AUSTRALIAN AIRPORTS ASSOCIATION

The Commissioners
Productivity Commission
Review into Economic Regulations of Airport Services
GPO Box 1428
Canberra, ACT, 2601

Monday 7 November, 2011

The AAA thanks the Commission for the opportunity to meet with it in Sydney on Friday 28 October to discuss issues arising from the 6 October 2011 submission by Professor Stephen Littlechild. This brief submission summarises our comments during that meeting.

Show Cause and Arbitration

As previously argued by the AAA and the individual airports, we continue to see no need for additional regulation for price monitored airports. The evidence is that the airports and airlines have successfully negotiated commercial agreements, and there is no evidence that the airports have earned unreasonable returns by exercising market power during those negotiations or in subsequent delivery of service. As such, the AAA believes the costs of any additional regulation would significantly outweigh the benefits.

The potential risk to ongoing investment presented by the show cause proposal can be gauged by the extensive media attention given to the ACCC's various recent comments – media attention that gave rise to airports receiving queries from investors, ratings agencies and creditors. Such attention of the media and capital providers would only be intensified if these comments were made in the context of a formalised show cause process, with attendant risks for airport investment financing. This potential risk could be materially reduced if the ACCC were required to clarify with the airport in question any analysis or interpretations of fact that could initiate a show cause process.

Nevertheless, the regulatory costs of the proposed show cause mechanism are substantially lower than any externally imposed dispute resolution procedure would be. Any externally imposed dispute resolution procedure would be perceived by debt and equity providers as significantly increasing regulatory risk. In addition, it would almost certainly present an opportunity for one or both parties to recreate the outcomes of a more heavy-handed regulatory framework and undermine the clearly demonstrable benefits of the light-handed regime. Such a dispute resolution procedure would need to avoid several difficulties, including regulation by stealth, regulatory escalation, proliferation of disputes, breakdown of commercial relationships, and delayed investment.

Voluntary 'Opt-out mechanism'

If the Commission's Final Report were to recommend that a show cause mechanism should be introduced, the AAA and relevant airports believe that that show cause mechanism should be inapplicable to any airport which voluntarily establishes adequate provisions for dispute resolution between it and the airlines. The AAA and those airports would support the inclusion of an additional recommendation consistent with this as part of a show cause package.

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We believe that during the discussion of 28 October there was broad agreement between ourselves and the airlines that the preferred approach is to support commercial negotiation to the maximum extent possible. Consistent with this:

- Any dispute resolution process should be the result of consultation between the airport and the airlines. Following consultation, an airport could lodge with the Minister a dispute resolution process for future negotiations, and request the Minister exempt the airport from the show cause mechanism.

- Any dispute resolution process should promote arbitration only as a last resort. Other forms of dispute resolution (such as escalation to more senior management, mediation, conciliation, expert determination of specific issues, or neutral evaluation) should be included to the extent the airport and airlines believe they will promote commercial outcomes without unreasonably delaying resolution.

- If possible, the selection of the independent facilitator (eg mediator or arbitrator) should be mutually agreed by the parties. If the parties cannot agree, the dispute resolution process should specify a default process for such identification using a reputable and independent party (such as nomination by the Institute of Arbitrators and Mediators or the Australian Commercial Dispute Centre). In order to promote commercial outcomes, the independent authority should generally have relevant expertise in commercial dispute resolution – except where the nature of the dispute (eg legal, engineering or economic) specifically suggests other expertise would be more relevant (eg a lawyer, engineer or economist).

As mentioned at the meeting of 28 October, it would not be necessary or appropriate for the Commission to "reinvent the wheel" or attempt to set out in a prescriptive way what an airport must do to opt out. There is an established body of material that both recognises discretely different forms of alternative dispute resolution and lists various recognised bodies to assist. Further information can be found at http://www.nadrac.gov.au.

In addition, dispute resolution clauses are contained in almost all commercial contracts and airports and airlines would be readily able to identify examples on which to draw.

Regards

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