Reform of economic regulation under Part VIIA of the *Competition and Consumer Act 2010*

Submission to the Review of Competition Policy

by

Margaret Arblaster[1]

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Executive Summary

The focus of this submission is the prices surveillance provisions contained in Part VIIA of the *Competition and Consumer Act 2010* (CCA). Part VIIA, called the prices surveillance part of the Act includes the regulatory functions of prices surveillance, price monitoring and price inquiries. Aviation infrastructure is the main industry sector still covered by the prices surveillance provisions and has been continuously covered by these provisions for over 23 years. Particular attention is given to economic regulation of this sector.

Prices surveillance was developed as part of the Hawke Government's Prices and Incomes Accord in the 1980s and related to very different market circumstances and policy objectives to those of today. The provisions have changed little over time although the economic environment in which these functions are applied, and the way that they are applied, have changed dramatically. It can be argued that the prices surveillance provisions are no longer 'for purpose' and the regulatory design is not consistent with best practice regulation.

This submission recommends that consideration should be given to the following changes to economic regulation contained in part VIIA of the CCA:

- providing a range of effective regulatory measures in competition legislation which are appropriate for different circumstances. The availability of a range of appropriate regulatory measures in legislation is likely to make light-handed regulatory measures more effective if there are credible alternatives available in the event that a stronger regulatory measure is considered warranted.
- enhancing the neutrality of regulation through improved accountability measures and review processes
- replacing price monitoring with information disclosure regulation. Two types of information disclosure seem appropriate; disclosure of publicly available information and disclosure of information under confidentiality arrangements to facilitate industry negotiations.
- improving the design of price control regulation. Legislative provisions that are suitable for privatised infrastructure as well as publicly owned, which are suited to long-term approaches to pricing where these are appropriate and which allow for a variety of methods of price control to be used depending on the industry circumstances would be an improvement on prices surveillance.

[1] This submission is based on Margaret Arblaster's nineteen years of experience between 1992 and 2010 as a senior manager in the Australian Competition and Consumer Commission (ACCC) and manger in a predecessor organisation, the Prices Surveillance Authority (PSA). During this time Margaret had managerial responsibility for administration of the regulatory arrangements applying to aviation infrastructure amongst other responsibilities. Since 2010 Margaret has been an independent researcher on aviation infrastructure, has undertaken consulting work and is a Teaching Fellow in Transport Economics in the Department of Civil Engineering at Monash University.

In addition, the design of the declaration and arbitration provisions in the national access regime in Part IIIA should be reviewed from the perspective of whether they support industry negotiations. The approaches should be as simple and as cost effective as possible but at the same time it is important that there are incentives for parties to settle disputes commercially rather than appeal to regulatory intervention. Consideration should be given to whether additional dispute resolution processes need to be available over the single arbitration measure currently in Part IIIA.

1. Introduction

Prices surveillance in Part VIIA of the *Competition and Consumer Act 2010* (the CCA) is a general provision which can apply to any industry. There are three forms of regulation contained in the prices surveillance part of the CCA; prices surveillance, price monitoring and price inquiries which potentially involve a price freeze for the duration of the inquiry. All three forms of prices surveillance have applied to Australia's major airports at various times since 1991. Prices surveillance has also applied to air traffic management (ATM) and aviation rescue and firefighting (ARFF) services since 1991. The experience of aviation infrastructure under prices surveillance regulation highlights many issues relating to the prices surveillance approach to regulation which are also relevant for other industries where the prices surveillance provisions apply or could apply.

Structure of submission

Section 2 provides background on prices surveillance contained in Part VIIA of the CCA and discusses the three forms of regulation contained in Part VIIA; prices surveillance, price monitoring and price inquiries.

Section 3 discusses economic regulation of aviation infrastructure in Australia including the experience of prices surveillance of aviation infrastructure, price monitoring of airport services and the application of access regulation to airport services.

Section 4 proposes reforms that should be considered to economic regulation under Part VIIA drawing on the experience of aviation infrastructure regulation and regulation of other industries under Part VIIA. Dispute resolution regulation is discussed.

2. The prices surveillance part of the *Competition and Consumer Act 2010* (CCA)

2.1 Background on the prices surveillance part of the CCA

The *Prices Surveillance Act 1983* (the PS Act) was part of the Hawke Government's policy approach to controlling inflation, known as the Prices and Incomes Accord, and administered by the Prices Surveillance Authority (PSA). The prices surveillance and price inquiry functions of the PSA were aimed at providing restraint in pricing as a balance to wage restraint exercised under the Accord between the Government and the Australian Council of Trade Unions. Prices surveillance was applied in sectors of the economy where effective competitive disciplines were thought not to be present and where prices were of strategic importance to the general price level.[2] The PSA's role was essentially to ensure that large firms which were in "a position to substantially influence a market for goods or services" [3] did not take advantage of that power in setting prices. In addition, its role was to support a new centralised wage fixing system by discouraging "cost increases arising from

[2] PSA 1991, A Review of the Prices Surveillance Authority's role.

[3] Wording used in section 17(3) (b) relating to factors that the PSA should have regard to in exercising its powers and performing its functions under the PS Act.

increases in wages and changes in conditions of employment inconsistent with principles established by relevant industrial tribunals."[4]

The PSA had two main functions under the PS Act; reviewing notifications of proposed price increases by enterprises declared by the Minister in respect of particular goods and services and conducting public price inquiries with the approval of the Minister. The Australian Competition and Consumer Commission (ACCC) was formed in November 1995 involving the amalgamation of the Trade Practices Commission and the PSA.

The PS Act did not initially specify any objectives for administering prices surveillance but did provide three criteria governing the functions of the PSA, and subsequently the ACCC, in exercising its powers under the prices surveillance provisions. The criteria are contained in s. 95G (7) of Part VIIA the CCA:

> "In exercising its powers and performing its functions under this Part, the Commission must, subject to any directions given under section 95ZH, have particular regard to the following:
>
> (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;
>
> (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."

These criteria differ from those related to economic regulation under other parts of the CCA, for example those in the national access regime in Part IIIA and in telecommunications access regulation in Part XIC.

2.2 Prices surveillance

Over the period 1983-84 to 1990-91 prices surveillance was applied to over 70 companies in around 24 industries and 33 price inquiries were undertaken related to pricing in particular industries.[5] Some examples of other goods and services that were covered by prices surveillance at this time include beer, biscuits, premixed-concrete, instant coffee, petroleum products, tea and toothpaste. In 1991 aviation services supplied by the Civil Aviation Authority and aeronautical services supplied by the Federal Airports Corporation were declared for prices surveillance. The number of companies declared for prices surveillance decreased progressively between 1991 and 2003. Since 2003 three product groups have remained covered by prices surveillance; aviation services supplied by Airservices Australia (Airservices), standard letter services supplied by Australia Post and aeronautical services supplied to regional airlines by Sydney Airport. This position remains today.

Companies declared for prices surveillance are required to notify the ACCC (previously the PSA) of proposed price increases for declared goods and services. Under prices surveillance there is a penalty for failing to notify proposed price increases before implementing them but no penalty for

[4] Wording used in section 17(3) (c) relating to factors that the PSA should have regard to in exercising its powers and performing its functions under the PS Act.
[5] PSA 1991, op.cite

not complying with the ACCC's, or PSA's, decision on prices. Following notification of proposed price increases the ACCC has 21 days to decide that it has no objection to the proposed prices, or that it would have no objection to a lesser price rise or no price rise. If the ACCC does not responded within the 21 day period, the company can implement the proposed price increase. At the completion of the prices surveillance process the prices for the declared goods and services are placed on a public register.

Over the last two decades the complexity of pricing issues in the industries where prices surveillance has been applied (aviation infrastructure, harbour towage services and postal services) has meant that administrative processes were generally used to increase the time available to undertake an assessment of price notifications. This recognised that in most cases it is not possible to undertake an adequate assessment of pricing proposals within the 21 day timeframe envisaged by the legislation. The current version of assessment procedures developed in the late 1990s to allow a more thorough assessment of price notifications is contained in the Statement of Regulatory Approach to Assessing Price Notifications, 2009.[6] The Airservices Australia long term pricing proposal provided to the ACCC in Draft form on 1 March 2011 with an ACCC decision on 22 September 2011 illustrates the use of this assessment process.

To-date there has been only one instance where a company has gone against an ACCC or PSA pricing decision, Adsteam Marine Limited in 2002[7]. However, where companies are owned by the Commonwealth Government, such as Airservices Australia and Australia Post, Ministerial roles in relation to their pricing arrangements is a factor which effectively reduces their discretion to not comply with a pricing decision made by the ACCC under the prices surveillance provisions.

Under the prices surveillance part there is scope for the Minister to give Ministerial Directions to the ACCC "to give special consideration to a specified matter or matters in exercising its powers and performing its functions under this part", s.95ZH of the CCA. The existence of a power to make Ministerial Directions is problematic. It allows for political discretion and the interpretation of Directions in relation to other criteria governing Part VIIA is not necessarily clear. Two Ministerial directions applying to all goods and services covered by prices surveillance were:

- "the Government's policy of generally not supporting price increases in excess of movements in unit costs", known as the 'Unit Cost Direction', issued on 15 October 1985
- "the Government's policy that increases in executive remuneration in excess of those permitted under wage fixation principles and decisions announced by the Australian Commission in National Wage Cases should not be accepted as a basis for price increases" issued on 22 April 1988

These two directions remained in place until the mid-1990s.[8] Ministerial Directions were used in the implementation of price caps on aeronautical charges at major airports. The detailed price cap specifications in the Ministerial Directions issued under the provision were incongruous with the language of s.95ZH.

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[6] ACCC 2009, Statement of Regulatory Approach to Assessing Price Notifications, June at http://www.accc.gov.au/publications/regulatory-approach-to-price-notifications

[7] ACCC Annual Report 2001-02, pp. 128-129. See http://www.accc.gov.au/system/files/ACCC%20Annual%20report%202001-02.pdf

[8] Some implementation difficulties associated with the Unit Cost Direction are reflected in the ACCC media release: "*Prices surveillance reform welcomed*" 19 September, 1996 at: http://www.accc.gov.au/media-release/prices-surveillance-reform-welcomed

2.3 Public inquiries

The possibility that the Minister could direct the ACCC, or PSA, to conduct a public price inquiry that could involve a freeze on prices for the period of the inquiry has been thought to be an incentive for a company to comply with a pricing decision. Since the ACCC was formed in 1995 there have been only three public inquiries under the prices surveillance provisions, two related to petrol pricing (1996 and 2008) and one into grocery prices (2009). [9] There has not been a public inquiry involving a freeze on prices since the ACCC was formed. Price inquiries are a blunt form of deterrence. They are resource intensive, both for the industry and the ACCC, and create uncertainty for the industry because of their wide ranging nature.

2.4 Price monitoring

Associated with the competition policy reforms implemented in 1995 was the insertion of a price monitoring function into the PS Act. Under these provisions (now s.95ZA to s.95ZG of the CCA) the Minister can direct the ACCC "to monitor prices, costs and profits relating to the supply of goods or services" and the ACCC is required to make copies of a report on its monitoring publicly available as soon as practical after the report has been completed. Container stevedoring charges at major Australian ports have been monitored under these provisions since 1999, airport charges since 1999 and unleaded petrol prices monitored since 2008. The Government directed the ACCC to monitor the price of drinking milk prices following deregulation of milk prices on 1 July 2000 for a period of nine months.[10]

Price monitoring is not generally designed to assess the level of prices but rather to track movements in prices over time. Price monitoring normally involves developing a set of indicators at the beginning of a period and tracking these over time. As time passes the indicators can become less relevant or may need refining because of changing market circumstances or factors which were not identified at the outset. The greater use of 40 foot containers instead of 20 footer containers which developed in the early 2000s is an example of where changes to indicators were made in the context of monitoring container stevedore charges. The changing definition of aeronautical services is an example of a change that occurred in the context of monitoring airport charges.

The ACCC has also undertaken price monitoring under the direction of the Government under general powers in the CCA. The monitoring of the professional indemnity and public liability insurance premiums and medical indemnity premiums following tort law reforms are two examples where this has occurred. The release of reports on monitoring undertaken under the ACCC's general powers is at the discretion the government.

2.5 General assessment of the Prices Surveillance part of the CCA

The prices surveillance provisions contained in Part VIIA of the CCA conflict with best practice regulatory design in a number of important respects:

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[9] The three Inquiries under the prices surveillance provisions in Part VIIA of the *Competition and Consumer Act 2010* that have occurred since the ACCC was formed are:

Inquiry into Petroleum Products Declaration, 1996

Inquiry into the price of unleaded petrol, 2007

Inquiry into the competitiveness of retail prices for standard groceries, 2008

[10] See ACCC Media Release 8 January 2001, No. 079/01.

- The prices surveillance provisions of the CCA were developed in a different era and relate to different policy objectives than the ones that they are used for today. The legislative criteria guiding the operation of Part VIIA have not changed although the industrial relations frameworks and its relevance to pricing in Australia have changed. Similarly, there have not been any changes to the legislative provisions that govern the assessment processes and time frames although procedural adaptions have had to made. The language used is not user friendly nor easy to interpret in today's environment. The provisions are essentially the same as the original 1983 PS Act.[11]

- The regulation is not neutral and independent because decisions on undertaking prices surveillance, monitoring or a public inquiry are political decisions made by Ministers rather than decisions made by an independent agency based on objective legislative criteria. Ministerial directions can also be given under s. 95ZH influencing the approach taken in evaluating pricing proposals. This contrasts with the approach taken in the national access regime where decisions on regulation are made by independent agencies under legislative criteria, or in the case of declaration for access an application can be initiated by industry and is then assessed by the National Competition Council (NCC) under legislative criteria with Ministerial decisions on NCC recommendations potentially subject to independent review.

- The accountability under the prices surveillance part of the CCA is limited because there is limited possibilities for formal review processes. Appeal or review is limited to appeals under the *Administrative Decisions (Judicial Review) Act 1977* which essentially relates to matters of law on procedural issues.

- The surveillance arrangements relating to Australia Post, Airservices and aeronautical services to regional airlines using Sydney Airport[12] have not been subject to formal transparent review processes. Similarly, there have not been formal transparent review processes associated with long term monitoring undertaken under the prices surveillance provisions, including monitoring of container stevedoring charges and unleaded petrol prices. Monitoring of aeronautical services at Australia's major airports, where there has been two Productivity Commission reviews, is an exception.

3. Economic regulation of aviation infrastructure in Australia under the prices surveillance provisions

Aviation infrastructure has been continuously regulated under the prices surveillance provisions (now in Part VIIA the CCA) since 1991. Apart from aviation infrastructure services, the only other industry sector which is currently subject to prices surveillance, and where there has been long term and continuous application of prices surveillance, is standard letter services supplied by Australia Post.

3.1 Prices surveillance of aviation infrastructure

[11] See in particular the notification provisions in s.95Z, 95ZA and s.95ZB of the CCA.

[12] The regulatory cap and price notification regime for regional air services at Sydney Airport were explicitly excluded from the 2011 Productivity Commission review. See p.vi.

Airservices Australia is a corporate entity wholly owned by the Australian government and provides air traffic control at 29 major airports in Australia (with the exception of Darwin and Townsville where services are provided by the Royal Australian Air Force) and in upper level air space and controlled air space in Australia. Airservices is also the provider of aviation firefighting and rescue services (ARFF) at major airports in Australia. While internationally terminal navigation and ARFF services can be provided through competitive tendering processes to airports, such as in the UK, this is not the case in Australia.

In Australia, the long distances between major capital city airports and the lack of good substitute airports and modes of transport between capital cities are among factors that have contributed to assessments that the major capital city airports in Australia, in particular Sydney, Melbourne, Brisbane and Perth, have significant market power.[13] Within an airport the degree of market power varies across services.

The government adopted a package of airport-specific economic regulation associated with the privatisation of Australia's major airports in 1997 and 1998. The prices surveillance provisions were used to implement (CPI-X) price cap regulation of aeronautical services[14] at the newly privatised airports involving 11 airports in Australia at this time. This was the first time that these provisions had been used to implement (CPI – X) price cap regulation. Other elements of the economic regulation applied to privatised airports included price monitoring of aeronautically related services[15], monitoring of quality of airport services under Part VIII of the *Airports Act 1996* (the Airports Act), airport specific access arrangements under Part XIII of the Airports Act and mandatory reporting of financial and other performance information under Part VII of the Airports Act. The Government's policy in establishing the regulatory arrangements was "to protect airport users from any potential abuse of market power by airport operators" while at the same time encouraging negotiation between airports and airlines.[16]

3.2 Price monitoring of airport services

Price caps on aeronautical services at regulated airports were replaced with price monitoring in 2002. Price monitoring of aeronautically related services and the airport specific access arrangements were also removed at this time. Price monitoring of airport car parking prices was introduced on 7 April 2008. Four major airports – Brisbane, Melbourne, Perth and Sydney – are now covered by price monitoring under the CCA.

The Government's objectives for price monitoring are identified in the Terms of Reference given to the Productivity Commission review of airport regulation commenced in 2006. The objectives identified for the price monitoring regime were to:

a) promote the economically efficient operation of airports
b) minimise compliance costs on airport operators and the Government; and

[13] Productivity Commission (2002, 2006, 2011), Inquiry Reports on the economic regulation of airport services; Australian Competition Tribunal (2000). Decision: Re Sydney International Airport [2000] ACompT (1 March 2000) Downloaded 11/08/00 http://www.austlii.edu.au/au/cases/cth/ACompT/2000/1.html

[14] "Aeronautical services' include services related to aircraft movements and passenger processing.

[15] The group of airport services described as 'aero-related' services included aircraft maintenance, aircraft refuelling charges and car parking charges amongst other charges.

[16] Australian Government, Department of Transport and Regional Development, *Pricing Policy Paper*, November 1996, p.1

c) facilitate commercially negotiated outcomes in airport operations, benchmarking comparisons between airports and competition in the provision of services within airports (especially protecting against discrimination in relation to small users and new entrants).[17]

An evaluation of the price monitoring of airport services in relation to whether it has met the Government's objectives is contained in Arblaster,[18] M. (2014). This paper concludes the price monitoring approach to light-handed regulation does not meet the Government's objectives in important respects.

The existence of a credible threat of a stronger regulatory action is important to the effectiveness of light-handed regulation. The Productivity Commission has considered that the credible threat of sanction for airports that abuse their market power is fundamental to the effectiveness of the light handed approach.[19] The existence of a credible threat of stronger regulation was considered an issue in both the 2006 and 2011 Productivity Commission inquiries and resulted in a recommendation in each report that a new procedure be adopted which the Commission called a 'show cause' mechanism.

There are a number of reasons why there is not a credible threat of a stronger regulatory action associated with the price monitoring framework for airports. One is that the information provided in price monitoring reports cannot provide an adequate assessment of airport performance on its own. Price and quality of service monitoring provide indicative information but do not permit an assessment of whether airports are economically efficient or whether they have used their market power. Another factor is that there are not generally acceptable and effective alternative regulatory measures available in legislation that could be invoked and applied to situations where the use of significant market power has been identified. Prices surveillance would not be considered a suitable regulatory measure in this situation. Airlines favour a negotiated approach and do not support a return to price regulation.[20] They consider that "re-regulation would only increase costs for all parties and lead to inefficient outcomes" (p.1). A further factor is that there would be a very significant delay between any identification of adverse performance and the development and implementation of a stronger regulatory measure or sanction.

The Productivity Commission reviews have not made assessments of airport performance which rely on information produced in the ACCC's monitoring reports. The findings on the prices charged by airports in the 2011 review are based on publicly available benchmarking studies. While international benchmarking studies provide useful information, there are limitations with these studies for the purpose of identifying the use of significant market power. Further, if international benchmarking studies are relied upon to assess airport performance then the question arises whether the ACCC's role in monitoring price and quality of service is warranted?

[17] Quoted in Productivity Commission (2006). Review of Price Regulation of Airport Services, Report No. 40, Canberra, p.iv.
[18] Arblaster, M. (2014). *The design of light-handed regulation of airports; lessons from experience in Australia and New Zealand*, Journal of Air Transport Management 38, pp.27-35.
[19] Productivity Commission, 2011, p. XXXV
[20] Airline Industry joint submission to the Productivity Commission, 2011

Monitoring data is hard to interpret because it is not designed to assess the level of prices. Monitoring data is not necessarily comparable over time and between airports. There are not common methodologies between the airports associated with data preparation.

Under price monitoring in Part VIIIA the ACCC is required to release public reports. The preparation of annual substantial reports containing a large amount of data, such as the 300 plus page airport monitoring report, involves a significant ongoing resource commitment for the Government as well as for the industry.

3.3 Access regulation and aviation infrastructure

The national access regime under Part IIIA of the CCA has been applied to airport services. In addition industry specific access regulation in s.192 of the Airports Act applied to airport services up to 2003. The airport specific access framework applied to newly privatised airports as a transitional measure in the privatisation process. Under this framework airport services which met general criteria were automatically declared by the Minister of Transport for access under the national framework unless airport operators had had an access undertaking (under s.44ZZA of Part IIIA of the TP Act, now the CCA) developed and accepted by the ACCC within the first twelve months of privatisation. The criteria for an airport service to be a 'declared service' under the airport specific access regime were based on whether the service was "necessary for civil aviation and provided by significant facilities that could not be economically duplicated".[21] The ACCC had the power to interpret the application of the Minister's declaration criteria and therefore whether specific services were covered.

Taking into account the declaration processes under Part IIIA of the CCA and s.192 of the Airports Act, there have been four cases where negotiate-arbitrate regulation has been considered for airport services. There has also been a case under Part IIIA involving the supply of jet fuel services to airlines using Sydney Airport which was initiated by the Board of Airline Representatives in Australia (BARA)[22]. Under the Part IIIA declaration process the NCC has recommended declaration of airport services in two cases and in a third case recommended not to declare the services associated with the supply of jet fuel. There were two cases where the ACCC was required to interpret the application of the access provisions under the Airports Act. In one case the ACCC determined that the service, a landside service, was a declared service.[23] In another case, the ACCC considered the case should not be declared because of regulatory overlap.[24]

The airport specific access provision were more streamlined and less complex than the declaration process under the national access arrangements. The ACTO[25] and Virgin Blue[26]

[21] Criteria s.192(5) of the *Airports Act 1996*

[22] See National Competition Council (NCC), (2012). Jet Fuel Supply infrastructure at Sydney Airport, Application under s. 44F of the Competition and Consumer Act 2010 for declaration of services provided by the Caltex Pipeline and the joint user hydrant installation at Sydney Airport, Final Recommendations, 13 March.

[23] Australian Competition and Consumer Commission (ACCC) (1999). Determination Pursuant to section 192 of the Airports Act 1996 - Delta Car Rentals, Statement of Reasons, April.

[24] Australian Competition and Consumer Commission (ACCC) (2001). Draft Determination: Application by Virgin Blue in respect of certain terminal services at Melbourne Airport, Pursuant to section 192 of the Airports Act 1996, Statement of Reasons, October.

[25] Australian Competition Tribunal (2000). Decision: Re Sydney International Airport [2000] ACompT (1 March 2000).

[26] Australian Competition Tribunal (ACT) (2005). Virgin Blue Airlines Pty Limited, (including summary and determination) ACompT 5 (12 December 2005).

declaration processes under the general Part IIIA provision were time consuming, costly and complex. Since these declaration processes were undertaken amendments to the CCA have introduced time limits in Part IIIA processes. The airline application for declaration of jet fuel facilities in 2012 was a comparatively expeditious process.

In all cases where declaration has occurred a negotiated solution has resulted. In the Virgin Blue case arbitration on landing charges was commenced following declaration of Sydney Airport's domestic landing services in 2005 but resolved through negotiation shortly after commencement. [27] The availability of a declaration-negotiate-arbitrate process under the national access regime can enhance incentives to achieve negotiated outcomes and provide a means of obtaining access to services on reasonable terms and conditions *if* negotiations fail. The potential for airport users to adopt binding dispute resolution increases the countervailing power of users. Further, regulatory intervention under this approach is narrowed down to areas of disagreement under this approach.

The ACCC has not accepted any access undertakings for airport services to-date. Two privatised airports, Perth and Melbourne airports, attempted to develop and have access undertakings accepted by the ACCC within the first twelve months of privatisation.[28] The undertakings did not proceed. Under the Part IIIA national access regime access undertakings are legally enforceable documents which implies that they have to satisfy interpretation by a court. It is seems likely that the variety, multi-dimensional nature and complexity of airport services are unlikely to suit the stringent requirements associated with access undertakings. Further, changing market circumstances and the complexity of airport services may lead to many variations to undertakings over time.

The applicability of the national access regime to airport services may have been limited due to amendments to the declaration criteria in 2010 which required that declaration of services in a particular market should lead to a *material* increase in competition in at least one dependent market.[29] Under this higher threshold for declaration it is likely that in circumstances where the airline market is considered the dependent market, effective competition in that market is likely to lead to an interpretation that the level of additional competition that would result from declaration of airport services would not be 'material'. If this is the case, airport services are less likely to meet the declaration criteria under Part IIIA. The situation may also be similar for airport services provided to other users, such as those using landside access. The Productivity Commission's recent review of the national access regime makes recommendations for changes to the declaration criteria which have the potential to further reduce the applicability of the regime.

It is important in assessing regulation, such as the national access regime, to avoid an overly negative view of regulation. The potential costs of regulation and the potential for regulatory errors can be highlighted and the potential benefits from regulation insufficiently recognised. The regulation of Airservices Australia over the last decade provides some examples where regulation is likely to have had positive impacts on efficiency.[30] For example, the ACCC has encouraged

[27] ACCC media release: ACCC welcomes commercial resolution of access dispute between Virgin Blue and Sydney Airport, 24 May 2007, MR130/07.
[28] ACCC Media Releases, 13 May 1998, no. MR086/98 and 29 May 1998, no. MR095/98
[29] CCA 2010, s.44G(2) "(a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;"
[30] See reports and submissions on Airservices price notifications on ACCC website at: http://www.accc.gov.au/regulated-infrastructure/airports-aviation/airports-aviation-projects

Airservices to improve its performance indicators with the assistance of its customers, to establish a long term approach to its pricing and to improve consultation with both large and small customers. Further, discussion of regulation often focuses on the level of prices at the expense of other issues which have been important for users of infrastructure services, such as the structure of prices and non-price issues such as quality of service.

While the Productivity Commission and the industry consider that negotiations between airports and airlines have improved relative to the price cap period, difficulties in negotiations under price monitoring remain at some airports as identified in the 2006 and 2011 Productivity Commission reviews. A light-handed approach to airport regulation has been favoured in Australia. However, if the national access regime has less relevance for airport services, it could be argued that there are no effective and acceptable regulatory frameworks available to support a light-handed negotiation approach. The potential availability of a stronger regulatory measure, such as the prospect of a dispute resolution process, such as an arbitration, is then absent.

4. Reform of the prices surveillance provisions in Part VIIA of the CCA

4.1 Regulatory approaches need to take into account technological developments and changing market circumstances

Aviation infrastructure is a key industry sector which has been covered by the prices surveillance part of the CCA. Rapid technological change has affected air navigation services as well as airports and market conditions have changed over time. One consequence of this is the increasing size of investments in aviation infrastructure. The development of long term contracts between airport operators and airlines as the vehicle for provision of airport services has increased. In comparison to the position at the time of privatisation, Australia's largest airports are experiencing increasing congestion of their infrastructure. The proposed new runways for Melbourne, Brisbane and Perth airports and the development of a second airport in Sydney reflect the growing demand for aviation infrastructure. At the same time airlines using Australia's aviation infrastructure are operating in a very competitive market and experiencing low or negative profitability.

Connectivity between airside and landside transport modes is important. The cost to passengers of using landside transport can be significant relative to the cost of an airline ticket. Landside services have changed over time. Congestion issues associated with landside access have become more significant.

Given the changing market circumstances for aviation infrastructure, and the issues associated with the design of economic regulation under part VIIA discussed above, the general provisions in Part VIIA of the CCA relating to economic regulation need to be reformed. Further, economic regulation under Part VIIA of the CCA has also applied and could apply to other industries in the future.

4.2 Reforms to economic regulation that should be considered

i. A range of regulatory measures which are alternative and/or complementary should be available in competition legislation which are appropriate for different circumstances

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and Arblaster, M. (2012), 'Comparing consultation on investment and technology decisions in air traffic management in Australia and the UK', *Journal of Air Transport Management,* Volume 22, July, pp. 36 - 44.

The CCA should contain alternative and complementary tools which can be used for economic regulation which allows economic regulation that is appropriate for the particular circumstances to be applied when some form of economic regulation is considered warranted.

Light-handed approaches to regulation are generally favoured in comparison to more heavy handed approaches. Experience with light-handed approaches to regulation in Australia and New Zealand suggests improvements to current regulation in the CCA could be achieved. The availability of a range of regulatory measures already in legislation is likely to make light-handed regulatory measures more effective because 'credible' alternatives available in the event that a stronger regulatory measure needs to be applied are available.

The *broad* approach adopted in New Zealand provides an example. Following a general review of regulation in New Zealand, new provisions relating to economic regulation were introduced into the Commerce Act and passed as the *Commerce Amendment Act 2008*. The Amendments provide for a broader range of regulatory tools under the Commerce Act compared to the single price control measure previously available under Part IV, so that 'fit-for-purpose' regulatory instruments can be applied to regulated goods or services if appropriate.[31] The Amended Commerce Act allows for different types of regulation in different industry circumstances with a consistent set of principles applying across industries.

ii. Accountable and systematic review processes for invoking or removing regulation should be considered

The neutrality of regulation would be enhanced, compared to current regulation under Part VIIA, if processes for reviewing regulation were made consistent across industry and accountability measures related to decisions on recommendations were included in legislation. The legislated accountability measures for Ministerial decisions on the outcome of inquiry review processes contained in the amended Commerce Act provide an example.

iii. Consideration should be given to replacing the price monitoring function with information disclosure regulation

Consideration should be given to replacing price monitoring with information disclosure regulation. Additional transparency of company performance is important in circumstances where firms have market power and in industries undergoing microeconomic reform. Transparency under the CCA could be achieved more effectively by replacing price monitoring with information disclosure regulation. Information disclosure regulation would allow the information required to be disclosed to be in specified formats so that information is consistent between entities, such as airports. However, on its own the limitations of what can be achieved by information disclosure regulation need to be recognised. The absence of a regulatory agency involved in regularly interpreting the data is more likely to make this the case.

Two types of information disclosure seem appropriate; disclosure of publicly available information and disclosure of information under confidentiality arrangements to facilitate negotiations.

[31] Telecommunications services are an exception and regulated by the New Zealand Commerce Commission under the *Telecommunications Act 2001*.

a. Information disclosure could allow some information suitable for public accountability to be made publicly available through companies placing it on their websites. This would allow more timely information to be available and lower the administrative costs to the Government. Publicly available information could be used by government policy departments, interested parties including those undertaking benchmarking studies and in regulatory reviews. However, avoidance of detailed information of the type normally required for price determination under economic regulation seems desirable so that information disclosure is not considered 'de-facto' price regulation and significant compliance and administrative burdens are avoided.
b. Negotiation between firms and industry could be facilitated by requiring specified relevant information necessary for commercial negotiations to be disclosed by firms to users under confidentiality arrangements.

iv. The design of price control regulation in Part VIIA should be improved

Although rare, there are likely to be some situations where individual price negotiations are not practical and where some form of direct price control could be warranted, air navigation services are a possible example. Prices surveillance under part VIIA of the CCA is no longer 'fit-for-purpose' regulation. Prices surveillance needs to be replaced with legislative provisions that are suitable for privatised infrastructure as well as publicly owned infrastructure services. Price control regulation also needs to accommodate long-term approaches to pricing, such as price caps or price paths, and to allow a variety of approaches to pricing to be used depending on the industry circumstances, such as the 'building block' approach or top down price-based approaches.

v. Careful design of regulated dispute resolution processes would support negotiations

For situations where infrastructure service providers have significant market power and negotiated approaches to price and service requirements are desired, then the availability of regulated dispute resolution can promote efficient infrastructure services and protect users from abuse of market power. Regulated dispute resolution is a self-executing policy which can narrow the scope of regulation through providing focused and appropriate remedies to identified specific instances of potential abuse of market power. The system should be as simple and as cost effective as possible but at the same time it is important that there are incentives for parties to settle disputes commercially rather than appeal to regulatory intervention.

The availability of different types of dispute resolution in circumstances of significant market power may be appropriate. In Canada, for example, amendments to the *Canadian Transportation Act 1996* (CTA) on 26 June 2013 increased the types of arbitration available for resolving disputes between rail companies and shippers. Final-offer arbitration[32] has been available under the CTA for resolution of disputes between shippers and carriers in certain circumstances and has been applied to rail and marine services.[33] Final-offer arbitration is designed to overcome concerns that parties

[32] Final-offer arbitration refers to arbitration in which both parties are required to submit their final offer to an arbitrator, and may choose any offer upon the arbitrator's discretion. This procedure gives each party an incentive to make a reasonable offer. The purpose of this type of arbitration is to counter arbitrators' tendency to make compromise decisions halfway between two parties' demands. The arbitrator must select the position of one of the parties and cannot select a compromise position.[West Des Moines Education Asso. v. Public Employment Relations Board, 266 N.W.2d 118, 119 (Iowa 1978)]
[33] *Canadian Transportation Act 1996,* Part IV, ss. 159 – 169.3

will position themselves for regulatory intervention through arbitration in negotiations and therefore resort too readily to arbitration. The provision is primarily used for issues relating to the prices that are intended to be charged. New arbitration procedures were added in the recent amendment to settle disputes between a shipper and a railway company regarding the establishment of service agreements.[34] In Canada there is provision for the parties to undertake mediation under the arbitration provisions.

[34]Ibid, Part IV, ss. 169.31 to 169.43