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24 September 2011

Dr Wendy Craik  
Presiding Commissioner,  
Inquiry into the Economic Regulation of Airport Services  
Productivity Commission  
GPO Box 1428,  
Canberra ACT 2601

Dear Dr Craik,

**Submission to Productivity Commission on the Draft Report of Inquiry into the Economic Regulation of Airport Services**

**Scope of submission and key points**

This submission addresses the Productivity Commission's(PC) recommendation for a 'Show Cause' process to be introduced to enable the current airport monitoring by the ACCC to be made more 'active' and, presumably, to increase the credible threat that stronger regulatory action could be invoked against any suspected abuse of market power.

In my view the introduction of a 'Show Cause' provision would not strengthen the airport regulatory framework but weaken it for the following reasons:

- It is not clear that the criteria required by the ACCC to issue a 'Show Cause' direction can be met from the information provided in the monitoring program
- The 'Show Cause' process is not likely to result in an appropriate or timely remedy to particular problems
- The 'Show Cause' process itself will create uncertainty and appears to lack transparency

**Outline of 'Show Cause' proposal**

'Key points' of the PC Draft report contain the recommendation for a 'Show Cause' process:

"Successive Australian Governments have not acted on the regulator's concerns that some airports might potentially be misusing their market power.

- Drawing on its monitoring role, the regulator should be able to direct an airport to show cause why its conduct not be subject to 'forensic' price inquiry.
- Where the regulator is dissatisfied with the response, the Government should invoke such a price inquiry that is guided by the Aeronautical Pricing Principles." (p.XX)

The PC notes the recommendation for a 'Show Cause' provision associated with ACCC monitoring reports in its 2006 Inquiry report was based on its consideration that monitoring system needed to be made more 'active' with 'determined' inaction or action. The Report also notes the Government's non-implementation of this recommendation "owing to the impact of the global financial crisis and some ensuing design flaws in the Government's proposed response". The PC believes "that there remains a need to make the system more 'active'". (p.XXXIV)

This position reflected a changed view by the PC of the way the ACCC should administer price monitoring. The PC's 2002 Price Regulation of Airport Services Inquiry report and the 2001 Inquiry Report on the Review of the *Prices Surveillance Act 1983* recommended only a passive information provision role.<sup>1</sup>

The 'Show Cause' direction is to be based on an assessment of suspected misuse of market power from the information provided in monitoring reports. If the ACCC is not satisfied with the airport/s response a second stage is a price inquiry which would be "far more broad ranging and examine airport conduct, including taking evidence from the airport operator, its customers and other relevant sources". (p. XXXIV)

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<sup>1</sup> The Report on the Review of PS Act describes the ACCC's price monitoring generally:

"The ACCC would be responsible for collating information provided as part of the monitoring program as specified by the relevant public inquiry...The ACCC also would be responsible for the public reporting of the information. As part of the monitoring the ACCC could provide some commentary on the data. However, it is important to note that under the monitoring arrangements envisaged by the Commission, the ACCC would not make any determinations on the appropriateness of prices or make recommendations to the Government using this monitoring provision. ... Commenting by the monitoring agency should be limited to those of a factual or descriptive nature. For example, the agency may wish to comment on the trend in data over the monitoring period or provide a factual comparison with data from the previous monitoring report. This is because, ..., the intent of monitoring is to facilitate information provision ..." (pp. 94-95)

In its 2002 Airport Inquiry Report the PC expressed the view that the implementation of airport monitoring should be carried out in a way that is consistent with its recommendations in its Inquiry Report on the PS Act:

"Airport-specific price-monitoring arrangements ... should be consistent with any generic price-monitoring provisions that may be introduced into the TP Act ..." (p.XLVI)

"The Commission is of the view that any criteria for monitoring ... should reflect generic monitoring criteria and be consistent with the monitoring principles discussed in the Commission's review of the PS Act." (p.328)

## The criteria for issuing a 'Show Cause' direction

In terms of the operational design of the 'show cause' mechanism the PC notes:

"...it is imperative that a show cause direction not be issued solely on the basis of particular outcomes in any one year. Rather, the ACCC should, after drawing on the last and prior monitoring reports, come to a view that there is a prima facie evidence that an airport has, over time, demonstrated a consistent pattern of achieving aeronautical returns in excess of a reasonably expected band of outcomes, having regard to price paths, the quantum and timing of investment and how that bears on quality outcomes, and market conditions. In keeping with an evidence-based approach with the ACCC assessing trends, a complaints-based system is not appropriate." (p.XXXIV)

The PC's Draft Report comments that its 2006 Inquiry Report "stressed that any 'show cause' threat should only be exercised 'if an airport has clearly misused its power, and that the consequences of that misuse are significant'". (p.242)

and

"The Commission's view is that ACCC price and quality monitoring is fundamental to providing the information base necessary to establish whether there is a prima facie case of misuse of market power." (p.256)

The PC's comments in its Draft Report imply that, based on the information in the annual monitoring reports, the ACCC should be able to assess whether an airport has *demonstrated* excess aeronautical returns over time taking into account a number of factors; or that an airport has 'clearly' misused its market power in a significant respect, as identified in the PC's 2006 Report. The PC also comments that in issuing a 'Show Cause' notice the ACCC should be "explicit in its judgments and prepared to stand by and act on those judgments. ..." <sup>2</sup> This further suggests that there should be a high hurdle for a determination of a 'Show Cause' notice.

Given the information that is provided to the ACCC for its monitoring reports it is unlikely that the level of assessment possible could enable these high hurdles to be met.

The ACCC commented in its 2009-10 Airport Monitoring Report :

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<sup>2</sup> PC Report, (p.XXXIV)

“Some indication about the airports’ performance can be made based on observations from the monitoring results over time within the context of the airports’ market, as well as the incentives and ability to use that market power.” (p.viii)

Further, in its submission to the Inquiry, the ACCC describes monitoring as being “helpful in identifying areas of concern”<sup>3</sup>. From the Draft Report it seems unlikely that the PC would consider that the identification of ‘areas of concern’ is sufficient to warrant a “Show Cause’ direction. Yet this may be all that is possible to discern from the monitoring information. The information reported to the ACCC for monitoring purposes is aggregated and provides only an *indicative* assessment over time. It is unlikely to provide ‘demonstrated’ excess returns or that an airport has ‘clearly’ misused of market power on its own.

### **Timely and appropriate remedy for misuse of market power**

A ‘Show Cause’ notice potentially leads to a public inquiry under the Part VIIA provisions of the *Competition and Consumer Act 2010*. Attachment A provides an illustrated timeline associated with the steps likely to be involved in making a ‘Show Cause’ notice and a subsequent inquiry. The timeline shows that the implementation of any measure recommended from a Part VIIA inquiry is not likely to occur until a minimum of 18 months after the end of the financial year on which monitoring information is based. If the ‘Show Cause’ step is removed from the processes, the amount of time taken between the end of a financial year and the completion of a Part VIIA inquiry would be reduced by several months.

The most likely outcome of a Part VIIA Inquiry is a recommendation or set of recommendations to the Government. It is unlikely that the types of recommendations that could arise from a Part VIIA inquiry would resolve specific issues associated with the use of market power? An important consideration is that, in the airport context, the Government and the industry have emphasized the importance of commercial negotiation. It is therefore unlikely that an Inquiry would lead to general price regulation of an airport. Few Part VIIA inquiries have occurred since the ACCC was established in 1995, with only two occurring this millennium, so there are few precedents to draw on to ascertain the likely success of this approach to market power.<sup>4</sup>

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<sup>3</sup> ACCC submission, p.19 and quoted in PC Draft Report, p.154

<sup>4</sup> Three Inquiries under the prices surveillance provisions (now Part VIIA of the *Competition and Consumer Act 2010*) that have occurred since the ACCC was formed are:

Inquiry into Petroleum Products Declaration, 1996

Inquiry into the price of unleaded petrol, 2007

Inquiry into the competitiveness of retail prices for standard groceries, 2008

### **Uncertainty and transparency of the 'Show Cause' process**

As a new process, without established procedures, but with the expectation that the process will lead to outcomes, the 'Show Cause' mechanism is likely to lead to industry uncertainty. Further, the PC Draft Report suggests the process is not expected to be transparent or to involve any input from industry other than from an airport/s.

Based on the uncertainty likely to be created by its adoption, and the other factors discussed above, it is unlikely that any potential benefits of the incorporation of a 'Show Cause' mechanism in the airport regulatory framework would exceed its costs.

Yours sincerely,

Margaret Arblaster  
Director  
TransAv

**Illustrative time line for processes involved in the ACCC issuing a 'Show Cause' notice which results in a Part VIIA Inquiry**

Action	Amount of Time	Likely time line in an expedited process
End of financial year X-1		30 June year X
Airports provide quality of service information for previous Financial year to the ACCC for year X-1	1 month <sup>5</sup>	31 July year X
Airports provide financial and price information For previous financial year X-1 to the ACCC	90 days <sup>6</sup>	29 Sept. year X
ACCC publishes monitoring report for year X-1		Feb./Mar. year X
ACCC issues a 'Show Cause' notice to an airport		Feb./Mar. year X
Airport responds to 'Show Cause' notice	4-6 weeks	April year X
ACCC assessment of airport response to 'Show Cause' notice		
ACCC makes a recommendation to the relevant competition Minister to invoke a Part VIIA Inquiry.		May year X
Minister makes a decision to undertake a Part VIIA Inquiry and the Inquiry is set up (airport/s are informed, Terms of Reference developed, resourcing established etc.)		May year X
<i>Airports provide quality of service information for previous Financial year to the ACCC for year X</i>	<i>1 month</i>	<i>31 July year X+1</i>
Price Inquiry completed and recommendations given to the Government	4-6 months	Sept./Nov. year X+1
<i>Airports provide financial and price information For previous financial year X to the ACCC</i>	<i>90 days</i>	<i>29 Sept. year X+1</i>
Government considers Inquiry recommendations and announces a response		Oct./Dec. year X+1
Implementation of Government response <ul style="list-style-type: none"> <li>• New legislation?</li> <li>• Ministerial instruments under Part VIIA?</li> <li>• Further investigation/study/review?</li> <li>• Other?</li> </ul>		Nov./Jan. year X+1
<i>ACCC publishes monitoring report for year X</i>		<i>Feb./Mar. year X+1</i>
<i>ACCC issues a 'Show Cause' notice to an airport</i>		<i>Feb./Mar. year X+1</i>

**Note:** *Italics – illustrates overlap of the next years monitoring process with the outcome from previous years 'Show Cause' process*

<sup>5</sup> Commonwealth Consolidated Regulations, Airport Regulations 1997 – Reg 8.03

<sup>6</sup> Commonwealth Consolidated Regulations, Airport Regulations 1997 – Reg 7.06