Australian Airports Association Submission to the Competition Policy Review

Prepared for the Competition Policy Review Panel

Australian Airports Association

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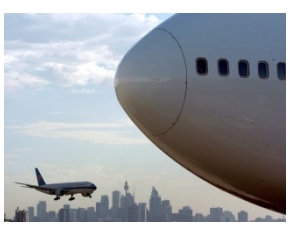
AUSTRALIAN AIRPORTS ASSOCIATION







Introduction

The Australian Airports Association (AAA) is the national industry voice for airports in Australia. The AAA represents the interests of more than 260 airports and aerodromes Australia wide – from local country community landing strips to major international gateway airports. There are a further 100 corporate members who provide goods and services to airports. The Charter of the AAA is to facilitate co-operation among all member airports and their many and varied partners in Australian aviation, whilst maintaining an air transport system that is safe, secure, environmentally responsible and efficient for the benefit of all Australians.

Australia's airport network represents key infrastructure essential to the country's economic and social advancement. The AAA accordingly welcomes the opportunity to participate in, and comment on, the Competition Policy Review being undertaken by the Panel.

This submission does not seek to respond to all the many and varied issues raised by the Panel in its April 2014 Issues Paper. Rather it focuses only on those issues that are of the greatest relevance and importance to airports. In addition to this Association submission, some airports may lodge their own individual submissions. At the very least those submissions would be expected to complement this submission by elaborating on the operating environment of the particular airport. However, it may also be that some individual member airports could have a different view on some matters canvassed in this submission. Should that be the case, we would expect that particular airport to raise those issues in their own individual submission, and we ask that those submissions be given full consideration in their own right.

Executive Summary

Australia's airports make a unique contribution to the economic and social well-being of Australia and its people. Not only do they generate employment for those who directly work for or at the airport itself, but through facilitating the movement of people and goods they allow the entire economy and community to function more effectively.

Laws inhibiting pro-competitive conduct by airports

There are, nevertheless, a number of current Commonwealth laws that inhibit the capacity of Australia's major capital city and metropolitan airports to compete either amongst themselves, with overseas airports or with other Australian businesses, and which thereby preclude these airports from maximising their potential contribution to the Australian economy:

- The full and undiluted imposition on Australia's much smaller "metropolitan" airports (Bankstown and Camden in Sydney, Essendon and Moorabbin in Melbourne, Archerfield, Gold Coast and Townsville in Queensland, Parafield in Adelaide, Jandakot in Perth, Launceston in Tasmania and Alice Springs in the Northern Territory), of a range regulatory controls specifically tailored to the much larger major capital city airports (Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Canberra and Darwin) imposes a disproportionately high regulatory cost on those metropolitan airports. While airports already compete amongst themselves as vigorously as they can within the present regulatory framework, this disproportional impact on metropolitan airports does nevertheless inhibit the capacity of at least some of them to compete even more strongly with the capital city airports to which they could offer a viable geographic alternative for some traffic.

- Commonwealth legislation which generally precludes land at all airports leased by the Commonwealth from being used for otherwise economically viable residential, community care, pre-school, educational or hospital purposes precludes those airports offering competition to other adjoining or comparable land providers in Australia's major population centres;

- Curfews and other operating restrictions (such as those at Sydney, Adelaide and Gold Coast) create competitive distortions, particularly in the international traffic market; and

- Bilateral Government-to-Government air traffic agreements inhibit large airports from competing with overseas airports.

Laws inhibiting anti-competitive conduct by airports

The economic realities of building and maintaining the major infrastructure required for an airport of even modest size dictate that there can only be one or at most two or three airports within relatively close proximity to one another. Accordingly, where the boundaries of markets are drawn relatively narrowly, it is easy to perceive any

airport as being a monopoly or oligopoly supplier within the market thereby defined for it (although this initial perception fails to recognise the strong competition between airports and the very strong countervailing power of airlines). It is thus vitally important that legislation designed to regulate anti-competitive conduct by monopolists or oligopolists is very sensitively drafted to avoid any unwarranted intrusion into ordinary competitive commercial activity.

Section 46 of the *Competition and Consumer Act 2010* achieves this sensitivity by focussing on the use of market power for anti-competitive purpose, rather than simply by reference to the effect in the market.

This fundamental character of section 46 should not be changed.

Laws inhibiting anti-competitive conduct against airports

The market power of any airport is significantly constrained by the countervailing power of the airlines that use its facilities. Generally the *Competition and Consumer Act 2010* places appropriate controls on the use by airlines of their countervailing power in their dealings with airports. However, recent conduct by certain airlines does raise an issue about whether these controls actually extend to all inappropriate use of that power.

The Australian Competition and Consumer Commission is currently challenging as unconscionable the conduct of a major supermarket chain in its price negotiations with its suppliers.

Some airlines have recently sought discounted landing and other charges from airports, with express or implied suggestions that the failure to provide such discounts may lead to the withdrawal of airline services to those airports and the communities they serve and/or the unilateral non-payment of some of the charges by airlines. These suggestions have been made notwithstanding that various affected airports are already operating at a loss and are therefore reliant for their ongoing operation upon substantial subsidies from their local government owners. In these circumstances, acceding to demands for further discounts would simply transfer costs generated by airline-driven demand and recent abnormal competitive behaviour between airlines on to ratepayers.

If the Commission's challenge to supermarket conduct succeeds, then the current provisions of the Competition and Consumer Act 2010 may well provide an adequate mechanism for unacceptable exercise of countervailing power as a purchaser. But, if the Commission's challenge fails, it may well be appropriate for detailed consideration to be given as to when, and to what extent, Australia's competition laws ought to apply to demands for commercially unviable pricing.

There is a delicate balance to be drawn between a powerful purchaser seeking the best available commercial price, and that same purchaser abusing its power to secure a commercially unsustainable price. The Panel may wish to consider whether the current law strikes an appropriate balance in all the circumstances.

LAWS INHIBITING PRO-COMPETITIVE CONDUCT BY AIRPORTS

Australia's airports make a unique contribution to the economic and social well-being of Australia and its people. Not only do they generate employment for those who directly work for or at the airport itself, but through facilitating the movement of people and goods they allow the entire economy and community to function more effectively.

At the same time a number of Commonwealth laws inhibit the capacity of Australia's major capital city and metropolitan airports to compete either amongst themselves or with other Australian businesses. Such laws thereby preclude these airports from maximising their potential contribution to the Australian economy.

Laws inhibiting competition between airports

In the 1990s the Commonwealth "privatised" airports previously operated by the Federal Airports Corporation at:

- Sydney, Bankstown and Camden;
- Melbourne, Essendon and Moorabbin;
- Brisbane, Archerfield, Gold Coast, Mt Isa and Townsville;
- Adelaide and Parafield;
- Perth and Jandakot;
- Hobart and Launceston;
- Canberra; and
- Darwin, Alice Springs and Tenant Creek.

Rather than allow those airports, once privatised by leases granted to private sector entities, to be regulated by Commonwealth, State and Territory laws of general application, the Commonwealth enacted the *Airports Act 1996* and Regulations made under it.

This legislation imposes or provides a framework for the imposition on affected airports of a number of regulatory regimes – in particular for land use, planning and building controls. Moreover, by use of the prices surveillance provisions in what is now the *Competition and Consumer Act 2010*, the Commonwealth retained the capacity to impose a regime of economic regulation.

Over time, the Commonwealth has lightened the economic regulatory burden on airports – both by not applying it to most airports and by limiting the constraints imposed on those that remain subject to this economic regulation. As a result, there is considerable granularity in the current economic regulation of airports, so that the regulatory burden is greatest on the largest airports and least or non-existent on the smallest airports.

In contrast, over time the Commonwealth has increased the intrusiveness and burden of the land use, planning and building controls and allowed for no granularity in the terms in which they are applied to fundamentally different classes of airports.

As things currently stand, Australia's much smaller "metropolitan" airports (Bankstown and Camden in Sydney, Essendon and Moorabbin in Melbourne, Archerfield, Gold Coast and Townsville in Queensland, Parafield in Adelaide, Jandakot in Perth, Launceston in Tasmania and Alice Springs in the Northern Territory) are subject to the same land use, planning and building controls as the much larger major capital city airports (Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Canberra and Darwin).

These controls impose a significant cost on airports, requiring the preparation of complex and highly detailed 20-year master plans every 5 years and additionally complex and highly detailed major development plans for a wide range of significant development activities, even where these have been forecast in an approved master plan. Each of these plans is required to be the subject of extensive consultation with a range of State and Territory Ministers, planning and land use authorities, local government authorities and the public at large.

There is no granularity in the way in which these controls are applied across airports. The controls that apply at the largest airport apply in the same terms at the smallest airport, regardless of its size or the nature of its traffic flows. Given that the metropolitan airports generally have a greatly diminished revenue base over which they can amortise the inherent associated cost, the regulatory burden is very disproportionately weighted against them.

As a result, the capacity of at least some of them to compete more strongly than they can at present with the capital city airports, to which they could offer a viable geographic alternative for some traffic, is significantly inhibited. Airports already compete against one another as vigorously as they can within the constraints of the present regulatory framework– for example, to attract international airlines, to attract internal leisure travel, and to attract airline maintenance service bases. However, if there were greater granularity and proportionality in the way in which the land use, planning and building controls apply to airports of different sizes, there would be a prospect of even greater competition by smaller airports with larger airports. The very significant differences between the operations at airports, such as those exemplified by (say) Brisbane, Archerfield and Gold Coast, highlight the disproportionality of applying the same land use, planning and building controls to vastly different airports, rather than tailoring controls so that they better reflect the scale of different airports.

It is a commonly accepted principle in Australia that regulation should intrude into the conduct of business affairs only when so required by the public interest, and only to the extent necessary to protect that public interest.

The AAA believes that the land use, planning and building controls of the *Airports Act 1996* infringe against this principle by imposing too heavy-handed a regime on Australia's metropolitan airports.

Laws inhibiting competition by airports

The *Airports Act 1996* also inhibits airports from competing with other off-airport businesses in a manner that the AAA believes is inappropriate.

The Act provides that it is an offence to undertake at an airport what is termed a "sensitive development" without Ministerial approval, and that this approval can only be granted in what the Minister is satisfied are "extraordinary circumstances". Essentially this means that airport land cannot be used for otherwise economically viable residential, community care, pre-school, educational or hospital purposes. In contrast, land adjoining an airport is eligible to be approved for used for these purposes; so too is land that might be distant from an airport but nevertheless subject to comparable noise or other activity characteristics that can be mitigated to allow use for these same purposes.

Particularly in the major cities where the supply of urban land is constrained, the AAA believes that these basically inflexible constraints on the capacity of airports to offer competition to other adjoining or comparable land providers should be reconsidered.

LAWS INHIBITING ANTI-COMPETIVE CONDUCT BY AIRPORTS

The economic realities of building and maintaining the major infrastructure required for an airport of even modest size dictate that there can only be one or at most two or three airports within relatively close proximity to one another.

Accordingly, where the boundaries of markets are drawn relatively narrowly, it is easy to perceive any airport as being a monopoly or oligopoly supplier within the market thereby defined for it (although this initial perception fails to recognise the strong competition between airports and the very strong countervailing power of airlines). For example, geographic boundaries might be tightly drawn on the basis that passengers seeking to visit a particular city will not accept a flight to another city as an acceptable alternative unless the two cities are in very close proximity. Again, an airline wishing to operate an aircraft of a particular size will only be able to do so at airports with the requisite runway length and strength, and traffic volumes may mean that only one of multiple airports in a city can economically provide such a facility.

It is thus vitally important that legislation designed to regulate anti-competitive conduct by monopolists or oligopolists is very sensitively drafted to avoid any unwarranted intrusion into ordinary commercial and competitive activity.

Section 46 of the *Competition and Consumer Act 2010* provides that:

1) *A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:*
    a) *eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
    b) *preventing the entry of a person into that or any other market; or*
    c) *deterring or preventing a person from engaging in competitive conduct in that or any other market.*

Section 46 achieves the necessary sensitivity by focusing on the use of market power for anti-competitive purpose, rather than simply by reference to effect in the market.

This fundamental character of section 46 should not be changed.

LAWS INHIBITING ANTI-COMPETITIVE CONDUCT AGAINST AIRPORTS

Even where an airport is the monopoly supplier of airport services in its area, it is far from powerful. There are many constraints on the extent to which an airport, and particularly a regional airport, can flex the commercial power often associated with a monopoly business.

In particular, airlines and other airport users possess marked countervailing power. A smaller airport negotiating with any significant airline has far less capacity to press a commercial outcome than a larger airport (and the Productivity Commission has found that even the largest Australian airports have not abused whatever market power they may have).

Airline businesses are themselves so cost sensitive that they will abandon routes if regional airport charges are increased to a point approaching anywhere near a monopoly rent, or simply refuse to pay even though they may continue to use the airport – indeed, it seems likely that at around half of Australia's regional airports, airport charges do not even reach cost recovery.

Additionally, airports often have to compete with one another, particularly to attract the location of airline maintenance facilities or to secure RPT services where there are other airports within a relatively close distance. Generally the Competition and Consumer Act 2010 places appropriate controls on the use by airlines (or other monopoly or oligopoly purchasers) of their countervailing power in their dealings with airports (or other monopoly or oligopoly suppliers). However, recent conduct by certain airlines does raise a question about whether or not the current provisions of the Act deal adequately with all potential use of such countervailing power.

The AAA notes that the Australian Competition and Consumer Commission is currently challenging as unconscionable the conduct of a major supermarket chain in its price negotiations with its suppliers.

Some airlines have recently sought discounted landing and other charges from airports, with express or implied suggestions that the failure to provide such discounts may lead to the withdrawal of airline services to those airports and the communities they serve and/or the unilateral non-payment of some of the charges by airlines. These suggestions have been made notwithstanding that various affected airports are already operating at a loss and are reliant, for their ongoing operation, upon substantial subsidies from their local government owners. In these circumstances, acceding to demands for further discounts would simply transfer costs generated by airline-driven demand or recent abnormal competition between airlines on to ratepayers.

If the Commission's challenge to supermarket conduct succeeds, then the current provisions of the Competition and Consumer Act 2010 may well provide an adequate mechanism for unacceptable exercise of countervailing power as a purchaser. But, if the Commission's challenge fails, it may well be appropriate for detailed consideration to be given as to when, and to what extent, Australia's competition laws ought to apply to demands for commercially unviable pricing.

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