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Airports Bill 1995

Date Introduced: 27 September 1995
House: House of Representatives
Portfolio: Transport
Commencement: Royal Assent

Purpose

To provide a regulatory regime for the leasing of Federal airports. The regime includes restrictions of foreign ownership, cross-ownership of major airports, the use of airport sites and the regulation of environmental impact of airport operations.

Background

Federal airports are currently operated by the Federal Airports Corporation (FAC) which owns 22 primary, regional and general aviation airports. The FAC commenced operations in 1988 and in world-wide studies and studies commissioned by the FAC has been shown to be an efficient operator of airports. According to the FAC's 1994 Annual Report, a Travers Morgan study of the 40 major international airports showed that Sydney airports landing and associated charges were fourth lowest of the airports studied. Additionally, an FAC commissioned study by a UK Professor showed that compared to UK and European airports, the FAC's productivity is significantly higher while unit operating costs are proportionally lower. The Annual Report also states that in terms of passengers per staff member there was a 15% productivity increase in 1994.

The FAC is a fully owned government business enterprise that operates according to normal commercial practices and pays company tax and dividends to the owner. Total Commonwealth equity in FAC was $707.7 million as at 30 June 1994. In the 1993-4 year, $8 million in dividends were payable by the FAC.

While the FAC is a profitable body, the majority of the airports it operates are, according to the FAC, loss making enterprises that receive cross subsidies from the profits made by the major airports. During 1993-94, in relation to the 19 major airports managed by the FAC,
Sydney, Melbourne, Brisbane, Adelaide, Perth, Hobart, Launceston, Coolangatta and Canberra airports made a profit, with profits being dominated by Sydney ($62.589 million), Melbourne ($44.064 million) and Brisbane ($37.228 million) airports. Major loss making airports during this period were Darwin ($2.179 million) and Townsville ($1.714 million). However, it has been reported that a private study by BZW found that the level of profitability largely depended on the accounting methods used, that only four FAC managed airports had negative cash flow and the profitability status of an airport largely depended on the debt serviced by the airport. (Under the Airports (Transitional) Bill 1995 debt can be removed before an airport is leased.)

The possible sale of Federal airports was announced in the 1994-95 Budget. The proposal was based on the premise that increased competition in the management of airports would lead to efficiency gains. The proposal met considerable opposition within the government. Following a study of the proposed sale, the government’s position changed to support long term leases of major airports, with 99 year leases being suggested as the most likely option.

The policy to offer maximum 50 years leases with the possible option of 49 year renewal was agreed at the ALP National Conference held in September 1994. The Conference also agreed on restrictions on foreign and cross ownership of the airports.

The Opposition’s position on the leasing of the major airports was announced by the Leader of the Opposition in a News Release dated 26-September 1995. While generally supporting the privatisation of airports, the News Release noted that it was Coalition policy that the leasing of Kingsford-Smith Airport should be delayed until the East-West runway is reopened and ‘a genuine Environmental Impact Statement on Badgerys Creek is completed’. It was also reported that the Leader of the Opposition was in favour of the transfer of all international traffic from KSA to Badgerys Creek once that was possible. It has been reported that Airservices Australia has predicted that a reopening of the East-West runway would reduce capacity at KSA by approximately 35%. It may also be predicted that the transfer of all international traffic from KSA would reduce the value of KSA as it would decrease the traffic through the airport and so reduce revenue (in 1993-4 international passenger movements comprised approximately one third of KSA’s passenger movements).

Main Provisions

The objects of the bill are dealt with in clause 3 and include:

- to promote the efficient and economic development and operation of airports;
- to ensure majority Australian ownership and control of airports;
- to limit the ownership and control of airports by airlines; and
- to ensure diversity of ownership and control of certain major airports.

‘Core regulated airport’ refers to the airports listed in clause 7 of the Bill, which include all major airports, including Coolangatta, Launceston and Townsville airports. The list also includes Sydney West Airport (Badgerys Creek).
The Commonwealth will be given power to grant an airport lease if the conditions contained in sub-clause 14(5) are complied with. The conditions are of great importance as sub-clause 14(4) provides that if a lease breaches the clause, including the conditions, it will be of no effect. The conditions are:

- there is to be single lessee which is to be a company over which the Commonwealth has Constitutional power;
- leases are to be for a maximum of 50 years and may contain an option for renewal for a maximum of 49 years;
- except for joint use airports (ie. those used for both civil and military purposes - Canberra, Darwin and Townsville airports) and Sydney West Airport, the lease provides that the area is to be used as an airport;
- for a joint use airport, the lease provides for the area leased to be used for prescribed purposes;
- for Sydney West Airport, the lease provides that a condition of the lease is to develop the site as an airport or use the area as an airport; and
- the lease provides for access to the airport for interstate and international traffic.

A company is to only hold an interest in one airport lease and any transfer or grant of lease in breach of this requirement will have no effect (clause 16).

Leases for Sydney (Kingsford-Smith) and Sydney West Airports are to be held by subsidiaries of the same company. If the lease for Sydney West is granted to a Commonwealth owned company, as provided for in the Airports (Transitional) Bill 1995, the Commonwealth is to ensure that if it disposes of the company the disposal is to be to a company that is a subsidiary of the same company as the holder of the Kingsford-Smith Airport lease (clause 18). Sub-clause 18(6) provides that a lease for Kingsford-Smith or Sydney West Airport is to terminate if an 'unacceptable leasing situation' exists. This will be where the lease holders for those airports are not subsidiaries of the same company. (The situation where the Sydney West Airport lease is held by a Commonwealth owned company is not addressed in this provision.)

There is to be only one lease in respect of an airport at any time, and any lease that breaches this requirement will be of no effect (clause 19).

A lease is not to be granted if it would breach foreign-ownership, airline or cross ownership rules (see below) and a lease granted in breach of this condition will be of no effect (clause 21).

Leases are not to be transferred, otherwise than as enforcement of a security, without the written approval of the Minister and any transfer in breach of this will have no effect (clause...
24). Such approval is not to be granted if the ownership restrictions would be breached as a result of the transfer (clause 25). Additionally, a transfer is not to separate the legal and beneficial interests in a lease (clause 27) and if a lease is acquired as a result of the enforcement of a security it is to be transferred to a qualifying company within 90 days of the acquisition (clause 29).

Lessee companies are to use the leased premises as an airport, or for joint use airports for prescribed purposes in connection with an airport, or for:

• the development of an airport; or

• activities incidental to the operation or development of the airport (regulations may be made to prescribe the activities that are also to be considered incidental to the operation/development of the airport) (clauses 31 and 32).

A lessee is not to enter into an agreement for another to manage an airport unless the contract is one of employment or approved by the Minister (clause 33) and regulations may be made to prohibit the sub-leasing of an airport (clause 34).

Restrictions on Ownership and Control

Foreign ownership and control

Foreign ownership of an airport lease will be restricted to a maximum of 49% (clause 40). It will be an offence for a person or persons to acquire shares in a company if they knew, or were reckless to the effect of the acquisition, that it would result in foreign ownership exceeding this amount (clause 41). An airport operator is to take reasonable steps to assure that the 49% limit is not exceeded (clause 42). (It may be noted that if a similar situation arose as with the recent QANTAS sale where the ownership limit was exceeded.) If the foreign ownership limit is exceeded, the Minister may apply to the Federal Court for an order to remedy the situation, including orders that shares be disposed of, that payments relating to shares held be deferred or prohibited, or that rights in relation to shares not be exercised (clause 43).

Airline ownership and control

An airline and its associates will be restricted to a maximum ownership of 5% of a company that holds an airport lease (clause 44). Clauses 45, 46 and 47 contain similar provisions as clauses 41, 42 and 43 (see above).

Cross-ownership

Cross-ownership will be restricted where the airports form a pair as defined in clause 49, which lists various airports at which lease holding companies or airport management companies form a pair. Basically, the pairings are such companies that operate at Tullamarine and Kingsford-Smith; Brisbane and Kingsford-Smith; Tullamarine and Sydney West; and Brisbane and Sydney West. The maximum cross-ownership between such companies is 15% of any type of stake in the other company (clause 50). It will be an offence for a person or persons to acquire shares in a company if they knew, or where reckless to the effect of the
acquisition (ie. that it would result in cross-ownership exceeding this amount (clause 51)). An airport operator is to take reasonable steps to assure that the limit is not exceeded (clause 52). If the cross-ownership limit is exceeded, the Minister may apply to the Federal Court for an order to remedy the situation, including orders that shares be disposed of, that payments relating to shares held be deferred or prohibited, or that rights in relation to shares not be exercised (clause 53).

Practical control

**Clauses 54 to 57** aim to prevent the cross-ownership rules from being breached by a person having practical control over an airport operator company rather than a stake of more than 15%.

If the Minister is satisfied that the directors of an airport operator company are accustomed, or under an obligation, to follow the directions or wishes of another, or that a person is in a position to exercise control over such a company, the Minister may declare that the person has practical control of the company if further satisfied that the person's stake in the company does not exceed 15% (clause 55). If such a declaration is made, the company in respect of which it is made is a member of a pair of airport operator companies, and the person has either practical control of the other airport operator company or has a stake in that company of more than 15%, the following will apply:

- the person is to take such steps as are necessary to ensure that in respect of at least one of those companies the directors are not accustomed or obliged to follow the person's instructions or wishes and that the person does not have practical control of the company; or that the maximum stake in each of those companies does not exceed 15% (clause 56).

The Minister may also apply to the Federal Court for orders to prevent the above situation from continuing (clause 57).

General

The head office of an airport operator company must be in Australia (clause 58), and the company is to ensure that the majority of its directors are Australian citizens or foreign citizens who are ordinarily resident in Australia (clause 59). If either of these provisions is breached, the Minister may apply for an injunction to enforce the requirement.

State and territory laws are to apply to the extent that they are capable of operating concurrently with the above provisions (clause 61).

Anti-avoidance

If one or more person enters into a scheme and it would be concluded that the person/s entered into the scheme with the sole or dominant purpose of avoiding the leasing or ownership and control provisions and as a result of the scheme they have acquired an airport lease, sub-lease or a licence relating to an airport lease, the Minister may direct the person/s to dispose of the asset acquired. If such a scheme is entered into and the result is the acquisition of an increased stake in an airport operator company, the Minister may direct that that interest be disposed of (clause 65). Finally, if such a scheme is entered into and results in
a person/s entering into an agreement to manage the development or operation of an airport and the agreement is of a kind specified in the regulations, the Minister may give notice to the parties to the agreement to terminate it (clause 66).

**Land use**

The requirement dealing with land use, planning and building controls will apply to core regulated airports and other airports specified in the regulations where there is a lease in effect for the airport (clause 68).

**Airport master plans**

Draft and final airport master plans (a final plan will be one approved by the Minister) are to deal with matters relating to the development and operation of an airport. For airports other than joint use airports, the plans are to deal with the matters specified in clause 71, which include:

- matters prescribed by regulation;
- the development objects of the lessee;
- the lessee's assessment of the future needs of the airport; and
- forecast noise level exposure due to the operation of the airport.

In relation to joint use airports, the requirements are substantially the same but apply only to the area of the airport that has been leased to the airport operator.

Plans will continue in force when a lease is transferred (clause 74) and airport leasees will be given 12 months, or such longer period as the Minister allows, from the granting or acquisition of a lease to prepare a draft plan (clause 75).

Plans will have effect for 5 years or until a new plan is prepared (clause 77), although an airport operator will be required to submit a new draft plan to the Minister before the expiration of the current plan (clause 76).

During the operation of a plan, the Minister may request the operator to prepare a new draft plan that may replace the plan in operation (clause 78).

Consultation: Before a draft plan is submitted to the Minister, the airport operator will be required to advertise that a plan has been prepared and allow 90 days for public comment on the plan. If public comment is made on the plan, the company is to certify to the Minister that it has considered the comments in preparing the draft plan submitted to the Minister. In addition, regulations may specify information regarding the public comments that is to be provided with the draft plan (clause 79). If an airport operator has had consultations with a State or Territory government, a State or Territory Authority, a local government body, an airline or other airport user, or any other person prior to the request for public comment...
under clause 79, the draft plan submitted to the Minister is to include a list of the people or organisations consulted and a summary of their views (clause 80).

In deciding whether to approve a submitted draft plan, the Minister is to have regard to:

- whether the plan, if implemented, would meet the requirements of civil aviation users of the airport;
- the effect on land use in the airport and surrounding areas;
- the consultations that occurred in preparing the plan;
- the views of the Civil Aviation Safety Authority and Airservices Australia; and
- other matters the Minister considers relevant.

If the Minister refuses to approve a plan, the minister is to require the airport operator to prepare a new draft plan within 180 days or such longer period as the Minister allows (clause 81).

Where a plan has been approved and becomes a final master plan, and the lease requests a variation of a `minor nature’ (the term minor nature is not defined) the Minister may approve the variation, or, if the variation is not approved, the Minister is to notify the leasee of the reasons for the refusal (clause 84).

Major Development Plans

Division 4 of Part 5 of the Bill deals with plans that must be prepared when it is proposed to:

- construct or extend a runway;
- construct a passenger terminal that exceeds 500 square metres or extend a passenger terminal by more than 10%;
- construct a new building that has floor space in excess of 1,000 square metres; or
- proceed with a development of a kind specified in the regulations (clause 88).

Such developments are not to proceed unless they are in accordance with an approved major development plan (clause 89).

Major development plans are to deal with:

- the objectives of the development;
- the extent to which users of the airport will be affected;
- whether the development is consistent with the final master plan for the airport, if such a plan is in force;
• if the development could affect noise levels, the effect on noise exposure levels; and

• other matters as specified in the regulations (clause 90).

Public submissions, consultation and approval procedures are substantially in accordance with those regarding master plans (clauses 91 to 95).

Building control

'Building activities', which are to be controlled, is given a wide definition in clause 97 and includes work involving the construction and demolition of structures, earth works, engineering works, electrical works and hydraulic works.

A holder of an airport lease is not to conduct, or allow to be conducted, building activities unless they are carried out in accordance with the regulations or the activity has been declared to be exempt by the regulations (clause 98).

Regulations relating to building activities may deal with:

• the granting of approval for building activities;

• conditions relating to an approval;

• the variation or removal of approval;

• fees in respect of approvals; and

• the transfer of approvals to new lease holders (clause 99).

Approval is only to be given if consistent with the final master plan and the major development plan (clause 100).

If unapproved building activity is carried out and it is not exempt under the regulations, the Minister may approach the Federal Court for an order requiring remedial work to be carried out or for the work to be removed (clause 102).

Clauses 103 to 108 deal with the requirement for a certificate of fitness to be issued before a building or other work can be occupied or used. Regulations may be made to exempt works from the requirement for a certificate of fitness and may also be made in relation to the issue of certificates, conditions of certificates, revocation of certificates and the fees that may be payable in relation to certificates.

Environmental management

The requirement for an environment strategy applies to the same airports as the requirement for a airport master plan.

A draft or final environment strategy is to relate to a five year period and must specify:
• the objectives of the environmental management of the airport;

• the source of environmental impacts;

• the proposed studies, reviews and monitoring of environmental impacts from the operation of the airport;

• the measures to be carried out to prevent, control or reduce environmental impacts;

• details of the consultations involved in the preparation of the strategy; and

• such other matters as specified in the regulations (clause 113).

In determining whether to approve a draft strategy, the Minister is to have regard to the effect the implementation of the strategy would have on air, water and soil quality; the effect on noise levels; and details of the consultations entered into in developing the strategy. If the Minister refuses to approve a strategy, the Minister may require the company holding the airport lease to submit a new draft plan within a minimum of 180 days of being notified of the requirement (clause 123).

Provisions relating to public comment, consultations and minor variations to the strategy are similar to those for airport master plans.

Regulation may be made regarding the prohibition or regulation of pollution on the site, including air, water, soil and noise pollution (clause 129).

Accounts and reports

Accounts of airport operator companies are to be prepared in accordance with the regulations which will incorporate the accounting standards applicable to the Corporations Law (clause 133). Accounts are to be audited (clause 134). Airport operators are also to prepare annual returns in accordance with the regulations (clause 137).

Accounts and reports are to be lodged with the Australian Competition and Consumer Commission (ACCC) (this body was established as part of the reforms resulting from the Hilmer report and replaces the Trade Practices Commission and the Prices Surveillance Authority).

Service Monitoring

Clause 145 provides for the regulations to specify performance indicators for airport operators and those who provide services under an agreement with such a body. Examples of performance indicators are given in clause 146 and include indicators relating to passenger and aircraft congestion and standards for passenger services, runways, taxiways and aprons.

ACCC is to monitor and evaluate the quality of services against the performance indicators and other criteria that ACCC develops (clause 147).
Regulations may also be made regarding the records that must be kept regarding performance indicators and for the provision of such information to ACCC (clause 148).

Variation and closure

Part 9 of the Bill (clauses 152 to 155) provides that if a lease exists in respect of an airport, regulations are not to made that would vary the site, repeal the declaration of the site as an airport or result in an absolute prohibition on the use of the site as an airport without the written consent of the lease holder. The Part also provides that a leasee may surrender the lease to the Commonwealth either unconditionally or subject to such conditions as agreed between the parties.

International agreements

Where Australia is a party to an international agreement that deals with the carriage of international freight or passengers or freight by air and that agreement has come into force in Australia, clause 158 will allow regulations to be made to give effect to the agreement so far as it relates to the operation of airports that are accessed by international air transport.

Control of certain activities at airports

Part 11 of the Bill (clauses 160 to 169) provides for regulations to be made in relation to leased airports regarding:

- the sale, supply and possession of liquor;
- the control of the supply of goods and services;
- the parking or use of vehicles within the airport site; and
- the control of gambling and smoking.

The Part also provides that it is not to exclude the operation of State or Territory laws that are capable of operating with these measures.

Protected airspace

Clause 172 provides for the regulations to define 'prescribed airspace' where it is in the interests of safety, efficiency or regularity of air services that such airspace be protected. It will be an offence for a person to conduct a controlled activity in prescribed airspace without permission (controlled activity is defined to be construction, alteration or other activity with a building that extends into prescribed airspace)(clauses 173 and 174).

Demand management

The Minister may declare the capacity of an airport, based on the maximum number of aircraft movements that the airport is capable of handling during a specified period of time (clause 184). Before making such a declaration, the Minister is to prepare a draft declaration and allow public comment on the draft (clause 185). Before calling for public comment on a
draft, the Minister is to offer the airport operator, aircraft operators who use the airport, Airservices Australia and the Civil Aviation Safety Authority an opportunity to make submissions on the capacity of the airport (clause 186).

If a declaration relating to the capacity of an airport is in force, the Minister may declare that the airport is subject to statutory demand management (clause 187). In determining whether to make such a declaration, the Minister is to have regard to the matters listed in clause 188, which include:

- whether demand exceeds capacity;
- the effectiveness of the self management and self regulation of the capacity;
- the effect of pricing arrangements on demand;
- the extent or likely extent of congestion at the airport;
- existing or proposed laws or other controls relating to environmental matters, including noise; and
- Australia's international obligations.

A demand management scheme may be:

- a category exclusion scheme - ie a scheme that excludes certain categories of aircraft at certain times or all the time;
- a slot allocation scheme - a scheme based on the allocation of take off and landing slots;
- a movement limitation scheme - a scheme that limits the total movements or limits the number of movements for certain categories of aircraft movements during a period; or
- a scheme not covered by one of the above categories.

A demand management scheme for an airport may be a combination of the above schemes (clauses 189 to 194).

The demand management plans will have effect in addition to the proposed Sydney Airport Curfew Act and the air navigation regulations (clauses 197 and 198).

Air traffic services and fire and rescue

An airport leasee is not to provide air traffic, navigation, fire fighting or rescue services unless those services are provided by Airservices Australia or through an arrangement between Airservices Australia and a third person (clause 202).
Endnotes

2. Ibid. p. 8.
3. Ibid. p. 34.
4. Ibid. p. 16.
5. Ibid. pp. 18 and 19.

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