

14 April 2010

Our reference  
BEVA.10021695

**By registered post and email: adjudication@acc.gov.au**

Dr Richard Chadwick  
General Manager  
Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Attention: Ms Teresa Nowak

Dear Dr Chadwick

## **Board of Airline Representatives of Australia Inc (BARA) – Response to Draft Determination**

I refer to your letter of 24 March 2010 and to the Draft Determination issued by the ACCC in response to BARA's application on 26 November 2009 (Authorisation No. A91200). Your letter and the Draft Determination indicate that the ACCC proposes to grant re-authorisation for BARA to negotiate collectively with specified providers of essential airport services for a period of 5 years.

### **Coverage of providers and essential airport services**

BARA is pleased that the ACCC has indicated that it proposes to grant re-authorisation for BARA to negotiate with specified providers of essential airport services, a group which has now been expanded to include Gold Coast Airport. We are concerned, however, that by its terms the Draft Determination does not give BARA any scope to negotiate with other, and in some cases yet to be identified, providers of essential airport services in circumstances where the benefit to competition is no less compelling than is the case with BARA's current and contemplated dealings with specified providers of essential airport services.

In particular, we note that in paragraph 4.93 of the Draft Determination under the heading *Coverage or composition of the group* the ACCC indicates that it does not consider it appropriate to grant authorisation in terms that would enable BARA to negotiate collectively with providers of 'essential airport services' other than those which are specifically identified.

We also note that the ACCC (in paragraph 4.95 of the Draft Determination) has indicated that if BARA does wish to bargain collectively with providers of essential airport services other than those named in the Draft Determination in the future then, depending on the circumstances, BARA may apply to the ACCC for either a minor variation to the authorisation or revocation of

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the authorisation and substitution of a new authorisation. Having made a detailed application and submission which covers the core providers of essential airport services, namely the major international airports, Airservices Australia and the Bureau of Meteorology, at this stage we believe there is little or no prospect BARA would seek to disturb those arrangements by applying for revocation of the authorisation and substitution of new authorisation at any time for the next five years. Applying for a minor variation is a more feasible and realistic option, although it too could impose an undue and unnecessary regulatory burden on BARA.

### **BARA's proposal**

BARA believes that by addressing the ACCC's particular concerns with regard to the definition of essential airport services and future unnamed providers, a process can now be established which would provide for future unnamed service providers on strict conditions.

In particular, we note the ACCC's concerns as set out in paragraph 4.93 of the Draft Determination and, in the paragraphs below, propose how those concerns can be addressed:

1. The ACCC has expressed concern that the list of essential airport services is not exhaustive and therefore there appears scope for uncertainty about what may constitute a new 'essential service'.

It was always BARA's intention to focus on the providers of existing "essential airport services" and not on "new" services (see the Summary and sections 2.4(e), 3.6 and 4 of BARA's original submission dated 26 November 2009).

BARA is now prepared to accept the list set out in Appendix 2 to its original submission (as amended and attached to this letter) is a closed and exhaustive list but with one minor proviso, namely that the list of core essential airport services, which are identified as "aeronautical services and facilities" (and further classified as "Aircraft-related services and facilities" and "Passenger-related services and facilities"), will accord with the particular listing set out in Part 7 of the *Airports Regulations 1997* (including any substitute regulation) from time to time.

You will also note that we have amended Appendix 2 as follows:

- (a) by making it much clearer that the list in Appendix 2 is in fact the same as the list in Regulation 7.02A of the *Airport Regulations 1997*; and in particular
- (b) by deleting words which appeared in the eighth dot point under the heading "1. Aircraft-related services and facilities" (namely references to "baggage screening systems" and "airside inspection facilities") and under the eighth dot point under the heading "2. Passenger-related services and facilities" (namely a reference to "government mandated security services") so that the list in Appendix now follows precisely the list in the *Airports Regulations 1997*.

So far as (a) above is concerned, that change has been made to provide greater certainty.

In regard to (b), we note there may have been some concern that the listing in Appendix 2 as provided in the original submission did not exactly follow the listing in the *Airport Regulations 1997*. To remove any doubt in that regard we note that the listing is now taken verbatim from Regulation 7.02A the Airports Regulations 2007.

2. The ACCC has also expressed concern that the identity of new providers of essential airport services may itself affect the assessment of the competitive impact of the proposed arrangements.

We believe limiting the class of essential services should go a long way in allaying that concern. However, to put the matter beyond doubt BARA will accept two further conditions:

- (a) that any provider of essential airport services which is not specifically identified in the Draft Determination must be a sole provider of those essential airport services at a major international airport (including the Gold Coast Airport) (including any sole provider so appointed after a tendering or other selection process); and
- (b) BARA will provide to the ACCC the name of any intended provider which conforms to the requirements of paragraph (a), not being a provider specified in the Draft Determination, within 5 business days of the approach by BARA to that provider.

We also note as follows:

- (i) It is likely that the majority of yet to be identified service providers will in fact be service providers which simply assume or take over the contracts of existing named providers – in other words there will likely be no impact on competition. Particularly is this the case if the definition of essential airport services is exhaustive.
- (ii) BARA's acceptance of a 'sole provider' condition means no issue should arise about unequal bargaining power – that advantage will always be held by the sole provider.
- (iii) The ACCC has accepted a condition similar to the condition set out in paragraph (b) above in at least one other recent Draft Determination: see paragraph 5.6 of the Draft Determination lodged by NWIOA Ops Pty Ltd in relation to collective negotiations with providers of rail infrastructure in the Pilbara region of Western Australia. We submit a similar condition can be introduced in this instance.

BARA also accepts that in the case of "new" essential airport services (most likely marginal or peripheral services) it may in fact need to apply for a minor variation to the authorisation. For the reasons set out above it is difficult to contemplate there will ever need to be a revocation and substitution of a new authorisation in these circumstances.

**The addition of a new service provider, Unisys Philippines Limited**

Finally, I note that BARA has in a separate letter accompanying this letter made a submission for the inclusion of another provider, Unisys Philippines Limited, as a service provider which should in fact be identified as a specific provider of particular essential services.

We would be grateful if the ACCC could consider both this submission and BARA's accompanying submission at the same time.

Yours sincerely



**Bernard Evans**  
**Consultant**

encl

cc: Warren Bennett  
Board of Airline Representatives of Australia Inc

## Appendix 2

### Essential Airport Services

When airlines operate at an airport, there is a range of services they need to consume. These services are provided jointly and are generally consumed in common by a number of airlines. It is important to note authorisation is sought in relation to the services provided at the airport irrespective of who provides them.

These services fall into a number of categories which together constitute the essential airport services for which BARA seeks to be authorised to negotiate.

#### Aeronautical services

Part 7 of the *Airports Regulations 1997 (Cth)* defines "*aeronautical services and facilities*" (and Direction 29 made under section 95ZF of the *Trade Practices Act 1974 (Cth)* refers to this definition).

In particular, Regulation 7.02A defines "*aeronautical services and facilities*" as those services and facilities at an airport that are necessary for the operation and maintenance of civil aviation at the airport, and includes each service or facility that is mentioned in an item below under (a) in relation to aircraft-related services and facilities and under (b) in relation to passenger-related services and facilities, as follows:

(a) Aircraft-related services and facilities

- Runways, taxiways, aprons, airside roads and airside grounds
- Airfield and airside lighting
- Aircraft parking sites
- Ground handling (including equipment storage and refuelling)
- Aircraft refuelling (including a system of fixed storage tanks, pipelines and hydrant distribution equipment known as a Joint User Hydrant Installation or JUHI)
- Airside freight handling and staging areas essential for aircraft loading and unloading
- Navigation on an airfield (including nose-in guidance systems and other visual navigation aids)
- Airside safety and security services and facilities (including rescue and fire-fighting services and perimeter fencing)
- Environmental hazard control
- Services and facilities to ensure compliance with environmental laws
- Sites and buildings used for light or emergency aircraft maintenance

(b) Passenger-related services and facilities

- Public areas in terminals, public amenities, lifts, escalators and moving walkways
- Necessary departure and holding lounges, and related facilities

- Aerobridges and buses used in airside areas
- Flight information and public-address systems
- Facilities to enable the processing of passengers through customs, immigration and quarantine
- Check-in counters and related facilities (including any associated queuing areas)
- Terminal access roads and facilities in landside areas (including lighting and covered walkways)
- Security systems and services (including closed circuit surveillance systems)
- Baggage make-up, handling and reclaiming facilities
- Space and facilities, whether in landside or airside areas, that are necessary for the efficient handling of arriving and departing aircraft (eg airline crew-rooms and airline operations centres)

### **Staff-related access services**

Airports levy a range of minor charges in relation to staff access to the airport, including charges for:

- Aviation Security Identity Cards
- Airside drivers licences and training
- Training staff to use airport equipment (particularly aerobridges)
- Staff car parking

### **Essential office and operational accommodation**

Airlines require accommodation at airports for operational and clerical/customer service staff. These areas are relatively small but need to be close to passenger processing areas and as such the areas occupied may have attractive alternative uses, particularly retail or CIP lounges. These accommodation services tend to be provided under fairly standard leasing arrangements and, whilst they are negotiated directly between airports and airlines, BARA has on occasion had a need to become involved with airports in a general approach to setting rents and negotiating other terms for such areas.

### **Airline communications systems**

Airlines require access to on-airport radio communications systems in order to facilitate the operational activities of customer service staff involved with ensuring the on time movement of passengers and aircraft at the airport. These systems often involve the airport operator in the provision of dedicated equipment for a RF network for a particular airline for the terminal and apron precincts or access to the wider RF network(s) installed by the airport operator. The airport operator generally charges airlines for these facilities separately to general aeronautical charges. The charges can take the form of a licence, lease or rental payment. As with rents/lease payments for essential office and operational accommodation, BARA members from time to time have referred to BARA instances of arguably unjustifiable charges for provision of or access to these facilities and systems.

### **Common user terminal equipment (CUTE)**

CUTE facilities provide the information and telecommunications services that link common user check-in desks to individual airline booking systems and airport baggage handling control systems.

The arrangements for the supply of these services vary from airport to airport and can involve both airport operators and third parties.

### **Air Traffic Control Services**

These services are currently provided by Airservices Australia and include:

- Terminal navigation services
- En-route navigation services

### **Aviation Rescue and Fire Fighting Services**

These services are currently provided in the main by Airservices Australia.

### **Aviation Weather Services**

These services are currently provided by the BoM, but potentially by others.



## Restriction of Publication of Part Claimed

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14 April 2010

### [PUBLIC VERSION]

Dr Richard Chadwick  
General Manager, Adjudication Branch  
Australian Competition and Consumer Commission  
GPO Box 3131  
Canberra ACT 2601

Dear Dr Chadwick

The Board of Airline Representatives of Australia (BARA) has reviewed the Australian Competition and Consumer Commission's (ACCC) Draft Determination to allow BARA to collective bargain over the provision and pricing of essential airport services (Authorisation No. 91200). BARA offers the following comments on the ACCC's Draft Determination and advises that, in addition to this letter, you will receive from our legal advisers, Middletons, a separate letter, which addresses some concerns the ACCC has regarding coverage of essential airport services and the identification of providers of those services.

#### **Coverage of providers and services**

BARA has no objection in principle to separately identifying all individual new providers of essential airport services and, for that reason, BARA is prepared to accept both a more certain definition of essential airport services and agrees to a condition which will effectively limit the class of the providers and enable them to be identified by the ACCC.

There is, however, one service provider which BARA believes should be identified now and dealt with specifically in the final Determination. In particular, BARA requests that the final Determination include a specific reference to Unisys Philippines Limited (Unisys), which is the current provider of the Account And Authorise (AAA or Triple A) baggage reconciliation system, as an additional provider of an essential airport service. It follows that authorisation is sought for BARA's current and future dealings with Unisys and, in particular, with change requests related to the supply of AAA services.



In this regard BARA refers the ACCC to Appendix 2 of BARA's application (as amended and in the form attached to Middletons' accompanying letter). Appendix 2 provides that essential airport services include "*Airside safety and security services and facilities...*" under the heading "*Aircraft-related services and facilities*" and "*Security systems and services...*" under the heading "*Passenger-related services and facilities*".

BARA emphasises that it always intended for services such as AAA services and the provider of such services (the identity of which may change from time to time depending on the winning tenderer) to be covered by its initial application.

### **Background on AAA**

Since the late 1990s the Australian Government had been considering options for a AAA system in Australia. After September 11 2001, the Australian Government mandated a range of increased and new security requirements for Australia's domestic and international airports. For international airlines, one new mandated security requirement was for a AAA system. However, unlike most other government-mandated security requirements (eg checked baggage screening), it was mandated that it was the responsibility of the airlines, rather than the airport operator, to have a AAA system at each international airport.

The objective of the AAA system is to ensure that:

- all checked bags that are loaded on an aircraft have been assigned to that flight,
- all checked bags which are loaded are accounted for, and
- all unaccompanied bags are identified and subject to extra security controls.

AAA involves a combination of hardware and software infrastructure. It includes bag tags, record links with flights and an authorisation process before bags are loaded onto planes. It is a multifaceted and logistically complex process involving airline staff, security services and ground handlers.

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### **Commercial arrangements**

The pricing and provision of AAA was obtained through a competitive tender process, with Unisys being the successful tenderer. The AAA commercial arrangements operate in the same manner as other essential airport services, namely:

- participation by airlines is voluntary, but as discussed later, some airlines choose not to use the Unisys system,
- BARA did not purport to bind any of its members in negotiations on any aspects of AAA,
- BARA does not participate and has no knowledge of specific arrangements that may have been negotiated separately by some airlines with Unisys, and
- BARA obtains no commercially sensitive airline-specific information.

The AAA system involves both sophisticated hardware and software. The continued efficient delivery of the security service requires continual interaction between BARA and Unisys.

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## **Market definition**

The market definition for the provision of the AAA system is the same as for other essential airport services. The relevant primary market is for the provision of essential airport services, including in this instance, a government-mandated security service.

The AAA system may be regarded as part of both "Aircraft-related services and facilities" (see the particular item "Airsides safety and security services and facilities...") and "Passenger-related services and facilities" (see the particular item "Security systems and services...").

The relevant downstream markets are the international air transport passenger and freight markets.

## **The public benefit of the existing arrangements**

The existing arrangements for AAA have provided, and continue to provide, material public benefits.

The arrangements were essential to implement the government-mandated security service as quickly and as efficiently as possible. The AAA arrangements, therefore, provided real public benefit in the pursuit of the Government's national security objectives. Without some form of collective negotiation, it would have been necessary for every international airline to undertake tenders and procure a AAA system separately. This was clearly not practical, especially when the security expertise of airlines was at a premium given the range of security enhancements implemented after September 11 2001. The arrangements, therefore, facilitated a quicker and more efficient and orderly expansion of government-mandated security requirements than otherwise would have been possible.

The collective tender avoided unnecessary duplication of resources to secure an essential airport service. The ability of many smaller international airlines (or larger airlines with a small presence in Australia) to negotiate fair and reasonable terms of conditions for a AAA system at the time was (and still would be) questionable. This would have left these airlines to 'take or leave' contracts with potential providers. Without the current arrangements, the ability for some international airlines to profitably compete in Australia would have been reduced.

The arrangements also continue to provide material reductions in transaction costs to airlines. BARA continues to ensure that the AAA system is effectively and efficiently provided. Consistent with the other public benefits of BARA's activities, these efficiencies are likely to be passed onto end users.

## **Consideration of potential anti-competitive effect**

There are no anti-competitive effects associated with the current arrangements for AAA. Rather, the arrangements support effective competition between international airlines operating to Australia, while implementing the Government's security requirements.

Competition between the airlines for the essential security service is low or non-existent. There are no capacity issues with the security service, with adequate service availability for all participating airlines. AAA represents a 'behind the scenes' security activity, with little or no scope for product differentiation between airlines.

Participation in the arrangements is also voluntary for both BARA and non-BARA members. For most airlines, the existing arrangements are the most cost-effective way of providing the AAA service. However, some airlines (for example United Airlines) choose not to use the Unisys

system. United Airlines had the ability to implement its own AAA system and chose not to use the one developed through BARA. One small international airline also decided to use manual procedures to reconcile passengers' bags to planes, and, therefore, does not use or pay for the Unisys system. Airlines clearly have options for the provision of AAA services.

BARA obtains no commercially sensitive information from airlines through its involvement with AAA. Charging for the service occurs directly between each airline and Unisys. Further, as discussed above, BARA obtains no activity data from either the airlines or Unisys.

### **Net public benefit**

BARA considers that the current AAA arrangements continue to provide real and demonstrable benefits to the community with little or no anti-competitive detriment. This is to be expected as the objective of the arrangements was to quickly and efficiently implement a new security service considered an urgent priority of the Australian Government. BARA's continual involvement will ensure that the system continues to meet the Government's requirements in the most effective manner.

### **Authorisation sought**

BARA requests that the final Determination include a reference to Unisys, which is the current provider of the AAA baggage reconciliation system, as an additional provider of an essential airport service for the term of the current contract (until 30 March 2014).

It will be necessary for the airlines to consider the future procurement of AAA services prior to the expiry of the current contracts with Unisys. If the airlines consider that collective negotiation continues to represent the most cost-effective option, BARA will notify the ACCC of any new sole provider of AAA services which operates at a major international airport in accordance with the proposal Middletons have outlined in the accompanying letter.

So far as the Draft Determination is concerned, it is submitted the only changes which need to be made to clauses 5.6 and 5.7 are to include specific references to Unisys Philippines Limited.

Please do not hesitate to contact the undersigned or Bernard Evans at Middletons (tel. 02 9513 2515) if there are any aspects of this submission you wish to discuss.

Yours sincerely



Warren Bennett  
**Executive Director**