are allocated to services in a reasonable and transparent manner. For example, this may involve allocating costs in a manner that takes into account the demand sensitivities associated with the services provided.

The ACCC examined the structure of prices when it assessed price notifications for multiple services for Airservices Australia's long-term pricing proposal in 2004, Australia Post's letter pricing proposal in 2002 and 2008 and Sydney Airport's aeronautical pricing proposal in 2001.

Future price paths

A future price path involves the declared firm proposing prices that extend beyond the forthcoming 12- month period in its price notification.

A declared firm is only required under Part VIIA of the Act to submit the proposed price in a price notification. However, the ACCC has a preference for price

¹⁶ Concerns over abuse of market power such as predatory pricing may be addressed by s.46 of the Trade Practices Act.

notifications to include future price paths and will usually consider such a price path to be a relevant consideration in its assessment of the notification against the criteria in s.95G of the Act.

Where the declared firm submits information on costs and future demand over the long term, information on prices covering this period can assist the ACCC to assess the profitability and efficiency with which the declared goods or services are to be supplied. In certain circumstances, a path of prices that are fixed for several years can provide incentives for the regulated firm to reduce its costs and increase productivity beyond the pre-determined level. Future price paths can also provide some certainty to users of the declared service(s) regarding the timing and size of expected future price rises.

As a general guide, the ACCC may take into account information about future prices previously proposed by the declared firm when conducting future notification assessments about forthcoming price increases (see ‘standard’ and ‘short form’ assessment process in chart A). Key benefits to the declared firm in submitting a pricing proposal that provides for a path of future prices include greater regulatory certainty and a shorter regulatory process for it in the future as a short-form assessment process may be used for future prices during the period as long as they are below the previously assessed price path.

The ACCC notes that there may be changes in the environment affecting the declared firm’s operations which may lead that firm to propose revising a price path. Such changes could arise from the impact of unexpected events on the declared firm’s efficient cost base, which may necessitate reconsideration of the efficient level of revenue required by the declared firm and thus the notified price. Possible examples of unexpected events leading to a substantive change in a firm’s efficient cost base could include but are not limited to the following:

- changes in government policy (e.g. changes in taxation, service standards)
- changes in corporate ownership
- a terrorism event (e.g. leading to mandatory changes in security arrangements)
- an insurance event.

It may be appropriate for a path of future prices to be revised if:

- the declared firm’s efficient costs are being increased by the event
- the event is beyond the firm’s control
- the event was not contemplated at the time the decision of the price path was made
- the benefit of the ACCC not objecting to the new notified price outweighs detriment to users from an unexpected change in price.

Potential revisions to future price paths should be a matter of discussion between the declared firm and the ACCC during a pre-lodgement meeting in anticipation of a price notification proposal.

The ACCC will determine whether demand forecasts submitted by the declared firm are prudent. The ACCC is not likely to regard unanticipated/revised changes in future demand (affecting service volumes) as being a reason (in isolation to other factors) for a declared firm submitting a revised price path in future notifications. This is because, in setting a long-term price path, it is appropriate for the declared firm to bear the normal commercial risk associated with forecasting demand.

5. ACCC information requirements for a declared firm

5.1 Provision of documents by the declared firm

In order to satisfy the basic informational requirement under subs.95Z(5) of the Act, the notifying firm must provide the ACCC with a notice in writing stating that the declared firm proposes to supply goods or services of a particular description in a particular locality on specified terms and conditions at a specified price.

In assessing notifications under s.95Z the ACCC will expect the declared firm to justify its case for price increases. The ACCC will examine the evidence and arguments put forward by the declared firm to form an opinion about the efficiency of the declared firm's cost base and the reasonableness of its rate of return. The level of information needed to assess a price notification will vary with the issues raised in each individual case.

As a guide, information that is likely to assist the ACCC's assessment includes, but is not limited to, the following:

- A detailed description of the operations of the declared firm (including provision of corporate plans and other strategic plans where applicable)
- Information (including financial models) over a sufficient length of time to enable the ACCC to form a reasonable assessment of the profitability and efficiency with which the declared goods or services are supplied. This implies that the ACCC will require information for a period of several years (e.g. three to five years), rather than a short time frame of, say, a year. Economic and financial parameters used to construct the pricing proposal should be specified.
- The relationship between declared goods or services and non-declared goods or services and the basis on which costs have been allocated between these services. In some cases, information about cost allocation methodologies may need to be more detailed than that required by any statutory record keeping rules that may apply to the declared firm in order for the ACCC to form a view about the reasonableness of the cost allocation approach applied for the purpose of assessing proposed price increases.
- The levels and movements in costs, revenues, activity levels and asset values (including investment levels) over an entire period of assessment (not just a comparison between a base period and the current period). Asset valuation methods should be specified.
- Indicators of levels of product or service quality (which may be covered in terms and conditions of supply).
- Information which indicates whether the firm is operating efficiently, such as:
 - comparisons of unit costs or productivity with similar service providers;
 - movements in the firm's productivity, in past years and/or forecast;

- the nature of productivity improvements agreed in enterprise agreements as trade-offs for wage and salary increases.

During the assessment process, it is possible that the ACCC may need to request additional supporting information from the declared firm or ask it to respond to queries that arise from the ACCC's consideration of information provided earlier. The ACCC's ability to conduct an assessment of the draft notification within reasonable timeframes will be influenced by the declared firm's willingness or capacity to respond to such queries in a timely manner.

5.2 Confidentiality

The receipt of information is crucial to the ACCC's ability to assess notification proposals. Matters of confidentiality, disclosure and use of information are therefore important parts of this process. In addition to this statement, parties should refer to the ACCC's general information policy is available in its publication, *Information Policy, the collection, use and disclosure of information (October 2008)*.

The Act provides a specific regime for the ACCC's treatment of information where the ACCC is required to carry out its statutory functions under Part VIIA, including assessment of a formal price notification.¹⁷

The information used by the ACCC to assess price notifications is usually supplied on a voluntary basis. A declared firm will typically provide the ACCC with information to support its proposal that includes material the declared firm considers to be commercial-in-confidence.

In providing information voluntarily to the ACCC for the purposes of Part VIIA, if a party wants information in its submissions to be treated as confidential, it must clearly indicate the parts it regards as confidential and the reasons for the claim. The type of information which may be considered confidentiality includes details of relative costs for a firm's activities that would prejudice its competitive position. The party should provide (i) a public version and (ii) a version in which the confidential sections are marked, or a separate appendix containing the confidential parts.

The ACCC will consider such claims for confidentiality and then may either reject or accept the claim. If the ACCC denies a confidentiality claim, the party may withdraw the information, or choose to allow it to become publicly available. The ACCC will not consider withdrawn information when reaching its decision.

In addition to information supplied voluntarily s. 95ZK of the Act enables the ACCC to require a party to furnish information or documents relevant to a price notification. Providers of such information may claim confidentiality under s. 95ZN for particular information on the grounds that disclosure would damage its competitive position. In accordance with that section the ACCC will keep such information confidential if it is satisfied that the claim is justified and is not of the opinion that disclosure is necessary in the public interest.

¹⁷ For example under ss.95ZL and 95ZP

The ACCC notes that the following information directly relating to the requirements of a price notification will not be treated as confidential by the ACCC:

- date of the notice
- name of notifying firm
- description of the goods or services covered by the notice
- locality of supply of those goods or services
- proposed prices and terms and conditions for the supply of those goods or services.

Confidential information will usually be relevant to the ACCC in conducting its assessment. Therefore, although not disclosing the confidential information, elements of the ACCC's preliminary view or final decision may refer to confidential material in support of its views reached on elements of the firm's proposal. For example, qualitative references may be made, or numbers may be aggregated and expressed as indices or percentages.

If the ACCC accepts the claim for confidentiality and retains the information it may then take some account of the confidential information in its deliberations, but give less weight to it on the grounds that the material has not necessarily been subject to public scrutiny by interested and expert parties. Where confidential material is provided to and retained by the ACCC it may direct interested parties to approach the declared firm directly to seek access to such information with appropriate confidentiality arrangements to be determined between the parties.

Information obtained by the ACCC for use in other statutory functions

The ACCC recognises that it is critical to adopt sound information handling practices in order to maintain the confidence of parties that provide confidential information to the ACCC. However, if the ACCC has legitimately obtained information for one purpose, and that material discloses information relevant to another of its statutory functions, the ACCC will, in general, use that information in the context of that other statutory function subject to any specific legal requirements to the contrary.¹⁸

ACCC public register

There are separate provisions for claims of confidentiality relating to information to be published on the public register under s.95ZC of the Act. The ACCC may exclude confidential information from those records if it is satisfied that the claim of confidentiality is justified and is not of the opinion that disclosure of the information is necessary in the public interest. If the ACCC refuses to exclude information from the public register which is claimed to be confidential, an application may be made to the Administrative Appeals Tribunal for review of that decision.

Information that was treated as confidential during the assessment process will normally also be excluded from the public register.

¹⁸ For further information see ACCC, *Information Policy: The Collection, Use and Disclosure of Information*, October 2008.

Statement for public register

Section 95ZC of the Act requires the ACCC to include, as soon as practicable after the prescribed time, the following information on a register that is open for public inspection:

- the notice of the proposed price increase
- the outcome of its consideration
- a statement of reasons for the decision

The information is also posted on the ACCC website.

Gazette notice

The ACCC must, within three months after the end of the applicable period publish a gazette notice that states the date it received the price notification and any particulars relating to the outcome of its consideration.

Contact information

To obtain further information on the obligations of a declared firm under Part VIIA and the ACCC's approach to assessing price notifications please contact:

General Manager
Transport and General Prices Oversight Branch
Australian Competition and Consumer Commission
GPO Box 520
Melbourne Vic 3001

Email: transport@acc.gov.au