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## **1. INTRODUCTION**

### **Context – the changing environment for Airport and Air Navigation Services.**

The inquiry into the Prices Surveillance Act, which together with the Airport's Act 1996 underpins the regulation of Aviation charges, comes at a time of major regulatory change and indeed structural change in the provision of Aeronautical and Air Navigation Services. The prices oversight regime applicable to these major infrastructure services and monopoly suppliers must be considered in light of these developments and structural changes. To give a sense of the magnitude of change in the provision of Aeronautical and Air Navigation services, it may be useful to outline some of the major changes:

- |            |  |
|------------|--|
| 95/96      | The FAC Aeronautical Charges regime moved from a "Network" price to a "location specific" price in anticipation of Airport Privatisation.  |
| 96/97      | Tranche 1 Airports were sold to private operators under a CPI-x regulatory regime to be administered under the Prices Surveillance Act by the ACCC and reviewed after 5 Years.   |
| 97/98      | Airservices Australia introduces "location specific" pricing for Aviation Rescue and Fire Fighting.  |
| 97/98      | Tranche 2 Airports sold to private operators under a CPI-x regulatory regime to be administered under the Prices Surveillance Act by the ACCC and reviewed after 5 Years.  |
| 98/99      | Airservices Australia introduces "location specific" pricing for Terminal Navigation Services.   |
| 98–ongoing | Various ACCC determinations, discussion papers and guidelines developed giving greater clarity to the regulatory framework applying to Airports.   |
| 99         | Minister for Transport and Regional Services issues a policy statement "a measured approach to Aviation Safety." contemplating the introduction of contestability into some parts of Airservices business.   |
| 2000       | ACCC issues a booklet titled "Airports Review" outlining the proposed timing and process for the conduct of its review of the CPI-x regulatory regime.   |
| 2000       | CASA issues Notices of Proposed Rule Making proposing amendments to Civil Aviation Safety Regulations for discussion which, when put into effect, will allow for introduction of competition in the provision of Tower Services, Aviation Rescue and Firefighting and maintenance of aeronautical telecommunication equipment. |

The changes outlined above are, in the main, implementation of micro economic reform policies – driving toward improving transparency and where possible competition. Having said this, by their very nature, aeronautical facilities at airports and the provision of air navigation services have natural monopoly characteristics. There is limited and in most cases no substitutability between Airports and as such, there is no effective competition to drive and promote economic efficiency in provision of Airport and Air Navigation services. As such, from a user's perspective, some form of price oversight and regulation is required.

## **2. APPLICATION AND OBJECTIVES OF THE PRICES SURVEILLANCE ACT WITH RESPECT TO AIRPORTS**

### **The structure and objectives of Prices Oversight of Aeronautical Charges.**

During 1996/97 and 1997/98 the Commonwealth Government granted long-term leases on all Commonwealth owned airports with the exception of Sydney Airports and Essendon Airport in Melbourne. At the same time the Government established a comprehensive economic regulatory framework to apply to the privatised airports and Sydney (KSA) Airport.

In pursuing the privatisation of airports, the government was aiming to “improve the efficiency of airport investment planning and operations and is expecting increasingly innovative airport management.” (i) The prices oversight arrangements have been designed to promote operation of the airports in an efficient and commercial manner, while at the same time protecting airport users from any potential abuse of market power by airport operators. The Government has given the ACCC primary responsibility for administering the regulatory arrangements.

A second objective of the regulatory regime was to drive more commercial relationships between airport operators and airport users.

“It is the Government’s intention to step back from setting prices at individual privately-leased airports, and to provide a framework in which – over time – airport operators and their customers are encouraged to negotiate directly, and resolve prices rather than involve the Government of the day” (ii)

The regulatory framework comprises a package of measures under the Airports Act 1996, the Prices Surveillance Act 1983 and the Trade Practices Act 1974. The measures include:

- a CPI-X price cap on aeronautical charges;
- prices monitoring of aeronautically related charges;
- transparency measures, including airport specific financial reporting and quality reporting requirements; and
- airport specific access arrangements.

In many respects, the regulatory arrangements applying to Airports mirror those in other industries (gas, electricity and telecommunications). Access arrangements under the Airports Act link in the provisions of Part IIIA of the TPA. (iii) Indeed, part IIIA of the TPA has been applied by the ACCC in relation to Airports (iv) The price cap is similar in principle to the price cap in place with respect to a number of services provided by Telstra. Similar quality of Service monitoring arrangements apply in gas and electricity.

(i) [Peter Harris FAS Aviation DOTRS – address to The Airport Privatisation Conference; 15 September 1996]

(ii) [DOTRS PRICING POLICY PAPER]

(i) [S192 Airports Act 1996]

(iv) [DELTA case].

The regulatory framework applies to Melbourne, Perth and Brisbane (“Tranche 1 Airports”) and Adelaide, Alice Springs, Canberra, Coolangatta, Darwin, Hobart, Launceston, and Townsville Airports. (“Tranche 2 Airports”). Sydney (Kingsford Smith) Airport, while still under Government Ownership, is subject to similar arrangements (excluding the CPI-X price cap on aeronautical charges).

The primary instruments relating to Airports regulation relevant under the Prices Surveillance Act are a number of Treasurers Declarations to the ACCC, in particular *Declaration 14 (tranche 1 & 2) Declaration 83 (tranche 1) Declaration 84 (tranche 2)* which categorise Aeronautical Services into Regulated and Monitored Services (s27A of Prices Surveillance Act).

*Declaration 13* specifies CPI-x formula and sets the x factor for each airport. *Declaration 13* also contemplates “pass through” the cap of Necessary New Investment (“NNI”) and Government Mandated Security Charges. *Declaration 15, 16 & 85* apply to Sydney (KSA) Airport and, with the exception that Sydney KSA Airport is not subject to a price cap (but is subject to prices surveillance and monitoring) are substantially the same as the Declarations applying to Tranche 1 & 2 Airports.

Ansett at all times endeavours to negotiate with Airports on each issue as the preferred course of action.

In relation to declared services, the ACCC has established effective procedures for consulting and working with users and Airport Operators in forming its views on price increases it will permit to pass through the price cap. Whilst Ansett may not always agree with the ACCC’s decision, we have always felt our views have been sought and heard by the ACCC in the course of their consideration. The processes in place are fair and lead to outcomes Ansett in general, views as appropriate.

Having the ACCC as an ‘ independent third party’ who must review proposals also in our mind works to modify behaviour of Airport Operators who know ACCC approval must be gained and tend, in general, to adapt their approach accordingly.

There is in Ansett’s view an observable difference in Airport Operator behaviour in respect of ‘notified or declared’ services; monitored services and those services not subject to ACCC scrutiny under the Prices Surveillance Act.

### **3. APPLICATION AND OBJECTIVES OF THE PRICES SURVEILLANCE ACT WITH RESPECT TO AIR NAVIGATION SERVICES**

Our experience with ACCC oversight of ASA is less than that of the Airports. This is by virtue of the fact that we are dealing with one service provider who, since the ACCC determinations referred to below were made in 1998, has either reduced or held prices with no real price increases. (see our comments below on the inability of ACCC to require price reductions).

### **4. LIMITATIONS ON THE EFFECTIVENESS OF PRICES OVERSIGHT UNDER THE PRICES SURVEILLANCE ACT.**

**(a) Time constraints placed on the ACCC**

One problem Ansett has experienced in the administration of the Airports Regulatory Regime by the ACCC has been the strict 21-day timeframe imposed on the ACCC.

We have experienced situations where Airports have apparently represented to the ACCC that copies of notifications have been sent to Airlines when, in fact, we have not seen or do not see copies of the notification for up to two weeks after the notification is lodged. We are then required to put less than complete submissions, drafted in haste to the ACCC. Often, such behaviour occurs after Airports have themselves evidenced a reluctance to fully consult regarding the charges impact of their proposal.

We are aware that in relation to some areas – most noticeably the Perth and Brisbane Airport Proposals for ‘Necessary New Investment’ (“NNI”) a phrase not defined in the Declaration of the price cap – the process took a good deal longer than 21 days. This was, we understand due to the airports agreeing to lodge a proposal for consideration rather than a notification which would have triggered the 21-day timeframe.

Ansett can understand the frustration felt when processes continue over a period seen as unduly long. For its part, Ansett attempts to act in good faith with all of our Airport suppliers and whilst we do not disclose copies of ACCC submissions to others, we do provide copies of our submission to the individual airport in question.

It is fair to say that much of the regulatory regime for airports was loosely defined or not defined at all. Phrases such as NNI, Government Mandated Security, direct cost and the like have needed debate, consideration and interpretation. The ACCC, airport operators and airlines have all expended a good deal of time and energy considering these issues. If this has meant the first consideration took longer than we all would have liked, it has also meant we now have a clearer enunciation of the ground rules in each area, meaning future requests for increased charges on these issues should become relatively routine.

What is important to note however is that airport behaviour prior to notification has an impact on the timing of any approval. Where airports fail or refuse to consult where there is little transparent information provided or where airports shield information behind confidentiality agreements – Ansett and presumably other airlines will seek to obtain further information to allow us to make commercial submissions to the ACCC with a full understanding of the business impact for us.

Ansett recognises the timing of ACCC decisions is a critical factor. We acknowledge the importance of a clearly defined timeframe being imposed on the regulator in the context of the broader application of the Prices Surveillance Act when first drafted. We submit however with the current limited application of the Prices Surveillance Act to declared persons, the ACCC could and should be given greater discretion to extend the timeframe within which a decision must be made if circumstances warrant.

The circumstances which may warrant such an action could be defined eg: where the notification does not come after an appropriate user consultation process; where the notification has not been provided to users prior to, or at the very least, concurrent with lodgement of the notification with the ACCC. The major concern Ansett has with the 21 day timeframe is that we are often responding to proposals

we have not yet had an opportunity to consider in detail – and these are often complex and detailed proposals involving significant financial impact on Ansett's business.

Short of refusing to approve a notification, the ACCC must comply with the 21-day timeframe. It is Ansett's view that this lack of discretion ACCC can lead a potential abuse of process by some Airports.

The time taken to resolve issues such as these is a critical feature of any regulatory regime. Whilst Ansett has concerns regarding the 21-day time limit under the Prices Surveillance Act, our concerns would be heightened if legal action under part IIIA of the TPA were the only recourse. The Commission raised, in its issues paper, the questions whether part IIIA would be a sufficient substitute form of regulation for the Prices Surveillance Act, Ansett considers Para IIIA alone would be problematic. Litigation of this nature is costly and often takes considerable time (measured in years not months) from commencement to conclusion. This is more appropriate for ad-hoc issues in more competitive markets – not we submit as a central piece in a regulatory framework.

**(b) Lack of effective enforcement provisions under the Prices Surveillance Act**

Perhaps the most important limitation on the effective operation of the Prices Surveillance Act is the absence of effective enforcement measures by the ACCC. We note the Act's intent of 'prices oversight' and not 'prices control' however in our experience this is not always appropriate.

There are perhaps two standout examples of situations where the lack of enforcement powers has seriously undermined the Regulatory Regime for Airports.

The first and most striking is the Fuel Throughput levies proposed by Brisbane and Perth.

This matter began almost immediately after privatisation of these airports in 1997. The oil and airline industries had been objecting for considerable time to the introduction of fuel throughput levies at privatised airports across Australia. The levies proposed were in addition to already commercial rates of rental paid by the fuel companies for the site and pipelines used to refuel aircraft. No additional service or benefit was received or proposed for the additional impost. In June 1998, the ACCC issued a discussion paper. After gathering submissions from interested parties, the ACCC handed down its report on 'Fuel Throughput Levies' pursuant to those monitoring functions in December 1998.

That December 1998 report found:

*"Introduction of fuel throughput levies will significantly increase the price of refuelling services at airports where they are introduced.*

*The report concludes that the fuel throughput levies introduced by BAC and proposed by WAC are not justified in terms of increases in costs or through offsetting reductions in other charges.*

*There is a strong case that large airports have market power in the market for refuelling services.*

*There is a strong case that by introducing fuel throughput levies airport operators have taken advantage of market power that they have in the provision of refuelling services.*

*The commission recommends that stricter forms of prices oversight should be considered in relation to aircraft refuelling services*

*The commission recommends that refuelling services are included within a CPI-x price cap” (v)*

As required, the ACCC presented those findings and its recommendation that refuelling services be included in a CPI-x price cap to the Treasurer in December 1998.

It is now May 2000 yet despite a number of representations to the Treasurer and the Assistant Treasurer no action or response to the ACCC’s recommendation has been forthcoming.

In the absence of any decision by the Treasurer, despite the ACCC’s clear recommendation, the Airports are imposing this charge on fuel suppliers who are passing it on to the Airlines.

That the ACCC is unable to enforce their clear recommendations or expect prompt responses from Government to their recommendations is difficult to accept as being in the interests of economic efficiency.

Aircraft Refuelling Services were not included as ‘declared’ services but rather were included as services subject to prices monitoring. (vi)

In announcing the monitoring declaration, the Treasurer emphasised that:

“Price monitoring will allow the ACCC to collect data where the airport operator may have scope to exercise market power but where coverage of the services under the more formal price cap is not considered warranted. Any abuses of market power will be the trigger for consideration of stricter forms of prices oversight.” (vii)

In the absence of regulatory oversight, the fuel levy arrangements will constitute ‘a licence to print money’ and this surely cannot have been the Commonwealth’s intention.

A second issue raising similar concerns has arisen. Again, Perth and Brisbane Airports have introduced “Ground Access fees” and are applying these charges to Taxi operators entering the airport. A number of other Airports are considering similar proposals of varying application and magnitude.

(v) [ACCC Report Pursuant to the Commissions Monitoring Functions Under the Prices Surveillance Act 1983: *Fuel Throughput Fees December 1998*]

(vi) [Declaration 14 & Declaration 16]

(vii) [Treasurers Office, Press Release number 55, 25 May 1998]

The ACCC in its Regulatory Reports for Brisbane and Perth comments:

“In late April 1998, the Commission became aware that BACL proposed to introduce a fee for taxis of \$1 per pick up. Pricing Declaration 83 requires that increases in charges for ‘aeronautical’ services be notified to the Commission. ‘Aeronautical’ services under that Declaration include, “landside roads, landside lighting, and covered walkways”. The Commission formed the view that the taxi charge introduced by BACL would fall under this definition of an ‘aeronautical’ service.

As can be seen from the above tables, if taxi charges are not included in the price cap, then BACL reduced charges by 2.78% against the required 2.4% reduction\* for the 1998/99 period. If taxi charges are included in the price cap, then based on Commission estimates, BACL over recovered revenue in the range of 2.35% to 3.3%. The regulatory framework allows for an over recovery of revenue in any given year, provided that the revenue amount is passed back to users within two years.”

\* This figure includes the CPI-X required reduction of 3%, less the percentage of revenue under recovered by BACL in the 1997/98 period of 0.6% (viii)

“In late August 1998, the Commission became aware that Westralia proposed to introduce a fee for taxis of \$1 per pick up (unbooked) and \$2 per pick up (pre-booked). Pricing Declaration 83 requires that increases in charges for ‘aeronautical’ services be notified to the Commission. ‘Aeronautical’ services under that Declaration include, “landside roads, landside lighting, and covered walkways”. The Commission formed the view that the taxi charge introduced by Westralia would fall under this definition of an ‘aeronautical’ service.

“On the bases of the above reconciliation (including taxi revenue), Westralia reduced charges by 3.2% instead of the required 4.24% reduction. This amounted to an over recovery of revenue of 1.05%, or approximately \$169,000. The regulatory framework allows for the over recovery of revenue in any given year, provided that the revenue amount is passed back to users within two years. In order to comply with the framework, Westralia should pass back the over recovery to users.” (viii)

Ansett’s view is when (and then only to the extent that) such fees recover the capital cost incurred in developing necessary new infrastructure, it may not be inappropriate to use a mechanism such as ground access fees to recover that cost. The cost should however be agreed, rate of return and related issues approved and the charge should end upon full cost recovery being achieved.

The Airports involved, we understand, hold a different view. In the case of Brisbane and Perth, no additional infrastructure was provided. In the case of other airports that have discussed the introduction of these fees with Ansett, either no additional infrastructure is proposed; the charge proposed has no relationship to cost (but is rather considered a ‘concession fee’) and there is no proposal to drop the charge upon full cost recovery being achieved.

### **(c) Scope of monitored services and ‘declared’ services**

The Treasurer’s declarations define “notified” (or “declared”) services as “aeronautical services limited to:

- (a) Aircraft movement facilities and activities.
- (b) Passenger processing facilities and activities” (ix)

(viii) [REGULATORY REPORT, BRISBANE AIRPORT 1998/99]

(ix) [Declarations No.83, No.84 and No.85]



Declarations made by the Treasurer define the ACCC's formal monitoring role in relation to "aeronautical related services". Aeronautical related services are defined as:

- (a) Aircraft refuelling
- (b) Aircraft maintenance sites and buildings
- (c) Freight equipment storage sites
- (d) Freight facility sites and buildings
- (e) Ground support equipment sites
- (f) Check-in counters and related facilities
- (g) Car parks (including public and staff car parking but not valet parking)

In Ansett's view the categorisation of these services as monitored services is inappropriate. Given the limitations on the ACCC's powers in relation to monitored services and the market power exerted by Airport Operators in relation to these services, we consider they are more appropriately 'declared' services.

(d) **Inability of ACCC to require price reductions.**

This issue is worthy of comment in considering the effectiveness of prices oversight. The trigger for ACCC review of prices of regulated suppliers, under the Prices Surveillance Act, is a proposal to increase prices.

The ACCC in its determination of charges proposed by Airservices in 1998 held that issues which warranted further investigation and analysis had been raised which could not be addressed in the 21-day timeframe (or a 3-day agreed extension). Since the Prices Surveillance Act does not provide for the ACCC to reduce prices, the ACCC decided to cap prices at a lower level than proposed pending further consideration of the issues. (x)

It is not difficult to envisage a situation where, for any number of reasons, price reductions would be appropriate – and could be shown to be appropriate - but ACCC powers are not triggered as there is no proposal to increase prices. This may be, for example, where a declared provider is shown to be making excessive profits. It may also occur where a declared provider uses profit of one location to cross subsidise other locations –contrary to location specific pricing principles. It is easy to envisage this occurring within the current Airservices charges structure for example.

This issue is an important one and Ansett submits the powers of the ACCC under the Prices Surveillance Act in respect of declared persons should extend to investigation of potential over recovery and/or cross subsidy. The ACCC should have power to initiate such investigations and to enforce any recommendations it may make if any over recovery or a cross subsidy issue is found to exist.

(x) [Statement for the public register on proposed Airservices Australia terminal navigation and rescue and firefighting charges June 1998]

## **5. THE IMPORTANCE OF THE COMPETITION PRINCIPLES AGREEMENT OBJECTIVES IN REGULATORY REGIMES.**

Whilst not specifically related to the Prices Surveillance Act, Ansett would like to comment on a number of issues we feel adversely impact on the Airport's regulatory regime as recommendations made by the Commission in this inquiry have the potential to lead to modification of that regime.

Location specific pricing (as opposed to network pricing) of monopoly services (ie. breaking up the FAC network, introduction of location specific prices within the Airservices network of towers and Rescue and Fire Fighting Services) would we believed lead to improved levels of transparency and the appropriate price signals for the efficient use of those services.

We are growing increasingly concerned at a number of events which are, in our view, eroding any benefits or structural efficiencies seen from location specific pricing.

For example, while Airservices was moving toward location specific pricing and passing on cost reductions, the government in the 99/00 budget introduced significant fuel levies to subsidise a number of rural and regional towers. Efficient economic signals are not being sent under a regulated location specific pricing regime where new cross subsidies are introduced under a non-regulated mechanism by government. The fuel levy is paid primarily by regular public transport domestic airlines and to a lesser extent by regional airlines. The subsidy is provided to maintain regional and General Aviation Airports, the majority of which do not have regular public transport domestic operations, many of which do not have regional services.

## **6. THE NEED FOR CONSISTENCY BETWEEN REGULATORY REGIMES**

The need for a consistent economic regulatory regime over Airports and Air Navigation Charges cannot be over emphasised. In the Airline Industry worldwide, these charges are grouped and managed together under a "user charges" banner. This is an efficiency issue for users and is due to the similar nature of the charges. Both are strategic, critical services supplied by (often the same) monopoly service providers.

## **7. OBSERVATIONS ON THE COST OF COMPLIANCE WITH THE EXISTING REGULATORY REGIME**

Ansett does not consider that, to date, the cost of compliance has been a concern. From time to time we have engaged consultants or legal advisers to assist us in preparation of submissions but do not find we have incurred undue costs – certainly no more than we would otherwise in negotiation of transactions of similar magnitude with Airports or Airservices.

## **8. ACCC REVIEW OF THE REGULATORY REGIME APPLYING TO AIRPORTS**

The prices oversight arrangements in place for Airports are scheduled for review by the ACCC after five years of operation. The ACCC has issued a booklet entitled "Airports Review - Approach and Guidelines" outlining the timeframe and proposed

approach to this review. It is appropriate and timely that the inquiry is taking place in the lead up to the ACCC review. Stimulation of thought and debate within the industry is constructive and can only assist in achieving an optimum regulatory regime going forward. It is interesting to revisit the ACCC's statements, made in 1998, in relation to this review – statements Ansett still considers appropriate and supports in full.

“The Government has stated that a key objective of the review is to ensure that the aviation industry retains appropriate protection. One of the main considerations for the Commission in conducting the review will be airport operator conduct. The Commission will take a firm line on inappropriate conduct. If operators have a track record of abusing their market power the Commission is likely to recommend more stringent regulatory arrangements for different airports so that inappropriate conduct at one airport will not impact adversely on another operator.

At the same time, the review also represents an opportunity for reduced regulatory obligations. The main factor in the ACCC's review is operator conduct”. (xi)

In closing we make the following remarks:

It is important to keep in mind the objectives of the regulatory regime quoted in part 2 of the submission. Ansett considers the Prices Surveillance Act to be a useful mechanism to use although it has had limitations – originally being drafted for a broader regulatory purpose.

We consider regulation under the Prices Surveillance Act (particularly if modified to address our concerns) or indeed regulation as used in other regulated industries such as electricity or telecommunications, where separate codes are developed, would be appropriate. These issues however are issues Ansett is currently grappling with and has not yet formed a final position on. They are issues which will be directly addressed not only in the review but also in the ACCC review on airports.

As indicated earlier, Ansett has a keen interest in the Commission inquiry. Should you wish to discuss any aspect of this submission, please do not hesitate to contact me on (03) 9623 3991.

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23 May 2000-05-23

(xi) [ACCC PAPER: Economic Regulation of Airports – An overview 1998]

