



AUSTRALIAN
AIRPORTS
ASSOCIATION

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Discussion Paper - Options to strengthen misuse of market power law

Dear Mr Rogers,

I am writing to you in relation to the Australian Government's Discussion Paper on *Options to strengthen the misuse of market power law*. The Australian Airports Association (AAA) welcomes the opportunity to provide input into this consultation process, as the airport industry has a strong interest in any proposed amendments to the existing misuse of market power provisions in the Competition and Consumer Act 2010 (CCA).

The AAA is the national industry voice for airports in Australia. The AAA represents the interests of more than 260 airports and aerodromes Australia wide – from local country community landing strips to major international gateway airports. The AAA's members include Adelaide, Brisbane, Cairns, Canberra, Darwin, Gold Coast, Hobart, Perth, Melbourne and Sydney airports. There are a further 130 corporate members who provide goods and services to airports. The Charter of the AAA is to facilitate co-operation among all member airports and their many and varied partners in Australian aviation, whilst maintaining an air transport system that is safe, secure, environmentally responsible and efficient for the benefit of all Australians.

In reviewing the Government's response to the final report of the Competition Policy Review (the Harper Review) and the Productivity Commission's 2013 review of the National Access Regime, the AAA was pleased to note that the Government decided to implement the Productivity Commission's recommendations on the Regime's declaration criteria. In supporting the Productivity Commission's recommendations, the Government has recognised the importance of maintaining an access regime that promotes effective competition in upstream and downstream markets. If the Government had agreed with the Harper Review recommendations on declaration criteria, there could have been significant implications for the airport sector that could have compromised the competitive negotiation process with airlines by complicating and potentially weakening the declaration criteria. As a result this could have resulted in costly and unnecessary arbitration processes, which would not achieve the primary objectives of the National Access Regime.

While the AAA supports the Government's decision regarding the National Access Regime, we are concerned that further consideration is being given to amending Section 46 of the CCA 2010 by removing the 'take advantage' test and moving to an 'effects' test for the misuse of market power. The AAA is concerned that amending the current Section 46 provisions could compromise the existing commercial negotiation process between airports and airlines.

The economic realities of building and maintaining the major infrastructure required for an airport, of even modest size, dictate that there can only be one or at most two or three airports within relatively close proximity to one another.

Accordingly, where the boundaries of markets are drawn relatively narrowly, some may incorrectly perceive an airport as being a monopoly or oligopoly supplier within its defined market. However, this perception fails to recognise the strong competition that exists between airports (even between those not in close proximity to each other) and the very strong countervailing power of airlines. It has been recognised consistently, including by the Productivity Commission's report on the Economic Regulation of Airport Services, that very few airports possess market power and even fewer require any sort of economic regulation. The Productivity Commission report also noted that commercial agreements between airport and airlines are becoming increasingly more sophisticated, with the inclusion of service level obligations, consultation on capital investment, price paths and dispute resolution processes when 'in-contract'.

It is therefore vitally important that legislation designed to regulate anti-competitive conduct is very sensitively drafted to avoid any unwarranted intrusion into ordinary commercial and competitive activity.

Section 46 of the Competition and Consumer Act 2010 currently provides that:

1. *A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:*
 - a) *eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
 - b) *preventing the entry of a person into that or any other market; or*
 - c) *detering or preventing a person from engaging in competitive conduct in that or any other market.*

The AAA believes that Section 46 achieves the necessary sensitivity required by focusing on the use of market power for anti-competitive purpose, rather than simply by reference to effect in the market. The Harper Review recommendation and Options B-F in the Discussion Paper are designed to broaden the misuse of market power law and therefore increase the potential of legal proceedings. It is the AAA's view that proceeding with such a change would likely increase uncertainty in the market to the detriment of consumers and potentially impact the commercial airport-airline negotiations process. With a broader misuse of market power test, airports would be subject to an increased threat of litigation from airlines in the event of a dispute on the terms of aeronautical and terminal services.

The AAA acknowledges that a misuse of market power proceeding is extremely costly and time consuming to commence (and historically rare) when compared to the alternative of an application for declaration under the National Access Regime. However, the remedies for a breach of the prohibition of misuse of market power are much more severe for an airport than a successful application for declaration. Therefore it is important to fully consider the implications of any changes to Section 46, as the AAA believes that the threat of a misuse of market power proceeding becomes more credible if the Government broadens the current test.

The AAA believes that Section 46, as it currently stands, provides adequate protections against the misuse of market power and should not be changed. The AAA recommends that the Government adopt Option A from the Discussion Paper and make no amendments to the current misuse of market power provisions.

I would welcome the opportunity to discuss this matter with you further and should you have any questions, please contact me via Simon Bourke (AAA Policy Manager) on 02 6230 1110 or sbourke@airports.asn.au.

Yours sincerely,



Caroline Wilkie
Chief Executive Officer