ACCC WORKSHOP ON AIRPORT ACCESS UNDERTAKINGS
COMMENTS ON ACCC'S APPROACH TO SEC 192 OF AIRPORTS ACT

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In commenting upon the ACCC's paper on Sec 192 of the Airports Act, I would first like to say a few things about the regime itself. I will then discuss the ACCC's paper which, of course, reflects its proposed response to that regime. At the outset though, it must be said that the investigation and analysis reflected in the ACCC's paper and the conduct of today's workshop are welcome approaches to a complex subject.

With respect to the regime itself, it is interesting that Sec 192 of the Airports Act ("Application of the access regime in Part IIIA of the Trade Practices Act 1974") is located in Division 2 of Part 13 of the Act immediately alongside Sec 194 and subsequent provisions which deal with "demand management" which are in Division 3 of Part 13. Part 13 as a whole is entitled "Access to airports and demand management at airports". The result of this juxtaposition is that we have an Act containing, literally side by side, provisions for opening up the capacity of the supply side of the airport system and closing down the capacity of the demand side. Perhaps those of us who are close to, or involved in, the industry are so used to the idea of opening up the capacity of on-airport facilities and, on the other, the idea of regulating demand for those same facilities, that we have not noticed the degree to which these two provisions pursue totally opposite policy objectives. But the reality is that they do.

At the practical level it would appear that Sec 192 is focussed upon the individual components of the airport system. Sec 194, on the other hand, would appear to be focussed upon the capacity of the total airport system, the aggregate capacity achievable by all the components. Given expectations as to the operation of Part IIIA of the Trade Practices Act, the assumed operation of Sec 192 would be to increase productivity of elements of the airport to which it applies. On the other hand, demand management schemes might be expected to reduce the capacity of airports, as they are normally discussed in the context of control of airport activity levels in order to

minimise the environmental impact of aircraft operations. This is certainly the way in which the Sydney Airport Demand Management Act 1997 operates.

Given the simultaneous operation of these two contradictory provisions, it is not out of the question for an access regime pursuant to Sec 192 to produce capacity that cannot be used because of a demand management scheme pursuant to Sec 194 and related provisions. Indeed this seems to be assumed by Sec 193 which provides that an access regime is subject to any demand management scheme.

These regimes are being put in place at a time when the way in which airport services are provided in Australia is being fundamentally changed. Airports are being moved from public into private ownership. The cross-subsidies endemic in a network arrangement are being eliminated as airports are sold one by one to individual consortia dependent in future upon management of their individual airport's costs and revenues to achieve their financial goals. In these circumstances, it would be expected that the new, private sector airport operators would be willing to seek and exploit opportunities for growth, including expansion or duplication of facilities to meet the needs of incumbents and new entrants.

It is in relation to this expectation that the regime may have a further contradictory effect. If an access regime is put in place, the privatised airports may opt for the less risky course of allowing the access regime to provide for growth by squeezing additional productivity out of existing facilities rather than expanding existing facilities or building new ones. This tendency may be reinforced by the fact that the Minister's determination is irrevocable for its duration once made so that even if facilities were to be expanded to the point where supply exceeds demand, the access regime would continue to apply until its expiry date; this would be a particular concern if the Minister's declaration was for an unduly lengthy period. Thus the expansion of capacity and overall entrepreneurial approach expected of the privatised airports may be discouraged by access regimes pursuant to the operation of Sec 192. This outcome would appear to contradict the presumed intent of the provision.

Quite apart from its potential operation in unexpected ways, both as a result of the operation of Sec 194 and related provisions, as well as its possibly unexpected operation in its own right, access regimes pursuant to Sec 192 are a form of economic regulation of an industry which has become less regulated and in relation to which there are calls for remaining regulation to be removed. Such regimes, particularly when they seek to allocate scarce resources, arguably have a regulatory effect themselves and inhibit the otherwise free operation of market forces.

The reasons for the juxtaposition of Secs 192 and 193 are readily identified. Essentially it reflects the desire of successive Commonwealth Governments and the Parliament to ensure the benefits of competition as far as possible within an overall activity level that reflects community tolerance of aircraft noise. It is legitimate for governments to try to achieve this balance. However, in so doing, care needs to be taken that capacity is not constrained to the point where competition is impossible and

the community is deprived of the economic and social benefits of air travel. These include the employment and amenity generated as a result of tourism and other economic activity that flows from air travel. From the ACCC's point of view we would hope that it would understand the importance of expanding capacity of airports within the context of the overall policy decisions of Government, rather than only rationing access to capacity that is already there.

Of course, all of us must take the law as we find it, as the ACCC has sought to do in its draft paper. From Ansett's point of view as an incumbent in the domestic market, and a new entrant in the international market, the following comments appear to be worth making with regard to the paper

Firstly, we note that the paper relies very heavily upon the views of the NCC and Treasurer in the ACTO proceedings. In factual terms, these related to the question of access to the freight aprons and hard stands at Melbourne and Sydney Airports. In legal terms, they related to the operation of Sec 44G (2) of Part IIIA of the Trade Practices Act. From Ansett's point of view the critical elements of the NCC's and Treasurer's decisions were those that related to the questions of whether it was "uneconomical for anyone to develop another facility to provide the service" and it is proposed, in what follows, to largely restrict comment to this aspect.

It may not be generally realised (although it is acknowledged in the ACCC's paper) that the wording of Sec 44G (2) (b) of the Trade Practices Act and Sec 192 (5) of the Airports Act are different. Section 44 (G) (2) (b) of the Trade Practices Act comes into operation when "it would be uneconomical for anyone to develop another facility to provide the service"; Sec 192 (5) (b) of the Airports Act comes into play where a service "is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated",

We see these two formulations as being materially different and not interchangeable. The test adopted by Sec 192 of the Airports Act sets a higher threshold than that contained in Sec 44 G (2) (b) of the Trade Practices Act.

This is because:

- the absence of the reference to "another facility" in the Airports Act suggests its operation is directed only at monopolies, rather than situations where a multiplicity of facilities may be available

- the reference to "duplicated" in the Airports Act suggests that the test is whether a facility that is essentially the same as the existing facility cannot be economically constructed, which is more restrictive than whether it is uneconomical to develop another facility to provide the relevant services.

- the reference to "anyone" in Sec44G (2) (b) implies a greater degree of subjectivity and a different threshold than in the Airports Act Sec 192 (5) (b) formulation.

- the context in which the words appear in sec 192 (5) of the Airports Act is very different to that surrounding Sec 44 G (2) of the Trade Practices Act. The latter provision is accompanied by provisions requiring a number of criteria to be satisfied, including that the facility is of national significance and that access to the facility would not be contrary to the public interest. These provisions are absent from the Airports Act formulation. Accordingly, there is a strong policy reason for construing the economic duplication test as setting a correspondingly higher threshold so as to avoid the Sec 192 access regime becoming a disincentive to investment in airport facilities.

Secondly, reverting to the facts of the ACTO proceedings, they were concerned with access to freight aprons and hard stands. The NCC assumed that the relationship between those facilities and the airport as a whole was such that in order to duplicate those facilities it would be necessary to duplicate the airport as a whole. That assumption was adopted by the Treasurer. However, the NCC concluded that it was not economic to develop a new international passenger and freight airport in either Sydney or Melbourne. Ansett is of the view that the NCC should have considered whether it would be uneconomical for anyone to develop another hard stand or apron within Sydney or Melbourne International airports. This is because the facilities the subject of the declaration application were hard stands and aprons, rather than the airport itself, and there is no reason for excluding the possibility of constructing other hard stands and aprons within the perimeter of the existing airports.

The implication of these views for the ACCC's Discussion Paper is that we query how far as a matter of generality and relying on the ACTO decisions the ACCC can make decisions with regard to those elements of airport infrastructure to which Sec 192 (5) (b) should apply, as opposed to applying the specific words of the test set out in the Airports Act in the context of the specific circumstances of each individual airport. It is Ansett's view that the latter is the necessary and appropriate course. The discussion in the ACCC's draft paper may well provide a useful way of examining these issues, provided the realities at individual airports are taken into account and Sec 192 (5) is applied as written.

In so doing, it will be open for the ACCC to review its determinations to take account of changing circumstances at the airport, whether with respect to land use or other relevant factors.

In terms of competition policy outcomes, we see this approach as being more likely to encourage the development of additional infrastructure and avoiding the de facto economic regulation that would accompany any access regime that was applied in other than the most restricted circumstances. It will be important that airport capacity not be unduly constrained by the premature imposition of an access regime before all

opportunities for expansion of existing facilities as well as their duplication are explored.