REGIONAL AVIATION ASSOCIATION OF AUSTRALIA

26 May 2011

The Commissioner
Economic Regulation of Airport Services
Productivity Commission
GPO Box 1428
CANBERRA CITY ACT 2601

Dear Commissioner,

Please find attached an additional RAAA submission to the Productivity Commission Economic Regulation of Airport Services Public Inquiry.

If you have any questions or require any further information please do not hesitate to contact me.

Yours sincerely

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RAAA Submission to the Productivity Commission – Additional Submission

Inquiry into the Economic Regulation of Airport Services

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RAAA SUBMISSION TO THE PRODUCTIVITY COMMISSION – ADDITIONAL SUBMISSION

Introduction

This submission is additional to the Regional Aviation Association of Australia (RAAA) submission to the Commission made on the 13th April 2011 and to the joint submission made on 21 April 2011 to which the RAAA was a party.

The RAAA considers this submission is necessary after noting the views expressed within submissions made to the Department of Infrastructure and Transport (DIT), the National Competition Council (NCC) and the Australian Competition and Consumer Commission (ACCC).

Clearly the overall views of the DIT and the NCC align with those of the major airports, but diverge significantly from those of the ACCC.

The conclusion drawn by the DIT and the NCC that the current regulatory regime is working effectively and does not require significant change is categorically rejected by the RAAA, as is the notion that any change could in fact be counter productive.

The DIT submission notes the failure by airlines to seek "the active intervention of the ACCC in negotiations" and concludes from this that airport operators have been able to finalise commercial negotiations with airlines, the result being that the current regime is working.

However, the DIT is not party to or present at any of the commercial negotiations, and it is simply not the experience of RAAA members, which undertake economically critical regional aviation activities every day throughout Australia, that the current regulatory regime is effective.

The DIT has not indicated the basis upon which it relies for its factual conclusions and does not have a regulatory or industry based role, contrary to the ACCC which is the agency to which many industry participants turn when concerns arise, and which is also tasked with oversighting the industry and making annual reports to the government.

As for the comments of the DIT in its submission, the RAAA queries how the ACCC could be brought into commercial negotiations in the absence of a Part IIIA declaration. Contrary to the facts suggested by the DIT, RAAA members have, since the last review, raised various issues with the ACCC in the hope of some assistance, but the ACCC can only act on issues that constitute a breach of the Competition and Consumer Act (the Act) and it has in fact a very limited ability to assist with bullying behaviour and difficulties that arise from the bargaining imbalance that exists between airports and their customers. To our knowledge, requests to the ACCC for assistance in these instances have been denied.

The experience of RAAA members is that it is often not possible to reach commercial outcomes with airports that constitute fair and reasonable access to aeronautical services and facilities on fair and reasonable terms, and that the current regulatory regime does not assist with this problem.

As outlined in the RAAA's previous submission, the RAAA supports an efficient market based access environment that takes into account the fact that airports are monopolies and provides appropriate regulatory settings inclusive of a negotiate/arbitrate mechanism as well as simplified access to the provisions of Part IIIA of the Act.

Change is needed urgently.

The RAAA is deeply concerned that the submissions of the DIT and the NCC fail manifestly to address the fact that inappropriate use of market power by airports is adversely affecting investment in, and the long term future viability of, regional aviation and as a result, adversely affecting regional communities.

The RAAA also takes this opportunity to suggest that the negative impacts of the inappropriate use of market power by airports is not necessarily limited to those experienced by regional aviation. Other equally important aviation sectors including on airport aviation maintenance and technical companies face similar difficulties and challenges.

The RAAA notes that the DIT was instrumental during the 1990's in developing relevant policy positions for privatisation and regulatory oversight of airports, and it would be understandable for the department to retain a commitment to the current regime. The RAAA is concerned that positions being expressed today could potentially be influenced by historical involvement and, if this is the case, any lack of objectivity, real or perceived, should be counter balanced with rigorous external review.

Considering the largely aligned positions of the DIT, the NCC and individual airports, the RAAA is also concerned that the DIT and the NCC's views are unduly influenced by airports, proponents of airports and the airport investment community. Without doubt these latter parties have benefited very significantly from the financial windfall arising from providing monopoly services to airport users who do not have recourse to effective processes that restrain monopoly behavior. It is, without question, in these parties' best interests to ensure that the current light handed regime remains in force or is further diluted. The DIT and NCC positions are clearly at odds with the one government agency tasked with oversighting and monitoring the industry, ie the ACCC.

It is disappointing in the extreme that the DIT and the NCC have not provided an insight extending beyond what is best for airports. The very significant opportunity presented by the Commission's inquiry to effect change in the long term best interests of the entire Australian aviation sector and all its varied interests appears not to be a priority for those agencies. This is despite the fact that airlines will invest at least as much and often more than airports in the next few years and that they also require certainty, effective and timley commercial arrangements and encouragement to invest.

The RAAA encourages government agencies to look beyond the narrow interests of airports and engage with the aviation sector as a whole. RAAA members would welcome the opportunity to support and facilitate this engagement which may provide a greater understanding of the complex issues and stakeholder interests involved.

The current regulatory regime

The RAAA does not dispute the conclusion of both the DIT and the NCC that the current so called 'light handed' regulatory regime is conducive to enabling capital investment by airports including procuring the necessary funding and securing the commercial returns necessary for the investments to occur. Further the RAAA is cognisant of mechanisms that enable this to be the case as airports are critical infrastructure to ALL RAAA members, and the operations and services provided by those members. Airport users are for obvious reasons and without recourse dependent on airports and the facilities and services airports provide.

If capital investment considerations for airports were the sole consideration in judging the success or otherwise of the current regulatory regime the RAAA would understand the positive sentiments expressed within the submissions made by the DIT and the NCC. The RAAA notes that those same sentiments are also found within all submissions made to the Commission by individual airports.

However any RAAA support for the applicable regulatory framework is subject to the important consideration that airports and users of airports can reach the equivalent of 'fair and reasonable' market based outcomes despite the absence of competitive forces.

This is simply not the case under the current regime, as has been highlighted to the Commission by the RAAA and echoed in each and every submission made by an airport user or made on behalf of airport users.

The context

For the purpose of clarity within this additional submission, the RAAA reiterates the view that fair and reasonable access on fair and reasonable terms to aeronautical services and facilities is not always possible, due, in part, to inherent limitations within the current regulatory regime. The RAAA strongly agrees with the ACCC's view that:

> *"not all airlines have countervailing power in negotiations with the major airports sufficient to constrain any exercise of market power. In addition, the general provisions of Part IIIA do not present an effective constraint on the behaviour of the airports given the considerable time, costs and uncertainty faced by airlines seeking declaration".*

In response to the Terms of Reference for this Inquiry, the RAAA considers there is sufficient evidence to conclude that:

- the privatisation of airports has resulted in the creation of monopolies, including many secondary city and regional airports;
- not unexpectedly, these monopolies are abusing their market power, especially in relation to smaller players who require access to airports to conduct their businesses but have little bargaining power;
- this inequality of bargaining power means commercially negotiated outcomes are not a realistic expectation, which leads to:
    - prices rising in excess of what would be expected in a reasonably competitive environment;
    - a lack of security of tenure;
    - a loss of lessee/tenant improvements without reasonable compensation; and
    - discrimination against smaller players in the pricing and quality of services offered.
- It would seem that a monitoring regime without compliance procedures or an enforcement mechanism is ineffective in restraining monopoly behavior.
- the current regime is manifestly inadequate to restrain these abuses of monopoly market power.

Recommendations

The RAAA supports an efficient market based access environment which recognises that airports are monopolies and provides appropriate regulatory settings.

The RAAA believes there is a pressing need to address serious problems and inefficiencies inherent within the current regulatory regime by strengthening and broadening the current regulatory settings to counter-balance the monopoly market power of airports and ensure more efficient outcomes for the whole network.

To this end the RAAA recommends:

- the regulatory regime be extended beyond the five monitored airports to encompass other city and regional airports;
- the regulatory regime be extended beyond airline passenger activity to encompass all aviation activity including non-airline and non-passenger related;

- the regulatory regime be extended beyond the scope of aeronautical services and facilities defined by regulation 7.02A of the Airports Regulations 1997 (Amdt 8) to encompass all services and facilities essential to the operation of civil air services including aircraft maintenance facilities, airside freight handling facilities, airside access provisions, employee access to the airport inclusive of parking and public transport, and essential administrative facilities;
- the regulatory regime must have a more robust compliance and/or enforcement mechanism; and
- the regulatory regime must be readily affordable for and accessible by smaller players.

Two-tiered regulatory solution

The RAAA proposes a two-tiered regulatory solution.

Tier 1

A negotiate/arbitrate model may offer an effective solution. However, the arbitration mechanism must be such that it is not so expensive or cumbersome that smaller players are precluded from using it.

The RAAA considers it desirable to provide airports and industry with a readily accessible and speedy regulatory mechanism for simple disputes involving relatively minor commercial implications. This would be particularly important for smaller industry players who may lack the necessary resources to engage effectively with other forms of arbitration.

This mechanism could be the Commonwealth Administrative Appeals Tribunal or a similar mechanism such as an appropriately resourced and knowledgeable Industry ombudsman or arbitrator supported by appropriate and relevant legislation.

Such a regime needs to recognise that smaller players inclusive of those who must be on-airport to conduct their businesses are failing, because of the monopoly power of the airports, to negotiate reasonable price outcomes similar to the larger players.

The RAAA submits that a model for resolution of this problem as suggested by the Victorian Civil and Administrative Tribunal in the case of Bema Gold (Australia) Pty Ltd and Moorabbin Airport Corporation under the Victorian Retail Leases Act 2003 is worthy of consideration. As recourse to the ACCC under Part IIIA of the Trade Practices Act is beyond the resources of small (and probably all but the largest) operators and is uncertain, a resolution mechanism through the Commonwealth Administrative Appeals Tribunal could provide an effective remedy where the market has patently failed.

Tier 2

The RAAA strongly agrees with the ACCC view:

> *"deemed declaration under Part IIIA to be the most appropriate regulatory option for constraining those airports that exercise market power in the provision of aeronautical services. This approach would encourage the airports to behave as if their activities were carried out in a competitive marketplace."*

To this end the RAAA strongly agrees with the ACCC proposal to deem airports as declared under Part IIIA of the Competition and Consumer Act 2010 provisional upon the regulatory regime being extended to encompass airports other than the five major airports, non-airline and non-passenger related aviation activity, and all services and facilities essential to the operation of civil air services.

The RAAA shares the ACCC's view that deeming airports to be declared avoids the very expensive and time consuming process of declaration application, and creates at the commencement of commercial negotiations a more equitable bargaining position for all parties.

The implication is both parties are likely to negotiate in good faith so as to reach a mutually fair and reasonable commercial outcome. ACCC arbitration and ACCC imposed rulings should be the fallback but are neither desirable nor preferred.