Legislation Review of Clause 6 of the Competition Principles Agreement and Part IIIA of the Trade Practices Act 1974

WTH Pty Ltd trading as Avis Australia

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Introduction

In response to the Productivity Commission's Terms of Reference WTH Pty Ltd trading as Avis Australia (Avis) believes that the current access framework:

- promotes confusion amongst airport access seekers;
- discriminates against some car rental providers and places them at a commercial disadvantage;
- affects competition for identical and/or similar services through price discrimination; and
- restricts access seekers' commercial business and pricing arrangements.

Under the existing access framework, airport facility users may choose between two mechanisms, namely Part IIIA of the *Trade Practices Act 1974* or s.192 of the *Airports Act 1996*, when seeking to gain access to airport infrastructure. Given that there are different declaration criteria applying under these mechanisms, there has been some confusion and inequities created amongst access seekers and airport infrastructure providers over their application and consistency.

In some instances some car rental providers have been placed at a commercial disadvantage by being forced to pay higher charges than other access seekers providing similar services and having unreasonable terms and conditions forced upon them by airport operators unfairly exercising market power during negotiations.

Access arrangements should be altered to: -

(a) take account of "commercial interest" as a criteria for assessing declaration applications;

(b) adopt an end user approach to assessing the impact of an application on competition in upstream and downstream markets;

(c) include a framework for pricing of access services; or if these are not adopted

(d) expand the criteria for airport services subject to access regimes to include all airport facility services, including car parks and car rental desks.

1. Role of Access Regulation

Australia's access regimes are intended to encourage competition in markets constrained by the natural or statutory monopoly characteristic of upstream or downstream markets.

The various access regimes have been designed to encourage efficient development of infrastructure facilities and to promote competition in markets using the services of those facilities. Under the National access regime, access seekers can obtain a legal right to utilise the services of certain infrastructure under reasonable terms and conditions.
The access regime allows firms to avoid duplicating facilities which would be under utilised and inefficient. Infrastructure owners also benefit from spreading fixed costs across a larger base.

Part IIIA

In response to Clause 6 of the Competition Principles Agreement (CPA) the Commonwealth introduced Part IIIA of the *Trade Practices Act 1974* (TPA) to establish a national access regime thereby allowing businesses to seek access to the services of essential facilities at reasonable terms and conditions, and fair prices.

Under Part IIIA an access seeker may either apply to the National Competition Council (NCC) for a recommendation that the service be declared, seek access through an effective state or territory access regime or seek access under the terms and conditions specified in an undertaking by a facility owner accepted by the Australian Competition and Consumer Commission (ACCC). Under Part IIIA declarations and certifications are made by the relevant Minister on the NCC's recommendation.[1] Before making a recommendation to the designated Minister, the NCC must consider the following criteria:

- access would promote competition in another market (usually upstream or downstream from the service);
- it would be uneconomical for anyone else to develop another facility to provide the service;
- the facility is of national significance, having regard to its size or importance to interstate or overseas trade or the national economy;

[1] In the case of airport services, the ACCC has the power to declare services under s.192 of the Airports Act.

- access to the service can be provided without undue risk to human health and safety;
- no other effective access regime covers the service; and
- access is not against the public interest.

Other Access Regimes - Airport Services

There are a number of other access regimes operating concurrently with the National access regime set out in Part IIIA of the TPA, including airport services promulgated under the Airports Act.

In the case of airports, services can be declared through the declaration provisions of Part IIIA of the TPA or s.192 of the Airports Act 1996 (Airports Act).

"The process outlined under Part IIIA operates concurrently with s.192 of the Airports Act, although in practice the coverage of s.192 will mean that facilities are unlikely to be declared through the Part IIIA process."[2] Services are declared under s.192 for the purposes of Part IIIA of the TPA. Once declared these services are treated in exactly the same way as if they had been declared under Part IIIA except for a difference in criteria for declaration.

Although the Airports Act does not provide a list of declared services, it does refer to services provided at core related airports that meet certain criteria and sets out the following definition in s.192(5):

> *airport service means a service provided at a core regulated airport, where the service:*
> *(a) is necessary for the purposes of operating and/or maintaining civil aviation services at the airport; and*
> *(b) is provided by means of significant facilities at the airport, being facilities that cannot be economically duplicated;*
> *and includes the use of those facilities for those purposes.*

[2] Draft Guide 'Section 192 of the Airports Act – Declaration of airport services'. ACCC. October 1998. p.14

Under s.192(4A) and (4B) of the Airports Act, the Australian Competition and Consumer Commission (ACCC) has the power to determine that a service is or is not an airport service without reference to the above criteria.[3]

Differences between the two mechanisms for declaration

Differences between Part IIIA of the TPA and s.192 of the Airports Act include:

- s.192 provisions relate to specific 'core regulated airports' whereas Part IIIA declarations are generally available to a wide range of industries;
- declaration under s.192 is effectively automatic provided it falls within the definition contained in s.192(5) whereas declarations under Part IIIA are available only through application to the NCC and upon its recommendation being accepted by the relevant Minister; and
- differences in the declaration criteria – the test in Part IIIA requires that it is 'uneconomical for anyone to develop another facility' whereas the criteria in s.192(5) requires only that facilities 'cannot be economically duplicated'.

"Part IIIA uses more exhaustive criteria, and potentially applies to a narrower set of services. The important exception to this is that Part IIIA will apply if it is 'uneconomical ... to develop another facility', which is a potentially weaker test than the Airports Act test of economic duplication. However, in other respects the Airports Act uses much weaker tests. For example, it contains no requirement that access promote competition in related markets, and while the facility must be uneconomic to duplicate, it need not be nationally significant."[4]

Current Declarations/Determinations

To date the NCC has made only two recommendations in relation to airport services under Part IIIA. These relate to the provision of services at Sydney and Melbourne airports for the *use of freight aprons and hard stand areas to load/unload international aircraft; and use of areas at the airport to store equipment used to load/unload international aircraft and to transfer freight from the loading/unloading equipment to/from trucks at the airports*.

[3] Draft Guide 'Section 192 of the Airports Act – Declaration of airport services'. ACCC. October 1998. p.viii.

[4] International Air Services – Inquiry Report. Report No. 2. Productivity Commission. 11 September 1998. p.202.

In the case of the Airports Act there has been only one determination, Delta Car Rentals, relating to the provision of *landside roads and associated vehicle facilities for dropping off and picking up passengers at Melbourne Airport*. Under this determination Delta Car Rentals gained the right to negotiate with the airport operator regarding access and, in the event these negotiations are unsuccessful, have the ACCC arbitrate terms and conditions. While it is feasible that an "on-airport" provider(s) may be able to obtain a similar declaration(s) it is unlikely given current criteria for declaration (under either Part IIIA or the Airports Act) that such declaration would be extended to cover other services such as access to rental desks and parking bays. This is a rather anomalous situation given that "on-airport" car rental providers pay substantial fees to airport operators and yet are unable to negotiate on a commercial basis and/or resolve disputes through arbitration.

Interestingly, Sydney Airports Corporation Limited (SACL) subsequently opined that it did not believe that a similar application would be successful in the context of Sydney Airport.[5]

Lack of Business Certainty

The existence of these two mechanisms promotes some confusion amongst airport users and service providers over their application and consistency.[6]

"The use of different criteria and processes raises the prospect that non-essential facilities will be declared, increases uncertainty about expected returns and deters investment in airport facilities. This could be detrimental to competition and economic efficiency in the airport sector."[7]

Certainly, in the case of the Delta decision, the ACCC applied the criteria for declaration under Part IIIA of the TPA in making its determination. However, the decision has created an anomaly in the market in which car rental companies operate. This declaration affords to Delta (an "off-airport" car rental provider) with the right to enter into negotiations with the airport operator for access arrangements and, if these negotiations are unsuccessful, the right to have terms and conditions arbitrated. In contrast the "on-airport' car rental providers supply licensed services which are not covered by a declaration and thus do not have the option of seeking arbitration. As a consequence "on-airport" car rental providers are placed at a commercial disadvantage. Avis believes that it is not the intention of the legislation to discriminate in this way. In order to rectify this situation, Avis suggests greater consideration be given to the legitimate and reasonable

[5] Minutes of Third Pre-tender Meeting for Car Rental desk Site and Non-Desk Site Licences, Contracts 368 & 369. p16.

[6] 'International Air Services – Inquiry Report. Report No. 2. Productivity Commission.11 September 1998. p.202.

[7] Ibid p.203.

commercial interests of the parties involved when making access determinations (refer Section 3).

While it may be argued that Avis could also apply for a declaration on similar grounds as Delta, this would necessitate somehow unbundling this service from the 'package' of services that it provides under the "on-airport" licence arrangements but still being unable to negotiate non declared services contained in the package on a commercial basis.

Ineffectiveness of 'on-site concession' agreements

The current access arrangements have limited application and can in certain circumstances inhibit commercial arrangements between airport operators and airport users not covered by access arrangements.

For example, where non-licensed "off-airport" car rental providers operate by dropping off and picking up passengers at an airport terminal, an "on-airport" concessionaire could be financially disadvantaged even though it has entered into a contractual arrangement with the airport operator for access. In practical terms airport operators may be significantly hampered in delivering rights access to the concessionaire(s).

Arbitration of Disputes

"Declaration gives current airport and potential airport users greater rights than their existing rights to negotiate terms and conditions of access with the airport operator".[8]

Where negotiations between an access seeker and an airport operator breakdown, an access dispute may be referred to a private arbitrator or the ACCC. In the case of private arbitration, a contract for access in accordance with the arbitrator's decision may be submitted to the ACCC for registration, thereby enabling the contract to be enforceable under Part IIIA as if it were a ACCC determination enforceable via the Federal Court. In these circumstances access seekers are provided some countervailing power when dealing with infrastructure owners. No such constraint exists when Avis negotiates with airport operators.

This right to seek arbitration provides the "off-airport" car rental providers with a significant advantage over "on-airport' providers.

[8] Draft Guide 'Section 192 of the Airports Act – Declaration of airport services'. ACCC. October 1998. p12

Competition

The goal of any access regime is to increase and encourage sustainable competition in upstream and downstream markets. *An access regime is an instrument governments can use to inject competition into a market where it may otherwise be lacking.*[9]

Competition already exists in the market for car rental services at major airports around Australia. This existing competition ensures consumers receive the lowest cost services with the best service levels possible. Any commercial advantages are quickly passed onto consumers.

In Avis' view applications for access should consider existing competitive markets. Where competition already exists in the end market, additional access should be negotiated on the same basis as existing operators.

The current regimes, namely s.192 of the Airports Act and Part IIIA of the TPA, have not been effective in promoting or encouraging sustainable competition. In fact, the lack of certainty which the current regime produces actively discourages investment and prolongs commercial negotiations. The nature of the current access regime means that it favours certain business models over others and does not apply in a holistic way to the entire infrastructure services. In fact, it fails to consider in many cases legitimate commercial interests of current users.

Effectiveness of current regulatory regime

Avis believes the current access regime adopts a narrow view of services. Certain services may be covered while others may not be covered by access arrangements even when these services are, or portions of them may be, substitutable in the eyes of consumers. This lack of a total service approach has led to the creation of a number of anomalies and uncertainty in the car rental business and if left unaddressed may adversely impact on investment and business initiatives to the detriment of the travelling public.

While Avis believes the provision of car rental services is unlikely to meet the criteria for declaration under s.192 or Part IIIA, elements of the service may qualify. This view is supported by the actual ACCC determination that the provision of certain land sites, roads and vehicle facilities were subject to s.192.[10]

As previously outlined this creates a ludicrous situation when Avis, which pays for the right to operate at the airport, has a lesser right to negotiate for a continuation of its

[9] National Competition Council, National Access Regime, *Draft Guide to Part 3A of the Trade Practices Act*, August 1996 Page 5
[10] ACCC declares vehicle access services at Melbourne Airport, 17 May 1999, press release.

services than its competitors who, as "off-airport" providers, may not be required to pay any fee for access. While clearly an unintended consequence of the legislation, this places the parties involved in a difficult commercial position, with the value of the existing "on-airport" access rights diminished. Avis does not believe that it is the intention of the legislation to discriminate between business operating models rather that business operating broadly similar services should be competing on the same basis.

In order to remedy this situation, Avis suggests greater consideration be given to the legitimate and reasonable commercial interests of the parties involved when making access determinations. The addition of a commercial interest criteria into the assessment process may aid in this occurring. Avis also suggests that a more holistic approach be taken to the provision of access services. Access to essential facilities should be considered on the basis of the operations and the business being provided rather than simply the services being sought by an access seeker.

The current regime also fails to counter the market power of infrastructure owners. For example, Avis has introduced at considerable cost enhanced customer service facilities which are dependent upon Avis retaining access to parking bays in close proximity to airport terminals. Given SACL's proposal to relocate facilities to a remote location, there is a disincentive for Avis to introduce customer service initiatives in the future.

SACL makes its decisions about remote access without involving the car rental concessionaires and benefiting from their global experience in operational, properties, facilities and customer service issues. Based upon Avis' worldwide experience (including Miami, Phoenix, Singapore Changi, Vancouver and all Australian airports), overwhelming customer opinion is that they prefer parking bays in close proximity to the terminal. Most customer complaints arise from problems associated with remote facilities. Canada has in place a national policy of providing parking facilities for car rental businesses in close proximity to airport terminals. Implementation of remote car parking facilities would result in loss of business to taxis, hire cars and "off-airport' car rental operators.

2. Monopoly Power

As mentioned earlier, airports are not economically duplicable. This provides airport operators with significant monopoly market power. Access regimes are designed to reduce the ability of the infrastructure owner to use its market power to prevent market entry. This exploitation of market power may take various forms, including: -

- higher prices;
- lower output;
- reduced quality of services;
- denial of or disincentives for innovative services that new entrants bring to the market; and
- reduced incentives for access seekers to operate efficiently.

There is a need for the access regime(s) to address the unequal bargaining positions between airport operators and car rental providers as neither s.192 of the Airports Act or Part IIIA of the TPA adequately address the following issues: -

- lack of genuine negotiation on the part of infrastructure owners;
- the ability to charge excessive access prices;
- structuring access arrangements in ways that affect competition for identical or similar services by price discriminating against individual service providers;
- unreasonably abbreviated deadlines for submission of documents during tender processes;
- arbitrary scheduling of meetings thereby preventing attendance by key representatives from access seekers;
- unreasonable delays in the negotiation process; and
- restrictions on access seekers commercial business and pricing arrangements.

Limited protection from current legislation

The current legislation has a limited scope. Many commonly provided services using airport infrastructure, such as car rental operations, do not meet the criteria for declaration. This situation encourages infrastructure owners to abuse their market position during negotiations. For example, SACL has demonstrated a total disregard for the commercial impact of its pricing initiatives when dealing with car rental companies as evidenced in the recent allocation of 'Car Rental Desk Site Licence(s)'. From Avis' perspective SACL's pricing strategy amounts to little more than transfers of income to itself. In the event that this additional cost impost leads to an increase in car rental fees, then this inefficiency will flow on to the public in the form of increased prices.
Since the market at Sydney Airport represents the gateway to the Australian car rental market, Avis in order to maintain it market share has been forced to accept an unsatisfactory arrangement after virtually being threatened with 'a take it or leave it basis' attitude from SACL management. Unacceptable terms include:

- an effective licence fee increase of approximately 60% ;
- an inequitable arrangement whereby car rental providers with substantial market shares being forced to pay significantly more for additional parking bays in excess of across the board allocations made to all "on-airport" providers regardless of market share;
- SACL's intimation that non-licence holders may be able to operate at Sydney Airport;[11]
- SACL's admission that, while the "Non-Desk Licence" prohibits the supply of other goods and services, there will be no monitoring or enforcement of such by SACL in relation to : -
  - car parking services offered by car rental providers such as Delta;
  - on-airport advertising; and
  - courtesy phone systems

  because these are not activities subject of the licences being offered under either Request for Tender Nos. 368 or 369;[12]
- potential relocation of Avis' car collection and return areas to a remote site outside of the car park;

[11] Minutes of Third Pre-tender Meeting for Car Rental desk Site and Non-Desk Site Licences, Contracts 368 & 369. p9.
[12] Minutes of Third Pre-tender Meeting for Car Rental desk Site and Non-Desk Site Licences, Contracts 368 & 369. p 9 & Attachment 2 to SACL letter dared 21 July 1999.

- no guarantee of occupancy in the event of the sale of Sydney Airport during the term of the licence;
- substantial capital losses in the event SACL requires relocation of Avis' 'booth' from the car park at the Domestic Terminal; and
- a potential discriminatory outcome as a consequence of having a remote site at a different location to the existing remote service facility and increased running costs.

Given the unique position that airport operators hold, Avis believes that, if the current arrangements continue, the criteria for airport services subject to access regime should be expanded to include all airport facilities services, including car parks and car rental desks.

In addition measures should be included in the criteria to ensure infrastructure owners do not unfairly exercise their market power in negotiations. This may take the form of a right of arbitration, similar to that available to businesses seeking access to a declared services. Avis would support extending the availability of arbitration to all businesses negotiating with infrastructure owners.

3. Criteria for Declaration

Avis believes the current criteria for declaration under Part IIIA can lead to distortions in the market as evidenced by the Delta decision. Avis supports amendments to the criteria which would eliminate or reduce the possibility of such anomalous situations. Such amendments may include:

- an end product approach to decisions
- a legitimate commercial interest clause
- an existing competition criteria.

Under the existing terms of 'on-airport concession' agreements, car rental providers at Sydney Airport are required to pay concession fees for the right;

- to conduct a car rental business at or from the airport;
- to maintain a car rental desk at the International Terminal of Mascot Airport; and
- to access the 'Car Rental Returns Area'.

The current access criteria favour examining each service, subject to a request for declaration, in isolation. The criteria do not require an operational competitive analysis of the impact of declaration may have on existing operators or the infrastructure owners' business. This lack of a holistic approach has led to the ludicrous situation now in place at Melbourne Airport.

Avis favours a more complete or holistic approach being undertaken when considering applications for declaration. Applications should be assessed not only with regard to existing criteria and services in question but also in relation to the services to be offered by the applicant. Where competition already exists in that end use market or alternative operators provide similar services, less weight should be given to the application.

4. Pricing

Avis believes that a 'holistic' approach should be undertaken to access pricing and services provided. Currently there are no guidelines as to how access prices should be negotiated. While current arrangements encourage an access seeker and infrastructure owners to negotiate terms and conditions, the reality is that there is little or no incentive for facility operators to negotiate given their monopoly position and hence to forgo monopoly rents. For example, Avis was forced to accept an increase of about 60% at Sydney Airport.

The current access regime does not provide a framework for the calculation and negotiation of pricing once access has been determined, which further increases the level of uncertainty and adds to the failings of the current regulatory system. The lack of a framework for negotiation encourages infrastructure operators to seek monopoly rents when negotiating access prices. SACL's unwillingness to negotiate is evidenced by its management's "take it or leave it" attitude expressed during pre-tender meetings.

Avis believes a more holistic approach to the determination and pricing of access will lead to greater investment, improved competition and increased certainty for both the providers of access services and the users.

While the current access regime allows for arbitration by either private arbitrator or the ACCC in relation to declared services, the reality is an access seeker can expect long delays as evidenced by the Delta's negotiations with Melbourne Airport's owners. This monopoly position can be exploited by the infrastructure owner to maximise the revenue from organisations competing for access and hence lead to a shift in economic welfare from consumers to the infrastructure owner .

Where the terms and conditions of access for some services provided by a monopolist are regulated but others not, there is encouragement to recover monopoly rents from the provision of the unregulated services which in turn may act as an incentive to distort investment. This could in turn impact on investment decisions with airport owners being encouraged to 'over invest' in infrastructure or in the economically inefficient use of limited land used to provide the unregulated services.

Clearly the *Prices Surveillance Act 1983*, which is used to constrain price increases in aeronautical charges, is unlikely to assist in creating an effective framework given limitations recently identified by the Productivity Commission[13]. Avis suggests that the access regimes should require the parties to negotiate in a transparent consultative

[13] Review of the Prices Surveillance Act 1983. Interim Report. October 2000.

manner to achieve outcomes based upon fair terms and conditions. Such a framework should prescribe a methodology and criteria for the parties to use. This would reduce the burden on the ACCC to arbitrate and would lead to swifter and more commercial access pricing outcomes.

5. Need for industry specific regulation

Promotion of economic efficiency

The national access regime and industry-specific regimes are designed to ensure efficient development of infrastructure facilities and to promote competition in markets that use the services of those facilities. The regime should ensure fair and reasonable terms and conditions of access are regulated to achieve these objectives.

The current arrangements applying to access airport infrastructure by rental car companies does not promote economic efficiency and, consequently, does not ensure efficient infrastructure development. For example, the current price structure at Sydney Airport discourages usage of rental car space beyond that currently allocated to rental car companies as the cost per unit has increased by around 25% for additional spaces. While some companies continue to have spare capacity and therefore do not experience higher per unit marginal costs, competition should ensure additional costs incurred by other companies are not passed on to consumers. The outcome is simply distributive, the airport operator appropriating some consumer surplus from rental car companies who suffer reduced profitability. However, when market demand grows to the point where all operators require additional spaces, the higher costs of those spaces will be passed on to consumers, representing an efficiency cost. These prices should be regulated to ensure that higher per unit charges are justified taking into consideration the true opportunity cost of not putting those additional spaces to an alternative use, such as public car parking or even aeronautical uses.

Dual system of airport access regime

The Productivity Commission made the following statement in a report on its inquiry into international air services:

> "The use of different criteria and processes raises the prospect that non-essential facilities will be declared, increases uncertainty about expected returns and deters investment in airport facilities. This could be detrimental to competition and economic efficiency in the airport sector." (Productivity Commission (1998) *International Air Services: Inquiry Report*)

Avis considers that this dual system should be retained as Part IIIA criteria are too narrow and do not take account of the unique monopoly position held by airport infrastructure operators.

Distortion of investment incentives

Where the terms and conditions of access for some services provided by a monopolist are regulated but others not, the freedom to recover monopoly rents for provision of the unregulated services distorts the investment incentives of the provider. It then may be profit maximising for the provider to 'over invest' in infrastructure or to inefficiently utilise limited land to profit from the unregulated services.

6. Conclusion

The access provisions in Part IIIA of the TPA should be retained as they have the capacity to increase competition and reduce the monopoly power of infrastructure owners. However, in practice the current arrangements have led to market anomalies which do not appear to be the intention of the legislation.

As steps towards remedying these anomalies, Avis proposes the following changes to current access arrangements: -

(a) include "commercial interest" as a criteria for assessing declaration applications.

(b) adopt a holistic approach to assessing the impact of an application on competition in upstream and downstream markets and the duplicity of any service.

(c) include a framework for pricing of access services; or if these are not adopted

(d) expand the criteria for airport services subject to access regimes to include all airport facility services, including car parks and car rental desks.