

3 June 2015

The Hon Bruce Billson MP
Minister for Small Business
Parliament of Australia
CANBERRA ACT 2600

Dear Minister,

Re: Harper Competition Policy Review – Final Report submission

Sydney Airport welcomes the opportunity to provide a submission to the Final Report of the Harper Competition Policy Review (Final Report). Sydney Airport provided detailed comments during the initial industry consultation phase and congratulates the government on the open and engaging process undertaken during this review.

Increased competition is key to improving economic performance, and Sydney Airport is committed to ensuring industry works with government to identify potential reform measures both through this process and as part of an ongoing dialogue with The Treasury.

As identified throughout the review process, there are a number of opportunities within the aviation sector to maximise productivity gains through the promotion of pro-competitive practices. Many of these include reducing protectionist measures that limit international aviation activity and tourism growth, reducing competitive distortions that exist between airports and making improvements to the regulatory and operating environment in the aviation sector.

While Sydney Airport's substantive comments relating to competition policy reform are contained within its original submission, this Final Report submission raises a number of supplementary matters that require further consideration by the government.

Airport privatisation

The Final Report highlighted several comments made by the ACCC in previous years about the effects of airport privatisation on the competitive landscape.

From the beginning of the airport privatisation process, the Australian Government recognised, in a policy sense, the benefits of common ownership and management of the two airports within the Sydney Basin. This was reflected in the Sydney Airport 2002 sale lease agreement which included a Right of First Refusal in relation to the development and operation of a second Sydney Airport within 100 kilometres of the CBD. This approach was and is in line with international best practice for cities with multiple airports, in that common ownership is likely to:

- Encourage and support traffic growth at the new airport by offering incentives to airlines
- Create differentiated product offerings that target services for the local catchment

- Make efficient investment decisions regarding investment in aviation capacity over time in the system
- Deliver financial stability across the airport system

This in turn will maximise the utilisation of the new airport and support faster economic growth and benefits. Globally, airports are recognised for the significant employment and economic wealth they generate, for the cities in which they operate. In 2012, the Australian Airports Association, asked Deloitte Access Economics, to evaluate the economic contribution of Australia's airports to the nation. They calculated that the direct economic contribution of Australian Airports to the Australian economy was in the order of \$17.3 billion. The indirect economic contribution was a significant multiple of this.

As a central component of air transportation, airports enable a range of business, trade and tourism activities that contribute to economic activity. Airports are also vital in supporting the multi-billion dollar tourism industry, and the hundreds of thousands of jobs it supports.

The then Federal Transport Minister Laurie Brereton said when introducing the *Airports Bill 1995* into Parliament on 17 October 1995 (more than 5 years before the commencement of the Sydney Airport privatisation process):

"In the budget this year, the government announced its leasing strategy. That strategy opted for the leasing of FAC airports in two stages, with the four major airports - Sydney, Melbourne, Brisbane and Perth - leased in the first phase, a phase in which Sydney will be jointly leased with the new airport at Badgerys Creek, Sydney West Airport. The latter decision reflected the outcome of market testing and overseas experience which suggested that multi-airport systems were more successful when developed on a complementary rather than competitive basis."

In fact, this formed the very basis for the sale of Sydney (Kingsford-Smith) Airport, attracting a premium above the airport asset price to obtain the right of first refusal to construct and operate a future second airport within the Sydney Basin.

With this in mind, Sydney Airport recommends the Australian Government consider the benefits of complementary ownership and management of a two-airport system in Sydney in light of the significant international experience, particularly in a more contemporaneous context.

Airport regulation

Sydney Airport agrees with the ACCC that *"the price monitoring and 'light-handed' regulatory approach appears to be working well overall"*. The ACCC has expressed concerns regarding recent price increases from other Australian airports (noting Sydney Airport's prices have increased broadly in line with inflation since the ACCC approved prices in 2001). Sydney Airport believes that these concerns are unwarranted and stand in contrast to the conclusion of the Productivity Commission (PC) reviews of economic regulation of airports in 2007 and 2011.

In fact, each of the PC reviews in 2002, 2007 and 2011 have further reduced the coverage of the price monitoring regime, reflecting the benefits of the 'light-handed' approach which has

facilitated the development of commercial relationships and commercial agreements with airlines over time.

Finding 7.1 of the 2007 PC Review found that, "*taken in context, these [price] increases do not indicate systemic misuse of market power*", in that the PC specifically contextualised the price increases against the airports' investment programs. Since the PC Review, both Melbourne and Brisbane have commercially negotiated increases in charges to fund new runways (with the ACCC 2013/14 Monitoring Report acknowledging evidence that at least some airlines demonstrated and exercised market power during these negotiations), and all four major airports have commenced significant investment programs in terminals, ground transport and other infrastructure.

As the PC found in 2011, the airport price increases continue to relate to substantial investment, and should not raise concerns.

Air services restrictions

Sydney Airport supports the Final Report's position that the economic benefits to the Australian economy and downstream tourism industries from increased international airline competition are significant. It is important that air services agreements deliver expanded capacity ahead of demand in a manner that delivers the maximum value to Australia at the earliest possible time.

Capacity and access constraints act as a deterrent to competition and thus weaken growth in aviation and downstream industries, particularly trade and tourism. The interests of Australia are best served by facilitating sustainable competition between airlines based on price, product, destination and frequency which ultimately deliver value to the traveller, rather than offering protection to Australian domiciled carriers.

Sydney Airport supports a review of how air services agreements are currently negotiated to place greater emphasis on the benefits of increased competition, including job creation, economic expansion and tourism growth.

Sydney Airport recommends that a more transparent and proactive approach be adopted by the Department of Infrastructure and Regional Development when conducting negotiations, taking into consideration the benefits that arise from free competition for both international visitors to Australia and Australians seeking to travel overseas. Industry should be provided with a greater level of involvement in the determination of Australia's priorities and ability to shape the ongoing strategy in negotiating air services agreements.

Misuse of market power

The Harper Review examined the misuse of market power and, in particular, the operation of section 46 of the *Competition and Consumer Act 2010* (the CCA).

The rationale behind the misuse of market power provisions is to ensure that smaller firms are protected from unilateral anti-competitive conduct while at the same time preserving the ability of firms with market power to compete vigorously. The current provisions balance these competing policy objectives by targeting particular forms of anti-competitive conduct that may not otherwise be caught by sections 45 and 47 of the CCA.

The Final Report notes that of the many submissions received that commented on section 46, opinions were divided on whether it is currently framed in a manner that is effective in deterring anti-competitive behaviour by firms with substantial market power.

The Final Report concluded that section 46 is deficient in its current form and it has recommended to government that the provision should be extensively amended so that it is directed to conduct that has the purpose, or would have or be likely to have the effect, of substantially lessening competition.¹ In response to concerns that this change could inadvertently capture pro-competitive conduct, the Final Report has also recommended that, when determining whether or not such conduct has been engaged in, the court should have regard to:

- a) the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market, including by enhancing efficiency, innovation, product quality or price competitiveness; and
- b) the extent to which the conduct has the purpose, effect or likely effect of lessening competition in the market, including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.

The proposed new section 46 would remove the need to prove a causal connection between the conduct and the firm's market power, and will involve an assessment of the effect of the conduct on the competitive process rather than an individual competitor.

Sydney Airport is concerned that implementation of this recommendation, as currently worded, would result in a range of unintended consequences for businesses and consumers. In particular, we do not agree with the proposal to remove from the existing section 46 the requirement to show a causal connection between a firm's market power and its conduct in respect of the misuse of market power provision.

The Final Report also recommends that the ACCC issue guidelines concerning the operation of section 46. It is not clear that introducing a provision that requires a court to have regard to a number of evidentiary matters will address concerns regarding the operation of a substantial lessening of competition test. Further, the ACCC guidelines will have no weight in court proceedings and could not safely be relied on by businesses in their decision-making processes.

Paradoxically, implementation of the recommendation in its current form could actually *discourage* genuinely pro-competitive and innovative behaviour. That such behaviour could inadvertently be stifled by the amended section 46 would clearly be undesirable and the opposite of that intended by the Review.

Example

To give an airport-related example (applicable to all major Australian airports), Sydney Airport provides on-site car parking in both our T1 and T2/T3 precincts. These car parks are operated on a 24-hour, 365 day basis.

¹ See recommendation 30.

For well over a decade, signage on the Departures roadways in both terminal precincts has made it clear that the area is a set down area-only and cannot be used to pick up passengers. This restriction is in place for security reasons and to ensure traffic volumes are properly managed, particularly at busy times. This means that anyone travelling to the airport by private car to pick up a passenger has no option but to park their car in one of Sydney Airport's on-airport car parks (whether they use the free pick up area or the regular car parking location). However, they can also choose to park their car in one of the many off-airport car parks. There are numerous competitors who provide car parking in areas near the airport and run passengers from their premises to the airport with a shuttle service. These competitors actively promote themselves as providing "airport car parking". The car parking market at and around Sydney Airport therefore is, and always has been, highly competitive.

In response to customer feedback on the price of our then range of on-airport car parking products, Sydney Airport decided several years ago to develop and offer to consumers a range of new online products. Our specific aim was to provide consumers with the option of booking their on-airport car parking in a variety of different ways at significantly discounted rates when compared to our "drive up" rates. This innovation responded directly to customer feedback. It has also assisted our planning for the future delivery of infrastructure to meet growing demand for on-airport car parking. This, in turn, has had very real and lasting benefits for consumers, including the ability to access, at a lower price, on-airport car parking. The possible deferral of capital expenditure to provide new car park infrastructure, in turn, is good for consumers and other aviation stakeholders.

However, our advice is that, were section 46 of the CCA to be amended as recommended in the Final Report, it is conceivable that one or more of the many off-airport suppliers of car parking services could allege that Sydney Airport's discounted car parking inhibits its ability to compete, despite contrary arguments that the conduct enhances price competitiveness. From the consumer's point of view, this is clearly not a desirable outcome and would discourage any attempt to provide on-airport car parking products more competitively.

Conclusion and recommendation

In summary, the Final Report recommends replacing the 'taking advantage' limb in section 46 with a 'purpose, effect or likely effect of substantially lessening competition' test that will, in our view, stifle competitive behaviour. As a result, conduct that can be pro-competitive in some aspects could adversely affect some competitors and therefore be said to affect the competitive process.

With this in mind, it is recommended that the proposed text of section 46 within the Final Report be amended as follows:

1. The 'taking advantage' limb in the existing section 46 be retained, in addition to the substantial lessening of competition test. This is similar to the approach currently taken in Part XIB of the CCA in respect of telecommunications;
2. Two elements be included in section 46 to clearly define the 'taking advantage' limb; and
3. The two factors that the court must have regard to when determining whether or not anti-competitive conduct has been engaged in, should be amended to include: (i) the reasons for the conduct; and (ii) whether the conduct involves below-cost pricing

Regulation review

The Final Report has recommended that all Australian governments should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Legislation (including Acts and regulations) should be subject to a public interest test and should not restrict competition unless it can be demonstrated that:

- a) the benefits of the restriction to the community as a whole outweigh the costs; and
- b) the objectives of the legislation can only be achieved by restricting competition.

In supporting this recommendation, Sydney Airport notes that a similar and highly successful National Competition Policy Review was undertaken by the Hilmer Committee between 1992 and 1995. This review resulted in the Council of Australian Governments agreeing on a significant law reform agenda, which was progressively implemented across all jurisdictions.

Implementation of this agenda was a significant microeconomic reform and resulted in numerous anti-competitive laws being either repealed in their entirety or amended in a way that benefitted consumers. There are a number of airport and aviation-related laws that could be reviewed and subjected to the proposed public interest test.

National Access Regime

Sydney Airport agrees with the Final Report's conclusion that Part IIIA of the National Access Regime should be reserved solely for exceptional cases where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.

Our national access regime holds an important place in Australia's competition framework. However, it is important that such regimes have a limited ability to interfere with the sanctity of commercial arrangements. In the case of Sydney Airport, arrangements with airlines are arrived at after extensive commercial negotiations. The arrangements that emerge from those negotiations should only be subject to reconsideration in the most exceptional of circumstances.

The ability of access seekers to seek declaration as a lever in commercial negotiations, or as a means to re-open concluded commercial negotiations, can be a significant impediment to the efficient operation of infrastructure.

Further, we note that an enterprises success or failure is rarely contingent solely on access to infrastructure. In the case of airports, we merely provide a platform from which airlines compete. Individual airline success is attributable to a wide variety of factors over which the airport asset owner has little or no control.

For these reasons, Sydney Airport agrees with the Final Report's conclusions in respect of increasing the thresholds for criteria (a) and (f), thereby ensuring that use of the national access regime is reserved for exceptional cases only.

Sydney Airport also agrees with the Final Report's observations that imposing future access regulation upon privately developed single-user infrastructure will adversely affect the competitiveness of Australian industry. For this reason, such future access regulation will likely be inefficient and should be resisted.

Sydney Airport would welcome the opportunity to provide further information on any of the further issues raised above, or those contained within the original submission. While this is not an exhaustive series of recommendations for reform to competition policy in Australia, the issues outlined in both the previous submission and this document represent the most significant opportunities to improve the competitive environment across the aviation sector over the short to medium-term.

Should you wish to receive a personal briefing on this submission or any other issues involving the aviation sector, please feel free to contact Mr Jon Stewart – Manager, Government Relations and Major Projects on (02) 9667 9288 or jon.stewart@syd.com.au.

Yours sincerely,



Kerrie Mather

Managing Director and Chief Executive Officer

cc: General Manager, Small Business, Competition and Consumer Policy Division – The Treasury