



Australian Competition and Consumer Commission

Access to airport services

Supplementary submission to the Productivity Commission's Inquiry into the Price Regulation of Airport Services

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1. Introduction

The Australian Competition and Consumer Commission (“the Commission”) recently submitted a submission in response to the Productivity Commission’s *Issues Paper on Price Regulation of Airports Services*.

The earlier submission did not deal with the question of the implications of access regulation for pricing of airport services. This supplementary submission considers whether there is a need for an access regime conferring rights on third parties to use airport facilities, and if so how such a regime should interrelate with price regulation of airport services.

Section 1 reviews the current airports access regime. Section 2 reviews the experience with that regime to date. Section 3 considers the relationship between the existing access and prices oversight regimes at airports. In sections 4 and 5 the Commission considers whether there is an “access problem” at airports, and if so whether a price cap regime could address that problem. It is concluded that a specific access regime is required, but that this should be coordinated with the price cap regime. Section 6 sets out some considerations in relation to the design and implementation of an access regime at airports.

2. The current access regime applicable to airports

Under the existing regime, a number of services provided by airport operators could potentially be declared under Part IIIA of the *Trade Practices Act 1974* (TPA). Section 192 of the *Airports Act 1996* (Airports Act) provides a mechanism for “automatic” declaration of “airport services” in relation to core regulated airports for the purposes of Part IIIA of the TPA. The declaration is triggered by a determination by the Minister, within a designated period after the sale or grant of lease (as relevant – see s 192(6)), that each airport service in relation to the airport is a declared service for the purposes of Part IIIA TPA. The Minister is not obliged to make a determination under s 192(1).

Where such a determination has been made, all “airport services” at the relevant airport are deemed to be declared for the purposes of Part IIIA. This means, amongst other things, that the negotiate/arbitrate model under Part IIIA is applicable to those services.

Pursuant to s 192(5), “airports services” means:

- a service provided at a core regulated airport, where the service:
 - (a) is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and
 - (b) is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated.

Thus, specific services are not defined or listed under the existing regime. Services are only declared if they constitute “airport services” under section 192.

The Commission has been given the power, under s 192(4A) and (4B), to make a written determination that a specified service or use of a facility is or is not an “airport service” for the purposes of the automatic declaration mechanism set out in s 192. A determination made by the Commission is a disallowable instrument¹. The Commission has indicated that it will take s 192(5) into account when exercising its powers under s 192(1), (4A) and (4B).²

It is important to note that this mechanism does not displace the application of Part IIIA to those airports in relation to which a determination has been made under s 192(4A) or (4B). A person is free to apply for declaration under Part IIIA even where such a determination has been made.

Declaration of a service provided by an airport operator does not, of itself, entitle a person to access to a service. “Rather, declaration opens the door, but before an applicant to use the service can become entitled to use the service the applicant must progress to the second stage and either reach agreement for access with the service provider or, in default of agreement, have its request for access determined through an arbitration by the [ACCC]”³.

Declaration of an airport service has the effect of preventing an airport operator from submitting an undertaking in relation to those services: see s 44ZZB TPA.

3. Experience to date with application of the access regime for airports

The ACCC and other regulatory bodies have been required to consider and make decisions in relation to these access provisions on a limited number of occasions. This has been in the context of both declaration of services and the assessment of proposed undertakings.

3.1 Declaration

The Minister has made determinations under s 192(1) that airport services are declared at the core regulated airports for the purposes of Part IIIA of the TPA. In addition the following determinations have been made or sought under s 192(4A) or (4B) of the Airports Act:

- a determination by the Commission dated April 1999 that certain landside vehicle access services are airport services under s 192(4A) Airports Act (“the Delta determination”); and
- an application by Virgin Blue to the Commission dated March 2001 for a determination under s 192(4A) Airports Act that certain services at Melbourne Airport are airports services (“the Virgin application”).

In addition the Minister declared certain services at Melbourne and Sydney International Airports under s 44H of TPA. The Minister’s determination was

¹ Such determinations are reviewable by Parliament, and by the courts on very limited grounds.

² ACCC, *Section 192 of the Airports Act – Declaration of airport services: A draft Guide*, October 1998.

³ Australian Competition Tribunal, *Sydney Airport International* [2000] ACompT 1 at paragraph 7 (the SIA decision).

appealed by the Federal Airports Corporation, but upheld by the Tribunal (“the SIA decision”).

No arbitrations have been conducted under Part IIIA in relation to airports services.

3.2 Undertakings

Core regulated airports were given the opportunity to submit an undertaking to the ACCC under s 44ZZA TPA within the “designated period” referred to in s 192 Airports Act. Perth and Melbourne Airports took advantage of this opportunity and submitted proposed undertakings to the Commission in 1998. Their proposed undertakings were not accepted by the Commission, and the Minister made a determination in relation to each of those airports. No other core regulated airport has submitted an undertaking pursuant to s 44ZZA TPA.

4. Comparison of and interrelationship between the current access and price surveillance regimes

4.1 Services covered by the regimes

The *Prices Surveillance Act 1983* (PS Act) provides a framework for the application of a price cap regime to declared aeronautical services.

While there is significant overlap between the price cap regime established under the PS Act and the access regime established under the Airports Act and Part IIIA, the scope of coverage of the two regimes (in terms of the services to which they apply) is not identical. Further, there is no mechanism for coordination of the determination of the scope of the regimes.

- In relation to each service that is declared pursuant to the PS Act there is a possibility that the service (or part of it) is declared under s 192 Airports Act or that it could be declared under Part IIIA TPA. The question is whether the service satisfies the criteria in s 192(5) Airports Act (or is the subject of a determination under s 192 (4A) or (4B)) or s 44H TPA respectively.
- In relation to those services that are declared under the PS Act but do not constitute “airport services” under s 192 there is also the possibility for the airport owners to submit undertakings under s 44ZZA TPA.
- However the services listed in Declarations 87 – 89 and Direction No 21 do not necessarily coincide with the definition of “airports services” in s 192 Airports Act or the services that could be the subject of declaration or an undertaking under Part IIIA TPA. In other words, services that are the subject of prices surveillance may not be the subject of Part IIIA and vice versa. In general terms, it would seem that section 192 probably covers a slightly wider range of services than those listed in the PS Act declarations – this issue is discussed in more detail in section 6 below.

4.2 Operation of the regimes

The defining feature of the access regime is that it establishes a right of access to services. Persons seeking to use the relevant service or facility are entitled, under certain conditions, to use that service/facility. This is not the case in relation to the prices surveillance regime; that regime provides no entitlement to use the services covered by a declaration or a monitoring direction under the PS Act.

The regimes are separate and the procedures applicable under each regime are very different. In particular –

- under the access regime it is necessary to apply to the Commission or NCC/Minister for a determination that the relevant service is declared under Part IIIA; in contrast, under the PS Act the services that are the subject of the regime are defined in the relevant instruments.
- the price cap regime is applied by means of assessment of notifications relating to proposed price increases; in contrast the access regime only comes into play when an access seeker either seeks a determination that a service is declared, or seeks arbitration of an access dispute in the event that negotiations fail.
- the current prices surveillance regime does not apply to regulate or set the price of individual services; rather, it applies to a bundle of services, allowing operators to adjust prices within an overall price cap applicable to the bundle as a whole. In contrast, the access regime requires the identification of separate services, and both declaration and arbitration apply to individual services so identified.

4.3 Use of new facilities

The construction and use of new facilities raises an area where there is potential overlap between the regimes. The provisions of the relevant directions under the PS Act relating to new investment applicable to each regulated airport require the Commission to have regard to -

- “support from airport users with a significant interest in the investment for the operator’s proposals, including in relation to charging changes”, and
- “the extent to which the proposed investment will facilitate the operations of new entrants to domestic or international aviation”⁴.

The application of these “necessary new investment” (NNI) provisions thus necessarily requires the Commission to assess whether any agreement has been reached between the airport operator and users in relation to use of the proposed facility. As a result, there is potentially some overlap between the consideration of a new investment proposal and the ability of access seekers to obtain access to those facilities. Virgin Blue’s request for determination about whether Melbourne Airport’s common user domestic terminal is declared is an example of such overlap. The terminal has already been assessed for purposes of a price cap pass through.

⁴ See Direction No. 20(12)(c) and (i). See also Direction No 18(2) in relation to Sydney (Kingsford Smith) Airport, although not in the context of a price cap regime.

4.4 Conclusions

The coexistence of two separate but uncoordinated regulatory regimes applying to regulate the behaviour of infrastructure owners in relation to the provision of the same or a similar set of services results in considerable regulatory complexity and potential uncertainty. This raises the cost of investment. It also creates a potential for forum shopping and gaming by interested parties if the regimes are not coordinated.

This overlap between the regimes requires the following issues to be addressed:

- is there a likelihood of airport operators denying or restricting access to services at airports or charging excessive prices for such access?
- could a price cap regime prevent such behaviour?
- if an access regime is needed, what are the implications of having two separate regimes? Should they be coordinated, and if so how?

5. Is there a likelihood of airport operators denying or restricting access to services at airports?

This section considers the question whether there is an “access problem” justifying a regime imposing obligations on airport operators to provide access to airport facilities.

Unlike some other natural monopolies, airport owners/operators tend on the whole not to be vertically integrated in relation to the services they provide. That is, there are few services provided at major Australian airports in respect of which the owner/operator also operates in a related upstream or downstream market. It can thus be expected that the owner/operator will normally have little incentive to restrict access to its services. This suggests that disputes with customers or users of the airport about the services provided at the airport are likely to relate to price rather than whether access is granted or the non-price terms and conditions of access.

That said, the Commission is inclined to think there is some merit in the argument expressed by BARA that “airports have the ability and potential to damage competition in upstream and downstream markets. Hence a static analysis of vertical integration within the airport industry is not a relevant basis for applying or removing access regulation ...”⁵. Vertical integration can be achieved in a variety of indirect ways, such as through contractual arrangements.

Experience with the access regime to date would seem to confirm that there are a number of indications that airport operators may have reasons for restricting access to certain facilities, either by denying access altogether or by imposing non-price terms and conditions that make it difficult for access seekers to compete in related markets. Further, these reasons may arise independently of vertical integration.

For example:

⁵ See the Productivity Commission’s Position Paper in relation to the Review of the National Access Regime at p 48.

- The SIA decision and the Delta Determination demonstrate that airports may have reasons for wanting to either control the entities to whom access is granted, or restrict the terms and conditions upon which access is granted. This could be the case in relation to services on either the landside or airside of the airport. This may have the effect of preventing an access seeker from being able to compete in a downstream market.

In the case of SIA, SACL sought to deny access to its facilities by certain providers of ramp handling services. That denial did not arise from vertical integration but “because [SACL] appears to want to control and decide itself who shall operate ramp handling activities at the airport”⁶. SACL cited issues such as congestion, space management and safety as reasons for needing to restrict the number of ramp handling providers at the airport.

- Airport operators may have an interest in the downstream market. The market for vehicle access provides an example of this. In the case of Delta, the applicant was in direct competition with Melbourne Airport, which operates on-site car parks and has a contractual interest in the revenues derived from the provision of on-site car rental.
- The recent entry of new airlines has, in various contexts, raised issues about access to terminals and related facilities. Specifically, the negotiations at both Adelaide Airport (MUIT) and Melbourne Airport (MUDT) have suggested that new entrants may not always want to use the services or facilities that are offered by airports, or not on the terms and conditions offered. Those terms and conditions may relate to matters other than price – for example, the location of the terminal facilities, or whether the new entrant uses a new multi-user terminal, and if so on what conditions.
- In the context of new facilities there may be an incentive for the operator to frustrate access negotiations to achieve maximum prices or optimal non-price terms and conditions.

In these circumstances, the Commission submits that there is a need to retain a regime entitling third parties to have access to essential airport facilities and services, and providing a mechanism for ensuring fair and reasonable terms and conditions for the use of those services and facilities.

6. Could a price cap regime enable effective access?

In the Commission’s view a stand-alone price cap regime is unlikely to constitute an effective tool for enabling effective and efficient access to bottleneck airport facilities in all circumstances, for the following reasons:

- The regime is unlikely to contain any obligation to provide access to the services or facilities covered by the regime. In the absence of such an obligation, users and potential users have no entitlement to use those services or facilities or even negotiate with the airport in relation to their use.

⁶ See SIA decision at paragraph 12.

- If the price cap controls changes in average prices over a basket of services, it will provide little control over the level of prices (or changes in prices) of specific services within that basket. While the setting of starting point prices may provide some opportunity to establish appropriate access prices, if the price for a particular service is subsequently increased, the operator retains the discretion to rebalance prices within the basket. Provided it does so, a user has no right to a lower price.
- A price cap regime is unlikely to provide any mechanism for the regulation or oversight of non-price terms and conditions of use of the services/facilities. Operators can effectively deny access by seeking to impose unreasonable terms and conditions on users or new entrants.
- As discussed above, the provisions relating to assessment of new investments that operate within an overall price cap may be inadequate of themselves to properly address issues of access to or use of new facilities.

7. Designing and implementing an access regime for airports

7.1 Problems with the existing access regime

There are a number of disadvantages associated with the existing access regime which it would be desirable to avoid in designing an access regime for airports going forward. The Commission would highlight the following:

- The interrelationship between the access and price cap regimes is uncertain and unnecessarily increases the cost of regulation. See section 6.2.
- The declaration procedures under Part IIIA constitutes a substantial barrier to access. Particularly small users are faced with a significant financial and administrative burden in obtaining a determination that a particular service is declared, and thus that the user has a right to negotiate access. Even the procedures under s 192 Airports Act impose an administrative burden on users to clarify whether the service to which they seek access is in fact a declared service. See section 6.3.
- The negotiate/arbitrate model similarly presents a number of obstacles. These are discussed more fully in section 9.2 of the Commission's earlier submissions and in the Commission's submissions to the Productivity Commission's review of the national access regime. See section 6.4.

7.2 Coordination of the price cap and access regimes

Duplication of regulatory regimes has significant costs and disadvantages which should be avoided if possible. The Commission submits that there are strong grounds for coordinating the price cap and access regimes.

In this respect it should be borne in mind that the rationale for both access and price oversight regimes is essentially the same: the existence and potential use of market power, and ultimately the efficient use of and investment in airport infrastructure. That market power arises from the fact that the infrastructure underpinning the provision of certain core airport services has natural monopoly characteristics.

As a matter of principle, the access regime should only apply where, or to the extent that, the price cap is unable to address the access problem. That is, where a price cap is implemented access regulation should provide a secondary remedy to supplement the shortfalls of price regulation.

New facilities

Previous sections of this submission have argued that a hybrid approach should be adopted to dealing with new investment in facilities at the airport that will be used to provide the declared services. This process would involve the Commission assessing major new investments to determine the extent to which costs should be incorporated in prices for the declared services. In doing so, it would inevitably be necessary for the Commission to have regard to the interests of users, and to determine whether the users support the investment.

Such a process does not sit comfortably with the existence of a separate mechanism enabling users to arbitrate access disputes relating to the same facility, as is currently the case, at least where those disputes relate to the price to be charged for use of the facility.

In the context of new facilities it may be preferable to integrate, or at least coordinate, the price cap and access mechanisms as far as possible. One approach could be to require access determinations to reflect the terms of a decision relating to pass through of a new investment under the price cap regime.

7.3 Declaration: mechanisms and criteria for determining the services covered by an access regime

Previous sections of the Commission's earlier submission have discussed the appropriate scope of services to be covered by a prices oversight regime for airports.

There are various possible mechanisms for declaring services under an access regime:

- (a) application of the generic declaration provisions of Part IIIA;
- (b) application of a more limited or "streamlined" set of criteria, such as those set out in section 192 Airports Act;
- (c) "up-front" specification of certain declared services; or
- (d) a combination of an up-front list of declared services and a mechanism for declaration of other services (or variation of the up-front list) in the future.

Declaration under Part IIIA

The difficulties experienced with the existing declaration mechanisms under the Part IIIA suggest that a declaration procedure whereby access seekers must first seek declaration of services before being entitled to access imposes a significant barrier to entry. This would seem to be unnecessary in the context of an industry where there is clearly a need for an effective access regime and a great deal is known about the nature of services provided at airports.

The section 192 process

The process provided by s 192 does not entirely avoid these difficulties because in practice users will require a determination by the Commission in order to have certainty about the status of the service to which they seek access. While the criteria to be applied are more limited than those in Part IIIA, there is still room for significant uncertainty about their application in particular circumstances.

In the event that a mechanism such as that set out in s 192 were to be retained, the Commission considers that the current criteria set out in section 192 would need to be reviewed in certain respects:

- section 192(5)(b) refers to “facilities that cannot be economically duplicated”. In contrast, Part IIIA refers to facilities in relation to which “it would be uneconomical for anyone to develop another facility to provide the service”. In the Commission’s view the discrepancy is undesirable and the terminology in Part IIIA is to be preferred.
- The Commission notes that, unlike Part IIIA, section 192 does not contain any explicit requirement that access to the service promote competition in another market. On the one hand it would not seem to be appropriate to require an airport operator to provide access to services where access would not promote downstream or upstream competition. For example, an operator may itself provide services in a downstream market that are necessary for the operation or maintenance of civil aviation services at the airport, and which are provided by means of significant natural monopoly facilities, but in respect of which it does not have significant market power. In those circumstances it is questionable whether access is an appropriate remedy. Examples may be the provision of car parking (as opposed to the facilities enabling third parties to provide car parking services) or ramp handling services (as opposed to the facilities enabling third parties to provide those services).

On the other hand, making declaration subject to a detailed analysis of the relative merits of access versus other rationing mechanisms (as was the case in the SIA decision) potentially overly complicates the declaration process. Regulated access does not of itself prevent the operator from applying transparent and objective mechanisms for rationing access on non-discriminatory terms, although it would prevent them from applying mechanisms that deny access. Declaration could thus provide operators with an incentive to ensure that such mechanisms are in place, thus minimising the risk of dispute. Sufficient is known about airports services to be able to conclude that a basic obligation to provide open access provides the

first best means of ensuring effective competition. Issues such as the number of organisations to whom access should be provided or the terms and conditions upon which access is to be provided are matters to be determined at the next stage after declaration – ie. by agreement, or in default of agreement by resolution of an access dispute⁷.

Up-front specification of declared services

Another option would be the specification of an initial set of services as declared services. The Commission sees considerable merit in this approach. In identifying the services that should be covered by the price cap regime a great deal will be known about the operator's market power in respect of core airport services. In its Draft Guide the Commission undertook some preliminary analysis of the services that are likely to satisfy the criteria set out in s 192(5) Airports Act. The result of that analysis was that it is strongly arguable that most of the services that are declared under the PS Act are likely to satisfy those criteria. The discussion in the Commission's earlier submissions suggests that it is likely that the services that have been identified as requiring prices oversight would satisfy the s 192(5) criteria.

It would be desirable to coordinate coverage of the price cap and access regimes as far as possible. However there may need to be some differences in the way that services are described for the purposes of setting a price cap, and their description for the purposes of access regulation. For example, closer consideration would need to be given to the question whether the specification of services for the purposes of access declaration would require a mechanism enabling the more detailed description of the particular facilities that are used to provide the service, or the specific use of those facilities constituting the service. It may be that this concern could be adequately met in the context of resolving a particular dispute (as part of determining the terms and conditions for access), rather than in the description of the service itself.

Further consideration would need to be given to whether the pre-existence of leases and other contractual arrangements governing the provision of certain services by the airport operator would also require differentiation between the services covered by the regimes. Even if these arrangements were considered grounds for exclusion of the relevant services from the price cap (as is currently the case), the Commission is of the view that there may be valid grounds for their inclusion in the access regime. A case in point is existing terminals that are subject to long term leases. In the Commission's view access to these facilities is important to enable new entrants to be able effectively to compete in related markets, and as a result the provision of these facilities (whether by the airport as owner or the lessee as operator of the facility) should also be subject to the third party access regime.

Initial list plus declaration mechanism

An up-front declaration of specified services at each airport should be coupled with the retention of declaration criteria, thus enabling declaration of other services in the future where they can be demonstrated to satisfy the criteria, or removal of services from coverage where it can be demonstrated that the criteria no longer apply.

⁷ See SIA decision at paragraph 128.

7.4 Form of access regulation

Once a service is declared, the question is what sort of access regulation should apply.

In designing an appropriate access regime the Commission endorses the Tribunal's observations that it is important not to encroach unnecessarily on the airport operator's freedom and need to manage the airport in the way it thinks fit, having regard to its legislative and commercial objectives.

Consideration must be given, for example, to the fact that the operation of the airport is constrained by environmental and safety regulation. Airport operators are required to establish Master Plans for the effective and efficient operation of the airport.

These factors suggest that, as far as possible, self-regulation should be preferred to regulation of access terms and conditions by either government or an independent regulator. There is a range of issues in respect of which the operator is probably best placed to determine how scarce resources should be allocated. The regulator is often not well placed to be making decisions on detailed issues of non-price terms and conditions.

These factors need to be balanced against the interests of third parties requiring use of the airport to compete in other markets, as well as the public interest in having competitive markets. As the Tribunal noted, "in general, economic efficiency is optimised by competition within and across markets that are unhindered by artificial barriers to entry". In short, freedom should be given to the operator to manage and operate the airport as it thinks fit, provided that in doing so it does not place constraints on competition in the markets in which services are provided⁸.

One way of dealing with these concerns would be to require the airport operator to submit for approval a set of terms and conditions for access, such as by way of an access undertaking or access arrangement. This document would set out –

- basic price and non-price terms and conditions applicable to the provision of the declared services at the airport.
- a dispute resolution mechanism.

A regime could be established to require such a regime to be implemented, in much the same way as access arrangements are established under the National Gas Access Code. Access undertakings would be submitted by each airport operator, and assessed separately.

However it must be acknowledged that experience with airport regulation in Australia to date suggests that there are a number of difficulties associated with putting in place *ex ante* terms and conditions for access to core airport services. These arise primarily from the fact that airports provide a range of interlinked but different (non-homogenous) services, and that the dynamics of the provision of those services is constantly changing in response to changing market conditions. As a result, it is

⁸ See SIA decision at paragraph 132.

difficult to establish generic terms and conditions that are sufficiently precise as to ensure that disputes will not arise in relation to their application in a particular case.

The other extreme is represented by the negotiate/arbitrate model of Part IIIA, whereby terms and conditions of access are not resolved until negotiations have failed and a particular access dispute has been notified for determination by the Commission. For reasons outlined above, in the Commission's view this process imposes an unnecessarily high barrier to achieving effective access.

Accordingly, the Commission is of the view that a middle ground should be sought. An alternative model could involve the imposition by law (whether in the enabling legislation or in subordinate instruments) of certain "standard access obligations". These obligations could provide that airport operators provide access to the declared services on the basis of non-discriminatory, objective and transparent terms and conditions. The obligations could also include an obligation to ensure that prices reflect costs.

Appropriate mechanisms would be required to enable the enforcement of those obligations, whether by way of court action initiated by the Commission and/or the arbitration of disputes as to whether those obligations have been fulfilled.

An example of such a regime is provided by the regime applicable in the United States, whereby airports must provide access on non-discriminatory terms. The FAA has the power to enforce those obligations by means of its financial controls. In the context of Australian airports, the legislative obligations could be enforceable in the courts. Alternatively, or in addition, access seekers could be empowered to notify disputes for arbitration; in that event, the arbitration should be limited to determining whether or not the legislative obligations have been complied with.

8. Conclusions

The Commission submits that –

- airport operators may have incentives to restrict or deny access to significant airport services with the effect of restricting competition in downstream markets;
- while recognising the need of operators to manage airport facilities, the promotion of competition means that some mechanism is required to ensure that access is not denied or restricted unreasonably;
- a price cap mechanism alone is not likely to be sufficient to address this problem: the imposition of an industry-specific access regime is required;
- if an access regime is to be retained, the existing access regime should be amended in certain respects, including –
 - the specification of certain up-front declared services, coupled with a mechanism for declaration of other services (or variation of the initial list) in the future;
 - amending the declaration criteria set out in section 192 Airports Act to bring them in line with Part IIIA in certain respects;
- consideration should be given to the imposition of standard access obligations on airport providers.