

Negotiate – arbitrate regulation: the experience with airports

Margaret Arblaster

Outline

- Economic regulation of airports in an international context
- The Australian experience of negotiate-arbitrate regulation of airport services
- Negotiate-arbitrate regulation as a form of regulation
 - Promotion of good economic outcomes
 - Where it may not promote good economic outcomes
- Summary and conclusions

Regulation of airports: an international context

- Trend over the last few decades has been for airports to be more independent from government, either as partially privatised or privatised entities
- Wide variety of airport circumstances and degrees of market power
- The degree of market power that an airport may have, has to be assessed on a case-by-case basis
- A spectrum of approaches to economic regulation and varied approaches to pricing aeronautical services
- Recent changes in regulatory frameworks
 - promotion of greater engagement and consultation between airports and airlines
 - reduction in regulatory intervention

Examples of some 'lighter' approaches to economic regulation of airports

Copenhagen - since 2008

- Framework based on a charges agreement being reached between airport and airlines with fall back to regulation if agreement not reached (includes service levels for selected areas)
- Copenhagen Airport is required to provide airlines with sufficient material to ensure an equitable and transparent process to negotiate from

Düsseldorf – since 2004

- An agreed negotiating framework developed between the airport and major airlines and representatives of smaller airlines, includes an explicit price cap formula
- If unable to reach agreement there would be regulation under the Luftverkehrs-Gesetz (i.e. the airport would have to seek approval of charges from the relevant transport authority)

Gatwick – 2014

- Move to relying on specific commitments on the level of charges and quality over seven years

Dublin – 2016

- A review recommends regulator should encourage constructive engagement and greater consultation but retain price cap

Economic regulation of airports in Australia

– *the history*

- A package of regulatory measures were applied to privatized airports from 1996:
 - price caps on aeronautical services
 - price monitoring of aeronautically related services
 - quality of service monitoring
 - national access regulation
 - industry specific access regulation
- From 2002:
 - price monitoring was applied to aeronautical charges
 - continuation of quality of service monitoring
 - reduction in the number of airports covered by regulation
 - price monitoring of car parks (introduced in 2008)

Overview of the application of access regulation to airports

The national access regime (Part IIIA of the *Competition and Consumer Act 2010 (Cth)*)

- negotiate-arbitrate provisions have been applied to airports
- access undertaking provisions – have not been implemented in an airport context
- amendments 2006 and 2010 - changed some threshold requirements for declaration and streamlined the institutional decision making processes (e.g. timeframes)

Negotiate-arbitrate regulation

- declaration of a service - first stage
- arbitration by the ACCC – second stage - If negotiations break down

The airport specific framework (s.192 of the *Airports Act 1996 (Cth)*)

- compared to the national access process, declaration process was substantially streamlined
- applied the national access provisions once a service was declared, i.e. arbitration if negotiations failed

Simplified comparison of the national access regime and airport specific access

National access regulation	Airport access provisions in Airports Act 1996 – repealed 6 September 2003
Application to National Competition Council (NCC) for declaration	Government declares airport services that meet airport specific criteria
NCC makes a recommendation to the Minister	ACCC assesses whether a service meets criteria if a user requests
Negotiate-arbitrate regulation applies to a declared service <i>unless</i> an appeal to the Australian Competition Tribunal (ACT) or the Federal Court occurs	Negotiate-arbitrate regulation applies to a declared service No appeal provision but ACCC decision is a 'Disallowable Instrument' in the Parliament
If negotiation fails, arbitration by the ACCC can occur	If negotiation fails, arbitration by the ACCC can occur
Possible appeal of an arbitration decision	Possible appeal of an arbitration decision

The experience of negotiate-arbitrate regulation of airport services

- Declaration under the national access regime and the airport specific access regime
 - three cases where airport services have been declared for access
 - National access regime - two cases
 - Airport specific access regime – one case
 - two cases where the regulation was *not* applied to airports services (and services provided at airports)
 - one case where an airline sought declaration but withdrew its application
- Arbitration
 - one cases where an arbitration was commenced but not completed
- In summary:
 - six cases where a user has initiated the regulatory process over a twenty year period

Summary of applications for negotiate-arbitrate regulation of airport services in Australia

Date of application	Applicant	Service	Airport	Legislation	Decision	Review of decision	Length of time
6 Nov. 1996	Australian Cargo Terminal Operators Pty Ltd (ACTO)	Hard stands and aprons for ground handling services	Sydney and Melbourne Airports	National access (Part IIIA of CCA)	Declaration	Australian Competition Tribunal	3 years 4 months
21 Oct. 1998	Delta Car Rentals	Access for dropping off and picking up passengers on terminals roads and use of landside roads	Melbourne Airport	Airports Act 1996 (s.192)	Declaration	Not possible	7 months
2 March 2001	Virgin Blue (1)	Low cost airport terminal for processing passengers	Melbourne Airport	Airports Act 1996 (s.192)	Not to declare	Not possible	8 months
1 Oct. 2002	Virgin Blue (2)	Landing services for domestic passenger aircraft	Sydney Airport	National access (Part IIIA of CCA)	Declaration	ACT and the Federal Court	4 years 5 months
27 Sept. 2011	Board of Airline Representatives of Australia (BARA)	Jet fuel supply infrastructure at Sydney Airport	Sydney Airport facilities owned by Caltex Oil and Joint User Hydrant Installation	National access (Part IIIA of CCA)	Not to declare	No reviews sought	8 months
8 August 2014	Tiger Airways Australia	Domestic terminal services	Sydney Airport	National access (Part IIIA of CCA)	Application for declaration withdrawn	Not applicable	Not applicable

Observations on the case history

- the applicants and the issues

- Most of the cases have been initiated by smaller market participants offering a service which is differentiated from larger more established airport users
- A variety of types of disputes where airport users have sought to apply negotiate-arbitrate regulation
 - two cases were initiated by non-airline users
 - issues in dispute have not been restricted to price
 - access to facilities to enable the provision of services (ACTO)
 - provision of additional services (Tiger)
 - quality of the service (Delta)

Observations on the case history - *the processes*

- Declaration cases under the *national* access provision
 - prior to legislative amendments declaration processes were very lengthy taking over 3 years
ACTO (1996) and Virgin (2002)
 - post legislative amendments the declaration process took 7-8 months
BARA (2011)
- Two cases involving interpreting the *airport specific* access declaration criteria took 7 – 8 months
 - Delta Car Rentals (1998) and Virgin (2001)

Summary of outcomes from declaration applications for airport services in Australia

Dispute	Was a negotiated outcome achieved without arbitration?	Other features of the outcome
Ground handling services	Negotiated outcome	Deficiencies in tendering process identified and guidelines proposed The Tribunal identified the importance new entrant access and variety of competitive strategies for competition
Access for dropping off and picking up passengers on terminals roads and use of landside roads	Negotiated outcome	The airport provided improved access to terminals for off airport car rental and car parking companies
Low cost multi-user domestic airport terminal for processing passengers	Outcome achieved under the price cap regulation which simultaneously applied at the time	The regulatory determination of the price for use of the terminal was significantly lower than that originally proposed by Melbourne Airport
Landing services for domestic passenger aircraft at Sydney Airport	Negotiated outcome	Arbitration was commenced but not completed
Jet fuel supply infrastructure at Sydney Airport	The services were not declared.	International airlines continue to be concerned about competitive conditions and the price of jet fuel at Sydney Airport
The price, quality and capacity for services at the domestic terminal at Sydney Airport	Negotiated outcome	

Observations on the case history

- *the outcomes*

- There has not been a rush to invoke declaration and arbitration
 - six cases in twenty years
 - Qantas dispute with Brisbane Airport over the funding of a new runway (2013-14) did not lead to an application for declaration
- Where airport services were declared, a negotiated outcome occurred and an arbitration either did not occur, or in the case where an arbitration was commenced, it was not completed
- Negotiate-arbitrate regulation has only been used in relation to services at Sydney and Melbourne airports, which are likely to have comparatively stronger market power compared to smaller airports

Negotiate-arbitrate regulation as a form of regulation – *promotion of good performance*

- Regulatory intervention is *minimized* because it relates to areas of dispute
 - e.g. Virgin (2002) declaration process restricted consideration to domestic runway services
- It is *effective* regulation
 - it has an ‘inbuilt’ threat of a stronger regulatory mechanism (i.e. arbitration) which is credible
 - issues of concern are resolved either through negotiation or through arbitration
- It can be applied to a range of circumstances where market power is exercised – *not just price*
- It can be used to address the concerns of a *range of users* – in the case of airports it has not just applied to airline users

Negotiate-arbitrate regulation as a form of regulation – *promotion of good performance* (*cont'd.*)

- The legislative framework under which negotiate-arbitrate regulation is exercised is governed by principles of economic efficiency
- There are appropriate checks and balances associated with the use of the regulation – appeals and reviews

Negotiate-arbitrate regulation as a form of regulation - *where it may not promote efficient outcomes*

- Markets where there is a bilateral market power between the supplier and the buyer of services
 - need effective competition between users to pass on the benefits of improved terms and conditions
- Situations of uneven bargaining power, where smaller users are not able to access negotiate-arbitrate regulation (e.g. costly processes or high threshold declaration criteria)
 - competition in the downstream market may be harmed if smaller market participants are forced exit, or not enter, the market

Negotiate-arbitrate regulation as a form of regulation - *where it may not promote good outcomes* (cont'd.)

- Transaction costs of negotiation are high
 - a very large number of parties/users to negotiate with
 - the costs (availability) of information to users relevant for negotiations are high

Summary and conclusions

- Negotiate-arbitrate regulation of airport services is consistent with international approaches which promote negotiation, reduce regulatory intervention and provide a credible threat of stronger regulation
- Australian experience in the context of airport services has shown that:
 - negotiated outcomes have been reached and not resolved by arbitration of disputes
 - negotiate-arbitrate regulation is a targeted and flexible approach
 - the regulatory design is critical to the effectiveness of the approach

Summary and conclusions

(Cont'd)

- Negotiate-arbitrate regulation is not likely to be a suitable approach to economic regulation in all circumstances
 - when there is bilateral market power between an airport and airport user
 - when the transaction costs of negotiation are high
- Negotiate-arbitrate regulation can facilitate potential new entrant access, and increase the countervailing power of smaller users and users offering new competitive strategies

Thank you

Margaret Arblaster

margaret.arblaster@monash.edu

margaret.arblaster@gmail.com