

Has reform of economic regulation under Part VIIA of the  
*Competition and Consumer Act 2010* been forgotten?

Submission in response to the Draft Report of the Competition Policy Review

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The Draft Report on the Competition Policy Review identifies that competition policy is:

“...aimed at improving the economic welfare of Australians. It is about making markets work properly to meet their needs and preferences.

In the Panel’s view, competition policy should:

- make markets work in the long-term interests of consumers;
- foster diversity, choice and responsiveness in government services;
- encourage innovation, entrepreneurship and the entry of new players;
- promote efficient investment in and use of infrastructure and natural resources;
- establish competition laws and regulations that are clear, predictable and reliable; and
- secure necessary standards of access and equity.” (Draft Report, p.4)

In its comprehensive review the Panel’s report does not appear to have actively considered reform of the Prices Surveillance provisions contained in Part VIIA of the Competition and Consumer Act 2010, in particular the provisions relating to price monitoring and prices surveillance. In my submission on the Review’s Issues Paper I focused on Part VIIA outlining the case for reform of these provisions.

I consider that Part VIIA fails the 1<sup>st</sup> and 5<sup>th</sup> principles of the six principles that the Panel identified that competition policy should achieve (above). In particular, Part VIIA is not ‘fit for purpose’ because it does not have the attributes that it effectively makes “markets work in the long term interests of consumers” and that it is a competition law that is “clear, predictable and reliable”. Additionally, Part VIIA appears to have been overlooked in Draft Recommendation 46 relating to “access and pricing regulator functions”.

My submission on the Issues Paper provided a general assessment of the Prices Surveillance part of the CCA (pp.5-6). I also addressed issues associated with the application of Part VIIA to aviation infrastructure in my submission (pp. 6-9). This submission on the Draft Report should be read in conjunction with my previous submission on the Issues Paper.

Key issues with the Prices Surveillance provisions in Part VIIA of the CCA

The prices surveillance provisions contained in Part VIIA of the CCA involves economic regulation that is *not* “clear, predictable and reliable”. It conflicts with best practice regulatory design in a number of important respects:

- i) The policy objectives associated with the prices surveillance provisions of the CCA do not reflect today’s circumstances, they were developed in a different era and were related to different policy objectives than the ones that they have been applied to in the 21<sup>st</sup> century. As a result the legislation contains a number of defects.
- The legislative criteria guiding the operation of Part VIIA have not changed since the legislation was enacted in 1983 although they include reference to an

outdated industrial relations framework which cannot be clearly related to pricing in Australia in today's environment.

- The assessment process under the Act is outdated. There have not been any changes to the legislative provisions that govern the assessment processes and time frames associated with prices surveillance although significant procedural adaptations have had to be made.
- The language used in part VIIA is not user friendly, nor easy to interpret in today's environment.

ii) Regulation under Part VIIA is not neutral and independent:

- 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. This contrasts with the approach taken in the national access regime where decisions on regulation are made by independent agencies under legislative criteria, or if made by a Minister after an assessment by the National Competition Council (NCC) under legislative criteria can be independently reviewed.
- Ministerial directions can be given under s. 95ZH influencing the approach the ACCC takes to evaluating pricing proposals.

iii) 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.

#### Application of Part VIIA to aviation infrastructure

Aviation infrastructure is an industry where the prices surveillance provisions contained in Part VIIA have been applied in all their forms since 1991. Important lessons on the attributes and suitability of these provisions as a form of economic regulation can be observed from this experience:

#### Price monitoring<sup>1</sup>

- Price monitoring under Part VIIA is likely to create uncertainty because there are no credible consequences associated with any identified adverse performance identified from monitoring. 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

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<sup>1</sup> See also 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. An offprint of this publication has been posted to the Competition Policy Review Secretariat.

the light handed approach in both the 2006 and 2011 inquiry reports. However, there does not appear to be a credible threat of stronger regulation under the existing regulatory framework.

- Monitoring data is hard to interpret because it is not necessarily comparable over time nor between airports. There are not common methodologies for data preparation applied across airports. Where concerns are identified from monitoring data these are hard to resolve or have not been resolved in Productivity Commission reviews of the regulatory framework.
- Productivity Commission reviews of the price monitoring of airports have not been able to make definitive assessments of airport performance and have not relied on information produced in the ACCC's monitoring reports

#### Prices Surveillance

- There were considerable legal difficulties in applying CPI-X price caps under the prices surveillance provisions to newly privatized airports in 1997 and 1998.

#### An alternative approach to price monitoring

In my June 2014 submission I proposed that information disclosure regulation with the backup of binding dispute resolution is an alternative approach to price monitoring in situations where the infrastructure provider has significant market power. Two forms of information disclosure regulation seem appropriate; provision of general information to the community that can be used in benchmarking studies and provision of information on a confidential basis to users to facilitate negotiation.

#### Summary

The Prices Surveillance provisions of Part VIIA of the CCA do NOT meet the principles established by the Competition Policy Review and should be reviewed.