



Australian
Competition &
Consumer
Commission

Statement of regulatory approach to assessing price notifications under Part VIIA of the *Competition and Consumer Act 2010*

March 2017

Australian Competition and Consumer Commission

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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 *Competition and Consumer Act 2010* (the Act).

The object of these provisions is to have prices surveillance applied only to those markets where, in the view of the Minister, competitive pressures are not sufficient to achieve efficient prices and protect consumers. The price notification provisions also allow for additional transparency about price increases in these markets.

The Minister, or the ACCC with the approval of the Minister, may make the prices of certain goods or services, or the provision of certain goods or services by a specific firm, subject to the price notification provisions. If this occurs, the firm is required to submit a price notification to the ACCC before increasing the price of these goods or services, and the ACCC is to decide whether or not to object to the price increase.

The aim of this statement is to outline the ACCC’s preferred approach to assessing a price notification. It provides:

- the legislative framework within which price notifications are assessed (section 2),
- the ACCC’s approach to assessment (section 3), and
- the information that the ACCC is likely to require from a declared firm (section 4).

This statement replaces the 2009 *Statement of regulatory approach to price notifications*.

The price notification provisions apply only to ‘notified goods or services’ and ‘declared firms’.¹

As at the date of publication of this statement, March 2017, three firms are declared — the Australian Postal Corporation (Australia Post), Airservices Australia and Sydney Airports Corporation Ltd — in relation to certain goods or services (see Table 1).

Table 1 Declared firms and notified services

Current declaration	Declared firm	Notified services
No.94, 5 May 2016* Commenced on 1 July 2016 and ceases on 30 June 2019	Sydney Airports Corporation Ltd in relation to Sydney Kingsford Smith Airport.	Aeronautical services and facilities ² 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.

¹ The Act refers to declared persons. For ease of readability, this document refers to ‘declared firms’.

² Having the same meaning as aeronautical services and facilities under Part 7 of the Airports Regulations 1997

<p>No.2, 10 September 2015**</p> <p>This declaration ceases on 30 June 2025</p>	<p>Australian Postal Corporation</p>	<p>Ordinary letters carried at the regular timetable (including the basic postage rate), and in some circumstances ordinary letter services carried at the priority timetable. The declaration does not cover bulk business letter services</p>
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* This declaration replaces Declaration 93 of 27 May 2013.

** This declaration replaces the Declaration dated 21 July 2015.

2. Legislative framework

2.1. The ACCC's functions under Part VIIA

The ACCC has the following price surveillance functions under Part VIIA of the Act:

- conducting and reporting on price inquiries (subss.95G(2), 95G(3) and 95G(4));
- considering price notifications (locality notices) 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)).

2.2. Price notifications and restrictions on price increases

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

2.2.1. Restrictions on price increases for notified goods and services

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 firm to be, in relation to goods or services of a specified description, a 'declared firm' for the purposes of the Act.³

Certain restrictions limit a declared firm's⁴ ability to:

- increase the prices of notified goods or services at a particular location
 - above the highest prices that applied in that location, or
 - if the goods or services were not previously supplied at that location, to a level above the highest prices that applied to the notified goods or services in Australia over the preceding 12-month period
- supply notified goods or services if that firm has not supplied these goods or services in Australia in the preceding 12-month period.

A change in terms and conditions of an existing service may also constitute a new service requiring a price notification to be lodged with the ACCC.

A firm found to be in contravention of these restrictions may be subject to a penalty of 100 penalty units.⁵

2.2.2. Price notifications

A declared firm may increase prices, or commence to supply notified goods or services in Australia without contravening these restrictions if it satisfies all four following requirements:

- (1) the declared firm has notified the ACCC that it proposes to commence supply or increase the price of a notified service (subs.95Z(5)). Such a notice is termed a 'locality notice' (also referred to as a 'price notification' in this statement).
- (2) either the applicable period in relation to the locality notice has elapsed (further explained in section 2.2.3 below), 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

³ s 95X.

⁴ subss. 95Z(1), (2) and (3).

⁵ At the time of writing 100 penalty units equates to \$18,000.

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) (subs.95Z(6)).

- (3) the terms of supply are the same or substantially similar to those proposed to the ACCC in the locality notice (subs.95Z(7)).
- (4) the actual price at which the goods or services are supplied does not exceed the proposed price in the locality notice (or a lower price, if it is specified by the ACCC) (subs.95Z(8)).

2.2.3. Consideration by ACCC

The ACCC is to consider a price notification and to take such action in accordance with the Act as it considers appropriate.⁶ The ACCC may:

- serve a notice stating it has no objection to the declared 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.⁷

The ACCC may also object to the price increase being sought.

The ACCC is required to make its assessment within the 'applicable period', of, 21 days, starting on the day the price notification is given. However, before the 21 days expires, the ACCC may extend the applicable period beyond 21 days with the agreement of the notifying firm.⁸

The applicable period is further increased by 14 days if the ACCC serves a notice specifying a lower price than the proposed price.⁹ 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 proposed price.

After the applicable period (e.g. 21 days) is concluded the declared firm can increase the price of notified services and/or introduce a new notified service.

Legislative criteria

In performing its prices surveillance functions, the ACCC must have 'particular regard' to the following¹⁰:

- 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.

⁶ subs.95G(5).

⁷ subs.95Z(6).

⁸ subs.95ZB(2).

⁹ subs. 95ZB(4).

¹⁰ subs.95G(7).

An explanation of how the ACCC generally applies this criteria to price notifications is set out in section 3.2 below.

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.¹¹

Public register

The ACCC is also required to maintain a public register of its price notification decisions. Further information on this is at section 4.2.

¹¹ subs. 95ZC(3).

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

3.1. The ACCC's assessment process

The ACCC is to consider a price notification within the applicable period. As explained in section 2.2.3, the applicable period will be 21 days unless extended.

However, price notifications are often complex, therefore, it is beneficial for the ACCC and the declared firm to consult with each other (and other parties where appropriate) before a price notification (i.e. locality notice) is formally submitted to the ACCC. This helps ensure that the ACCC has sufficient information to assess a price notification once it is submitted.

The ACCC's suggested process for assessing notifications is as follows:

- **Pre-lodgement**—Representatives for the declared firm are encouraged to meet with ACCC staff to discuss the prospective price notification, process and timetable before lodgement.
- **Draft price notification**—The declared firm lodges a draft price notification and a supporting submission. This provides 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**—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 view**—The ACCC considers submissions on the issues paper and releases a view outlining its view on the draft price notification. The declared firm and interested parties are able to provide comments on the ACCC's view.
- **Formal price notification**—The declared firm lodges a formal price notification with the ACCC.
- **ACCC decision**—After lodgement of a formal price notification, the ACCC issues its decision within the applicable period (21 days or longer if extended).

Two examples of possible processes for assessing price notifications are outlined in a flowchart ('Chart A') on page 10. **This provides a general guide to the ACCC's likely approach to assessing price notifications.**

The ACCC will tailor its assessment process (including the number of stages of its assessment and the length of each stage) to reflect the nature and significance of the price changes being sought. This is likely to depend on the nature and complexity of each price notification. In some cases, the declared firm may have additional legal obligations that it must satisfy prior to implementing price increases.¹²

A declared firm is able to lodge a formal price notification without prior consultation with the ACCC. As with all price notifications, the ACCC will give due consideration to the notification lodged. The ACCC prefers, however, for declared firms to adopt a consultative process as set out above.

¹² For example, pursuant to section 33 of the *Australian Postal Corporation Act 1989*, Australia Post must provide written notice to the Minister of a proposal to fix or vary certain rates of postage.

Where a declared firm lodges a price notification which the ACCC considers requires a more detailed assessment of the proposal and/or where a long-term price path is being proposed, the ACCC will generally conduct a standard assessment of the proposal (as per the process outlined on the left side of in Chart A).

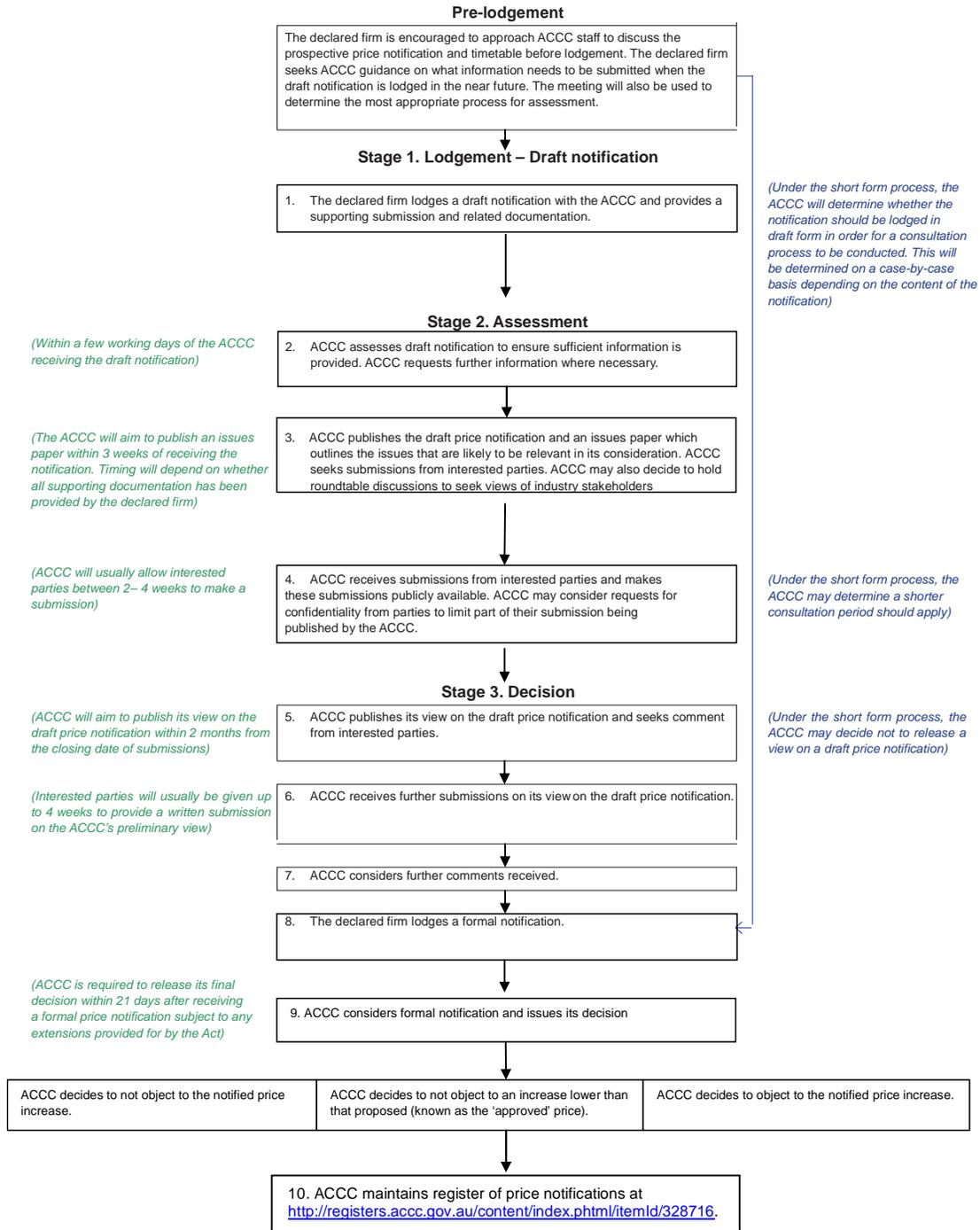
On consideration of a long term price path, the ACCC could decide not to object to the initial price increases and it also may outline a preliminary position not to object to future price increases that are consistent with the price path. Where a subsequent price notification proposes a price that was anticipated in the price path submitted in a previous price notification, the ACCC may consider that it is more appropriate to conduct a short-form assessment process (on the right side of chart A).¹³ A short-form assessment process provides scope for the ACCC to adopt an expedited assessment of a price notification. This may involve a shorter consultative process. The ACCC also may decide that it will only make a decision on a formal price notification.

¹³ 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)**



3.2. The ACCC's approach to applying the legislative criteria

The ACCC must have 'particular regard' to the following:

- a) the need to maintain investment and employment, including the influence of profitability on investment and employment (subs. 95G(7)(a));
- 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 (subs. 95G(7)(b)); 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 (subs. 95G(7)(c)).

The ACCC's general approach to applying this criteria to a price notification is explained below.

The ACCC also may have regard to other matters it considers relevant on a case by case basis.

Investment, employment & market power

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.¹⁴

An important consideration relevant to the first two criteria 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 takes the view that criteria one and two seek to promote economically efficient investment and employment throughout the economy. This is also consistent with the object of prices surveillance.¹⁵

Economic efficiency encompasses the following elements:

- *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

¹⁴ Australia Post and Airservices Australia are both statutory monopoly providers of particular services and the Productivity Commission found that Sydney Airport has a significant degree of market power in domestic markets (Economic Regulation of Airport Services—Inquiry report, 14 December 2011).

¹⁵ As set out in s.95E of the Act

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 efficient 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 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 addresses the first criterion by providing incentives to maintain profitable investment. However, in order to address the second criterion, a declared firm which may have substantial influence in a market for notified goods and services should not be able to charge prices which reflect a higher than reasonable rate of return, or inefficient costs.

Wages & conditions of employment

The ACCC considers the third criterion is now less relevant to its consideration of price notifications given there has been a movement away from centralised wage fixing to agreements negotiated at the enterprise level.

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 consider the level of wages and conditions as part of its review of the efficiency of the cost base.

3.3. Other considerations by the ACCC in assessing price notifications

Ministerial directions

The Minister may direct the ACCC to give special consideration to specified matters in exercising its powers and performing its functions under Part VIIA.¹⁶

At the time of writing, general Direction No. 8¹⁷ was the only general direction in place. It applies to the ACCC's consideration of all price notifications. It 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.

¹⁶ s. 95ZH.

¹⁷ Ministerial directions previously given under the *Prices Surveillance Act 1983* have been carried over to have effect as if made under the corresponding section of the Act. Direction 8 is a general direction given to the ACCC by the Government under s 20 of the *Prices Surveillance Act*.

The ACCC treats the level of wages and executive remuneration the same as any costs as part of its review of the efficiency of the cost base. This is similar to how the ACCC applies the third criterion. 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. In addition, executive remuneration may not form a material proportion of a firm's cost base.

The Government may also make directions relating to specific industries. For example, Direction No. 11, 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 given specific directions requiring the ACCC to assess proposed price increases in terms of price caps.¹⁸

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. 94¹⁹ requires the ACCC to assess proposed prices paid by operators of regional air services in terms of a price cap and specifies that percentage price increases should not exceed the percentage increase in the Consumer Price Index over that same period.

3.4. The ACCC's assessment methodology

Cost-based approach to assessing price increases

The ACCC adopts a flexible approach for determining the process of assessment, which reflects the individual characteristics of each price notification. For example, the size of the proposed price increase, 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 has used 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 firm on a price-based approach to assessment. The building block model is used to assess the extent to which the prices proposed by a regulated firm are commensurate with the efficient costs of providing those services. In assessing proposed price increases, the ACCC considers whether the revenue generated by the proposed prices would exceed maximum allowable revenue.

In determining the level of maximum allowable revenue, the ACCC considers:

- the level and 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 common costs and the structure of prices across services.

¹⁸ 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 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.

¹⁹ Direction 94 took effect on 1 July 2016 and requires the ACCC to give special consideration to the policy that the total revenue-weighted percentage increases in prices over the three years from 1 July 2016, 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 Consumer Price Index over that same period.

Efficient cost base

Relevant to the second criterion, 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 unnecessary or inefficient levels. Therefore, in considering a price notification, where possible the ACCC assesses the pricing proposal based on the service provider's efficient cost base, rather than its actual cost base. This could include consideration of international benchmarking studies and the extent to which the declared firm has made productivity gains.

Reasonable rate of return

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,²⁰ 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 has utilised a building block approach to assess price notifications for Australia Post's notified services and long-term pricing proposals from Airservices Australia.

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 goods and services that are not declared and that are provided 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, when assessing a 2015 price notification for Australia Post's declared letter services (which are a subset of its reserved letter service), the ACCC considered that both the declared and the broader reserved letter service were relevant to its assessment of the price notification.

Relative prices

In assessing a price notification it may be relevant for the ACCC to consider not just the overall level of pricing for all of the regulated goods or services, but also the relative prices for individual goods or services. The ACCC considers that an examination of relative prices proposed by a declared firm is particularly relevant where several individual goods or services are notified. 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.²¹

The ACCC considers it will generally be in the interests of a declared firm to set prices which broadly reflect relative costs. In assessing the structure of prices in a pricing proposal, the

²⁰ 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.

²¹ Concerns over abuse of market power such as predatory pricing may be addressed by s.46 of the Act.

ACCC will, when relevant, consider the extent to which the pricing structure promotes efficiency.

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 firm and the users of its services. 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 firm to recover its total costs. A declared firm that supplies multiple goods or services 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 has examined the structure of prices in assessing certain price notifications from Australia Post and Airservices Australia.

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 notifications to include future price paths and may consider such a price path to be a relevant consideration in its assessment of the price notification against the criteria.

Where the declared firm submits information on forecast costs and 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 over the period. In certain circumstances, a path of prices that is 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 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 price notification assessments about forthcoming price increases (see 'standard' and 'short form' assessment process in chart A). By submitting a pricing proposal that provides for a path of future prices the declared firm is able to benefit from greater regulatory certainty. The ACCC may also be able to undertake a short-form assessment process for future pricing proposals that are consistent with the 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 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 is not likely to regard unanticipated/revised changes in future demand (affecting service volumes) as being in itself a sufficient reason for a declared firm submitting a revised price path in future price 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.

4. ACCC information requirements for a declared firm

4.1. Provision of documents by the declared firm

In order to satisfy the basic information requirements of providing a price notification to the ACCC, 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.²²

In assessing price notifications 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. Generally, the ACCC will require information for a period of several years (e.g. three to five years). 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. Information about cost allocation methodologies may need to be detailed in order for the ACCC to assess the proposed price increases.
- Forecasts of cost levels, revenues, activity levels and asset values (including investment levels). 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, the ACCC may need to request additional supporting information from the declared firm. The ACCC's ability to conduct an assessment of the pricing proposal within reasonable timeframes will be assisted by the declared firm's willingness to respond to such queries in a timely manner.

4.2. Confidentiality

The receipt of information is crucial to the ACCC's ability to assess price notifications. Matters of confidentiality, disclosure and use of information are also important. Parties should refer to the *ACCC & AER Information policy: Collection and Disclosure of Information*

²² subs. 95Z(5).

(June 2014), available at <https://www.accc.gov.au/publications/accc-aer-information-policy-collection-and-disclosure-of-information>.

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.²³

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 it 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 to be confidential includes details of relative costs for a firm's activities that would prejudice its competitive position. The party should provide (i) a public version of the information 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, the ACCC can require a party to furnish information or documents relevant to a price notification.²⁴ Providers of such information may claim confidentiality for particular information on the grounds that disclosure would damage its competitive position. The ACCC must take all reasonable steps to 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.²⁵

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.

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.

Confidential information will often be relevant to the ACCC's assessment. Without disclosing confidential information, the ACCC it may refer to confidential material in a decision. For example, it may make qualitative references, or aggregate numbers and express these as indices or percentages.

²³ For example under ss.95ZL and 95ZP

²⁴ s 95ZK.

²⁵ s. 95ZN

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. Additionally, the ACCC will not generally accept conditions that seek to limit the use of information to a particular matter.

ACCC public register

The ACCC is to include, as soon as practicable after the prescribed time, the following information on a register that is open for public inspection²⁶:

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

The information is available posted on the ACCC website at <http://registers.accc.gov.au/content/index.phtml/itemId/328716>

The ACCC may publish claims of confidentiality relating to information to be published on the public register. 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.

²⁶ s. 95ZC.

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:

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