

Inquiry into Airport Regulation  
Productivity Commission  
GPO Box 1428  
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**Economic Regulation of Airport Services:  
Further comment on the  
Productivity Commission Draft Report of August 2011**

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**1. Introduction**

Recent submissions, not least by the ACCC, further call into question the viability of the ‘show cause’ proposal made by the Draft Report. But there remain concerns about the deemed declaration route proposed by the ACCC.

My previous comment (subdr 116) suggested that a more proportionate approach would be to declare only one airport, whichever airport was causing most present concern about the exercise of market power. This could be expected to a) improve the bargaining situation at that airport, b) provide valuable evidence about the effects of declaration, and c) encourage other airports to engage in more flexible commercial negotiation.

Subsequent discussion indicated to me that even this reduced and potential role for regulation was a cause for concern in some quarters. The present note therefore puts forward another suggestion for consideration.

**2. Two issues**

Policy on arbitration involves two distinct issues. One is the concept of access to independent dispute resolution per se. Here, both declared intentions and empirical evidence increasingly suggest that parties will overwhelmingly prefer to negotiate rather than resort to arbitration wherever possible.

The other issue is the role of regulation in such arbitration. Here, there is a widespread concern about ‘reintroducing regulation through the back door’, as for example in giving the ACCC a role via the deemed declaration route. This would not amount to the heavy-handed regulation of earlier times. Nonetheless, it is evident that there are deep-rooted and strongly felt concerns and fears here that are not lightly to be overcome.

This suggests that one should look for a solution involving independent dispute resolution (binding arbitration) that does not involve the ACCC. In principle no doubt one could envisage legislation to that effect (an airport-specific regime), but that would not be straightforward.

### 3. A suggestion

I therefore wonder whether the parties themselves (major airports and airlines) might voluntarily commit themselves to provide for independent binding arbitration, *by an individual or organisation of their own choice*, in the event that they were not able to agree the terms of a contract?

For airlines, this is something they have always sought. For airports, it would be better than deemed declaration. For both parties, this is surely a more immediate and effective and less threatening outcome than the possibility of an ACCC investigation with unknown consequences.

Furthermore, this approach would seem to be consistent with both the Commission and the ACCC positions.<sup>1</sup> In contrast, either of the presently proposed options would leave one of these bodies unhappy, and both still at odds with each other.

If each major airport and its airlines were voluntarily to agree such a procedure for independently resolving disputes that occur in the process of negotiating a contract (as well as during the term of the contract, as now), and if this were to happen before the Commission concludes its Report, that would obviously be a major step forward.

But it would not actually be necessary for such agreements to be reached immediately. Rather, the Commission could simply propose in its recommendations that neither assessment and investigation by the ACCC, nor deemed declaration, would be necessary or appropriate for a major airport that voluntarily agreed such a procedure with its airlines. Indeed, the Commission might deem it sufficient for an airport unilaterally to declare that it would be willing to enter into such an agreement with its airlines, provided there was evidence that such an offer was made in good faith.

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<sup>1</sup> For example, “The ACCC has proposed the use of deemed declaration. ... However, it recognises that others have argued for a fit-for-purpose airport regime, rather than use of Part IIIA. The ACCC agrees that the legal mechanism is less important than the substantive outcome of promoting competition and efficiency.” (ACCC submission of October 2011, p. 4)