

MEMORANDUM

To: Dr Alison Roberts, Chief Executive Officer
Airlines for Australia & New Zealand

Re: Productivity Commission Inquiry into the Economic Regulation of Airports

Date: 22 November 2018

1. I have been asked to express my views on the Memorandum dated 11 October 2018 prepared by Simon Uthmeyer and Sophia Grace of DLA Piper with respect to criterion (a) of the declaration criteria in Part IIIA of the *Competition and Consumer Act 2010* (Cth) (CCA)¹.
2. The opinion is expressed in that Memorandum that the recent changes to criterion (a)² have not significantly increased the threshold that must be met for declaration of services supplied by non-vertically integrated infrastructure operators, such as airports.
3. I disagree with that view.
4. As originally enacted, criterion (a) was framed to enquire whether access (or increased access) to the service would promote competition in a dependent market. As a result of amendments that commenced on 1 October 2006, criterion (a) was reframed to enquire whether access (or increased access) to the service would promote a material increase in competition in a dependent market. In both forms, the criterion was interpreted as asking whether access of any kind would promote competition in dependent markets in comparison to no access: see *Sydney Airport Corp v Australian Competition Tribunal* (2006) 155 FCR 124 and *Port of Newcastle Operations v Australian Competition Tribunal* (2017) 253 FCR 115. In my view, that criterion was readily, even trivially, satisfied in the case of natural monopoly infrastructure assets which were required to be used in order to compete in dependent markets.

¹ Now found in s 44CA of the CCA.

² Enacted by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).

5. With effect from 6 November 2017, criterion (a) has been amended to enquire whether access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in a dependent market. The relevant comparison is forward looking and now compares the expected competitive environment in dependent markets with access on reasonable terms and conditions as a result of declaration with the expected competitive environment in dependent markets without such access. As stated in the relevant Explanatory Memorandum (at 12.20)³, the latter case may contemplate no access or some form of access without declaration.
6. Accordingly, under the new law, the decision maker is required to consider the relevant facts and circumstances that bear upon the expected nature and extent of access, and the expected competitive environment in dependent markets, with and without access through declaration. Essentially, there are two stages to the analysis: first, to consider whether and to what extent access would be expected to be granted in the absence of declaration, and how the terms and extent of access are likely to differ if the service were to be declared; and secondly, whether and to what extent those differences would be likely to affect competition in dependent markets.
7. In a market context involving a non-vertically integrated natural monopoly such as airports, the new criterion (a) is likely to be more difficult to establish. While the infrastructure owner will continue to have the ability and incentive to exercise market power (and extract monopoly rents from access seekers), the infrastructure owner may have less incentive to restrict access in a way that harms competition in dependent markets. The fact that, in the absence of declaration, the infrastructure owner is able to exercise market power and charge monopoly prices to all access seekers does not necessarily lead to a conclusion that competition in a dependent market will be restricted or lessened by that exercise of market power. It follows that it will be more difficult to satisfy the new criterion (a) in the case of non-vertically integrated natural monopolies, such as airports.

Yours sincerely

Michael O'Bryan QC

enc

Liability limited by a scheme approved under Professional Standards Legislation.

³ Accompanying the *Competition and Consumer Amendment (Competition Policy Review) Act 2017* (Cth).