

5 July 2013

Carole Gardner  
Productivity Commission  
Level 12  
530 Collins Street  
Melbourne, VIC, 3001

**Submission to the Productivity Commission Draft Report: National Access Regime**

Dear Ms Gardner

The Australian Airports Association (AAA) is the national voice for Australian Airports that represents the interests of over 250 airports and aerodromes across Australia, from regional landing strips to major international gateway airports.

The Productivity Commission has released its Draft Report: National Access Regime (Draft Report). The AAA has reviewed this document and would like to offer the following thoughts.

The AAA wants to commend the PC for the quality of the report and the veracity of its arguments.

The AAA would like however to raise possible amendments that may decrease opportunities for future conflict regarding the suggested material. On the matter of expansion and extension, the Draft Report suggest that in Part IIIA the ACCC must have the power to order and extension - so that when arbitrating a dispute, a provider may be directed to extend the capacity of the facility.

Currently section 44V(2) specifies the matters that an ACCC arbitral determination can deal with. One of the matters that a determination may deal with is a requirement that the provider extend the facility.

Section 44W(1) prohibits the ACCC making a determination which:

- (a) requires the provider to bear some or all of the costs of extending the facility or maintaining the extension: or
- (b) results in the third party becoming the owner of any part of the facility or of extensions of the facility without the consent of the provider.

The ACCC has never made a decision requiring the extension of a facility and no court has considered whether the term "extension" in the context of an infrastructure facility is limited to investments which extend the geographic reach of the facility or whether it would encompass investments which expand the capacity of the facility. The Productivity Commission's proposal is in the nature of an "avoidance of doubt" amendment.

The Productivity Commission also proposes that the ACCC should publish guidelines on how its power to direct extensions and expansions would be exercised. The ability of the ACCC to order extensions and expansions of airport infrastructure is significant, including because access seekers will strive to have the term "some or all of the costs of extending the facility or maintaining the extension" narrowly construed to mean just direct (cash) cost incurred by the owner.

From the infrastructure owners perspective the "cost" of a regulatory imposed expansion or extension is likely to be broader because:

- (i) The owner may be capital constrained. While the prohibition in section 44W is likely to give rise to determinations which require the access seeker to enter into firm (potentially take or pay) commitments to effectively underwrite the investment, an obligation to expend constrained capital on an expansion or extension sought by a particular access seeker is likely to have other opportunity costs.
- (ii) The particular extension or expansion sought by the access seeker may be operationally in conflict with the owner's preferred or long term plans for development of the assets, including because in the case of extensions the owner may have an alternative, more valuable use of the land that the expansion would occupy. Further, in the case of expansions, the investment required to expand capacity may disrupt the operation of the facility.
- (iii) The extension or expansion might not be in the immediate power of the infrastructure provider to provide as it may be subject to environmental impact studies, Master Planning or Major Development Plans processes, community consultation requirements or capital raising requiring investment into government procedural authorisations, management time or financial penalties or unfavourable terms in subsequent expansions or extensions.

The risk that the ACCC will narrowly construe the term "some or all of the costs of extending the facility or maintaining the extension" is material including because, while there is no express acknowledgement of opportunity costs to the owner in being forced to extend or expand a facility, section 44X(e) requires the ACCC to have regard to "the value to the provider of extensions whose cost is borne by someone else".

That is, the determination made by the ACCC should take into account – in deciding what the access seeker will pay – the value of the asset in the hands of the infrastructure owner.

The Productivity Commission's recommendation does not adequately address these issues. Guidelines issued by the ACCC would be necessarily general in nature and in any event would not bind the ACCC in any decision making.

Part IIIA should contain specific criteria which the ACCC is required to have regard to in both determining whether or not to make a determination requiring expansions or extensions and, where such a determination is made, the terms on which it is made. At a minimum the term "cost" in section 44W(1) should be amended to expressly include opportunity costs and costs associated with any impairment to the use and operation of the facility and associated land borne by the owner.

The AAA is looking forward to working with the Productivity Commission on these important matters. We stand ready to meet with yourself regarding these. Please feel free to contact myself Caroline Wilkie should you want to arrange further discussions.

Regards

Caroline Wilkie  
CEO